

CLEAR THE AIR

COUNTERPOINT: OPPORTUNITIES LOST AND OPPORTUNITIES GAINED: SEPARATING TRUTH FROM MYTH IN THE WESTERN RANCHING DEBATE

By
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In her article published in the previous volume of Environmental Law, Western Grazing: The Capture of Grass, Ground, and Government, Professor Donahue applies a “capture metaphor” to the legal, political, cultural and economic aspects of grazing on federal rangelands in the American West. She argues that Western ranchers have created a “cowboy myth” which lacks any “legal, historical, or scientific legitimacy,” to “capture” the law, politics, science, and public perception supporting the so-called “disastrous” four hundred year old practice of grazing Western rangelands.

In response, this article begins by examining the rule of capture in a historical context, demonstrating that the “capture” of private property through beneficial use is an integral and legitimate part of the American legal system, and only through political changes were Western ranchers deprived of “capturing and owning” Western rangelands in fee. However, while historic opportunities were lost, others were gained. In the second part, the article examines the current state of “grazing rights,” demonstrating that grazing rights are secure, and that the spirit of capture lives on in another fundamental American principle, the Constitutional right of due

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process. Finally, this article examines the scientific, cultural, and economic elements of Western rural ranching, and contends that grazing is environmentally sound, culturally rooted in fact, and economically beneficial. The legend of the American cowboy is true, and ought to be rewarded, strengthened, and supported by the American people.

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I. INTRODUCTION

Western cowboys were among the first American pioneers. Spanish settlers began grazing domestic livestock in what is now New Mexico over 400 years ago, before Jamestown was colonized or the Pilgrims arrived in Plymouth. With the treaty of Guadalupe Hidalgo in 1848, Spanish ranches became a part of the United States. The United States adopted the Spanish custom of "open range," allowing settlers and nomadic herders unlimited access to graze public rangelands. The Spanish custom had worked well for 250 years, so long as ranches remained uncrowded. However, the westward expansion of America soon filled Western states and territories with cowboys, cows, shepherds and sheep, all hoping to secure a maximum share of open range grazing. The result was disastrous infighting and overgrazing. Congress's open range policy was ultimately eliminated with the passage of the Creative Act of 1891,¹ the Organic Act of 1897,² and the Taylor Grazing Act of 1934.³ These Acts led to apportionment of federal land grazing rights to ranching settlers owning private land and water resources who were best able to utilize adjacent and interspersed federal rangeland. In this way, Western ranches developed into distinct, sustainable ranching units, which included a combination of private homestead land, private rangeland, private

¹ Act of March 3, 1891, ch. 561, 26 Stat. 1095, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

² 16 U.S.C. §§ 473-482, 551 (2000).

³ 43 U.S.C. §§ 315a-315o (2000).

water developments, and federal land grazing rights. In this form, Western “federal land” ranches have persisted for over 100 years.

The environmental movement has recently created an anti-grazing movement. Vowing the complete elimination of grazing on federal land and the small amounts of public land, this dedicated group of advocates has flooded the courts with lawsuits seeking to reduce or eliminate grazing, lobbied lawmakers to repeal laws granting grazing rights, pressured federal agencies to curtail grazing, and inundated the public with anti-grazing propaganda. Law professor Deborah Donahue is a vocal anti-grazing advocate.⁴ In her law review article, *Western Grazing: The Capture of Grass, Ground, and Government*,⁵ she applies a “capture metaphor” to the legal, political, cultural and economic aspects of grazing on federally controlled Western rangelands. She argues that Western ranchers have created a “cowboy myth” to “capture” the law, politics, science, and public perception supporting grazing rights. She concludes that there is no legal, scientific, cultural or economic basis to allow the continuation of grazing on federal rangelands.

This article partially agrees with Professor Donahue on one premise: the “rule of capture” allowed ranchers to capture grazing rights. Unlike Professor Donahue, however, this article concludes that the rule of capture is a positive legal principle, rooted in American jurisprudence and designed to reward the industrious, creative labor of American citizens. The rule of capture was *fully* applied to homesteaders, farmers, miners and water users, allowing these groups to *completely* capture private property rights, but was only *partially* applied to ranchers, allowing ranchers to capture the *conditional* right to graze public lands. While ranchers were not allowed to fully obtain fee title, they did obtain a powerful set of constitutionally protected entitlements which cannot be arbitrarily eliminated. Grazing rights constitute a substantial property interest. This article also demonstrates that grazing does not harm arid Western ecosystems, and is culturally, economically, and environmentally beneficial. Based upon this examination of law and science, there are significant legal, scientific, cultural, and economic reasons to support and protect federal land grazing rights and the rural ranching way of life.

II. OPPORTUNITIES LOST

A. A Historical Perspective of the Rule of Capture

In the beginning, when humans were scarce and their needs were few, property law was a natural law based on individual possession of common resources.⁶ As humans increased, their corresponding needs for common

⁴ See generally DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999).

⁵ Debra L. Donahue, *Western Grazing: the Capture of Grass, Ground, and Government*, 35 ENTVL. L. 721 (2005).

⁶ “[W]hile the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such

resources in a given area began to exceed the supply of such resources.⁷ As a natural response to scarcity, property law developed additional elements, rewarding not only physical possession of the resource, but also the labor involved and the use to which it was put.⁸ For example, individual ownership of land suitable for agriculture developed as the natural right of those individuals who actually tilled the land:

Hunters and herders had no need of private property in land; but when agriculture became the settled life of men it soon appeared that the land was most fruitfully tilled when the rewards of careful husbandry accrued to the family that had provided it. Consequently – since there is a natural selection of institutions and ideas as well as of organisms and groups – the passage from hunting to agriculture brought a change from tribal property to family property; the most economical unit of production became the unit of ownership. As the family took on a more and more patriarchal form, with authority centralized in the oldest male, property became increasingly individualized, and personal bequest arose. Frequently an enterprising individual would leave the family haven, adventure beyond the traditional boundaries, and by hard labor reclaim land from the forest, the jungle or the marsh; such land he guarded jealously as his own, and in the end society recognized his right, and another form of individual property began.⁹

These principles applied equally to the grazing of livestock in arid regions. Blackstone explains:

The article of food was a more immediate call, and therefore a more early consideration. Such, as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of water also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, “because he had digged that well.” And Isaac, about ninety years afterwards, reclaimed this his father’s property; and, after much contention with the Philistines, was suffered to enjoy it in peace.¹⁰

things as his immediate necessities required.” WILLIAM BLACKSTONE, 2 COMMENTARIES *3.

⁷ *Id.* at *3–5.

⁸ *See id.* at *3–10.

⁹ WILL DURANT, *THE STORY OF CIVILIZATION, VOL. I, OUR ORIENTAL HERITAGE* 18–19 (1992).

¹⁰ WILLIAM BLACKSTONE, 2 COMMENTARIES *5–6.

Blackstone's venerable example illustrates the application of labor to create a property right. Abraham pastured his flocks in arid lands, where water for his livestock was scarce. Through his labor in digging a water well and using the well to water his livestock, he obtained a recognized property interest, an interest which was later inherited by his son Isaac. Abraham's property interest arose not from mere possession of the land, but from the labor he invested in creating and using the water well, which in turn allowed him to use the surrounding pasture lands.

The legal principles which allowed Abraham to create a property interest in his well, labor and use, are embodied in the rule of capture. "Capture" is defined as an "[a]ct of catching or controlling" something.¹¹ Abraham used his labor to "catch" and "control" groundwater by digging a new well,¹² and then used the water to water his livestock. In other words, labor and use captured a natural resource. In *Pierson v. Post*,¹³ the court held that "possession" and therefore ownership of a fox required actual capture of the fox, through "industry and labor," as opposed to mere pursuit of the fox.¹⁴ While the latter involved the "industry and labor" of pursuit, the former put such labor to use by actually capturing and using the fox pelt. Thus, the rule of capture, as applied in the *Pierson* case, necessarily required labor and use,¹⁵ which in turn created or "captured" the property right.¹⁶

The creation of property through labor, use, and capture was further refined with the doctrine of "beneficial use." Water law in the Western United States is governed by the law of "prior appropriation," meaning priority of water use based on those who use water in a manner beneficial to

¹¹ BLACK'S LAW DICTIONARY 212 (6th ed. 1990).

¹² The rule of capture has historically been applied to groundwater. Stephanie E. Hayes Lusk, *Texas Groundwater, Reconciling the Rule of Capture with Environmental and Community Demands*, 30 ST. MARY'S L.J. 305, 308–09 (1998). Traditionally, the well owner was entitled to use as much water from his well as he could pump. *Id.* at 308 n.6, 315–16. However, due to modern pumping technology, a single well is often able to drain an entire area, depriving adjacent landowners of groundwater. *Id.* at 319–20, 323. As a result, most states have modified the rule of capture with correlative rights, appropriation, and reasonable use rules. *Id.* at 307 n.5. The rule of capture and its subsequent modifications have similarly been applied to oil and gas reserves. *See, e.g.,* Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas, 489 U.S. 493, 498 (1989).

¹³ *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

¹⁴ *Id.* at 178.

¹⁵ Capture through labor and use is analogous to the concept of "sweat equity," defined as "[e]quity created in property through labor . . ." BLACK'S LAW DICTIONARY, *supra* note 11, at 1448. "Sweat equity" as a legal doctrine has been applied to various business relationships. *See* Dresser-Rand Co. v. Virtual Automation Inc., 361 F.3d 831, 839 (5th Cir. 2004) (holding that Texas misappropriation law is designed to protect sweat equity); *Fisher v. Trainor*, 242 F.3d 24, 28–31 (1st Cir. 2001) (applying the concept of a property right in sweat equity to a contracts case).

¹⁶ Capture through labor and use also prevents waste. In *Pierson*, the parties were fighting for the right to own valuable fur. Had *Pierson* abandoned his capture, *Post* would have been able to retrieve the fox for his own use, thereby preventing waste of the resource. The doctrine of beneficial use prevents waste by requiring the capturing party to use or lose the resource. *See* 94 C.J.S. *Waters* § 363 (2005) (explaining the application of beneficial use doctrine to appropriation of water rights). Thus, labor and use not only create but also enhance capture by preventing waste of the resource.

society.¹⁷ For example, if a certain quantity of water is diverted annually from a given stream to water livestock, and the use was the first “beneficial” use of that particular stream, then the use constitutes a vested water right superior to all subsequent beneficial uses.¹⁸ The purposes of beneficial use include the promotion of useful labor and the prevention of waste.¹⁹ State law²⁰ may recognize livestock water rights in springs, wells, diversions, and in water taken directly from the stream by livestock.²¹ Livestock water rights cannot be taken by the government without due process and just compensation.²²

Whether it be called capture, beneficial use, or capture through beneficial use, the principle remains the same: the person who applies labor to an unclaimed natural resource in a manner which results in a beneficial use should be entitled to ownership of that resource. This is a common principle of American property law.²³ For example, the law of adverse possession rewards the industrious, yet illegal, user of private property over the legal owner who does not steward her land for a period of time.²⁴ Historically, capture through beneficial use was a primary legal mechanism which the United States government used to transfer ownership of public land and natural resources to individual citizens.²⁵ Settlement and

¹⁷ See generally A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, *WATER RESOURCE MANAGEMENT* 149–234 (1993) (providing an introduction to the roots, evolution, and elements of prior appropriations doctrine); 94 C.J.S. *Waters* § 363 (2005); Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998) (exploring the origins of beneficial use doctrine and critiquing it as inefficient).

¹⁸ See TARLOCK ET AL., *supra* note 17, at 177 (describing the elements of prior appropriation).

¹⁹ See *id.* at 195 (“[A] common theme running through the cases is that wasteful uses were not beneficial.”).

²⁰ The doctrine of “equal footing” holds that the right to define and regulate water rights is the exclusive right of the states, even when such water is on federal land. See *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228–29 (1845) (holding that Alabama has jurisdiction over navigable waters upon entry into the Union “on an equal footing with the original states”); *United States v. Alaska*, 521 U.S. 1, 5 (1997) (applying the doctrine of “equal footing” to the tidal waters of Alaska), *reh’g denied*, 521 U.S. 1144 (1997); *Idaho v. Couer d’Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (applying the doctrine of “equal footing” to tribal lands); *California v. United States*, 438 U.S. 645, 654 (1978) (applying the doctrine to California).

²¹ *Hage v. United States*, 51 Fed. Cl. 570, 578–84. (2002); *Fallini v. Hodel*, 725 F. Supp. 1113, 1122–24 (D. Nev. 1989).

²² See cases cited *supra* note 21; see also *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 319 (2001) (holding that, in general, water rights are a compensable property interest).

²³ See generally Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (discussing possession as a basis for property ownership). John Locke “argued that an original owner is one who mixes his or her labor with a thing and, by commingling that labor with the thing, establishes ownership of it.” *Id.* at 73. Similarly, James Madison observed that the “rights of property originate” in “different degrees and kinds” based principally on the “diversity in the faculties of men,” and that the “protection of these faculties is the first object of government.” THE FEDERALIST NO. 10 at 78 (James Madison).

²⁴ See Rose, *supra* note 23, at 79–80 (discussing courts’ treatment of adverse possession); JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 333–39 (3d ed. 1989).

²⁵ See generally GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY,

agriculture were the first beneficial uses encouraged, initially though the sale of public lands for a nominal fee.²⁶ However, land auctions were subject to abuse. For example, unscrupulous speculators would commandeer homesteads by waiting until poor homesteaders improved the land, such that the homesteader could not afford to purchase it at the subsequent land auction.²⁷

Such abuses led Congress to shift from direct sales to a doctrine of "preemption."²⁸ The doctrine of preemption helped to cure abuse by allowing settlers to homestead and improve the land prior to a government survey, and then later pay for their homestead.²⁹ The settler did not own the land in fee simple, but did have a superior right against all other citizens, and had the right to eventually purchase the land in fee simple from the government for a nominal fee.³⁰ With passage of the Homestead Act of 1862,³¹ Congress increased its support of homesteaders by offering 160 acres of land in fee simple for free, provided the settler homesteaded and cultivated the land for five consecutive years.³² Thus, the legal principle driving the Homestead Act was the same as that for preemption: settlers who applied their labor to create a beneficial use ultimately captured a property right.³³

FEDERAL PUBLIC LAND AND RESOURCES LAW 73-102 (5th ed. 2002) [hereinafter COGGINS] (discussing historical grants of land to settlers, miners and railroads as well as grants of natural resources); George Cameron Coggins, Parthenia Blessing Evans & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 535, 541-43 (1982) [hereinafter Coggins, *Rangeland Management I*] (discussing settlement of the West); George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 4-22 (1982) [hereinafter Coggins, *Rangeland Management II*] (discussing land grants and settlement patterns).

²⁶ See COGGINS, *supra* note 25, at 78-79 (discussing homesteading).

²⁷ See *Atherton v. Fowler*, 96 U.S. 513, 517 (1877) (discussing scenes of oppression and unfairness).

²⁸ See *id.* (holding that preemption protects the first homesteader from forced entry by a subsequent homesteader). See also COGGINS, *supra* note 25, at 75-76 (discussing the concept of preemption).

²⁹ See *Atherton*, 96 U.S. at 517 (discussing allowance of preemption lands that were not surveyed).

³⁰ See *id.* at 518 (discussing property rights granted by preemption).

³¹ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 (previously codified at 43 U.S.C. §§ 161-64 (1970)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787.

³² *Id.* See also *King County v. Rasmussen*, 299 F.3d 1077, 1083 (9th Cir. 2002) (discussing operation of the Homestead Act of 1862). Homesteading was enormously popular. From 1880 to 1900, homesteaders occupied more than 5.5 million acres. From 1865 to 1890, the population of Nebraska grew from 28,000 to 1,066,000, Iowa from 600,000 to 1,600,000, and the Dakota Territory from 5,000 to 140,000. From 1870 to 1900, the population of Oregon grew from 91,000 to 414,000, and from 1870 to 1900, the population of Arizona increased from 10,000 to 123,000. PAGE SMITH, *THE HISTORY OF AMERICA, THE RISE OF INDUSTRIAL AMERICA: A PEOPLE'S HISTORY OF THE POST-RECONSTRUCTION ERA* 800 (1997).

³³ See Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645, 646 (1997) (stating that ranchers are entitled to rangelands through John Locke's theory that a property right arises when someone creates something valuable from a resource).

Capture through beneficial use was also applied to minerals and water. Mining law developed out of the "first in time, first in right" custom of the 1849 gold rush.³⁴ Miners who were first to stake a claim were entitled to work the claim and keep the minerals taken therefrom.³⁵ Congress sanctioned this custom with the General Mining Law of 1872,³⁶ which allows citizens to prospect, locate, and mine for valuable minerals on public land, and if successful, ultimately gain fee title to their claims.³⁷ Western water law evolved from this custom.³⁸ As with mining, the water right was created not by mere possession, but by possession coupled with beneficial use.³⁹ If the miner mined, the farmer irrigated, and the rancher watered his livestock, then the legal right to those resources was secured.

The principles which governed mining and water law are similar to those which governed preemption and homestead law. The citizen who applied her labor to land or a natural resource in a beneficial manner captured that land or resource and was therefore entitled to legal protection of the investment. American jurisprudence encouraged and rewarded the labor required to build and sustain an industrious nation. To this day, American citizens can still homestead, farm, mine, and use water on some federally controlled land.⁴⁰ The rule of capture articulated by the court in *Pierson v. Post* is not merely a quaint observation about a fox hunt, nor is it a legal principle whose time is past, but rather is an application of foundational principles of private property that hearken back to Abraham's well. Labor applied to a beneficial use rewards the laborer by capturing the property right.

B. A Brief History of Western Grazing

Homesteaders, farmers, and miners were all given private property rights based on their beneficially applied labors. Abraham's well illustrates that this principle was applied to grazing lands over 3000 years ago. How, then, did nearly one-third⁴¹ of the land mass of the United States, over eighty

³⁴ See COGGINS, *supra* note 25, at 85–91 (describing the development of federal mining law and its relation to local mining custom).

³⁵ *Id.* at 89–90.

³⁶ 30 U.S.C. §§ 22–39 (2000).

³⁷ *Id.* § 26; see also Coggins, *Rangeland Management II*, *supra* note 25, at 14–15 (describing the claim to land that a miner may have if he finds valuable minerals on that land).

³⁸ See *supra* note 12 and accompanying text.

³⁹ See *supra* notes 17–22 and accompanying text.

⁴⁰ While the Federal Land Policy and Management Act repealed many of the laws facilitating disposal of public lands, such as the Homestead Act of 1862, some still remain. American citizens can still homestead and farm certain public lands pursuant to the Desert Lands Act of 1877, 43 U.S.C. §§ 321–323 (2000). American citizens can also stake a mining claim pursuant to the Mining Law of 1872, 30 U.S.C. §§ 22–39 (2000), and can still obtain water rights on federal lands pursuant to state law and the equal footing doctrine. See *supra* note 20 and accompanying text.

⁴¹ See COGGINS, *supra* note 25, at 1. The western states have a disproportionate amount of federal land. Starting in Kansas and traveling west through Colorado, Utah, and ending in Nevada, the percentage of federal land in each state is approximately 1%, 34%, 64%, and 82% respectively. *Id.* at 14.

percent of some Western states, remain in federal ownership, when the majority is rangeland which has been grazed by American ranchers for over 100 years? Why did “capture through beneficial use” fail to give ranchers the same right, the right to property ownership in fee, as it did for all other American pioneers? The answer is a curious combination of circumstances, irrational politics, and national sentiment. However, while Western ranchers failed to secure all of their ranch land in fee simple, the history must be told, since it is the foundation upon which current grazing rights stand.

Spanish settlers began grazing in what is now the southwestern United States over 400 years ago.⁴² Due to the arid climate, Spanish and Mexican land grants were insufficient to sustain an individual ranch.⁴³ The local custom which developed in response was to use the deeded land and water as the ranch’s homestead and headquarters, but then also graze on adjacent unclaimed rangelands, thereby creating a sustainable ranching unit.⁴⁴ When the United States signed the Treaty of Guadalupe Hidalgo in 1848, it promised to honor the property rights of Mexican ranchers granted to them under Spanish and Mexican law, as well as under local custom.⁴⁵ Initially, the United States government not only recognized the Mexican custom of grazing on adjacent unclaimed rangelands, but also promoted it in order to encourage rapid settlement of the region.⁴⁶

As with Spanish and Mexican land grants, United States homestead laws were completely inadequate for the needs of western ranches.⁴⁷ The Homestead Act of 1862⁴⁸ granted only 160 acres of land.⁴⁹ In sharp contrast,

⁴² See Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 511 (1993–94) (discussing the early beginnings of grazing by the Spanish); JERRY L. HOLECHEK, REX D. PIEPER & CARLTON H. HERBEL, *RANGE MANAGEMENT, PRINCIPLES AND PRACTICES* 23–24 (4th ed. 2001) (“The first cattle, sheep, and horses were brought into the United States from Mexico . . . in 1540.”).

⁴³ Falen & Budd-Falen, *supra* note 42, at 512. “[A] small family ranch of 50 head of cattle often required more than 5,000 acres . . .” Nelson, *supra* note 33, at 660; see also COGGINS, *supra* note 25, at 780 (noting that it takes anywhere from 25 to 50 acres of land in the west to support a single cow). Currently, the Forest Service and the Bureau of Land Management (BLM) permit approximately 31,000 ranchers to graze on a total of approximately 259 million acres of federal rangeland, averaging over 8,000 acres per permit. See COGGINS, *supra* note 25, at 777–78. This does not include the private land acreage interspersed with federal land. *Id.*

⁴⁴ Falen & Budd-Falen, *supra* note 42, at 512. “Sustainable” is defined as “a method of harvesting or using a resource so that the resource is not depleted or permanently damaged” and “relating to a lifestyle involving the use of sustainable methods.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1260 (11th ed. 2003). Both definitions are important for ranchers. If the rancher depletes or permanently damages rangeland, then the rancher cannot continue to graze in subsequent years and goes out of business. The environmental and economic aspects are inseparable. Thus, for the purpose of this article, a “sustainable” ranch is one that is large enough to steward the land in an environmentally sound manner and still make the rancher an adequate living.

⁴⁵ Falen & Budd-Falen, *supra* note 42, at 512–13.

⁴⁶ *Id.* at 513–18.

⁴⁷ Nelson, *supra* note 33, at 660; Coggins, *Rangeland Management II*, *supra* note 25, at 20–21.

⁴⁸ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 (previously codified at 43 U.S.C. §§ 161–64 (1970)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2787.

⁴⁹ COGGINS, *supra* note 25, at 78–79.

ranches located in arid regions west of the 100th meridian often require a minimum of several thousand acres of rangeland to be sustainable.⁵⁰ Due to homestead size limits, most western rangelands went unclaimed.⁵¹ Congress's response to this problem was limited. From 1877 to as late as 1916, Congress passed a series of acts which increased the amount of land which could be obtained through settlement, in some cases up to 640 acres.⁵² While this was an improvement, it was still grossly inadequate. As a result, American ranchers were forced to develop sustainable ranching units in the same manner as Spanish ranchers already had, using private homestead and water rights as the ranch's base property, coupled with the custom of grazing adjacent open rangeland.⁵³ Congress recognized this custom by encouraging an open range policy on public lands and allowing unclaimed rangelands to be grazed by anyone who wished, with or without owning a private homestead, rangeland, or water resources.⁵⁴ Many stockowners without private land and water took advantage of the open range policy, grazing herds and flocks nomadically, and operating without private property by continually driving their livestock through open range as forage was needed.⁵⁵

Congress's homestead and open range policies were recipes for disaster. Landed ranchers often attempted to exclude nomadic ranchers and new homesteaders by controlling private land, access, and water resources, and by fencing off large tracts of public land.⁵⁶ As conflicts among the parties increased, many people turned to harassment, intimidation, fraud, and violence in an effort to control various parts of the open range.⁵⁷ The problem was inflamed with the introduction of sheep in the 1870s, which

⁵⁰ See Nelson, *supra* note 33, at 659–60 (noting that in the arid west, “the productivity of the land was so low that a small family ranch of 50 head of cattle often required more than 5,000 acres for grazing”); Coggins, *Rangeland Management II*, *supra* note 25, at 24 (noting that the 160 acres of land available to homesteaders was “grossly inadequate for a western ranching operation”).

⁵¹ Coggins, *Rangeland Management I*, *supra* note 25, at 548.

⁵² See, e.g., The Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321–323) (granting 640 acres to anyone who could irrigate within three years); Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (codified at 43 U.S.C. § 218) (repealed 1976) (increasing homesteads to 320 acres); Stock-Raising Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified at 43 U.S.C. § 219–301) (repealed 1976) (allowing free entry into 640 acres for grazing purposes).

⁵³ See *Golconda Cattle Co. v. United States*, 201 F. 281, 284 (9th Cir. 1912); Coggins, *Rangeland Management I*, *supra* note 25, at 548; Coggins, *Rangeland Management II*, *supra* note 25, at 22.

⁵⁴ See *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (stating that rangelands “shall be free to the people who seek to use them”). But see *Omaechevarria v. Idaho*, 246 U.S. 343, 352 (1917) (allowing limited state regulation of the right to use public lands).

⁵⁵ Coggins, *Rangeland Management I*, *supra* note 25, at 548; Coggins, *Rangeland Management II*, *supra* note 25, at 22–24.

⁵⁶ See *Leo Sheep Co. v. United States*, 440 U.S. 668, 683–84 (1979) (describing exclusionary techniques and other methods of controlling access to public lands); *Public Lands Council v. Babbitt*, 529 U.S. 728, 732 (2000) (discussing hostility between forage competitors); Nelson, *supra* note 33, at 660 (describing ranchers' attempts to fence rangelands); Coggins, *Rangeland Management I*, *supra* note 25, at 548 (discussing conflicts between range users); Coggins, *Rangeland Management II*, *supra* note 25, at 23–24 (highlighting the conflict caused by attempts to privatize public lands).

⁵⁷ Nelson, *supra* note 33, at 661; Coggins *Rangeland Management II*, *supra* note 25, at 22.

cowboys viewed as harmful to rangeland and therefore incompatible with cattle grazing.⁵⁸ Congress could have settled these so-called “range wars” by abandoning its open range policy and allocating private property rights in a manner consistent with the realities of the West. Instead, Congress compounded the problem with the passage of the Unlawful Enclosures Act of 1885.⁵⁹ The Act prohibited any person from fencing in or otherwise obstructing access to public land through “force, threats, intimidation . . . or any other unlawful means.”⁶⁰ While the Unlawful Enclosures Act would seem to have favored nomadic ranchers, in practice it encouraged conflict by reinforcing the open range policy.

Adding insult to injury was Congress’s “checkerboard” distribution of railroad lands. From the beginning, Congress promoted private railroad interests by awarding vast tracts of public land to railroad companies for every mile of railroad track built.⁶¹ Specifically, Congress adopted a policy of granting ten to twenty mile swaths of land on either side of the railroad right-of-way. However, Congress only included the odd-numbered sections, leaving a “checkerboard” pattern of public-private land ownership.⁶² The scope of railroad land grants was massive, totaling approximately 100 million acres.⁶³ The purported theory behind the “checkerboard” scheme was that, in building the railroad, the value of land would at least double, allowing Congress to eventually sell the even-numbered sections for as much as the whole amount of land would have brought without the railroad.⁶⁴ This policy worked fine, so long as Congress actually disposed of the even-numbered sections, but became an utter failure when it did not.⁶⁵

⁵⁸ See *Public Lands Council*, 529 U.S. at 732 (detailing attempts to curb sheep ranching). Some states passed laws making it illegal for sheep to graze in areas where cattle had grazed. See *Omaechevarria*, 246 U.S. at 344–45. The animosity between cowboys and shepherds was so great that violence often ensued. *Id.*; *McKelvey v. United States*, 260 U.S. 353, 354–56 (1922).

⁵⁹ Unlawful Enclosures Act of 1885, 43 U.S.C. §§ 1061–1066 (2000); see *Camfield v. United States*, 167 U.S. 518, 522 (1897) (outlining the Unlawful Enclosures Act); *Golconda Cattle Co. v. United States*, 201 F. 281, 285 (9th Cir. 1912) (giving a detailed description of the history of the Act and outlining the Act itself).

⁶⁰ 43 U.S.C. §§ 1061, 1063 (2000).

⁶¹ See *Leo Sheep Co.*, 440 U.S. at 672–73 (describing the checkerboard distribution of railroad lands); COGGINS, *supra* note 25, at 91–92 (giving an overview of distribution of public lands for railroads); Coggins, *Rangeland Management I*, *supra* note 25, at 542 (discussing checkerboard distribution).

⁶² *Golconda*, 201 F. at 284; Coggins, *Rangeland Management I*, *supra* note 25, at 542.

⁶³ Coggins, *Rangeland Management I*, *supra* note 25, at 542.

⁶⁴ *Leo Sheep Co.*, 440 U.S. at 672–73.

⁶⁵ See generally *Buford v. Houtz*, 133 U.S. 320, 321–22 (1890) (rejecting attempts by cattlemen—who owned 350,000 acres interspersed throughout one million acres of public land—to enjoin sheepherders from crossing their land to reach the public lands); *Leo Sheep Co.*, 440 U.S. at 677–78 (rejecting the United States’ claim that it had an implied easement to cross privately owned odd-numbered sections of land to reach the even-numbered sections that were held by the government even though it was physically impossible for the government to access its land without crossing private land and the odd-numbered sections were granted by the United States); *Camfield v. United States*, 167 U.S. 518, 525–26 (1897) (holding that the defendants violated the Unlawful Enclosures Act of 1885 because the defendants had indirectly enclosed adjacent public lands by constructing a fence around their own private parcels of “checkerboard” pattern land); *Mackay v. Uinta Dev. Co.*, 219 F. 116, 118 (8th Cir. 1914) (“[A]ll persons as its licensees have an equal right to use of the public domain, which cannot be denied

The simple geography of a checkerboard land pattern dictates that no particular section of public land can be accessed without trespassing on a corresponding section of private land.⁶⁶ Congress ended up retaining most of the even-numbered sections, and the unfortunate legacy of checkerboard land lives on to this day.⁶⁷

The 1890 case of *Buford v. Houtz*⁶⁸ is an early example of the problems these policies created. *Buford* involved a coalition of ranchers that had purchased 350,000 acres of railroad checkerboard land in Utah.⁶⁹ The ranchers ran 20,000 head of cattle on their private land and grazed on the interspersed public land.⁷⁰ The ranchers built corrals and other livestock improvements, but did not fence the land.⁷¹ A coalition of shepherds, who wished to graze some 200,000 sheep on the interspersed, unfenced public land sections, opposed the ranchers.⁷² The ranchers sued, seeking to enjoin the shepherds from trespassing on their private land. Relying on the fact that Congress had historically adhered to an open range policy, the Supreme Court held that "there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbid this use."⁷³ The fact that the shepherds were trespassing on the ranchers' private property made no difference. "The owner of a piece of land, who had built a house or enclosed 20 to 40 acres of it, had the benefit of this universal custom, as well as the party who owned no land."⁷⁴ The Court denied the ranchers' petition, holding that the public rangeland was free to all, and implying that if the ranchers wished to exclude the shepherds they would have to fence off their private land.⁷⁵

What the Court failed to acknowledge, let alone reconcile, was that the ranchers were practically and legally prohibited from fencing out their private land by the Unlawful Enclosures Act.⁷⁶ If the ranchers individually fenced their private sections, neither public nor private land could be accessed, but if the ranchers fenced the whole parcel, they would be deemed in violation of the Act.⁷⁷ Moreover, even if fencing could have been a legal option, it would have been cost prohibitive and practicably impossible.⁷⁸

by interlocking lands held in private ownership.").

⁶⁶ *Leo Sheep Co.*, 440 U.S. at 672–73.

⁶⁷ *Id.*

⁶⁸ 133 U.S. 320 (1890).

⁶⁹ *Id.* at 321–22.

⁷⁰ *Id.* at 322.

⁷¹ *Id.*

⁷² *Id.* at 322–23.

⁷³ *Id.* at 326.

⁷⁴ *Id.* at 327.

⁷⁵ *See id.* at 327–32.

⁷⁶ Unlawful Enclosures Act of 1885, 43 U.S.C. §§ 1061–1063 (2000). *Buford* was decided five years after Congress passed the Act into law.

⁷⁷ *Camfield v. United States*, 167 U.S. 518, 527–28 (1897).

⁷⁸ The plot of land in question was approximately 40 miles long and 36 miles wide, containing 350,000 acres of private land, or about 546 individual private land checkerboard sections. *See Buford*, 133 U.S. at 306. Assuming a 36 by 40 mile rectangular plot, a perimeter

There was simply no practical, legal way in which the ranchers could exclude sheep and still use their private land. In upholding the government's open range policy, the Supreme Court sanctioned trespass on 350,000 acres of private rangeland, thereby depriving the ranchers with private property and range improvements the benefit of their investment and labor.⁷⁹ Thus, the lawlessness of trespassing livestock owners was sanctioned, rewarded, and encouraged. Given these conflicting policies, it is little wonder that range wars ensued.

The health of the rangelands also suffered under these misguided policies. With no restrictions on the number of animals which could be grazed on open range, livestock numbers increased significantly.⁸⁰ Livestock numbers exceeded the carrying capacity of the range in many areas. The problem came to a head in 1889 and 1890, when the combination of damaged rangelands, too many livestock, summer drought, and severe winter storms killed millions of head of livestock and ruined many ranchers.⁸¹ The tragedy clearly illustrated the folly of the limited homestead/open range policy.⁸² By failing to limit the number of ranchers and livestock to that which is sustainable on a long term basis, given both drought and plenty, Congress created circumstances leading to environmental degradation and economic disaster.

At the same time, another phenomenon began to shape the disposition and management of public lands. In 1872, Yellowstone National Park became the first federal land, other than federal enclaves used for military, postal, and other constitutionally sanctioned government purposes, to enjoy "reservation" for a particular purpose.⁸³ The public embraced the concept,

fence would have been 152 miles long. In contrast, fencing in 546 individual square mile sections, each requiring four miles of fence, would have required a total of 2,184 miles of fence, enough to stretch from Utah to Washington, D.C. Assuming five strands of barbed wire per fence, that amounts to over 10,000 miles of barbed wire, nearly enough to go half way around the globe. Thus, fencing individual sections was not an economically viable option.

⁷⁹ Seven years later, the Supreme Court held that purchasers of railroad checkerboard rangelands who "choose to assume the risk of purchasing odd-numbered sections of the railroad company for pasturage purposes, without also purchasing, or obtaining the consent of the government to use, the even numbered ones, must call upon their own indiscretion to answer for their mistake." *Camfield*, 167 U.S. at 527. By placing blame on the rancher for the checkerboard mess, the Supreme Court callously avoided acknowledging the true source of the problem. Congress intended the checkerboard scheme to benefit both railroads and the government by making both even and odd numbered sections more valuable for resale. *Leo Sheep Co. v. United States*, 440 U.S. 668, 672-73 (1979). By retaining even-numbered sections, Congress defeated both purposes by making it impossible for either public or private landowners to use their land without trespassing on the other. *Camfield*, 167 U.S. at 525-27. Ranching investors could not have foreseen that Congress would abandon its original intent and replace it with the irrational policy of retaining even-numbered sections.

⁸⁰ See *Public Lands Council v. Babbitt*, 529 U.S. 728, 731 (2000) (noting during the 1880s boom in cattle production, cattle population on the Great Plains grew in excess of seven million head).

⁸¹ *Id.* at 732.

⁸² The age-old conflict between unlimited use of limited resources within a finite area has been described as a "tragedy of the commons." See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁸³ See COGGINS, *supra* note 25, at 106-07; Coggins, *Rangeland Management I*, *supra* note 25, at 543-44.

and soon Congress was removing other public lands from disposition and reserving them for specific purposes.⁸⁴ With passage of the Organic Act of 1897,⁸⁵ Congress allowed the President to remove land from disposition and reserve it for the purpose of maintaining water flows and ensuring a continuous supply of timber.⁸⁶ While these National Forest reservations were supposed to be composed primarily of forest, about half of all reservations ended up being rangeland.⁸⁷ Meanwhile, the overcrowding and infighting on the remaining unreserved public rangeland continued with no change in federal policy. The last straw was the depression and drought of the 1930s, which threatened to bankrupt the livestock industry.⁸⁸ With passage of the Taylor Grazing Act in 1934, Congress sought to protect rangeland health and stabilize the livestock industry by allocating range resources.⁸⁹ In so doing, Congress ended its policy of open range, and ushered in the era of federal rangeland management. Today, the Bureau of Land Management (BLM) and the Forest Service are responsible for administering approximately 259 million acres of federal and public rangeland.⁹⁰

C. Why the Rule of Capture Failed to Secure Rangelands in Fee Simple

The rule of capture should have operated to give ranchers fee title to sustainable ranch units. There is simply no legal basis to distinguish between the sweat equity of ranchers versus those of farmers, miners, and water users. Iowa farmers and California miners worked no harder and contributed no less than New Mexico or Wyoming ranchers to the sustenance and development of the nation. The fact that western ranches required a minimum of several thousand acres to be a sustainable ranching unit is legally irrelevant. Capture through beneficial use is a function of labor, not acres. The Iowa farmer who worked full time farming 160 acres of

⁸⁴ COGGINS, *supra* note 25, at 106–07. Many scholars believe that Congress does not have the constitutional authority to reserve federal land for purposes not expressly enumerated in the Constitution. See generally Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 372 (2005) (providing a comprehensive analysis of whether the Property Clause, as understood by the founders, permitted widespread retention of federal land within state boundaries). If true, federal land would be primarily relegated to post offices, military bases, and other enclaves, and the one-third of our nation which is currently under federal control would largely have to be transferred to states and the people. *Id.*

⁸⁵ Act of June 4, 1897, ch. 2, 30 stat. 11, 34–36 (codified as amended at 16 U.S.C. §§ 473–482, 551 (2000)).

⁸⁶ *Id.* § 475; *United States v. Grimaud*, 220 U.S. 506, 515 (1910).

⁸⁷ Today, 187 million acres of land are currently reserved as national forests, 100 million acres (53%) of which are grazed by livestock. COGGINS, *supra* note 25, at 688; Coggins, *Rangeland Management II*, *supra* note 25, at 38.

⁸⁸ Coggins, *Rangeland Management I*, *supra* note 25, at 550; Coggins, *Rangeland Management II*, *supra* note 25, at 40; see also *Public Lands Council v. Babbitt*, 529 U.S. 728, 732 (2000) (noting that the devastating drought and subsequent dust storms of the early 1930s prompted Congress to pass the Taylor Grazing Act).

⁸⁹ See COGGINS, *supra* note 25, at 783–86 (describing the history and purposes of the Taylor Grazing Act).

⁹⁰ *Id.* at 777.

corn should be no less entitled to capture his work than the California miner who worked full time mining a one acre mine. The equitable principle worked the same in both cases; the laborer could lay claim to the benefits of his labor. The principle of capture through beneficial use operated to secure private title to sustainable farms and mines in fee. Ranchers should have been given the same right.

Congress prevented the rule of capture from operating to its fullest extent by preventing ranchers from exclusively possessing the range. Capture requires actual possession.⁹¹ With respect to grazing, actual possession typically requires the rancher to enclose a defined area and exclude other livestock. An 1870 California court explained:

If Treat had inclosed the Potrero by a fence or ditch entirely around it, and sufficient to turn cattle, it would not admit of discussion, that, by the inclosure alone, and without other acts of dominion, he would have established an actual possession of the land. An inclosure of that character, is, in itself, sufficient proof of an actual possession. But it is so, only, because of the erection of the artificial barrier is an open, notorious act of dominion, proclaiming in unmistakable terms to the public that the land is appropriated and set apart from the adjoining lands for the exclusive use of the person who erected the barrier. A mere *intention* to occupy land, however openly proclaimed, is not possession.⁹²

Thus, livestock grazing typically qualifies as possession only when areas are fenced or improvements are made, but not when grazing is temporary, transient, or otherwise does not demonstrate exclusive possession.⁹³ The key is whether the rancher exerts “dominion over the premises.”⁹⁴ While ranchers often attempted to fence out or otherwise exert dominion over specific portions of rangeland, the government refused to recognize these efforts.⁹⁵ By outlawing fences and forcing an endless and indiscriminate series of trespasses on ranchers who were trying to form sustainable ranching units, the government metaphorically sliced Pierson’s fox pelt into myriad pieces, preventing each laborer from capturing the whole. While there was beneficial use occurring in the use of forage, the government would not let the beneficial use materialize into an ownership interest in the land. Without government sanction, the rule of law embodied in capture could not fully operate.

It is difficult to ascertain why ranchers were not given the full fruit of their labor. Congressional ignorance of the nature and needs of ranching may have played a part, but it would be naive to assume that Congress was completely blind to the facts. Part of the problem was a lack of vision; or perhaps a desire for quick profits over long-term stability, at least initially,

⁹¹ See *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

⁹² *Brumagin v. Bradshaw*, 39 Cal. 24, 46 (1870).

⁹³ See generally Wade R. Habeeb, Annotation, *Grazing of Livestock or Gathering of Natural Crop as Fulfilling Traditional Elements of Adverse Possession*, 48 A.L.R.3d 818 (2005).

⁹⁴ *Id.* at 824.

⁹⁵ See, e.g., *Buford v. Houtz*, 133 U.S. 320, 332 (1890) (recognizing the “extreme liberality” with which the government permitted use of the western lands).

on the part of ranchers and politicians who supported open range policies. Simple politics also played a significant role. Politicians, while supporting the outright grant of 100 million acres of land to their wealthy railroad constituents, hypocritically begrudged letting ranchers homestead on more than a section of land. The only way for western ranchers to obtain enough private land to create a sustainable ranching unit was to buy it from the railroads, leaving to their heirs the nightmare of checkerboard land patterns. The late nineteenth century policy shift from disposition to reservation of federal land was a factor, although by then grazing was already firmly established and rangeland overused. However, regardless of all the potential reasons underlying these policies and circumstances, the rule of capture failed to operate due to Congress's stingy disposition of land coupled with its tragic open range policy.

In an era of environmental rhetoric, it is popular for legal scholars to lament that federal rangelands have "historically . . . been managed primarily for the benefit of livestock ranchers, with environmental protection and alternative uses relegated to a secondary role at best."⁹⁶ History does not support this claim. Federal homestead and open range policies were a disaster for ranchers and rangeland alike. Homestead laws did not support the creation of legally recognized sustainable western ranching units. As a result, ranchers with private land were forced to use open rangelands, bringing them into direct conflict with other homesteaders and nomadic ranchers. The resulting range wars and rangeland degradation were a direct consequence of these policies. These problems could have been avoided, and ranchers would have been better served, had Congress recognized the custom of ranch homesteads by allowing them to purchase or claim a sufficiently large parcel of intermixed or adjacent public rangeland to create a sustainable ranching unit.

Federal rangeland policy failed to grant ranchers fee title to their ranches. The open range policy worked fine, so long as the rangeland remained uncrowded, but resulted in misery, conflict, and degradation once resources became scarce. Through the open range policy, Congress refused to *fully* recognize the principle of capture through beneficial use for ranchers, as it did for all other types of American pioneers. However, as discussed in the following section, Congress has *partially* recognized the principle of capture through beneficial use for ranchers by creating and recognizing a conditional right to graze specific portions of federal land. Grazing rights are vested in those who own private land and water resources, which serve as the ranch's homestead and headquarters, and are protected by statute, regulation, custom, and the Due Process Clause of the Fifth Amendment.

⁹⁶ Joseph M. Feller, *What is Wrong with the Bureau of Land Management's Management of Livestock Grazing on the Public Lands?*, 20 IDAHO L. REV. 555, 556 (1993-1994); see also Michelle M. Campana, *Public Lands Grazing Fee Reform, Welfare Cowboys and Rolex Ranchers Wrangling with the New West*, 10 N.Y.U. ENVTL. L.J. 403 (2002) (arguing that reforming the rangeland fee structure might lead to more efficient grazing and stable range conditions).

III. OPPORTUNITIES GAINED

A. Introduction: The Concept of Preference

As we have seen, there were several types of ranchers who historically used western rangelands.⁹⁷ The most venerable of these were the ranchers who received Spanish or Mexican land grants. Since these grants were inadequate to form sustainable ranches, the custom and usage of grazing surrounding unclaimed lands developed. This system worked well long before New Mexico became a territory of the United States and worked so well, in fact, that the United States government promptly adopted the custom to encourage American settlement of its newly acquired territories. Unfortunately, the United States government also adopted the Spanish custom of failing to grant homesteads of adequate size. As a result, the best land and water were soon taken into private ownership, and a new class of rancher developed, nomadic ranchers who were either unwilling or unable to develop a sustainable ranching unit based on private land and water resources. Finally, as the *Buford* case illustrates, a third class of rancher arose, investors who purchased large quantities of private land, usually railroad checkerboard lands, to develop sustainable livestock operations.

With its hands-off open range policy, Congress was content to let these competing interests duke it out. However, Congress eventually decided to assert control over the public domain. In a few cases, such as with our National Park system, Congress decided to prohibit grazing. However, over the vast majority of land, Congress elected to recognize established grazing use. The question then became who, among the various ranching interests, would be entitled to continue grazing and how many animals could they graze? This was a serious problem, given the fact that the open range policy had overcrowded the rangeland and overtaxed the patience of ranchers. There had to be winners and losers.

The question was answered by the Forest Service. With passage of the Organic Act, Congress authorized the President to reserve land for timber production and the protection of water for agricultural purposes.⁹⁸ With regard to how grazing or the forage resource would be managed, the Forest Service codified the concept of “preference.”⁹⁹ Simply put, preference is a system that allocates grazing rights to those best able to use them. Ranchers with private land, homesteads, and water rights were given “preference” to graze adjacent or intermixed public rangelands.¹⁰⁰ Only when the grazing needs of those with such “base property” were satisfied could others without nearby private property obtain a permit to graze Forest Service lands.¹⁰¹ In so doing, the Forest Service recognized sustainable ranching units

⁹⁷ See generally *supra* Part II.B.

⁹⁸ See *United States v. New Mexico*, 438 U.S. 696, 705–06 (1978) (discussing the origins of the Organic Act and its preceding legislation).

⁹⁹ U.S. FOREST SERV., U.S. DEP’T OF AGRIC., *THE USE BOOK: REGULATIONS AND INSTRUCTIONS FOR THE USE OF NATIONAL FOREST RESERVES* 73–74 (1906) [hereinafter *THE USE BOOK*].

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 73.

comprised of a mixture of federal and private grazing resources.¹⁰² With passage of the Taylor Grazing Act, Congress recognized the “preference” system created by the Forest Service for all remaining federal land ranchers.¹⁰³ Through preference, modern grazing rights were born.

B. Grazing on Land Administered by the Forest Service

In the mid- to late-nineteenth century, many forests located on public land were subject to the unregulated commercial cutting of timber.¹⁰⁴ In response to the problem, Congress passed the Creative Act of 1891.¹⁰⁵ The Creative Act allowed the President to reserve forest lands, but did not provide for the regulation or use of such lands.¹⁰⁶ Conservationists opposed the Creative Act’s failure to protect forest lands through regulation, while western settlers opposed its failure to provide for use.¹⁰⁷ In response to this backlash, Congress passed the Organic Act in 1897.¹⁰⁸ The Organic Act allowed the President to designate national forest boundaries and to protect and use such forest land by reserving them for two purposes: “securing favorable conditions of water flows” and furnishing “a continuous supply of timber.”¹⁰⁹ The Act’s legislative history shows that Congress was concerned only with the protection of timber and the streams which a healthy forest produces.¹¹⁰ Grazing was not addressed; apparently Congress did not envision that vast tracts of rangeland would ultimately be reserved as national forest.¹¹¹ Despite the clear mandate to reserve “forest” land, over 100 million acres of public rangeland were ultimately reserved as national

¹⁰² *Id.* at 73–74.

¹⁰³ Taylor Grazing Act of 1934, 43 U.S.C. §§ 315a–315o (2000).

¹⁰⁴ *See* United States v. New Mexico, 438 U.S. 696, 705 (1978) (describing the devastation and noting the fear at the time of the imminent disappearance of the public forest lands); *Ex parte* Hyde, 194 F. 207, 213 (N.D. Cal. 1904) (outlining efforts at the end of the nineteenth century to curtail “depredation and destruction” of the national forests, which resulted in the 1897 Organic Act and its 1891 predecessor); West Virginia Div. Izaak Walton League of America, Inc. v. Butz, 367 F. Supp. 422, 428–29 (N.D.W.V. 1973) (discussing “Congress’s apparent distaste and antagonism toward certain exploitative practices” and describing the goals behind the Act’s provisions).

¹⁰⁵ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

¹⁰⁶ *Id.*; *see also* United States v. New Mexico, 438 U.S. at 705–06 (rejecting the government’s contention in that case that Congress had intended to allow regulation of the reserved lands for “aesthetic, recreational, and fish-preservation purposes”).

¹⁰⁷ *See supra* notes 104–06 and accompanying text.

¹⁰⁸ Organic Act of 1897, 16 U.S.C. §§ 473–482, 551 (2000).

¹⁰⁹ *Id.* § 475; *see also* United States v. New Mexico, 438 U.S. at 706–18 (discussing the goals behind the Organic Act and subsequent legislation, including the Multiple-Use Sustained-Yield Act of 1960). With passage of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531 (2000), Congress allowed the Forest Service to manage “renewable surface resources of the national forest for multiple use and sustained yield of the several products and services obtained therefrom.” However, while the “multiple use” mandate broadened the management objectives for national forests, it did not further “reserve” national forests for such purposes. *See* United States v. New Mexico, 438 U.S. at 713–14.

¹¹⁰ *See* United States v. New Mexico, 438 U.S. at 706–18.

¹¹¹ *Id.*

forest, over half of all forest land so reserved.¹¹² Upon reservation, Congress's open range grazing policy on these lands was eliminated.¹¹³

Initially, the Secretary of the Interior was appointed to manage national forests.¹¹⁴ Since half of the national forest system was actually rangeland, which at the time was being used by the American people for grazing,¹¹⁵ the Secretary of the Interior immediately began to adopt policies to recognize and protect existing grazing use.¹¹⁶ In 1902, the Secretary of the Interior began regulating grazing pursuant to a system of "preference," with preference for grazing privileges being assigned first to ranchers residing within the national forest, second to ranchers with ranches within the national forest but who resided elsewhere, third to ranchers with ranches outside of but near to the national forest, and lastly to persons not living near the reserve who had some sort of equitable interest in the national forest.¹¹⁷

In 1905, Congress amended the Organic Act by switching management authority from the Secretary of the Interior to the Secretary of Agriculture.¹¹⁸ The amendment also stated that the Secretary of Agriculture "shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and "may make such rules and regulations and . . . regulate their occupancy and use and . . . preserve the forests thereon from destruction."¹¹⁹ That same year, the Secretary met with western livestock industry leaders regarding the Secretary's development of rules for "occupancy and use" of livestock on forest rangeland.¹²⁰ The Secretary of Agriculture promised the ranchers to build on and improve the "preference" system began by the Secretary of the Interior, by protecting "priority of use" based on "the Law of Occupancy and the Prior Appropriations Doctrine," by making grazing reductions only after "fair notice," by giving "preference" to small ranchers with "intelligent forest management," and by allowing rancher input in the form of "advisory

¹¹² See *supra* note 87 and accompanying text.

¹¹³ See *United States v. Grimaud*, 220 U.S. 506, 516–21 (1911). Citing to the *Buford* case, the Court held that "the implied license under which the United States has suffered its public domain to be used as a pasture for sheep and cattle . . . was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention to the [Forest Service] rules and regulations." *Id.* at 521.

¹¹⁴ *Id.* at 508–09.

¹¹⁵ See *Osborne v. United States*, 145 F.2d 892, 895 (9th Cir. 1944) (stating that, while "no specific provision is made by Congress for the issuance of permits for stock grazing in national forests [it is] assumed in the cases that the general right of grazing on public lands continues after they have been declared within a forest reserve subject to the authorization to the Secretary of Agriculture to make regulations for the preservation and care of the growth in the forests").

¹¹⁶ See *Falen & Budd-Falen*, *supra* note 42, at 519 (citing the Secretary's 1902 order of preference for grazing applicants).

¹¹⁷ *Id.*

¹¹⁸ *Grimaud*, 220 U.S. at 508–09.

¹¹⁹ 16 U.S.C. § 551 (2000).

¹²⁰ *Falen & Budd-Falen*, *supra* note 42, at 520. In particular, the federal government was interested in encouraging the protection and development of livestock grazing improvements as well as water resources. *Id.* at 519.

boards.”¹²¹ As a result, in 1906 the Secretary codified into regulation *The Use Book*.¹²² *The Use Book* states:

Applicants for grazing permits will be given preference in the following order.

(a) Small near-by owners.

Persons living in or close to the reserve whose stock have regularly grazed upon the reserve range and who are dependent upon its use.

(b) All other regular occupants of the reserve range.

After class (a) applicants have been provided for, the larger near-by owners will be considered, but limited to a number which will not exclude regular occupants whose stock belong or are wintered at a greater distance to the reserve.

(c) Owners of transient stock.

The owners of stock which belong at a considerable distance from the reserve and have not regularly occupied the reserve range.

Priority in the occupancy and the use of the range and the ownership of improved farming land in or near the reserves will be considered, and the preference will be given to those who have continuously used the range for the longest period.¹²³

Thus, those with land and homestead ties closest to the national forest held the greatest entitlement to graze therein. Based on the “preference” system created by *The Use Book*, ranchers could then obtain permits to graze livestock on national forest rangelands.¹²⁴

The Use Book’s system of grazing preference became a remarkably stable property right. Nearly fifty years after *The Use Book* was codified, a United States tax court¹²⁵ held that “preference is the dominant element of the [Forest Service] grazing privileges, and in the absence of contingencies, which may never happen, the grazing permit, as the facts show as true in this case, and renewals thereof follow the preference as a matter of course.”¹²⁶ The court continued:

That the grazing of livestock on the national forests is to be regarded as a substantial, well-established, and indefinitely continuing part of the national forests program, is not, according to our reading of the grazing regulations and the Forest Service Manual, open to question. In fact, along with the declared purpose of perpetuating the organic resources on both the national forests and related lands, another of the “leading objects” of the said program is the

¹²¹ *Id.*

¹²² THE USE BOOK, *supra* note 99, at 3; Falen & Budd-Falen, *supra* note 42, at 520; *Grimaud*, 220 U.S. at 509.

¹²³ THE USE BOOK, *supra* note 99, at 73–74.

¹²⁴ *Grimaud*, 220 U.S. at 509–10 (Grimaud was indicted for grazing without a permit).

¹²⁵ The value of grazing rights have frequently been subject to state, local, and federal taxation. See Falen & Budd-Falen, *supra* note 42, at 522–23.

¹²⁶ *Shufflebarger v. Comm’r of Internal Revenue*, 24 T.C. 980, 995 (1955) (noting the monetary value of grazing permits as evidenced by New Mexico and Army permit purchases).

“stabilization of that part of the livestock industry, which makes use of the national forests”; and along with and in promotion of such stabilization is the declared purpose of protecting the “established ranch owner and home builder against unfair competition in the use of the range.” The word “stabilization” is [sic] from the word “stabilize,” which means to make stable, and stable, in turn, means firmly established, constant, durable, permanent. Studied in the light of these purposes and objectives, it seems to us abundantly clear that the statute and the regulations contemplate that once the right to a fair and just allotment of grazing lands has been acquired under the established procedures, that right, subject to some adjustment if it should become necessary for protection of the range or for a more equitable distribution among preference holders, is to be regarded as an indefinitely continuing right.¹²⁷

“A [Forest Service] preference, once acquired, is not exhausted through use and it is not limited as to time, but is of indefinite duration and continues until canceled or revoked.”¹²⁸ The court’s assessment of the Forest Service preference right is remarkably insightful. By apportioning grazing rights to sustainable ranching units with private base property, and then treating those rights as indefinitely continuing, the Forest Service was able to provide significant stability to individual ranches and the livestock industry as a whole.

The Forest Service’s approach continues to this day. While current Forest Service regulations no longer use the term “preference,” in substance the preference right remains. Rangeland is divided into logical range management units,¹²⁹ called “grazing allotments,” which are typically comprised of a combination of national forest rangeland, adjacent or interspersed private land and water resources, and “range improvements” designed to improve forage production and promote sustainable grazing use.¹³⁰ Permits to graze on allotments are issued, typically for a ten year period, “to persons who own livestock to be grazed and such base property as may be required.”¹³¹ “Base property” is defined as private land, water, and range improvements owned by the rancher and “specifically designated by him to qualify for a term grazing permit.”¹³² Permit holders are given “first priority for receipt of a new permit at the end of the term period,” and if the grazing allotment is retired ranchers are given “reasonable compensation” for their interest in permanent livestock grazing improvements.¹³³ Ranchers are also given significant rights to collaborate with the Forest Service with

¹²⁷ *Id.* at 991–92.

¹²⁸ *Id.* at 992.

¹²⁹ See THE USE BOOK, *supra* note 99, at 80 (“Reserves in which grazing is allowed will be divided into districts approved by the Forester, and such range divisions made among applicants for the grazing privilege as appear most equitable and for the best interest of the reserve.”).

¹³⁰ 36 C.F.R. §§ 222.1(b)(1), 222.1(b)(1)(21), 222.2(a) (2005); see also Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(d) (2000) (stating procedures for creation of allotment plans).

¹³¹ 36 C.F.R. § 222.3(c)(1)(i); see also 43 U.S.C. § 1752(b) (permitting the Secretary to issue permits for periods less than ten years).

¹³² 36 C.F.R. § 222.1(b)(3).

¹³³ *Id.* §§ 222.3(c)(1)(ii), 222.6(a).

respect to the management of grazing allotments.¹³⁴ Thus, preference to graze is given to those best able to use the grazing resource, ranchers who own adjacent or interspersed private land, water, and grazing resources and who use their federal land allotments as part of their sustainable ranching unit.

In sum, with passage of the Organic Act, Congress foreclosed the possibility that ranchers who graze on the 100 million acres of rangelands reserved as National Forest could potentially claim such land in fee simple. However, where one land ownership right was eliminated, another was born. The 100 year system of preference embodies all of the legal doctrines discussed herein. With the concepts of “base property” and “grazing allotments,” the Mexican custom of homestead ranching units utilizing adjacent or interspersed public rangeland was honored. By awarding grazing permits to those with livestock, base property, and range improvements, the doctrines of capture and beneficial use were recognized.¹³⁵ In addition, awarding grazing permits eliminated the competition and trespass resulting from the open range policy, created sustainable ranching units, and rewarded and legally recognized the labor of ranchers. Finally, although Congress has never expressly sanctioned the Forest Service preference system, neither has it sought to interfere,¹³⁶ and it has, in fact, indirectly approved of the preference system by enacting the Federal Land Policy and Management Act.¹³⁷ The system of grazing preference has, in essence, become the new custom and usage of western rangelands.

C. Grazing on Land Administered by the Bureau of Land Management

While federal regulation of rangelands reserved in national forests began as early as 1902, Congress’s open range policy persisted on all unreserved public lands for another three decades.¹³⁸ The depression and drought of the 1930s brought the open range problem to its breaking point,

¹³⁴ *Id.* §§ 222.7, 222.11.

¹³⁵ The Forest Service’s codification of “priority of use” based on “the Law of Occupancy and the Prior Appropriations Doctrine” was tantamount to recognizing “capture through beneficial use.” Falen & Budd-Falen, *supra* note 42, at 520.

¹³⁶ This is an important point. In *Buford v. Houtz*, 133 U.S. 320, 326 (1890), the Supreme Court held that 100 years of congressional acquiescence to the open range policy effectively rendered it the law of the land. The same may be argued with respect to the 100 years of congressional acquiescence to the Forest Service system of preference. *Cf.* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 155–56 (2000) (finding that the Food and Drug Administration (FDA) did not have authority under its organic act to regulate cigarettes when it refused for 35 years to assert such authority and that Congress, through subsequent acquiescence and legislation, “effectively ratified the FDA’s previous position that it lacks jurisdiction to regulate tobacco”).

¹³⁷ See Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000). For example, the Act states that “permits and leases for domestic livestock grazing . . . within National Forests . . . shall be for a term of ten years . . .” *Id.* § 1752(a). Permit holders are given priority for renewal of existing permits. *Id.* § 1752(c). By requiring Forest Service grazing permits to be issued for a term of ten years, Congress sanctioned the grazing permit system which is based on preference. See *Brown & Williamson Tobacco Corp.*, 529 U.S. at 155–56.

¹³⁸ See *supra* notes 79, 85–90 and accompanying text.

leading Congress to pass the Taylor Grazing Act.¹³⁹ The purposes of the Taylor Grazing Act were threefold: 1) to regulate occupancy of the remaining public rangeland; 2) to protect the rangeland from harm; and 3) to stabilize the livestock industry “by preserving ranchers’ access to the federal lands in a manner that would guard the land against destruction.”¹⁴⁰ Congress gave the Secretary of the Interior the responsibility to implement the Taylor Grazing Act, and accordingly required the Secretary to “do any and all things necessary to accomplish the purposes” thereof.¹⁴¹

The Taylor Grazing Act authorized the Secretary of the Interior to create “grazing districts” on all unreserved public rangeland.¹⁴² Grazing districts were created to “promote the highest use of the public land, pending its final disposal.”¹⁴³ For a grazing district to be created, the land must be “chiefly valuable for grazing and raising forage crops.”¹⁴⁴ A grazing district must be used for grazing.¹⁴⁵ Land within a grazing district is withdrawn “from all forms of entry and settlement.”¹⁴⁶ By setting aside rangeland chiefly valuable for grazing, requiring grazing to occur thereon, and withdrawing such land from settlement, Congress intended to reserve grazing districts primarily for grazing. As summarized in a 1994 report to Congress:

During Congressional debates on the [Taylor Grazing Act], Members repeatedly referred to grazing district lands as being “reserved” for grazing purposes and analogized the grazing districts to forest reserves. Many provisions of the TGA deliberately parallel those of the Forest Organic Act of 1897. Grazing districts may be seen as being both “reserved” in the sense that they were removed from private appropriation and dedicated to a particular purpose, and as being

¹³⁹ Taylor Grazing Act of 1934, 43 U.S.C. §§ 315–315r (2000). *See also* John S. Harbison, *Hohfeld and Herfords: The Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 468 (1992).

¹⁴⁰ *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1163 (10th Cir. 1998), *rev’d on other grounds*, 529 U.S. 728 (2000); *see also* Julie Anderson, *Public Lands Council v. Babbitt: Herding Ranchers off Public Land?*, 2000 B.Y.U. L. REV. 1273, 1294–96 (2000). “It is clear from the title of the [Taylor Grazing] Act that Congress recognized that it was dealing with a question of great national importance affecting an industry which produced food products” *United States v. Achabal*, 34 F. Supp. 1, 2 (D. Nev. 1940), *rev’d on other grounds*, 122 F.2d 791 (9th Cir. 1941).

¹⁴¹ 43 U.S.C. § 315a (2000).

¹⁴² *Id.* § 315.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See* *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999) (explaining the purposes of a designated grazing district). The Secretary can modify the boundaries of a grazing district, but unless land is removed from designation as grazing, the Secretary must use it for grazing. *See* 43 U.S.C. § 315 (describing the establishment and use of grazing districts). Accordingly, the Secretary must demonstrate good cause to reduce grazing within a grazing district. *See* 43 C.F.R. § 4110.3 (2005) (stating that changes in “permitted use specified in a grazing permit or lease” issued by the BLM “must be supported by monitoring, field observations, ecological site inventory or other data acceptable to the authorized officer”). In 2003, the BLM issued a proposed rule that would also require grazing managers to analyze and consider relevant social, economic, and cultural factors when implementing changes in the permitted use of BLM grazing districts. *Grazing Administration—Exclusive of Alaska*, 68 Fed. Reg. 68,452, 68,459 (Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100).

¹⁴⁶ 43 U.S.C. § 315.

“public lands” in the sense that private title to lands in grazing districts *could* be obtained if the lands were reclassified for such acquisition. District lands were recorded on contemporaneous Department of Interior records as “Reserved Public Domain (Subject to Taylor Act).”¹⁴⁷

“Congress intended that once the Secretary established a grazing district under the [Taylor Grazing Act], the primary use of that land should be grazing.”¹⁴⁸ To preserve grazing districts for grazing, the Secretary must “regulate their occupancy and use,” “preserve the land and its resources from destruction or unnecessary injury,” and “provide for the orderly use, improvement, and development of the range.”¹⁴⁹ Today, grazing occurs on approximately 158 million acres of land administered by the Secretary of the Interior, through the BLM.¹⁵⁰

With passage of the Taylor Grazing Act, Congress formally adopted the Forest Service’s system of allocating grazing rights through preference.¹⁵¹ Section 315b of the Act states in pertinent part:

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range. . . . Grazing permits shall be issued. . . . Preference shall be given in the issuance of grazing permits to those within or near a [grazing] 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 . . . except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. . . . [G]razing 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.¹⁵²

¹⁴⁷ Pamela Baldwin, *Legal Issues Related to Livestock Watering in Federal Grazing Districts*, Cong. Res. Serv. Rep. Doc. No. 94-688A, at 46 (1994).

¹⁴⁸ *Public Lands Council*, 167 F.3d at 1308 (holding that grazing cannot be eliminated by issuing grazing permits for “conservation” or other non-grazing purposes). With passage of the Public Rangelands Improvement Act, Congress reinforced the notion that grazing must occur with a grazing district. See 43 U.S.C. § 1903 (2000) (describing rangeland management policies). Specifically, while grazing may be discontinued on “certain lands” within a grazing district, the Secretary must first make and support an affirmative decision that grazing should not occur. *Id.* Absent such a decision, grazing must continue in a manner which emphasizes maximum rangeland productivity. *Id.*

¹⁴⁹ Taylor Grazing Act, 43 U.S.C. § 315a (2000).

¹⁵⁰ See COGGINS, *supra* note 25, at 777 (describing livestock grazing on public lands).

¹⁵¹ 43 U.S.C. § 315l. In fact, Congress apparently considered grazing management under the Taylor Grazing Act interchangeable with that for national forests. *Id.* This section of the Taylor Grazing Act gives the President power to shift Forest Service rangelands into Taylor Grazing Act grazing districts, and vice versa, for the purpose of administrative efficiency. *Id.*

¹⁵² 43 U.S.C. § 315b (2000).

As on national forest rangelands, ranchers can only qualify for a Taylor Grazing Act grazing permit if they own or control private property or water necessary for grazing use.¹⁵³ Preference is given to qualified ranchers whose private property is in or near a grazing district, thus adopting the Forest Service rule that preference is given to ranchers best able to utilize a given portion of the federal rangeland resource.¹⁵⁴ The Taylor Grazing Act also formally recognizes a rancher's "grazing unit," meaning the value of the private land and water combined with the value of the preference right and grazing permit, and provides for the economic stability of the grazing unit by conditionally guaranteeing renewal of the grazing permit when the grazing unit has been mortgaged, and by providing that grazing rights must be "adequately safeguarded."¹⁵⁵ Thus, ranchers who have invested labor and resources into grazing livestock on federal land are "entitled" to grazing permits indefinitely, providing stability to the livestock industry.¹⁵⁶

Since the Taylor Grazing Act was passed in 1934, courts have struggled to define the exact nature of the preference right granted thereunder.¹⁵⁷ In the 1938 case *Red Canyon Sheep Company v. Ickes*, the court held that the preference right conveyed under the Taylor Grazing Act was a property interest subject to protection in equity.¹⁵⁸ The court characterized ranchers who own base property as a "preferred class set up by the statute and regulations . . . entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range."¹⁵⁹ Further, "Congress intended that . . . livestock owners, who . . . have been for a substantial period of time *bona fide* occupants of certain parts of the public domain, and who are able to make the most economic and beneficial use thereof . . . are entitled to grazing permits . . ."¹⁶⁰ The court went on to state:

We recognize that the rights under the Taylor Grazing Act do not fall within the conventional category of vested rights in property. Yet, whether they be called rights, privileges, or bare licenses, or by whatever name, while they exist they

¹⁵³ *Id.* Private land and water are known as "base property." *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

¹⁵⁴ 43 U.S.C. § 315b (2000).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see also Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(a) (2000) (providing that, absent extenuating circumstances, grazing permits are to be issued for a ten year period); *Shufflebarger v. Comm'r of Internal Revenue*, 24 T.C. 980, 991–92 (1955) (stating that the principal purpose of a preference right is to stabilize ranches and the livestock industry).

¹⁵⁷ See generally Harbison, *supra* note 139 (discussing court precedent related to the Taylor Grazing Act). Harbison demonstrates that the Taylor Grazing Act preference right includes many of the hallmarks of a traditional property right, such as the right to exclude others from grazing use and the right to transfer the preference via the transfer of the base property to which the preference attaches. *Id.*

¹⁵⁸ *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 313–18 (D.C. Cir. 1938).

¹⁵⁹ *Id.* at 314 (emphasis added).

¹⁶⁰ *Id.* at 313–14.

are something of real value to the possessors and something which have their source in an enactment of the Congress.¹⁶¹

Thus, “the valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration of the Taylor Grazing Act ripen into a permit, makes that privilege a proper subject of equitable protection”¹⁶² Likewise, the court in *McNeil v. Seaton* stated:

“Preference *shall be given*” to those like appellant who come within the Act. This appellant not only was engaged in stockraising when the Act was passed, but he qualified under the Range Code as and when first promulgated. He was entitled to rely upon the preference Congress had given him: to use the public range as dedicated to a special purpose in aid of Congressional policy. We deem his rights — whatever their exact nature — to have been “protected against tortious invasion” and to have been “founded on a statute which confers a privilege.” Accordingly this appellant was entitled to invest his time, effort and capital and to develop his stockraising business, all subject, of course, to similar preferences to be accorded in the affected area to others comparably situated. We see no basis upon which, by a special rule adopted more than twenty years after appellant had embarked upon his venture, he may lawfully be deprived of his statutory privilege.¹⁶³

A number of principles can be gleaned from these statements. First, a preference right is de facto driven by the doctrine of capture through beneficial use. The court in *Red Canyon Sheep* speaks of ranchers having a superior right “against others who do not possess” base property in a grazing district (capture), “who are able to make the most economic and beneficial use thereof” (through beneficial use).¹⁶⁴ The court compared the grazing right to a water right, “a category of vested interests in property. . . . [L]ess than the full ownership of property because it is a right not to the corpus of the water but to the use of the water,”¹⁶⁵ or again, capture through beneficial use. Second, regardless of whatever label it is assigned, a preference right is something of “real value” subject to protection in “equity.”¹⁶⁶ Third, a preference right is an “entitlement” or “privilege” created by Congress.¹⁶⁷

The “entitlement” or “privilege” created by the Taylor Grazing Act does have limits. For example, courts have uniformly held that the Taylor Grazing Act provision which states that the issuance of a grazing permit “shall not create any right, title, interest, or estate in or to the lands” means that the grazing preference, or the value imparted to base property from a grazing preference, is not a compensable property interest.¹⁶⁸ Likewise, the Taylor

¹⁶¹ *Id.* at 315.

¹⁶² *Id.* at 316.

¹⁶³ *McNeil v. Seaton*, 281 F.2d 931, 937 (D.C. Cir. 1960) (citations omitted) (emphasis added).

¹⁶⁴ *Red Canyon Sheep*, 98 F.2d at 313–14.

¹⁶⁵ *Id.* at 315.

¹⁶⁶ *Id.* at 315–16.

¹⁶⁷ *Id.* at 313–15; *McNeil*, 281 F.2d at 937.

¹⁶⁸ Taylor Grazing Act, 43 U.S.C. § 315b (2000); see *United States v. Fuller*, 409 U.S. 488, 494 (1973) (holding that the value which a federal grazing permit adds to private land is not a

Grazing Act requires that the BLM regulate the “occupancy and use” of grazing districts and “preserve the land and its resources from destruction or unnecessary injury,” giving the BLM discretion to promulgate and enforce regulations consistent therewith.¹⁶⁹ Accordingly, the BLM has the power to withdraw or dispose of land within a grazing district,¹⁷⁰ and may cancel, suspend or revoke a grazing permit for violations of the terms and conditions contained therein.¹⁷¹

However, the fact that the BLM has discretion to apportion and regulate grazing rights does not mean that the agency’s discretion is unlimited. The BLM *must* permit grazing within designated grazing districts, and *must* apportion grazing rights to those who, by virtue of the ownership or lease of their base property, are best able to utilize the grazing resource.¹⁷²

Once grazing rights are “recognized and acknowledged,” the Taylor Grazing Act requires the BLM to “adequately safeguard” them.¹⁷³ For example, the BLM must renew a grazing permit when a failure to do so would harm the value of a mortgaged ranch.¹⁷⁴ Likewise, the BLM has an affirmative duty not to interfere with established grazing rights by inducing a third party to interfere with permitted grazing.¹⁷⁵ Thus, while the BLM has limited discretion to modify or eliminate grazing rights, so long as grazing rights exist the BLM cannot interfere with them.¹⁷⁶ The Tenth Circuit explained:

As long as the [grazing] permits were unrevoked, the grantor [BLM] would have no more right to interfere with their exercise than would any third party. In

compensable property interest); *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (holding that the Taylor Grazing Act grazing permits and preference rights are not a compensable property interest); *accord* *United States v. Cox*, 190 F.2d 293, 294–97 (10th Cir. 1951) (permit interests not compensable under taking by War Department); *Mollohan v. Gray*, 413 F.2d 349, 353 (9th Cir. 1969) (holding lower court should have dismissed for lack of jurisdiction); *White Sands Ranchers of New Mexico v. United States*, 14 Cl. Ct. 559, 566–67 (1988) (holding permits have no compensable value). This is also true for grazing rights on national forests. *See* *Osborne v. United States*, 145 F.2d 892, 895–96 (9th Cir. 1944) (change in status of land to national forests does not change that right of grazing does not perfect a property right).

¹⁶⁹ Taylor Grazing Act, 43 U.S.C. § 315a (2000); *Mollohan v. Gray*, 413 F.2d at 352.

¹⁷⁰ *See* *LaRue v. Udall*, 324 F.2d 428, 432 (D.C. Cir. 1963) (holding that the Taylor Grazing Act’s provision allowing for the creation of grazing districts pending final disposal allows the government to dispose of land within an established grazing district).

¹⁷¹ *See* *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1005, 1007 (9th Cir. 1981) (upholding administrative determination of trespass resulting in reduction and revocation of grazing privileges); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1401–04, 1407 (10th Cir. 1976) (upholding denial of grazing privileges sanction for violation of lease terms and conditions).

¹⁷² Taylor Grazing Act, 43 U.S.C. §§ 315, 315b (2000); *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999); *Public Lands Council v. Babbitt*, 529 U.S. 728, 734 (2000).

¹⁷³ Taylor Grazing Act, 43 U.S.C. § 315b (2000).

¹⁷⁴ *See id.* (providing the ranch must first comply with the terms and conditions of the grazing permit).

¹⁷⁵ *See* *Oman v. United States*, 179 F.2d 738, 739–42 (10th Cir. 1949) (holding that allegations of federal employees encouraging interference with plaintiff’s rights pursuant to the Taylor Grazing Act stated a claim under the Federal Tort Claims Act).

¹⁷⁶ *Id.*

fact, by the very terms of the Taylor Act, the grantor (defendant) had not merely a duty to refrain from the invasion of plaintiffs' grazing privileges, but an affirmative obligation to adequately safeguard them.¹⁷⁷

The BLM's failure to adequately safeguard grazing rights may subject it to liability in tort.¹⁷⁸ The BLM may also have contractual obligations to the permitted rancher.¹⁷⁹ For instance, the BLM cannot require a permitted rancher to provide water for wild horses under the terms and conditions of a range improvement permit when that was not part of the original agreement.¹⁸⁰ The presence of livestock water improvements may create statutory or constitutional rights, in that the Taylor Grazing Act does not permit the BLM to regulate in a manner which interferes with appropriated stockwater rights, and such water rights may be a compensable property interest.¹⁸¹ Finally, BLM employees do not have discretion to engage in otherwise lawful management activities for unlawful purposes or with an unlawful intent.¹⁸²

¹⁷⁷ *Id.* at 742.

¹⁷⁸ *See id.* (holding that the BLM can be liable in tort for inducing a third party to interfere with permitted grazing use); *see also* *Hatahley v. United States*, 351 U.S. 173, 181 (1956) (holding that the BLM can be liable in tort for failing to correctly implement a state law regarding abandoned horses); *Alves v. United States*, 133 F.3d 1454, 1459 (Fed. Cir. 1998) (holding that an exchange of use agreement between the BLM and a permitted rancher may create liabilities sounding in tort). *But see* *Chorunos v. United States*, 193 F.2d 321, 322 (10th Cir. 1952) (finding no tort claim when the BLM refused to grant a trailing permit); *United States v. Morrell*, 331 F.2d 498, 502 (10th Cir. 1964) (finding no tort claim when the BLM granted a grazing permit to a rancher knowing that livestock may trespass on unfenced adjacent private land).

¹⁷⁹ *See* *Fallini v. Hodel*, 725 F. Supp. 1113, 1116–17 (D. Nev. 1989) (contractual obligations created by the terms of a livestock range improvement permit); *Alves v. United States*, 133 F.3d 1454, 1458–59 (Fed. Cir. 1998) (contractual obligations created by an exchange of use agreement).

¹⁸⁰ *Fallini v. Hodel*, 725 F. Supp. at 1116–17.

¹⁸¹ *See id.* at 1119–24 (finding that there is no implied water right contained within the Taylor Grazing Act, and the BLM's interference with recognized water rights may constitute a regulatory taking); *Hage v. United States*, 51 Fed. Cl. 570, 578–84 (2002) (holding that appropriated stockwater rights are a compensable property interest); *United States v. Cox*, 190 F.2d 293, 297–99 (10th Cir. 1951) (Philips, C.J., dissenting) (arguing that when grazing rights are eliminated, the subsequent elimination of stockwater rights must be compensated).

¹⁸² The Frank Robbins case provides an interesting example. Wyoming rancher Frank Robbins sued a number of BLM employees personally for money damages, alleging that the defendants engaged in adverse management actions against him with the unlawful intent and purpose of extorting an easement from him and punishing him for exercising his constitutional right to exclude the defendants from his private property. *Robbins v. Wilkie*, No. 98-CV-201-B, 2004 WL 3659189 (D. Wyo. Jan. 20, 2004). Denying the defendants' motion for summary judgment, the district court held that Frank Robbins "provides a significant amount of evidence which could lead a jury to conclude that Defendants did intend and agreed to extort and punish Plaintiff." *Id.* at *6. The district court also held that the defendants are not protected by qualified immunity for engaging in otherwise lawful management actions taken with an unlawful motive and intent. *Robbins v. Bureau of Land Mgmt.*, 252 F. Supp. 2d 1286, 1292–93 (D. Wyo. 2003). The Tenth Circuit Court of Appeals upheld the district court's denial of the defendants' motion for summary judgment and qualified immunity defense. *See Robbins v. Wilkie*, 433 F.3d 755, 759 (10th Cir. 2006). Professor Donahue cites to newspaper articles for the proposition that Frank Robbins received favorable regulatory treatment, but ignores published case law holding that Frank Robbins' regulators may be held personally liable for extortion and unconstitutional retaliation levied against him. *See* Debra L. Donahue, *Western Grazing: The Capture of Grass*,

With passage of the Taylor Grazing Act, Congress created a valuable entitlement designed to protect individual ranches and the livestock industry as a whole. Adopting the Forest Service's approach to the apportionment of grazing rights, grazing preference is allocated to those best able to utilize the grazing resource. While the BLM has some discretion to regulate and perhaps eliminate the entitlement, there are a number of important limitations to this discretion. Once grazing rights are established and defined, they must be affirmatively protected and allowed to continue indefinitely. As long as the rancher complies with the terms and conditions of the grazing permit, the permit cannot be arbitrarily eliminated. The system of entitlement created by the Taylor Grazing Act was Congress's solution to the open range problem. The Act balances the need to protect ranchers and ranching with the need to protect the rangeland, rightly considering the two needs inseparable. Thus, while Congress failed to grant western grazing lands in fee, it created a system of entitlement just short of that. The property right held by ranchers, while not a compensable fee interest, is nevertheless a valuable property right imparting significant benefits to those who possess it.¹⁸³ In laboring to create a sustainable ranching unit, the BLM allowed ranchers to "capture" adjacent and interspersed federal rangelands.

D. Due Process Applied to Grazing Rights

The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law."¹⁸⁴ "Property" protected by due process is defined broadly. "[P]roperty interests protected by procedural due process have extended well beyond actual ownership of real estate, chattels, or money."¹⁸⁵ Governmental benefits, which are a matter of entitlement, are property of vested recipients and are subject to due process protections.¹⁸⁶ "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims

Ground and Government, 35 ENVTL. L. 721, 775–76 (2005).

¹⁸³ As stated by Harbison, "BLM conveys to livestock graziers legally cognizable interests in the public lands. At the most basic level, property is the right to possess or occupy a tangible and identifiable object. That grazing permittees and lessees have such a right is undeniable, despite the assertion of both the standard BLM permit and lease that they convey[] no right, title or interest . . . in any lands or resources owned by the federal government. To the contrary, this article shows that permittees and lessees acquire rights of the kind that do constitute property." Harbison, *supra* note 139, at 463 (internal quotations omitted).

¹⁸⁴ U.S. CONST. amend. V.

¹⁸⁵ *Board of Regents v. Roth*, 408 U.S. 564, 571–72 (1972); *see also* *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970) (stating that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them" and thus any termination of those benefits are protected by procedural due process).

¹⁸⁶ *See Bd. of Regents*, 408 U.S. at 577 (stating that recipients of some government benefits such as welfare have a claim of entitlement to those benefits that creates a right to defend those entitlements if the need arises).

of entitlement to those benefits.”¹⁸⁷ The Supreme Court has explained, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”¹⁸⁸ An entitlement is the “right to benefits, income, or property which may not be abridged without due process.”¹⁸⁹ Holding that welfare payments are a matter of statutory entitlement for those qualified to receive them, the Supreme Court in *Goldberg v. Kelly* noted:

It may be realistic today to regard welfare entitlements as more like “property” than a “gratuity.” Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that “(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.”¹⁹⁰

Since the *Goldberg* decision, courts have recognized that entitlements protected by procedural due process may take a wide variety of forms.¹⁹¹ For example, an entitlement protected by procedural due process is created when a person has a legitimate claim to the issuance of a license.¹⁹² If there

¹⁸⁷ *Id.*; see also *Greene v. Babbitt*, 64 F.3d 1266, 1272 (9th Cir. 1995) (stating that property interests can stem from federal law).

¹⁸⁸ *Bd. of Regents*, 408 U.S. at 577. Elaborating in a companion case, the Supreme Court explained that the lack of explicit statutory language or agency guidelines may not preclude the creation of a property interest. See *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972). Attendant circumstances may support the creation of a property interest protected by due process. *Id.*

¹⁸⁹ BLACK’S LAW DICTIONARY, *supra* note 11, at 523.

¹⁹⁰ *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (quoting Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)); see also Charles Reich, *The New Property*, 73 YALE L.J. 733, 739–43 (1964) (discussing the view that government licenses are increasingly being considered one’s “property” and the desire to seek legal protection against interference with that interest).

¹⁹¹ See *Bell v. Burson*, 402 U.S. 535 (1971) (motor vehicle registration and driver’s license); *Tur v. U.S. Fed. Aviation Admin.*, 4 F.3d 766 (9th Cir. 1993) (airman’s certificate); *Industrial Safety Equip. Ass’n, Inc. v. United States. Envtl. Prot. Agency*, 837 F.2d 1115 (D.C. Cir 1988) (agency certification of manufactured health equipment); *Reed v. Vill. of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (renewal of liquor license despite the fact that it is statutorily termed a “privilege”); *Holmes v. United States*, 815 F. Supp. 429 (M.D. Alaska 1993) (continued participation as a retailer in the food stamp program); *United States v. Hall*, 751 F. Supp. 1380 (E.D. Cal. 1990) (a previously approved mining plan of operations for an unpatented mining claim is property separate from the mining claim itself).

¹⁹² See *Bd. of Regents*, 408 U.S. at 577–78. Numerous types of federal entitlements are in the nature of licenses which cannot be suspended or denied without due process. See Blackwell

is “either a certainty or a very strong likelihood” that the license would be granted, according to the terms of the statute creating the license, a property right is created.¹⁹³ The Georgia Supreme Court has explained the importance of license renewal, with respect to a license upon which the licensee depends:

Counsel . . . sought to draw a distinction between revocation and refusal to renew a license [to sell insurance]. There is no difference in substance between the two. It is essential that insurance companies once qualified and licensed be assured that they may safely incur the expenses necessary for the permanent establishment of their business . . . and that the license will be continued by annual renewals so long as they meet the requirements of the law of this State.¹⁹⁴

The United States Supreme Court further noted, “Once [driver’s] licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood In such cases the licenses are not to be taken away without that procedural due process.”¹⁹⁵

Once an entitlement is established, the next question is what process is due. Due process requires the aggrieved party have adequate notice and an opportunity to be heard in a meaningful time and manner before an impartial decision maker.¹⁹⁶ If such deprivation is sufficiently egregious, compared with the immediate interest of the government in depriving the individual of the property right, then due process requires a hearing prior to termination of the right.¹⁹⁷

These cases stand for the proposition that when the federal government grants something of value, a property interest is created which cannot be taken away without first giving the owner adequate notice and an opportunity to respond. The more important the property interest is to its owner, the greater the level of process due. Applying these principles, federal grazing rights are very clearly a property interest granting their holders significant procedural due process rights. Grazing permits issued by the Forest Service and BLM are federal licenses¹⁹⁸ granted to ranchers

Coll. of Bus. v. Attorney Gen., 454 F.2d 928, 932–33 (2d Cir. 1971) (holding that the approval granted to a college by a federal agency which allowed alien students to attend the college was a property right in the nature of a license entitling the college to due process); *White v. Franklin*, 637 F. Supp. 601, 610 (N.D. Miss. 1986) (holding that a flight instructor’s license is a property interest entitled to due process under the Constitution and the Administrative Procedure Act prior to termination). The *White v. Franklin* court also held that the license was a liberty interest under the Constitution requiring due process because suspension thereof totally foreclosed on licensee’s ability to pursue a chosen profession. *Id.* at 611.

¹⁹³ See *Kaswan v. Mannings*, No. 90 CIV 5372, 1991 WL 41597, at *3 (S.D.N.Y., Mar. 20, 1991) (quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986)).

¹⁹⁴ *Bankers Life & Cas. Co. v. Cravey*, 69 S.E.2d 87, 90 (Ga. 1952).

¹⁹⁵ *Bell v. Burson*, 402 U.S. 535, 539 (1971).

¹⁹⁶ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

¹⁹⁷ *Id.*; see also *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976).

¹⁹⁸ See *Hage v. United States*, 35 Fed. Cl. 147, 166–67 (1996) (finding no reason to treat plaintiff’s grazing permit “any differently from those grazing permits dealt with by other federal courts over a long period and held to be licenses”); *Anchustegui v. United States Dep’t of Agric.*, 257 F.3d 1124, 1128–29 (9th Cir. 2001) (holding cancellation of grazing permit not valid where

entitled to them by virtue of their preference, linked to the ranches' base property and water rights.¹⁹⁹ In most cases, the existence of a sustainable ranching unit, and thus the livelihood of the rancher, is dependant upon the rancher's license, entitling the rancher to a significant degree of due process. At a minimum, the rancher is entitled to adequate notice and a hearing before an impartial tribunal prior to a reduction or elimination of the right.²⁰⁰

The *Coomes v. Adkinson*²⁰¹ case is illustrative. The case involved ranchers who, for forty years, repeatedly held grazing leases to rangelands located within the Pine Ridge Indian Reservation.²⁰² The ranchers' herd of cattle became infected with brucellosis, and was subsequently quarantined.²⁰³ In the meantime, the ranchers' current five-year leases expired, and the ranchers submitted applications and bids for lease renewal, as they had for the prior forty years.²⁰⁴ Due to the quarantine, the Bureau of Indian Affairs rejected the applications and awarded the leases to a third party.²⁰⁵ The ranchers sued, claiming that the Bureau of Indian Affairs had violated their constitutional rights by failing to give them notice and sufficient opportunity to respond prior to rejecting their lease applications.²⁰⁶ The Bureau of Indian Affairs responded by arguing that, as unsuccessful bidders for a grazing lease, the ranchers did not have a property interest subject to procedural due process.²⁰⁷ The court rejected this argument:

Ordinarily an unsuccessful bidder for government benefits, without more, has an insufficient property interest to invoke procedural due process protections. The plaintiffs here, however, do have more. The plaintiffs' lease on range units 27, 314, 705, 709, 710, and 733 expired October 31, 1975. As a matter of policy, however, the [Bureau of Indian Affairs] granted plaintiffs and all other lessees occupying some 350 grazing units holdover status with the right to remain on the land pending award of new leases. The federal defendants admit that plaintiffs and others were granted a lease continuance as a "courtesy". It has been recognized that a de facto tenure policy gives rise to sufficient property interests to require the protections of procedural due process.²⁰⁸

proceedings began without prior notice and opportunity to demonstrate compliance).

¹⁹⁹ See *supra* Part III.B-C.

²⁰⁰ See *supra* Part III.B-C; *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (holding that procedural due process requires that pretermination evidentiary hearings be held when public assistance payments to welfare recipients are discontinued); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (holding that an evidentiary hearing is not required prior to termination of disability benefits and that present administrative procedures for such termination fully comport with due process. The Court went on to note that due process rules are flexible procedural protections that turn on the particular circumstances of each case).

²⁰¹ 414 F. Supp. 975 (D.S.D. 1976).

²⁰² *Id.* at 980.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 980-81.

²⁰⁶ *Id.* at 993-97.

²⁰⁷ *Id.* at 993.

²⁰⁸ *Id.* at 994 (citations omitted).

Thus, the Bureau of Indian Affairs' *de facto* preference for ranchers with existing grazing rights created a property interest subject to procedural due process. The fact that ranchers had depended upon the continually renewed grazing leases for their livelihood was a vital factor:

Plaintiffs rely for their livelihood on their continued right to the land in question at least as much as welfare recipients rely on continued welfare benefits, or as unemployed persons rely on unemployment compensation, or any citizen relies on a tax exemption, or as a school child relies on not being suspended, or as any person relies on his driver's license not being revoked. This Court therefore holds that the termination without a due process hearing of plaintiffs' interests in units 27, 705, 709 and 733 on February 5, 1976 by federal defendants, violated plaintiffs' due process rights guaranteed by the Fifth Amendment to the United States Constitution.²⁰⁹

The court held that, when the statute or regulation inadequately defines the level of process due, the ranchers are entitled to "informal" procedure, the "minimal" level of due process necessary when ranchers' livelihoods were at stake:

[M]inimal requirements of due process, and as applied appropriately to this situation, are: (1) clear and actual notice of the reasons for termination in sufficient detail to prepare and present evidence relating to them, (2) notice of the names of persons who have knowledge of facts adverse and relied upon for termination and the opportunity to examine each of them as to knowledge and credibility, (3) a reasonable time and opportunity to present testimony in defense; and (4) a hearing on record before an impartial board or tribunal.²¹⁰

The *Coomes* case demonstrates that a minimal level of grazing entitlement can create a powerful due process property interest, one which cannot be eliminated without first providing detailed notice and a fair opportunity to prepare for and present testimony at a hearing, on the record, before an impartial tribunal. The ranchers in *Coomes* were merely grazing lessees. They had no statutory or regulatory entitlement to graze a particular portion of federal rangeland. But because the agency had routinely given the ranchers a grazing preference, allowing the ranchers to rely on this regulatory treatment for their livelihoods, a property right was created entitling the ranchers to a significant amount of due process prior to elimination of the right.

The grazing entitlement for BLM and Forest Service ranchers is much stronger than that identified by the court in *Coomes*. The Taylor Grazing Act defines the class of persons entitled to grazing rights, the scope of such rights, and the discretionary limitations placed on the BLM in the administration of such rights.²¹¹ The Forest Service *Use Book* and subsequent regulations prescribe similar rights for ranchers grazing on

²⁰⁹ *Id.* at 995 (citations omitted).

²¹⁰ *Id.*

²¹¹ See *supra* Part III.C (discussing the regulation of grazing on land administered by the BLM).

National Forest rangelands, rights which have been recognized and acknowledged for over 100 years.²¹² With passage of the Federal Land Policy and Management Act, Congress reaffirmed the allocation of grazing rights on both Forest Service and BLM rangelands, requiring grazing permits to be issued for (in most cases) ten years, giving existing grazing permit holders first priority for renewal of their grazing permit, and requiring two years advance notice prior to canceling a grazing permit on lands withdrawn from grazing use.²¹³ These statutory and regulatory provisions create a much stronger entitlement than the relatively simple *de facto* entitlement created by the Bureau of Indian Affairs in *Coomes*. At a very minimum, ranchers with preference rights and grazing permits administered by the BLM and Forest Service should be entitled to the “minimal” due process prescribed in *Coomes*, meaning detailed notice and sufficient time to prepare for and present evidence at a hearing, on the record, before an impartial tribunal, *before* having their grazing rights reduced or eliminated.²¹⁴

This analysis demonstrates that the appeal process currently prescribed by the BLM and Forest Service regulations may be constitutionally inadequate. For example, Forest Service regulations provide for appeals of certain grazing decisions to the next level of authorized officer, but do not provide for a hearing on the record before an impartial tribunal.²¹⁵ On the other hand, BLM regulations provide for a hearing on the record for appeals of decisions impacting grazing rights.²¹⁶ However, the adverse decision is not stayed in the meantime, unless the aggrieved rancher can prove the elements required for a preliminary injunction.²¹⁷ Thus, the rancher aggrieved by a

²¹² See *supra* Part III.B (discussing the regulation of grazing on land administered by the Forest Service).

²¹³ Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1702(p), 1752(a), 1752(c), 1752(g) (2000). The Federal Land Policy and Management Act also sought to protect ranchers by compensating them for range improvements when grazing lands are disposed of or otherwise devoted to a different purpose, and by exempting “existing” grazing use from the non-impairment standard applicable to wilderness study areas. *Id.* §§ 1752(g), 1782(c).

²¹⁴ But see *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999) (holding that a reduction in the number of livestock grazed on a Forest Service grazing allotment is not a property interest subject to due process).

²¹⁵ See 36 C.F.R. § 215.11 (2005) (listing those Forest Service decisions that are subject to appeal); 36 C.F.R. § 215.18 (2005) (providing that the Department of Agriculture’s final decision will be made by an Appeal Deciding Officer).

²¹⁶ The Taylor Grazing Act states that the Secretary of the Interior “shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge . . .” 43 U.S.C. § 315h (2000). This language means that “matters that arise in the administration of grazing districts” are subject to a formal hearing on the record, as required by the Administrative Procedure Act. See *LaRue v. Udall*, 324 F.2d 428, 432 (D.C. Cir. 1963) (observing, in the context of ruling that an exchange of land did not require a hearing under the Taylor Grazing Act, that by comparison the Act did call for a hearing in the context of grazing district administration). BLM regulations provide for such a hearing. 43 C.F.R. pt. 4160 (2004).

²¹⁷ See 43 C.F.R. § 4.21 (2005) (dictating the effect of a decision pending appeal and the standards and procedures for obtaining a stay). If the aggrieved rancher fails to obtain a stay of the adverse grazing decision, then she may appeal her case directly to a federal district court. See *Darby v. Cisneros*, 509 U.S. 137, 146–47 (1993) (confirming that once all administrative remedies have been exhausted then the aggrieved party is entitled to judicial review). However, this is little consolation, since the primary purpose of presenting evidence at a hearing is to

BLM decision may get adequate notice and opportunity for a hearing, but the actual hearing often comes many years after the adverse decision is implemented, with the rancher suffering as a result.²¹⁸

The terms and conditions of grazing permits and other documents authorizing grazing may also create constitutional rights vested in the rancher. Contractual obligations may be created by the regulatory agency in the process of administering grazing rights.²¹⁹ In turn, contractual obligations may create procedural due process rights.²²⁰ The regulated entity may sue to enforce these obligations, despite the fact that specific performance is not an allowable remedy against the government for breach of contract.²²¹ Thus, an aggrieved rancher can sue for constitutional violations committed in the course of the contract breach, and obtain injunctive relief therefrom, even if such relief is tantamount to obtaining specific performance for a governmental breach of contract.²²² Federal employees can also be held personally liable for money damages when they violate a rancher's clearly established constitutional rights.²²³

The Administrative Procedure Act²²⁴ provides additional due process rights applicable to grazing permits. The Act's section pertaining to hearings on the record states that "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."²²⁵ This suggests that, contrary to its

build the administrative record, the only factual record which the federal district court is allowed to examine when reviewing the agency's decision. *See* *McKart v. United States*, 395 U.S. 185, 194–95 (1969) (explaining how "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record"); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575–76 (10th Cir. 1994) (holding that "the 'arbitrary and capricious' standard requires an agency's action to be supported by the facts in the record" and that the district court "[is] required to conduct a plenary review of the record to ascertain whether the agency's action was supported by 'substantial evidence'"). This places the rancher in the position of either exercising her right to a hearing to build the record and suffering the consequences of the decision in the meantime, or immediately going to federal court with an inadequate or biased administrative record in an effort to timely alleviate her suffering. Neither option comports with her procedural due process rights.

²¹⁸ The Department of the Interior appeals process is notoriously slow. In the author's experience, it is typically from three to five years, and often more, between the time the grazing decision is issued and the time the Administrative Law Judge holds a hearing and renders a decision. Justice delayed is justice denied. *See supra* notes 216–17 and accompanying text.

²¹⁹ *Supra* note 179 and accompanying text.

²²⁰ *See* *Transohio Savings Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 606–11 (D.C. Cir. 1993) (holding that a litigant can seek the remedy of specific performance in federal court for breach of contract by the federal government if such breach affects claimed property rights).

²²¹ *Id.* at 610–11.

²²² *Id.*

²²³ *See* notes 181–82 and accompanying text; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (holding that warrantless entry, search of a personal residence, and arrest for narcotics charges, all without probable cause, give rise to a federal cause of action for damages).

²²⁴ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

²²⁵ *Id.* § 556(d).

regulation,²²⁶ the BLM is *required* to stay grazing decisions pending the final outcome of an administrative appeal. Similarly:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.²²⁷

This section has been specifically applied to Forest Service grazing permits, requiring the Forest Service to give the grazing permit holder adequate notice and a reasonable opportunity to demonstrate or achieve compliance prior to revoking the permit for alleged permit violations.²²⁸ The section continues, stating that “[w]hen the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.”²²⁹ Regarding this provision, the Second Circuit has stated:

The whole thrust of § 9(b) [5 U.S.C. § 558(c)] is to protect applicants and licensees, not to impose unsought obligations upon them . . . by providing that if the licensee has timely sought renewal, the valuable rights conferred by a license for a limited term shall not be lost simply because the agency has not managed to decide the application before expiration of the existing license. As Mr. Justice Burton said, dissenting in *Pan-Atlantic Steamship Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436, 444–445, 77 S.Ct. 999, 1005, 1 L.Ed.2d 963 (1957), in a passage with which the majority did not express disagreement:

The policy behind § 9(b) [5 U.S.C. § 558(c)] is that of protecting those persons who already have regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of a license before the agency finds time to pass upon its renewal.²³⁰

²²⁶ 43 C.F.R. § 4.21 (2004).

²²⁷ 5 U.S.C. § 558(c) (2000).

²²⁸ See *Anchustegui v. United States Dep't of Agric.*, 257 F.3d 1124, 1129 (9th Cir. 2001) (holding that claimant was entitled to written notice to give him opportunity to comply with permit).

²²⁹ 5 U.S.C. § 558(c) (2000).

²³⁰ *County of Sullivan, N.Y. v. Civil Aeronautics Bd.*, 436 F.2d 1096, 1099 (2d Cir. 1971). In *County of Sullivan*, the license involved an airline's authority, pursuant to the permission of the Civil Aeronautics Board, to continue service to a county airport. *Id.* In *Pan-Atlantic*, the license involved permission by the Interstate Commerce Commission which would allow a common carrier to continue service. *Pan-Atlantic Steamship Corp. v. Atlantic Coastline R.R.*, 353 U.S. 436 (1957). In both cases, the businesses which depended upon their licenses to operate were allowed to continue to operate on their expired licenses, pending a final determination by the

Activities of a continuing nature “suggest an activity that is normally carried on indefinitely under licenses that as a regular matter, are renewed or replaced with new licenses issued to the current holder,” as opposed to a license in a limited area for a limited period of time, such as a dredge and fill permit.²³¹ Applying these principles, grazing cannot be eliminated simply because the agency failed to timely consider the rancher’s application for renewal of a grazing permit. The provision works automatically, allowing grazing to continue indefinitely, until such time as the agency finally²³² determines the application.

Grazing rights are protected by procedural due process. Through statute, regulation, and long-term custom, the government has given ranchers valuable rights. These rights have been recognized and acknowledged for many years, and relied upon by ranchers for their livelihoods. As such, they cannot be reduced or eliminated without first giving the rancher adequate notice and opportunity to present evidence in a hearing on the record to an impartial decision maker.

E. Summary: Grazing Rights in a Nutshell

Those opposed to grazing on federal land often cite to decisions which hold that grazing rights are not a compensable property interest. Taking these cases out of context, they attempt to extrapolate the holdings to mean that ranchers have no legal right to graze beyond the capricious whims of federal managers, a position which federal managers often embrace. The argument is false. Grazing rights must be allocated, through a system of preference, to those best able to use them. Once allocated, they cannot be arbitrarily reduced or eliminated. Ranchers with recognized grazing rights are entitled to exclusively graze a given portion of federal rangeland. Grazing rights are transferable, principally through the transfer of base property. Federal regulators must affirmatively protect these rights. Ranchers are entitled to rely on the competence of federal regulators, and upon the promises made to them in the course of regulation. Federal regulators cannot interfere with or eliminate recognized water rights without paying for them. A rancher’s investment in grazing improvements constructed on federal land is partly protected. Finally, these valuable legal rights cannot be reduced or eliminated without first giving the aggrieved rancher adequate due process.

Grazing rights flow from a variety of sources: statutes, regulations, local custom, agency custom, congressional assent, and the United States Constitution. The rule of capture through beneficial use was partially applied

granting agency. The granting agencies’ failure to timely renew a license which was properly applied for could not be used as an excuse to shut down the licensees’ businesses.

²³¹ *Miami MDS Co. v. United States Fed. Comm’n Comm’n*, 14 F.3d 658, 660 (D.C. Cir. 1994).

²³² The term “finally” suggests a final agency action, which would in turn again suggest that the BLM’s failure to automatically stay grazing decisions, except in emergency situations, is illegal. See 43 C.F.R. § 4.21(b)(1)–(4) (2005) (describing the standards and procedure for obtaining a stay).

in the creation of entitlements which allow ranchers to operate sustainable ranching units. Bundled together, they represent a significant body of legal protections. Thus, while federal land ranchers own only a portion of their ranches in fee, they conditionally own the right to graze the entire ranch. The idea that ranchers have little to no legal right to graze is a falsehood created by those who wish to eliminate grazing use.

IV. SEPARATING TRUTH FROM MYTH

A. Grazing and Western Rangeland Ecosystems

Anti-grazing advocates often have the incorrect notion that the arid lands found west of the 100th meridian were replete with “luxuriant growth” and “[g]rass seven feet high” before livestock were introduced, transforming a verdant landscape into a barren wasteland.²³³ In truth, the scrubby brush, hardy forbs, and short grasses which comprise much of the Western landscape are native, existing long before livestock appeared.²³⁴ These plants evolved under—and are adapted to—the harsh and variable conditions found in the West: sparse and intermittent precipitation, fire, and grazing by native herbivores.²³⁵

The available body of scientific research reveals that grazing can have both positive and negative impacts on native rangeland ecosystems, but overall the net impact of moderate, controlled grazing use is either neutral or positive.²³⁶ Several professors of range and animal ecology at New Mexico State University recently reviewed more than one hundred articles, books, and other published scholarly works by qualified professional scientists which evaluated the impacts of controlled livestock grazing versus the exclusion of livestock, paying particular attention to arid Western rangelands.²³⁷ The literature review found that heavy, uncontrolled grazing can have detrimental effects by removing too much vegetation, changing species composition, excessively compacting the soil, and causing increased soil erosion.²³⁸ However, the literature review also demonstrated that

²³³ Campana, *supra* note 96, at 405.

²³⁴ See generally HOLECHEK ET AL., *supra* note 42, at 53–54, 69–76, 78–81, 85–104, 126–30; J. WAYNE BURKHARDT, COLLEGE OF FORESTRY, WILDLIFE AND RANGE SCIS. U. OF IDAHO, HERBIVORY IN THE INTERMOUNTAIN WEST: AN OVERVIEW OF EVOLUTIONARY HISTORY, HISTORIC CULTURAL IMPACTS AND LESSONS FROM THE PAST 3–4, 10 (Oct. 1996) (questioning the underlying assumptions in plant ecology and range management that the flora and fauna of western North America evolved without significant influence of large herbivores, and therefore large herbivore grazing has unnaturally impacted the range environment). This article was peer reviewed by the archaeological and ecological scientific communities prior to being published as a Station Bulletin. E-mail from Wayne Burkhardt to author (Jan. 10, 2006) (on file with author).

²³⁵ See *supra* note 234 and accompanying text.

²³⁶ See generally Jerry L. Holechek, Terrell T. “Red” Baker & Jon C. Boren, *Impacts of Controlled Grazing Versus Grazing Exclusion on Rangeland Ecosystems: What We Have Learned*, in RANGE IMPROVEMENT TASK FORCE REP. NO. 57 (N.M. State Univ. ed. 2004) (examining the impacts of controlled livestock grazing versus grazing exclusion on rangeland ecosystems, focusing on arid and semi-arid areas).

²³⁷ *Id.* at 1–3, 32–42.

²³⁸ *Id.* at 6–12, 19–21.

moderate, controlled grazing generally has neutral or beneficial impacts. For example, in some rangeland ecosystems, plant health became stagnant and declined in the absence of stimulating livestock grazing.²³⁹ Regarding hoof compaction, the literature showed that:

Although treading by livestock can have undesirable effects such as soil compaction, it can also have desirable effects. Treading incorporates standing dead material into the soil surface, increasing mineral cycling. It can reduce large accumulations of mulch and litter by incorporating these materials into the soil. Moderate treading by livestock appears to favor emergence and survival of perennial grass seedlings while heavy treading can favor forbs and shrubs. Like so many things, a small to moderate level of hoof action can be beneficial while heavy amounts are destructive.²⁴⁰

Grazing was also found to aid in nutrient cycling:

Without question, livestock grazing increases the rate of nutrient flow and availability in rangeland ecosystems by biting, chewing, rumination, digestion, urination, and defecation. These processes cause a large proportion of essential nutrients otherwise tied up in plant material to more rapidly become available in mineral form to support plant growth.²⁴¹

Overall, the scientific literature conclusively demonstrated that moderate, controlled livestock grazing is beneficial, compatible with arid rangeland ecosystems, and sustainable:

It has been known for over 100 years that sustained heavy to severe grazing intensities are harmful to soil, vegetation, and wildlife. Range scientists and ranchers have long acknowledged that damage to soil and vegetation occurred in the late 1800s and early 1900s because of severe grazing over much of the western United States. However, it is well established that steady improvement has occurred on both publicly and privately owned rangelands over the past 60 years due to better consideration of controlled grazing versus grazing exclusion.²⁴²

More than 35 controlled grazing studies from North America and over 50 studies from other parts of the world show managed livestock grazing using scientific principles is sustainable and generally results in rangeland improvement.²⁴³

²³⁹ *Id.* at 12, 16; see also C. S. Boyd & T. J. Svejcar, *Regrowth and Production of Herbaceous Riparian Vegetation Following Defoliation*, 57 J. RANGE MGMT. 448 (2004) (indicating that riparian vegetation may exhibit a compensatory growth response to defoliation during the growing season).

²⁴⁰ Holechek et al., *supra* note 236, at 21 (citations omitted).

²⁴¹ *Id.*

²⁴² *Id.* at 4.

²⁴³ *Id.* at 8–9.

Analysis of 20 studies shows that carefully managed grazing can have neutral or in some cases positive effects on plant species composition, productivity, and drought survival.²⁴⁴

The importance of the New Mexico State University literature review cannot be overstated. Qualified professors of range ecology examined the entire body of legitimate scientific literature which examined grazing use versus grazing exclusion. They found the body of research to be remarkably consistent. Where grazing was properly managed, rangeland health improved and the ecosystem benefited. Where grazing was excluded or not properly managed, rangeland health deteriorated and the ecosystem suffered. Thus, the best available science clearly indicates that grazing can and should occur; but grazing must also be properly managed, given the circumstances found within a particular area.

The fact that long-term grazing of arid rangelands is sustainable, with neutral or positive impacts, has been demonstrated by several studies. For example, a sixty-five year Nevada study indicated no significant differences between grazed and adjacent ungrazed areas.²⁴⁵ Similarly, a total of forty-one moderately grazed BLM rangeland sites located throughout the Chihuahuan Desert in New Mexico, an area averaging only 10 to 14 inches of precipitation per year, were studied over a 48 year period.²⁴⁶ The average

²⁴⁴ *Id.* at 30.

²⁴⁵ See D.R. Courtois, B.L. Perryman, & H.S. Hussain, *Vegetation Change After 65 Years of Grazing and Grazing Exclusion*, 57 J. RANGE MGMT. 574, 574-81 (2004) (reporting on the changes over a 65 year period due to both moderate grazing and grazing exclusion policies). Significantly, there was no difference in the abundance of cheatgrass. In fact, other studies have indicated that grazing exclusion can cause an increase in the abundance of cheatgrass. See J.A. Wagner, R.E. Delmas, & J.A. Young, *Thirty Years of Medusahead: Return to Fly Blown Flat*, 23 RANGELANDS 6, 6-9 (2001) (concluding that 30 years of protection from grazing did not stop the invasion of non-native plant species); see also J.O. Klemmedson & J.G. Smith, *Cheatgrass* (*Bromus tectorum* L.), 30 BOTANY REV. 226 (1964) (providing an extensive explanation and history of cheatgrass from a botanical and scientific perspective); U.S. Air Force, Air Combat Command, Mountain Home Air Force Base, *Vegetation Management Environmental Assessment at Juniper Butte Range* (2002) (finding no significant, scientifically documented impacts would occur due to restoring livestock grazing on a bombing range in western Idaho to reduce fuel loading of cheatgrass and other grasses and to prevent serious fires). For other studies showing no significant difference between grazed areas and areas protected from grazing, see, e.g., M. Westoby, B. Walker & I. Noy-Meir, *Opportunistic Management for Rangelands Not at an Equilibrium*, 42 J. RANGE MGMT. 266 (1989) (applying a state-and-transition model instead of the range succession model); W.A. Laycock, *Secondary Succession and Range Condition Criteria: Introduction to the Problem*, in SECONDARY SUCCESSION AND THE EVALUATION OF RANGE CONDITION 1, 11 (W.K. Lauenroth & W.A. Laycock eds., 1989) (discussing problems currently existing with the 'climax-based range condition classification system' approach to rangeland condition); W.A. Laycock, *Stable States and Thresholds of Range Condition on North American Rangelands: A Viewpoint*, 44 J. RANGE MGMT. 427, 427 (1991) (discussing the false assumption that range improvement will result if grazing pressure is reduced); W.A. Laycock, *Implications of Grazing vs. No Grazing on Today's Rangelands*, in ECOLOGICAL IMPLICATIONS OF LIVESTOCK HERBIVORY IN THE WEST 250, 254-55 (M. Vavra, W.A. Laycock & R.D. Pieper eds., 1994) (analyzing the effects of grazing and no grazing policies in different areas across the states); R.D. Pieper, *Ecological Implications of Livestock Grazing*, in ECOLOGICAL IMPLICATIONS OF LIVESTOCK HERBIVORY IN THE WEST *supra* note 145, at 177 (discussing how livestock grazing plays a role in sustaining western rangelands).

²⁴⁶ See Joseph M. Mavarró et al., *Long-Term Impacts of Livestock Grazing on Chihuahuan*

ecological state of the grazed areas stayed the same or improved.²⁴⁷ In fact, the number of grazed sites with late seral or climax ecological conditions increased from twenty-five percent at the beginning of the study to thirty-eight percent at the end, improving wildlife diversity, soil stability, watershed protection, esthetic appearance, biodiversity, endangered species, and financial returns for the ranchers.²⁴⁸ This led the researchers to conclude:

[W]e believe our study shows livestock grazing has been sustainable on most Chihuahuan Desert rangelands in southwestern New Mexico over the past 48 years because range condition scores showed no definitive change between 1952 and 1999. A higher proportion of rangeland was in late seral condition in 1999. Contrary to Donahue's (1999) viewpoint, we find that conservative livestock grazing is sustainable on arid lands receiving less than 26-35 cm annual precipitation.²⁴⁹

Thus, even in desert conditions, ecological conditions can improve under a moderate grazing regime. Other studies also indicate that rangeland conditions have improved since 1934 and, in fact, that rangelands in the 1990s were in their best conditions of the twentieth century.²⁵⁰ A 1990 BLM publication showed a doubling in rangeland in late seral condition between 1936 and 1989, and an over fifty percent reduction in rangeland in early seral condition.²⁵¹ Furthermore, studies have shown a number of examples of improvement in riparian areas using proper grazing management.²⁵² These studies show that, with proper management, livestock grazing can have neutral to positive long-term affects on arid rangelands.

The impacts of grazing on wildlife species depend on which species is at issue, with some species benefiting from various levels of grazing and other species not benefiting.²⁵³ Overall, wildlife species diversity was highest

Desert Rangelands, 55 J. RANGE MGMT. 400, 401-02 (2002) (monitoring rangeland ecological conditions in southwestern New Mexico for a 48 year period).

²⁴⁷ *Id.* at 402-04 (with the exception of the 1950s drought conditions).

²⁴⁸ *Id.* at 404.

²⁴⁹ *Id.*

²⁵⁰ See Bureau of Land Mgmt., *State of the Public Rangelands* (1990) ("Respected authorities in range science have stated that the public rangelands are in better condition than ever before in this century. . . . In 1989, BLM classified over 56 million acres in 'good' to 'excellent' condition."); Thadis W. Box, *Rangelands*, in NATURAL RESOURCES FOR THE 21ST CENTURY 101, 111 (R.N. Sampson & D. Hair eds., 1990) (analyzing the history, development, condition, and trends of American rangelands); Council for Agric. Sci. and Tech., *Grazing on Public Lands*, Task Force Rep. No. 129, at 4 (1996) (discussing scientific information concerning grazing on public lands in the western United States).

²⁵¹ See Bureau of Land Mgmt., *supra* note 250 ("Since 1936, . . . the area classified as early seral ("poor") has been halved, from 36.3 percent to 16 percent.").

²⁵² See W. Elmore & B. Kauffman, *Riparian and Watershed Systems: Degradation and Restoration*, in ECOLOGICAL IMPLICATIONS OF LIVESTOCK HERBIVORY IN THE WEST, *supra* note 245, at 212 (suggesting that using grazing strategies that link upland, riparian areas, and stream channels can create a self sustaining riparian restoration program).

²⁵³ See Holechek et al., *supra* note 236, at 22-27 (examining the impacts of controlled grazing on rangeland wildlife and noting "[i]t is impossible to make broad generalizations on the impact of livestock grazing on rangeland wildlife because each grazing situation is unique, and various

in a mosaic of light to moderately grazed areas with mid- to upper-level ecological states.²⁵⁴ Grazing can be used to improve wildlife habitat and benefit certain wildlife species.²⁵⁵ This includes several wildlife species which were candidates for listing under the Endangered Species Act. For example, with respect to the lesser prairie chicken, the United States Fish and Wildlife Service concluded:

Grazing has always been an ecological force within the Great Plains ecosystem [including Colorado and New Mexico grasslands]. The evolutionary history of the mixed-grass prairie resulted in endemic bird species adapted to a mosaic of lightly to severely grazed areas (Bragg and Steuter 1995, Knopf and Samson 1997). The Service believes that areas of heavily, moderately, and lightly grazed areas are necessary on a landscape scale.²⁵⁶

The Fish and Wildlife Service explained that extensive heavy grazing and cultivation are principal threats to lesser prairie chicken habitat, but that grazing was necessary to create the variable habitat structure necessary to sustain the species.²⁵⁷ Likewise, the mountain plover “evolved within a grassland mosaic of lightly, moderately, and heavily grazed areas [in Western states], and mountain plovers are considered to be strongly associated with sites of heaviest grazing pressure, to the point of excessive surface disturbance.”²⁵⁸ In other words, mountain plovers need “excessive”²⁵⁹ grazing to survive. The modern trend to reduce or eliminate grazing on Western rangelands has significantly contributed to a reduction in mountain plovers:

Some current domestic livestock grazing management emphasizes a uniform grass cover to minimize grassland and soil disturbance . . . , whereas the landscape created by the native herbivores was a mosaic of grasses, forbs, and bare ground that could change frequently in time and location. The shift to

wildlife species have different habitat requirements”).

²⁵⁴ *Id.*

²⁵⁵ See E.W. Anderson & R.J. Scherzinger, *Improving Quality of Winter Forage for Elk by Cattle Grazing*, 28 J. RANGE MGMT. 120 (1975) (describing changes in Rocky Mountain Elk populations in Bridge Creek Wildlife management Area in northeastern Oregon after implementation of a range management plan); Martin Vavra, *Livestock Grazing and Wildlife: Developing Compatibilities*, 58 RANGELAND ECOLOGY & MGMT. 128 (2005) (calling for further research on the implications of managing rangeland for the benefit of a single species); K.E. Severson & P.J. Urness, *Livestock Grazing: A Tool to Improve Wildlife Habitat*, in ECOLOGICAL IMPLICATIONS OF LIVESTOCK HERBIVORY IN THE WEST, *supra* note 245, at 232 (outlining range management options for manipulating habitats to benefit certain species). Livestock water developments, such as ponds and guzzlers, may also benefit wildlife by providing water where none may naturally exist.

²⁵⁶ Endangered and Threatened Wildlife and Plants, 12 Month Finding for a Petition to List the Lesser-Prairie Chicken as Threatened and Designate Critical Habitat, 63 Fed. Reg. 31,400, 31,403 (June 9, 1998).

²⁵⁷ *Id.* at 31,403–04.

²⁵⁸ Endangered and Threatened Wildlife and Plants: Proposed Threatened Status for the Mountain Plover, 64 Fed. Reg. 7587 (Feb. 16, 1999). The fact that mountain plovers are native to the inter-mountain West and “evolved” coextensive with grazing illustrates that western rangelands were subject to grazing long before livestock were introduced.

²⁵⁹ *Id.* Excessive grazing is often characterized as “overgrazing.”

livestock grazing strategies that favor uniform cover is believed to be partly responsible for the decline of mountain plovers in Oklahoma and Canada Mountain plovers are no longer reported from the Lewis Ranch in central Montana since elimination of grazing there in 1993 Mountain plovers on the Pawnee National Grassland are closely associated with heavily-grazed sites. Therefore, in order to prevent deterioration of existing mountain plover breeding habitat, the Forest Service has deferred implementation of new grazing management plans that would have reduced stocking rates However, similar attention to the vegetative requirements of mountain plovers is not in place throughout their breeding range. The decline in the cattle and sheep industry has caused additional rangeland to be converted to cropland, which is believed to have eliminated some of the mountain plover habitat in Montana²⁶⁰

As the lesser prairie chicken and mountain plover examples illustrate, some wildlife species depend on a variety of grazed areas for habitat, including areas which are “excessively” grazed. But these are just two of many wildlife species. Collectively, the scientific literature strongly suggests that maximum wildlife diversity can be achieved by grazing rangelands at a variety of intensity levels, all the way from resting rangelands to very heavy grazing use, with most species benefiting from light to moderate grazing.

Western rangeland plant communities are dynamic, regardless of whether humans actively or passively manage them.²⁶¹ Anti-grazing advocates often promote the idea that ecological systems can be held in a relatively static, pristine condition if only they are protected from disturbances.²⁶² However, the fact that a particular area may have remained in a given ecological state since historically heavy grazing use occurred does not necessarily mean that current grazing use is inappropriate. In many such areas, the climatic events necessary for recruitment have not yet occurred.²⁶³

²⁶⁰ Endangered and Threatened Wildlife and Plants: Proposed Threatened Status for the Mountain Plover, 64 Fed. Reg. at 7593–94 (citations omitted).

²⁶¹ Climate is an important factor in causing these changes. For example, Tausch et al. noted that “plant communities are variable in both space and time,” and that “[o]ur knowledge is presently insufficient to adequately describe interactions between ecosystems and changing climate” R.J. Tausch et al., *Viewpoint: Plant Community Thresholds, Multiple Steady States, and Multiple Successional Pathways: Legacy of the Quaternary?*, 46 J. RANGE MGMT. 439 (1993); see also H.B. Johnson & H.S. Mayeux, *Viewpoint: A View on Species Additions and Deletions and the Balance of Nature*, 45 J. RANGE MGMT. 322 (1992) (reporting evidence of wide shifts in species dominance and populations in the Chihuahuan, Sonoran, and Mohave Deserts over the geologically short period of 11,000 years as a result of shifting climates); Richard F. Miller & Peter E. Wigand, *Holocene Changes in Semi-Arid Pinyon-Juniper Woodlands*, BIOSCIENCE, July 1994, at 465 (documenting similar shifts in the presence or absence of juniper in the Great Basin).

²⁶² Dr. Barry Perryman and other range scientists have referred to this view as the pristine-management paradigm. Barry Perryman et al., *Viewpoint: Eastern Nevada Landscape Coalition Position: There are Costs of Doing Nothing in Natural Resource Management*, 25 RANGELANDS 30, 33 (2003).

²⁶³ See, e.g., A.M. Maier et al., *Climatic Influences on Recruitment of 3 Subspecies of Artemisia tridentata*, 54 J. RANGE MGMT. 699 (2001) (concluding that further “models need to be developed to foster our understanding of the mechanisms affecting big sagebrush establishment”); Barry Perryman et al., *Demographic Characteristics of 3 Artemisia tridentata Nutt. Subspecies*, 54 J. RANGE MGMT. 166 (2001) (concluding that “[r]ecruitment in big

On the contrary, the intermediate disturbance hypothesis indicates that, with appropriate time and spatial scales, moderate herbivory disturbance increases species richness.²⁶⁴

These examples illustrate the truth about grazing and Western rangeland ecosystems. Grazing can have both positive and negative impacts to plant and animal communities. However, when moderate, controlled grazing is applied, the positive impacts usually outweigh any negative impacts. Many plant and animal species and communities need disturbance, including grazing, to thrive. Properly managed, grazing in arid rangelands is sustainable, and has no long-term detrimental effects. These truths are supported by the whole body of legitimate scientific evidence, as opposed to the selective citations presented by anti-grazing advocates. Ranchers and range managers should strive to discover the best combination of stocking rates and management techniques specifically applicable to each grazing allotment, in an effort to maximize forage production, plant health, wildlife benefits, aesthetic quality, and ranch stability. In so doing, rangeland protection and economic stability can be simultaneously achieved.

B. The Cultural and Economic Value of Western Ranches

Anti-grazing advocates often argue that federal land ranches have little to no social, economic, or cultural values worth preserving. Ranch owners are assumed to be wealthy, urban landlords with no regard for rangeland health. Cowboys are portrayed as subsidized wards of a federal welfare state. Rancher contributions to local, state, and national communities are deemed unimportant. Federal agencies and politicians are portrayed as universally favoring ranching interests. Ranchers are accused of having duped the public into believing a romantic but false image of the hard-working, ethical cowboy. These arguments are made to support the argument that grazing could be completely eliminated with no adverse impacts.

The true picture of Western ranches is much different. As we have seen, the cowboys and shepherds who historically grazed Western rangelands were a diverse group, including ranchers who tried to build sustainable livestock operations on the basis of private homestead land and water rights combined with open rangeland, investors who purchased large tracts of checkerboard lands from the railroads, and nomadic ranchers who grazed flocks and herds across the open rangeland.²⁶⁵ Congress eventually eliminated its open range policy, replacing it with statutes and regulations

sagebrush stands occurs in pulses throughout Wyoming).

²⁶⁴ E-mail from Barry Perryman, Univ. of Nev., Reno, to author (Jan. 9, 2006) (on file with author). See generally J.P. Grime, PLANT STRATEGIES AND VEGETATION PROCESSES 39–51 (1979) (discussing the effects of disturbances on ruderal species); M.A. Huston, *A General Hypothesis of Species Diversity*, 113 AM. NAT. 81, 97 (1979) (introducing a hypothesis that a stable level of species diversity is the result of periodic population reductions and environmental fluctuations).

²⁶⁵ See *supra* Part II.B.

which favored settlers with private land.²⁶⁶ Congress stabilized and protected Western ranching by giving grazing rights to ranchers who homesteaded and worked to create sustainable ranching units.²⁶⁷ Often, the Western ranch developed into some combination of homestead land, private rangeland, private water rights, and public or federal rangeland.²⁶⁸ In many cases, particularly with respect to checkerboard lands, federal and private land and natural resources are intermixed in such a way that neither group of lands can be accessed or managed without trespassing on the other.²⁶⁹ In this way, the 259 million acres of federal and public rangeland which is currently grazed became inextricably intertwined with private land and natural resources. Under these circumstances, the elimination of grazing rights would be fatal to many ranching operations.

The elimination of grazing rights would result in environmental and aesthetic impacts. Ranchers and their families cherish their ranching lifestyle and way of life.²⁷⁰ If their federal grazing privileges were eliminated, many ranchers would try to stay in business.²⁷¹ However, doing so would require the fencing of private land, impacting the free movement of wildlife and destroying the wide open landscapes for which the West is famous. Ranchers may also have to increase their farming and haying activities on private lands to make up for the loss of federal land forage.²⁷² Farming often requires more resource inputs, including water, fuel, fertilizer, and chemicals, than the grazing of natural rangelands.²⁷³ Some private lands that are currently left in their natural state may have to be cultivated, causing additional impacts.²⁷⁴ However, due to a lack of resources to act as a substitute for lost grazing rights, many federal land ranchers would simply go out of business.²⁷⁵ When this happens, private lands are often sold for

²⁶⁶ See *supra* Part III.B–C.

²⁶⁷ See *supra* Part III.B–C.

²⁶⁸ See *supra* Part III.B–C.

²⁶⁹ See *supra* Part III.B–C.; see also *Leo Sheep Co. v. United States*, 440 U.S. 668, 672–73 (1979) (describing a “checkerboard” land grant made to Union Pacific Railroad); *Buford v. Houtz*, 133 U.S. 320, 322–23 (1890) (alleging defendants could not fence or enclose their land without enclosing public lands due to a checkerboard land grant to Central Pacific Railroad).

²⁷⁰ See Bradley J. Genter & John A. Tanaka, *Classifying Federal Public Land Grazing Permittees*, 55 J. RANGE MGMT. 2, 4–11 (2002) (identifying the characteristics and attitudes of public land ranchers).

²⁷¹ See L. Allen Torell et al., *The Lack of a Profit Motive for Ranching: Implications for Policy Analysis*, in *CURRENT ISSUES IN RANGELAND RESOURCE ECONOMICS: PROCEEDINGS OF A SYMPOSIUM SPONSORED BY WESTERN COORDINATING COMMITTEE 55*, N.M. AGRIC. EXPERIMENT STATION RESEARCH REPORT 737 (L. Allen Torell et al. eds., 2001), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3108&ftype=.pdf.

²⁷² Genter & Tanaka, *supra* note 270, at 11.

²⁷³ See Genter & Tanaka, *supra* note 270, at 11 (“It is widely accepted that ranching and cattle grazing are less intensive than commercial crop production in terms of water usage, labor inputs, and chemical usage.”).

²⁷⁴ *Id.*

²⁷⁵ See Larry W. Van Tassell et al., *Comparison of Forage Value on Private and Public Grazing Leases*, 50 J. RANGE MGMT. 300, 305 (1997) (concluding that the costs of grazing on public lands is higher because, inter alia, private grazing land is scarce); Aaron Harp et al., *Spatial Distribution of Economic Change From Idaho Ranches*, 53 J. RANGE MGMT. 164, 165 (2000) (explaining that few private forage options exist for federal permit holders). Rangeland

uses that permit a greater degree of profitability, such as mining, oil and gas development, and industrial and residential development. Such uses have significantly greater environmental and aesthetic impacts than the grazing of native rangelands.²⁷⁶ In addition to keeping rangeland open, ranching provides many benefits to certain species of wildlife.²⁷⁷ Water developments that benefit wildlife would no longer be maintained, and the species diversity that can occur with proper grazing management would disappear.²⁷⁸

The elimination of grazing rights would also have cultural and economic impacts. While federal land ranchers are a diverse group of people, they have strong cultural similarities.²⁷⁹ For example, a study of ranchers found that the two most important factors for owning a ranch are the beliefs that "owning land and a ranch is consistent with my family's tradition, culture, and values," and that "a ranch is a good place to raise a family."²⁸⁰ Thus, most ranch families view ranch ownership and the way of life that accompanies ranching as a way to maintain their family's values, heritage, and culture. Ranching families are often willing to forgo a profit and supplement their income to maintain their way of life.²⁸¹

Perhaps nowhere are the cultural roots of ranching more fully expressed than with Hispanic ranching families of northern New Mexico.²⁸² Several centuries ago,²⁸³ these ranchers began grazing livestock on community allotments granted to them from the Spanish government.²⁸⁴ After the signing of the Treaty of Guadalupe Hidalgo, the United States government refused to recognize many of these community allotments, and the allotments became part of the public domain.²⁸⁵ The loss of these grant lands and subsequent Forest Service policies have forced many members of the Hispanic community, who traditionally relied on subsistence agriculture, to seek alternate means of supporting themselves while continuing to graze

economist Dr. Frederick Obermiller has noted, "[i]n many areas of the West, no private sector range or pasture is available as an alternative to the permitted federal forage." Frederick W. Obermiller, Congressional and Administrative Policy on Public Land Grazing, Paper presented at the Contemporary Policy Issues Session, 67th Annual WEA International Conference, San Francisco, Cal., at 15 n.14 (July 10, 1992) (unpublished manuscript, on file with the Lewis & Clark Law School Environmental Law Review).

²⁷⁶ While some private lands would undoubtedly be purchased by environmental groups for preservation purposes, environmental groups would have to compete with developers and corporations willing to pay a premium price for land with valuable commercial and industrial properties.

²⁷⁷ See *supra* Part IV.A.

²⁷⁸ See *supra* Part IV.A.

²⁷⁹ Genter & Tanaka, *supra* note 270, at 11.

²⁸⁰ *Id.* at 4, 7.

²⁸¹ *Id.* at 3; Torell et al., *supra* note 271.

²⁸² See Carol Raish & Alice McSweeney, Forest Service Report, Economic, Social, and Cultural Aspects of Livestock Ranching on the Española and Canjilon Ranger Districts of the Santa Fe and Carson National Forests: A Pilot Study, RMRS-GTR-113, at 2 (Sept. 2003) (examining current economic, social, and cultural aspects of livestock operations owned by ranchers with federal grazing permits in northern New Mexico).

²⁸³ See sources cited *supra* note 25.

²⁸⁴ See Raish & McSweeney, *supra* note 282, at 4.

²⁸⁵ *Id.* at 5.

a few head of livestock on federal lands.²⁸⁶ Nevertheless, ranching remains an integral part of their culture. Ranching gives families a high quality of life, preserves their working relationship with the land, and reaffirms their ties to their ancestral lands and heritage.²⁸⁷ Community events such as butchering and branding provide social cohesion, and ranch life helps them teach their children the values of self-sufficiency and frugality.²⁸⁸ Consequently, the loss of grazing rights would ruin many of these ranches.²⁸⁹

Regional and local economic impacts must also be considered. Ranches with grazing permits account for more than half of all commercial beef cattle in the West.²⁹⁰ In Owyhee County, Idaho, the dependency on forage from federal land during the spring and fall is over eighty-five percent.²⁹¹ “[I]n many areas of the west, private land is in short supply, leaving few economical alternatives to public land forage.”²⁹² For example, the 1992 Census of Agriculture for two Idaho counties revealed that 217 out of the 316 commercially viable ranches held federal grazing permits.²⁹³ In the short term, there were few, if any, private forage options available to these ranchers if they lost their federal grazing permits.²⁹⁴ The impact on local communities can be even greater.²⁹⁵ In one community, a 25% reduction in federal grazing would lead to a 7.3% decrease in sales and a 6.4% loss of jobs, figures which would likely increase exponentially if grazing were completely eliminated.²⁹⁶ The ability of communities to switch to sectors less dependent on traditional industries, such as services and recreation, depends on the

²⁸⁶ *Id.* at 6.

²⁸⁷ See Carol Raish, *Environmentalism, the Forest Service, and the Hispano Communities of Northern New Mexico*, 13 SOC’Y & NAT. RESOURCES 489, 497 (2000) (discussing the positive economic considerations and quality of life benefits derived from small-scale livestock ranching operations).

²⁸⁸ *Id.*

²⁸⁹ Raish & McSweeney, *supra* note 282, at 21.

²⁹⁰ See Genter & Tanaka, *supra* note 270, at 2. To support the premise that Western ranching does not significantly contribute to national beef production, it is often incorrectly argued that only 2% of all United States beef production is attributable to federal land. The mistake apparently stems from the fact that of the nearly one million cattle operations in the United States, about 2% hold federal land grazing permits. See GOV’T ACCOUNTABILITY OFFICE, GAO-05-869, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED 10 (2005), available at <http://www.gao.gov/new.items/d05869.pdf> (providing statistical data on the amount of cattle grazing operations in the United States, including the amount that hold federal grazing permits and leases). This statistic is misleading, as the majority of commercial beef operations in the West hold federal grazing permits. Genter & Tanaka, *supra* note 270, at 2.

²⁹¹ Neil Rimbey et al., *Ranch-Level Economic Impacts of Grazing Policy Changes: A Case Study from Owyhee County, Idaho*, in CURRENT ISSUES IN RANGELAND RESOURCE ECONOMICS: PROCEEDINGS OF A SYMPOSIUM SPONSORED BY WESTERN COORDINATING COMMITTEE 55, N.M. AGRIC. EXPERIMENT STATION RESEARCH REPORT 737 (L. Allen Torell et al. eds., 2001), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3107&ftype=.pdf.

²⁹² Van Tassell et al., *supra* note 275, at 305.

²⁹³ Harp et al., *supra* note 275, at 165.

²⁹⁴ *Id.*; Rangeland economist Dr. Frederick Obermiller has noted that, “[i]n many areas of the West, no private sector range or pasture is available as an alternative to the permitted federal forage.” Obermiller, *supra* note 275, at 15 n.14.

²⁹⁵ Harp et al., *supra* note 275, at 164.

²⁹⁶ *Id.* at 166, 169.

structure of the overall economy.²⁹⁷ In one of the two Idaho communities, the basic economic infrastructure necessary to make such a switch possible did not exist.²⁹⁸

Anti-grazing advocates often claim that federal land ranchers are subsidized by the federal government through grazing fees that are below market value, arguing that the public would be better served by devoting rangelands to recreation.²⁹⁹ The logic of this argument is difficult to grasp, since recreation contributes little to no money to the management of federal rangelands.³⁰⁰ The economic loss attributable to recreation on BLM and Forest Service lands is equal to the losses from grazing and timber combined—making it by far the most heavily subsidized use of federal land.³⁰¹

Nor is it accurate to say that federal land ranchers are subsidized. For most ranchers, the cost to graze on federal land is greater than that for private land.³⁰² At least 34% of cattle producers grazing BLM land, 62% of cattle producers grazing Forest Service land, 60% of sheep producers grazing BLM land, and 92% of sheep producers grazing Forest Service land ultimately paid more to graze on federal lands than those grazing on leased private lands,³⁰³ and these costs are expected to increase.³⁰⁴ Non-fee costs such as lost animals, association fees, moving and herding livestock, miscellaneous labor, vehicle expenses, and horse costs are often greater on federal versus private lands.³⁰⁵ There are also costs associated with complying with federal laws, such as the Endangered Species Act.³⁰⁶

²⁹⁷ *Id.* at 169.

²⁹⁸ *Id.*

²⁹⁹ See generally Campana, *supra* note 96 (arguing that a small percentage of ranchers graze livestock on public lands managed by the BLM at the expense of taxpayers and the environment).

³⁰⁰ Unlike ranchers, the BLM and Forest Service generally do not charge hikers, bikers, hunters, fishers, bird-watchers, and other recreational users to conduct their activities on federal land. Campers may be charged nominal fees for using the amenities found at modern campsites.

³⁰¹ E. Bruce Godfrey, *Charging Fair Market Value for Using Federal Lands: Some Implications of an Ignored Policy*, in CURRENT ISSUES IN RANGELAND RESOURCE ECONOMICS: PROCEEDINGS OF A SYMPOSIUM SPONSORED BY WESTERN COORDINATING COMMITTEE 55, N.M. AGRIC. EXPERIMENT STATION RESEARCH REPORT 737 (L. Allen Torell et al. eds., 2001), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3097&ftype=.pdf.

³⁰² Van Tassel et al., *supra* note 275, at 305 (“The common belief that public land ranchers pay less on average than those leasing private lands is not true.”).

³⁰³ *Id.* These figures are actually underestimated, since they do not take into account the underlying purchase of federal grazing rights. *Id.* It is widely recognized that grazing permits have value which is capitalized into the value of a ranch. L. Allen Torell & John P. Doll, *Public Land Policy and the Value of Grazing Permits*, 16 W. J. AGRIC. ECON. 174, 175 (1991). Ranchers often have to pay taxes on this value. See *supra* note 125 and accompanying text.

³⁰⁴ See Larry Van Tassel et al., *Grazing on Public Lands in the 21st Century*, in CURRENT ISSUES IN RANGELAND RESOURCE ECONOMICS: PROCEEDINGS OF A SYMPOSIUM SPONSORED BY WESTERN COORDINATING COMMITTEE 55, N.M. AGRIC. EXPERIMENT STATION RESEARCH REPORT 737 (L. Allen Torell et al. eds., 2001), available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=3104&ftype=.pdf.

³⁰⁵ See Van Tassel et al., *supra* note 275, at 303.

³⁰⁶ See GOV'T ACCOUNTABILITY OFFICE, *supra* note 290, at 86.

Therefore, while “the federal government is not receiving full market value for its forage . . . ranchers are paying full market value.”³⁰⁷

V. CONCLUSION

There are many myths surrounding the federal land grazing debate. It is assumed that grazing rights do not constitute property interests. It is argued that federal managers have nearly unfettered discretion to curtail or eliminate grazing rights. Grazing is assumed to be fundamentally incompatible with Western ecosystems. Federal land ranches are portrayed as having little or no cultural, economic, or environmental value. These are the foundations of the anti-grazing platform. They are also myths. The rule of capture through beneficial use operates to give ranchers a full complement of statutory and regulatory entitlements which cannot be arbitrarily eliminated. Grazing rights constitute a constitutionally protected property interest which cannot be curtailed or eliminated without first giving the affected rancher a substantial level of due process. With proper management, grazing is fundamentally compatible with arid Western rangeland ecosystems. Grazing is sustainable, and often provides significant environmental benefits. Ranchers maintain an important cultural heritage, contribute to the economy, produce food for the nation, preserve the open Western landscape, and prevent environmentally and aesthetically damaging land use. These are the truths of federal land grazing.

The Western cowboy is often portrayed as the quintessential American hero, a strong, hard-working, ethical family man who cares for the land, contributes to his community, and honors the culture, traditions, and values passed down to him through generations of ranching families. The anti-grazing movement has sought to destroy this image. But the cowboy legend is grounded in fact, and survives to this day. The typical federal land ranch family lives on a multi-generational homestead. They ranch to sustain their family values, culture, heritage, and traditions. They persevere in the face of increasing costs and regulation, even if that means accepting a low income or subsidizing their ranch with other endeavors. They maintain a connection to the land, riding the same trails that their fathers, grandfathers, and great-grandfathers rode before them. They are community leaders, providing jobs for their town and food for their nation. They stubbornly refuse to let their ranches be subdivided into sprawling developments and industrial parks. In an increasingly urban, culturally homogenous society, they represent one of the few vestiges of traditional American values, culture, and heritage. They represent the spirit of America, and for that reason alone, they should be cherished and preserved.

³⁰⁷ *Id.*