BUREAUCRATIC ISSUES AND ENVIRONMENTAL CONCERNS: A REVIEW OF THE HISTORY OF FEDERAL LAND OWNERSHIP AND MANAGEMENT

GARY D. LIBECAP*

I. INTRODUCTION

As environmental concerns have increased, policymakers have considered various options for addressing the problems of natural resource use. These problems include how to protect lands of exceptional amenity value; how to promote efficient water use, pricing, and transfer; how to mitigate air, water, and land pollution; and how to maintain habitats for endangered species while balancing competing demands for production and recreation. Terry Anderson and Donald Leal summarize these and other issues in *Free Market Environmentalism*.[1] What sets their work apart from much of the existing literature is an emphasis on greater reliance upon private property rights and market mechanisms to address environmental issues. They outline a variety of settings in which the more complete definition of private property rights to natural resources can enhance both environmental quality and efficiency in outdoor recreation, water allocation, and energy development.

Despite the attractiveness of their arguments, it is doubtful that they will go very far in addressing environmental problems on the nation's public lands, which constitute some 724 million acres, or thirty-two percent of the total area of the United States.[2] The United States Forest Service administers approximately 230 million acres of the land,[3] and the Bureau of Land Management (BLM) administers over 270 million acres.[4] To

* Department of Economics and Karl Eller Center, College of Business and Public Administration, University of Arizona, Tucson, Arizona. This article was prepared in conjunction with the symposium entitled "Free Market Environmentalism: The Role of the Market in Environmental Protection," held on April 13, 1991 at the Northwestern School of Law of Lewis and Clark College.

1. TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991).

2. U.S. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 5 (1989).

3. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 670 (1990).

4. U.S. DEP'T OF THE INTERIOR, *supra* note 2, at 6.

carry out land management policies, the Forest Service received budget authority of $1.2 billion in fiscal year 1990 and employed the equivalent of nearly 21,000 full-time workers.[5] In the same year, the BLM received $436 million and employed the equivalent of over 7,000 full-time workers.[6]

The jurisdictions of these two agencies over federal lands are long-standing, beginning with the General Revision Act of 1891[7] for the Forest Service and the Taylor Grazing Act of 1934[8] for the BLM. Both agencies can be expected to oppose any reliance upon private property rights and markets to address the environmental issues affecting the lands under their jurisdictions. Full private property rights would end their role in managing federal lands, and hence their justification for budgets and staffing. Even less complete private rights arrangements within the structure of federal ownership, such as long-term leases, potentially provide important constraints upon bureaucratic discretion in land use decisions. Forest Service and BLM officials make land use decisions within their legislative mandates (some of which they have been actively involved in drafting) to accomplish a variety of objectives. These include responding to and balancing important constituent demands, reacting to congressional and executive department concerns, and, not the least, following the tastes and ideological beliefs of individual bureaucratic officials. The administrative environment for the Forest Service and the BLM, and indeed for most federal agencies, allows for considerable discretion and protection from congressional and executive interference in these matters.[9] "Bureaucrats will therefore have a measure of autonomy, perhaps a substantial measure—and they can use the coercive power of public authority to pursue their own interests at the expense of their creators'."[10] Greater reliance upon private property rights and markets threatens this environment. It would upset the political deals that have been made among politicians, bureaucrats, and interest groups about the structure of

5. U.S. OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1992, pt. 4 at 427-28 (1991).

6. *Id.* at 723-24.

7. General Revision Act, ch. 561, 26 Stat. 1095 (1891) (repealed 1976).

8. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-3160 (1988)).

9. *See* Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORGANIZATION 213, 223-38 (Special Issue 1990).

10. *Id.* at 234.

governance of public lands and, hence, the magnitude and direction of the associated gains and losses. No agency, no entrenched (and benefitting) interest group, and no winning coalition of politicians will willingly let this structure be eroded, except under unusual circumstances.

The possibility that such a large portion of land will be exempt from Anderson and Leal's prescriptions raises interesting questions. How did so much land come under permanent federal ownership? Was not the thrust of federal land policy, as reflected in the various homestead acts,[11] rapid and complete divestiture?

This article reviews the history of the retention of federal ownership of public lands, beginning with the General Revision Act of 1891. It concludes that this legislation became the basis for permanent bureaucratic management of federal lands. In addition, this article summarizes some criticisms of the management of the environment on federal lands and explores the critical institutional factors affecting decisionmaking within the federal land management agencies. The institutional structure critically affects how the BLM and the Forest Service will respond to pressures for alternative management of federal lands involving private property rights and market processes.

II. The Origins of Federal Lands and the Emergence of Permanent Bureaucratic Management

A. *Early American Land Policy*

In the early years of the Republic, no one envisioned that the federal government would retain ownership of much land. Indeed, the objective of federal land policy, beginning with the Land Ordinance of 1785,[12] was to transfer title from the federal government to private parties as quickly as possible. After 1785, Congress gradually ceased its efforts to raise significant funds from the sale of federal land, lowered prices, and adopted legislation to promote settlement of the federal estate by small farmers.[13] Federal lands were to be divided into small

11. *See* Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976); Homestead Act of 1891, ch. 561, 26 Stat. 1097 (repealed 1976); Homestead Act of 1908, ch. 19, 35 Stat. 6 (permitting second homestead if first homestead unsuccessful).

12. Ordinance of May 20, 1785, 28 J. Continental Congress 375 (Fitzpatrick ed. 1933).

13. *See, e.g.*, Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

plots and transferred piecemeal to bona fide settlers. Congress adopted a relatively egalitarian distribution policy, limiting claims generally to 160 acres per family under most land laws.[14] The goal was to create a stable society whereby broad-based land ownership would provide individuals with a stake in the economy and provide a check on the scope and power of government. Cash sales of federal lands were phased out and replaced by 160-acre allocations through the Preemption Act,[15] the Homestead Act of 1862,[16] the Timber and Stone Act,[17] and the Timber Culture Act.[18] Under the Homestead Act, for example, an individual could secure title to 160 acres through agricultural use and improvement of the land for five years.[19] The "commute" provision of the Homestead Law allowed claimants to buy the land after six months at a price of $1.25 per acre.[20] Once the conditions of settlement were met, title was transferred by the General Land Office (GLO) to the claimant. Through these and related land laws, some 1.2 billion acres had been transferred to private claimants by 1980.[21]

The allocation of property rights to land, the dominant form of wealth in an agrarian society, critically affected the nature and functioning of the entire economy.[22] In the early United States, nothing was as important for the development of a market-based, capitalist economy as the complete, secure, and rapid assignment of private property rights to land. Land ownership determined the distribution of wealth and income, and thus the identity of the principal economic and political actors in the society. The process for assigning property rights molded expectations for mobility and economic advancement. Finally, the property rights structure determined how adaptable the economy would be in responding to changes in factor and product prices.

With property rights to land secured and contracts for sale or

14. *Id.*

15. Preemption Act, ch. 208, 4 Stat. 420 (1830) (repealed 1891).

16. Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976).

17. Timber and Stone Act, ch. 151, 20 Stat. 89 (1878) (repealed 1955).

18. Timber Culture Act, ch. 277, 17 Stat. 605 (1873) (repealed 1891).

19. Homestead Act of 1862, ch. 75, 12 Stat. 392, 392-93 (repealed 1976).

20. *Id.*

21. Marion Clawson, *Major Alternatives for Future Management of the Federal Lands, in* RETHINKING THE FEDERAL LANDS 195, 211 (Sterling Brubaker ed., 1984).

22. *See* JONATHAN R.T. HUGHES, THE GOVERNMENTAL HABIT: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT (1977).

other transfers enforced, an environment was established for the security of property rights to other tangible and intangible assets. This legal and institutional structure formed the basis for private markets for resource allocation and use, and provided a limited, though important, role for government. The federal, state, and local governments not only provided the legal rules for the assignment and enforcement of property rights, but they also adopted policies to assist economic growth. Government provided funding for internal improvements, such as the building of canals, highways, and railroads. Government provided public education for the general population, at least in the North. Courts and enforcement officials were authorized to enhance the security of property rights and contracts, and legislatures adopted laws to remove sources of tenure uncertainty.[23]

B. *The General Revision Act and the Establishment of the National Forests*

The reversal of long-standing U.S. land policy and the beginning of bureaucratic management of federal lands began with the General Revision Act of March 3, 1891.[24] The General Revision Act *repealed* two of the most popular vehicles for patenting federal land, the Preemption[25] and Timber Culture Acts.[26] Furthermore, it slowed the transfer of title under the Homestead Act by extending the period between original homestead entry and the right to purchase a claim from six to fourteen months.[27] Settlers in arid regions favored commuted homestead claims and preemption entries because they could obtain title more rapidly than was possible by working the land for five years, as required by the Homestead Act.[28] With title, settlers possessed collateral for accessing credit markets.

These options were either removed or sharply limited by the

23. *See* JAMES W. HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836-1915 (1964); HARRY N. SCHEIBER, OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-1961 (1969); Gary D. Libecap, *Economic Variables and the Development of the Law: The Case of Western Mineral Rights*, 38 J. ECON. HIST. 338, 361-62 (1978).

24. General Revision Act, ch. 561, 26 Stat. 1095 (1891) (repealed 1976).

25. *See, e.g.*, Preemption Act of 1841, ch. 16, §§ 10-15, 5 Stat. 455-457, repealed by the General Revision Act, ch. 561, 26 Stat. 1095, 1097 (1891) (repealed 1976).

26. *See, e.g.*, Timber Culture Act, ch. 277, 17 Stat. 605 (1873), repealed by the General Revision Act, ch. 561, 26 Stat. 1095-96 (1891) (repealed 1976).

27. *Id.* at 1098.

28. Homestead Act of 1862, ch. 75, 12 Stat. 392, 392-93.

General Revision Act. The Act also halted temporarily all public offering of land.[29] Moreover, the Act denied owners of more than 160 acres the right to make a homestead entry.[30] Finally and critically, the law authorized the President to create forest reserves (later, the national forests) "wholly or in part covered with timber or undergrowth whether of commercial value or not . . . ."[31] Private individuals could obtain grazing and lumbering leases, but not titles, to national forest lands, which the Department of Agriculture would administer permanently after 1905. By 1909, the federal government had set aside 195 million acres in the national forests.[32]

The Congressional enactment of the General Revision Act was clearly a reversal of the long tradition of federal land divestiture.[33] Debate in Congress over the bill focused on how ranchers and large "speculators" had fraudulently filed timber culture and preemption claims, thereby denying legitimate homesteaders access to federal lands. The American Forestry Association also lobbied for the legislation to create the forest reserves,[34] as one of the growing number of lobbying groups favoring permanent government ownership and management of the remaining federal lands.

The General Revision Act was only the beginning. Subsequently, the government reserved coal and oil lands, power sites, and national parks and monuments. In 1934, the Taylor Grazing Act authorized permanent federal ownership of 165 million acres of unpatented rangeland.[35]

Curiously, the General Revision Act was enacted at a time when there were calls for more, rather than less, flexibility in federal land laws to facilitate the granting of private title to federal land. By the 1880s, the path of settlement had passed through most eastern lands, where soils were relatively rich and rainfall sufficiently plentiful to support small farms. In these areas, homestead settlement by small farmers in plots of 160

29. General Revision Act, ch. 561, 26 Stat. 1095, 1098 (1891) (repealed 1976).
30. *Id.*
31. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 484 (1968).
32. *Id.* at 580.
33. Gary D. Libecap, *The Political Economy of Institutional Change: Property Rights and the General Revision Act of 1891*, *in* CAPITALISM IN CONTEXT (John James & Mark Thomas eds., forthcoming 1993).
34. 51 CONG. REC. 2,349-2,538 (1890).
35. GARY D. LIBECAP, LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING 45-48 (1981).

acres had been the model for federal land policy. West of the 100th meridian, running from North Dakota to Texas, however, much of the territory was either arid rangeland better suited to ranching, or was mountainous and forested land, better suited to lumbering than to farming. In either case, changes in the land laws were required to allow private claims larger than 160 acres and for non-agricultural purposes, if the lands were to be alienated in a manner consistent with previous policy.

These changes posed dilemmas for Congress and the General Land Office in the administration of federal land policy. In forested areas, commercial loggers needed large tracts of land. Economies of scale existed in cruising timber for the best stands and in harvesting. Logging was often capital-intensive, involving the construction of spur railroad lines to haul logs to mills and lumber to markets. Efficient lumber operations, therefore, required both secure property rights to support the fixed-capital investment and large amounts of timberland for production. In the 1880s, however, no clear provision in the land laws existed for timber companies to obtain legal access to federal timberlands. The timber stands of the upper Great Lakes states of Michigan, Wisconsin, and Minnesota had been acquired earlier through cash sales and script.[36] After 1862, however, cash sales of federal lands to private claimants gradually were phased out and replaced by homestead entries as authorized by Congress in the Homestead Act. Congress was reemphasizing the small farm focus of federal land policy. Non-agricultural activities did not fit well with this scheme, and other than railroad land grants, lumber companies had few options for obtaining federal timber lands.

To acquire land, timber companies employed entrymen to place land claims under the Timber and Stone and Homestead Acts and engaged in costly fraud to circumvent the restrictions in the land laws.[37] Timber companies spent an estimated $17 million to evade the land laws in the Pacific Northwest, an amount greater than the federal government's total receipts for the land.[38]

36. Ronald N. Johnson & Gary D. Libecap, *Efficient Markets and Great Lakes Timber: A Conservation Issue Reexamined*, 17 EXPLORATIONS IN ECON. HIST. 372 (1980).

37. Ronald N. Johnson & Gary D. Libecap, *Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement*, 39 J. ECON. HIST. 129, 131-32 (1979).

38. *Id.* at 138.

Ranchers encountered similar problems as they attempted to patent federal grazing lands. In the arid lands of the West, where irrigation was necessary for farming or where twenty-five acres or more were needed to sustain a single cow for a year, the 160 acres authorized under the land laws were insufficient for a viable farm or ranch. Ranchers used fraud to evade the land laws to obtain title to as much land as possible. Ranch land claims were often a combination of homestead entries, preemptions, timber culture claims, desert land entries, and land purchases from railroads and state school land sections.

To acquire land to which title could not be obtained, ranchers made informal claims and enforced them through local livestock associations. Through continual use of an area, ranchers could protect a claim, although this often led to more intensive harvest than otherwise might be optimal.[39] Overgrazing to mark and protect informal holdings was costly, and it made both land and livestock vulnerable to drought, because grass stands were driven to low levels with little reserve when precipitation was scarce. Not surprisingly, the costs of overgrazing to define and enforce land claims against other potential users were reflected in lower calf crops, higher death losses, lower cattle weights, and diminished animal values.[40]

To reduce these costs, livestock associations attempted to block other ranchers and homesteaders from entering informally claimed land. For instance, in 1883, Montana ranchers along the Musselshell River claimed some 3,916,800 acres and announced:

> We, the undersigned, stock growers of the above-described range, hereby give notice that we consider said range already overstocked; therefore we positively decline allowing any outside parties or any parties locating herds upon this range the use of our corrals, nor will they be permitted to join us in any round-up on said range from and after this date.[41]

Additionally, individual ranchers fenced large tracts of federal land to establish more definite control over entry and use of rangeland, and to promote herd management. The extent of private fencing of federal land appears to have been in the

39. LIBECAP, *supra* note 35, at 15-23.

40. *Id.* at 23-28.

41. S. STOCKSLAGER, CATTLE GRAZERS ON PUBLIC LANDS, H.R. EXEC. DOC. No. 232, 50th Cong., 1st Sess. 5 (1888).

range of nine million acres in the eleven far Western states.[42]

As homesteaders continued westward settlement, they increasingly confronted the large land claims of ranchers and, occasionally, timber companies. Homesteaders became frustrated upon finding large tracts of desirable land either fenced or with access blocked by the actions of livestock associations:

> I took up 160 acres of government land. . . . It happened to be in a Big Cattle outfit's meadow and when I went to do my improvements as required by the laws of the United States of America, this same Cattle outfit shut and locked the gates and forbid me to come on my Homestead. . . .[43]

The General Land Office, which had been organized to process individual land claims under the land laws, became a vociferous opponent of the private fencing of federal lands. In 1882 and 1883, General Land Office Commissioner McFarland called for fence removal and the prosecution by the Justice Department of those ranchers who erected them. In 1883, Interior Secretary Teller announced that "this department will impose no objection to the destruction of these fences by persons who desire to make bona fide settlement . . . ."[44]

In the face of these conflicts over federal land, there was a call for the classification of federal lands into farming, timber, mineral, ranching, and other categories to facilitate alienation through revision in the land laws. It was argued that only in this way could the problems of over-harvest or land depredations be addressed. For example, in 1874, General Land Office Commissioner Burdett called for the cash sale of all timberlands to expedite the transfer of land to private parties:

> I am strongly of the opinion that the wisest policy the Government can pursue in respect to this class of lands is that which will most speedily divest it of title in the same for a fair consideration, for the reason that depredations to an enormous extent are constantly occurring, which existing laws are powerless to prevent and seemingly legally powerless to punish.[45]

In 1879, Congress established a Public Lands Commission to

42. LIBECAP, *supra* note 35, at 20.

43. Letter from Mr. John Thompson, Viola, Wyoming, to the General Land Office Commissioner (Nov. 30, 1921) (on file in Record Group 49, Unlawful Enclosures, U.S. National Archives, Box 903).

44. LIBECAP, *supra* note 35, at 32.

45. U.S. DEP'T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 7 (1874).

investigate problems with the disposal and use of heterogeneous lands in the West.[46] The Commission included the Commissioner of the General Land Office, Clarence King, and three nongovernment members, Alexander Britton, Thomas Donaldson, and John Powell. The Commission gathered testimony regarding range and timberlands at various locations in the West. A common plea was for more lenient federal laws to reflect variations in land quality and production potential and to provide for the speedy patenting of private land claims.

After assembling this testimony, the Commission issued a report to Congress calling for the classification and sale of the varied Western lands according to their best use.[47] For instance, the Commission argued that "the timberlands should be sold, and a law should be passed to this effect. Will not private ownership, self-interest, best protect this class of lands?"[48] To reflect arid conditions and the need for claims larger than the 160 acres authorized under existing land laws, the Commission called for 2,560-acre homesteads on arid range lands.

The recommendation for 2,560-acre homesteads was within the spirit of the federal land policy. Congress had repeatedly adjusted land policies to accommodate new political conditions by lowering land prices, enacting the Preemption and Homestead acts, providing land grants for internal improvements such as railroads and canals, and granting warrants for land as payment to soldiers. These actions generally were within the broad aims of rapidly transferring land in a relatively egalitarian manner and promoting economic growth.

Nevertheless, despite this record of past adaptability, the recommendations of the Public Lands Commission of 1879 were not enacted. Congress might have maintained the piecemeal allocation of land within 160-acre plots. But it did not do this either. Instead of liberalizing land laws, beginning with the General Revision Act in 1891, Congress gradually tightened the criteria for patenting federal lands and reduced the property rights that could be obtained from the federal government.

Absent fundamental changes in land distribution policies, conflicts over federal lands continued. In 1903, a second Public

46. GATES, *supra* note 31, at 422-34.

47. H.R. EXEC. DOC. No. 46, 46th Cong., 2nd Sess. IX, XIX, XXII (1880).

48. THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS, H.R. MISC. DOC. No. 45, 47th Cong., 2d Sess. 541-42 (1884).

Lands Commission was created to review the condition of federal lands and to recommend policies regarding their alienation or retention to the President and Congress.[49] The commission members were General Land Office Commissioner W.A. Richard, F.H. Newell of the U.S. Geological Survey and the Reclamation Service, and Gifford Pinchot. In its 1904 report, the Commission reversed its predecessor's recommendation for arid lands homesteads.[50] Although the Commission continued to support allocations in 160-acre plots, it called for the repeal of the Timber and Stone Act and the Desert Land Act,[51] which it argued also were used to acquire federal land fraudulently.[52] Finally, the Commission called for the federal government to *retain* rangeland and issue grazing leases rather than assign title to private individuals.[53] These last recommendations were not enacted until the Taylor Grazing Act of 1934,[54] but they represented the continuing shift from divestiture to government retention and management of Western lands.

As an example of the new thinking on this issue that would have been rejected outright in earlier times, consider the statement of Bernhard E. Fernow, Chief of the Division of Forestry in the Department of Agriculture in 1886:

> [T]he forest resource is one which, under the active competition of private enterprise, is apt to deteriorate . . . The maintenance of continued supplies as well as of favorable conditions is possible only under the supervision of permanent institutions with whom present profit is not the only motive. It calls preeminently for the exercise of the providential functions of the state to counteract the destructive tendencies of private exploitation.[55]

There are several reasons why federal land policy was revised in 1891. First, the General Revision Act reflected more general conditions within the United States regarding the functioning

49. GATES, *supra* note 31, at 488-91.

50. S. Doc. No. 189, 58th Cong., 3rd Sess. V (1905).

51. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321-323 (1988)).

52. S. Doc. No. 189, *supra* note 50, at VI, IX.

53. *Id.* at XXII.

54. Taylor Grazing Act, ch. 865, 48 Stat. 1269, 1269-70 (1934) (codified as amended at 43 U.S.C. §§ 315-3160 (1988)).

55. BERNHARD E. FERNOW, ECONOMICS OF FORESTRY: A REFERENCE BOOK FOR STUDENTS OF POLITICAL ECONOMY AND PROFESSIONAL AND LAY STUDENTS OF FORESTRY 20 (1902).

of the economy and the role of government within it. Besides the General Revision Act, Congress enacted a series of laws during the late Nineteenth Century calling for greater federal government intervention into the economy in ways that had previously been left to the market. The Interstate Commerce Act of 1887[56] and the Sherman Act of 1890[57] are other examples of new legislation that significantly extended the role of the federal government.

Although placing the General Revision Act into the context of other legislation of the period provides useful background, it also means that understanding the origins of the law will be difficult because of the complexity of the underlying issues involved. Indeed, the origins of more well-known legislation of the time, such as the Sherman Act, remain unclear and controversial. For example, there is long-standing debate about whether Congress enacted the Sherman Act to promote competition by attacking monopolies and other restraints of trade,[58] or was responding principally to the demands of special interests, including farmers and small firms who desired protection from increased competitive pressures and who feared what they believed to be the potential market power of large enterprises in factor and product markets. In many industries, larger firms, which were using new technology and production methods, were rapidly displacing older, smaller firms who in turn organized politically to redress the balance.[59]

The forces associated with technological change and the industrialization of the American economy in the late Nineteenth Century provided the environment for the enactment of the General Revision Act and other legislation that broadened the power of the federal government in the economy. There were increasing concerns, especially among small businesses and farmers, about the growth of firms and their potential market power.[60] There also was a greater sense of uncertainty among

56. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

57. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

58. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985).

59. GARY D. LIBECAP, THE RISE OF THE CHICAGO PACKERS AND THE ORIGINS OF MEAT INSPECTION AND ANTITRUST (National Bureau of Economic Research Working Paper No. 29, 1991).

60. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF

individuals regarding how they would fare in a rapidly changing economy.[61] These factors appear to have contributed to the observed unwillingness of Congress to expand the size of private claims to federal land.

The transformation of the economy was creating many winners and losers, who organized to lobby Congress on their behalf. With reduced transportation and information costs, not only was the economy becoming truly national, but economic issues and conflicts increasingly were interstate in scope, meaning that only the federal government (and not the state and local governments) had the requisite jurisdiction and resources to regulate economic activities.[62] Reductions in information and transportation costs also reduced the relative costs of forming nationwide interest groups for lobbying the federal government.

Many interests had a stake in the way federal lands were divested. The huge initial size of the federal estate, as well as the small-farm emphasis of the land laws, established the expectation that federal land would be distributed broadly. Various constituent groups formed to claim this land, including homesteaders, ranchers, miners, timber companies, oil firms, power companies, railroads, land developers, conservationists, their representatives in Congress and state legislatures, and officials of the General Land Office and Forest Service. Over the course of the Nineteenth Century, these groups increasingly competed for the same land and feared that changes in the law to accommodate the special problems of one group would deny access to others. Groups hardened their bargaining positions and lobby stands in Congress, where changes in land policies were made.

Two groups, homesteaders and ranchers, were especially important antagonists in the effort to shape federal land policies. Because a larger number of voters were homesteaders, potential homesteaders, and related land developers, the homestead lobby was a more influential political constituency in Congress than were the ranchers. The size of the homestead lobby can be

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THE SHERMAN ANTITRUST ACT 15-16 (1965); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGIN OF AN AMERICAN TRADITION 108-60 (1955).

61. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 338 (2d ed. 1985).

62. *See* RONALD N. JOHNSON & GARY D. LIBECAP, PATRONAGE TO MERIT AND CONTROL OF THE FEDERAL GOVERNMENT LABOR FORCE 7 (University of Arizona, Karl Eller Center Working Paper No. 85721, 1991).

approximated by the number of new homestead and preemption claims, largely in the arid West, from 1880 through 1900. Some of these claims were made by ranchers to secure title to rangeland, but most were for agricultural settlement. During that twenty-year period, 991,372 original homestead entries were made for 138,584,000 acres, and 185,511 preemption claims were filed for 27,279,000 acres.[63] Not all of the claims were completed for title, but the magnitude of the claims indicates how substantial the homestead lobby might have been. Furthermore, officials in the General Land Office were paid in part on the basis of the number of claims filed,[64] and recognition of the large land claims of ranchers and timber companies would have reduced the number of land filings through the agency, as well as the income of GLO officials at each land office. The influence of homesteaders contributed to provisions placed in the Republican and Democratic platforms from 1872 through 1888, which called for federal land to be distributed only to actual settlers as outlined in the Homestead Act.[65]

Conservationists also emerged in the late Nineteenth Century as an extremely cohesive interest group with influential ties to top government policymakers. Conservationists opposed the further alienation of federal land to any private claimant. Instead, they supported the reservation of public lands by the federal government and their scientific management by federal agencies. The demands of conservationists were strengthened by growing public concern over possible shortages of many key raw materials.[66] Conservationists used the specter of impending shortages to justify the federal government's continued reservation of land.

These concerns coincided with a series of severe macroeconomic recessions in the late Nineteenth and early Twentieth Centuries: The panic of 1884 was followed by the long depression of 1893-1897 and by another panic in 1907. These conditions contributed to a new sense of pessimism and a perceived narrowing of opportunities.[67] This environment

63. GATES, *supra* note 31, at 799.

64. Gary D. Libecap, *Bureaucratic Opposition to the Assignment of Property Rights: Overgrazing on the Western Range*, 41 J. ECON. HIST. 151 (1981).

65. GATES, *supra* note 31, at 454-62.

66. *See* SHERRY H. OLSON, THE DEPLETION MYTH: A HISTORY OF RAILROAD USE OF TIMBER (1971); Johnson & Libecap, *supra* note 36.

67. *Cf.* FRIEDMAN, *supra* note 61, at 338.

likely made political compromise for changes in federal land laws more difficult.

Conflicts over federal land and the size of individual claims also intensified because there was less federal land available for claiming by 1890. With less land to be distributed, recognition of the large land claims of ranchers and timber companies would have precluded others from obtaining a share of the federal estate. By 1890, the federal government had transferred sixty-five percent of the original federal estate of 1,442,267,520 acres to private parties and state governments.[68] A perceived shortage of available federal land led the U.S. Census to announce in 1890 that the frontier was closed:

> Up to and including 1880 the country had a frontier of settlement, but at present the unsettled area has been so broken into by isolated bodies of settlement that there can hardly be said to be a frontier line. In the discussion of its extent and its westward movement it can not, therefore, any longer have a place in the census reports.[69]

Despite this perception, some 500 million acres remained unappropriated and theoretically available for patenting in 1890.[70] Although much of this was arid rangeland and timberland, an adjustment in the Homestead Act to allow for 2,560-acre homesteads, for example, could have accommodated the claims of many. But Congress did not accept these changes. Public hostility to large firms was marked by hostility to large claimants of federal rangeland. In the late Nineteenth Century, the large-scale failure of small, dry-land homesteads had not yet occurred. Farms of 160 or 320 acres were often presented as viable, especially by railroads and federal agencies who were promoting settlement.[71] Furthermore, some of the largest ranching claims were held by English and Scottish investors in the cattle industry. These and other large rangeland holdings tied up land that otherwise would be available for homestead settlement. Foreign ownership of U.S. land, as well as the large

68. *See* E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES 1900-1950, at 8 (1951) (stating that the original public domain was 1,442,267,520 acres); LIBECAP, *supra* note 35, at 15-16 (stating that 505,678,000 acres of the public domain remained available for patenting in 1890).

69. BUREAU OF THE CENSUS, U.S. DEP'T OF THE INTERIOR, COMPENDIUM OF THE ELEVENTH CENSUS, 1890, pt. 1 at XLVIII (1892).

70. *See* LIBECAP, *supra* note 35, at 15-16.

71. *See* MARY W.M. HARGREAVES, DRY FARMING IN THE NORTHERN GREAT PLAINS, 1900-1925 (1957).

and controversial railroad land grants, many of which were in default by this time, was described with the same antagonism as were business trusts.

In response to this climate, Congress adopted two policies that were more politically acceptable than revising the land laws to continue the policy of providing private property rights. First, Congress subsidized continued homesteading and piecemeal divestiture through the Reclamation Act of June 17, 1902.[72] Under the Reclamation Act, federal funds were to be used to construct dams and irrigation systems to make homesteading in 160-acre plots viable in arid areas. Second, Congress avoided the problem of assigning private title to large tracts of low-value arid land by granting grazing permits in the national forests and, later, on federal rangeland that it withheld under the Taylor Grazing Act. These permits typically went to large ranchers who already were using the land, but renewable leases were much less visible politically and implied less commitment to a particular land allocation arrangement.[73] Furthermore, by withholding title, Congress could respond to the demands of conservation groups by assigning management of retained lands to federal agencies.

C. *The Taylor Grazing Act and Bureaucratic Management of Rangeland*

Although the Homestead Act and other remaining land laws were not significantly liberalized after 1900 to facilitate large land claims in arid regions, the Reclamation Act and related federal irrigation policies helped to promote homestead claims along watersheds. Within the Interior Department, Congress created the Reclamation Service, to construct dams and irrigation projects that would advance agricultural settlement.[74] The General Land Office (later, the Bureau of Land Management), also within the Interior Department, continued to focus on processing private land claims. Correspondingly, the Interior Department opposed the Department of Agriculture's efforts to assume administrative control over the remaining federal rangelands. The Department of Agriculture had proposed to

72. Reclamation Act, ch. 1093, 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 371-616 (1988)); *see* PEFFER, *supra* note 68, at 39-40.

73. *See* LIBECAP, *supra* note 35.

74. GATES, *supra* note 31, at 658.

establish grazing districts and to issue private grazing leases within them.[75] This ran counter to the Interior Department's emphasis on processing small homestead claims, which reflected its close ties to constituent groups such as homesteaders, land developers, railroads, and others who benefitted from the agricultural settlement of federal lands.[76]

The Interior Department's opposition to grazing districts began to change in the 1920s.[77] During the 1920s, as homestead claims to available federal lands began to wane and constituents with an interest in the retention of federal ownership gained influence, the Interior Department began to shift focus from the transfer of federal lands to private claimants to the bureaucratic management of the lands remaining under federal control.[78] With this shift, the Interior Department began to compete directly with the Agriculture Department for administrative jurisdiction over federal rangeland. The competition aggravated long-standing tension between the two departments, which had competed previously for control of the Forest Service and the National Park Service.

In 1934, the Interior Department convinced Congress to enact the Taylor Grazing Act,[79] which assigned the Department control over approximately 136 million acres of federal rangeland. The Taylor Grazing Act authorized the Secretary of the Interior to establish grazing districts and to issue grazing leases to ranchers.[80] The Department established Advisory Boards, staffed by ranchers, and adopted grazing fees. Within this structure, permanent bureaucratic management of federal rangelands by the Bureau of Land Management was established. For all practical purposes, the process of transferring federal lands to private claimants had ended.

III. Criticisms of Forest Service and BLM Policies

With the establishment of permanent bureaucratic management of federal forests and rangelands, policies evolved over

75. Libecap, *supra* note 35, at 35.
76. Libecap, *supra* note 64, at 152-58.
77. Libecap, *supra* note 35, at 37-38.
78. B. Delworth Gardner, Rangelands 25-37 (Resources for the Future Discussion Paper No. ENR90-04, 1990).
79. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-316 (1988)).
80. *Id.* at 1269-70.

time regarding the allocation and use of those lands. This section briefly summarizes some of the criticisms that have been raised regarding the management of environmental problems in the national forests and BLM lands.

The Forest Service is often criticized for its timber harvest policies. There is growing evidence that the Forest Service has promoted timber harvesting in areas where no private firm could profitably operate, and, alternatively, that it has restricted harvest on more productive sites.[81] Ronald Johnson, for example, argues that neither commodity users nor environmental groups have successfully captured the agency and that harvest policies are designed to maintain political support for the Forest Service in the annual appropriations process.[82] Because neither Forest Service officials nor BLM officials can benefit from more profitable harvest allocations, they have little incentive to adopt them. On the other hand, the magnitude of their administrative mandate and their range of opportunities to respond to constituents and to carry out personally-desired policies depends at least in part upon political support in Congress. It should not be surprising that Forest Service and BLM officials adopt harvest policies to keep Congress satisfied, rather than other interests.

The Forest Service's policy of spreading and subsidizing timber harvests to build and maintain political support under the guise of multiple-use and sustained-yield have been successful for the agency, but have come at high environmental cost. The agency has traded timber harvests and growth in highly productive areas (such as the Pacific Northwest), and valuable wilderness in less productive areas (such as the Rocky Mountain States), for political support, bureaucratic discretion, and budget growth.

Similarly, the Bureau of Land Management appears to have used managerial discretion to advance its interests and those of supportive clients by implementing policies that are unlikely to maximize the economic and environmental value of federal rangeland. Delworth Gardner, for example, criticizes the BLM's sustained-yield, multiple-use management as generally

81. William F. Hyde, *Compounding Clearcuts: The Social Failures of Public Timber Management in the Rockies, in* BUREAUCRACY VERSUS THE ENVIRONMENT 186, 187 (John Baden & Richard Stroup eds., 1976); Ronald N. Johnson, *U.S. Forest Service Policy and its Budget, in* FORESTLANDS 103 (Robert T. Deacon & M. Bruce Johnson eds., 1985).

82. Johnson, *supra* note 81, at 105.

lacking in economic content, although it may be rich in political and bureaucratic returns.[83] He asserts that investment decisions under the Federal Land Policy and Management Act of 1976[84] and the Public Rangelands Improvement Act of 1978[85] do not sufficiently consider economic criteria.[86] Long-standing agency policies, such as the use of common and low grazing fees across heterogeneous lands, benefit certain constituents but do not lead to the efficient use of the land.[87] Gardner argues that the failure to adopt more realistic grazing fees contributes to the misallocation of productive lands, and also means that less productive lands are retained for grazing when they might be more profitably returned to a wild state.[88]

There is little incentive for the agency to provide accurate information on the condition of rangelands, and this has contributed to a surprising debate over the actual status of the nation's public rangelands.[89] Indeed, the BLM has some incentive to portray the lands as being in poor condition in order to secure additional appropriations.[90]

Grazing permit holders on BLM lands have an insecure tenure because of the changing political landscape.[91] With permit insecurity, private investment in improvements, such as fences and wells, is reduced, and the motivation to overstock increases. The agency often discourages such private investment because it might contribute to an implied private property right to federal lands.

All in all, the current bureaucratic environment for the management of Forest Service and BLM lands does not lend itself either to the promotion of environmental concerns or to the maximization of economic returns. With many constituents

83. B. Delworth Gardner, *The Case for Divestiture, in* RETHINKING THE FEDERAL LANDS 156, 160 (Sterling Brubaker ed., 1984).

84. Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744 (1976) (codified as amended at 43 U.S.C. §§ 1701-1784) (1988)).

85. Public Rangelands Improvement Act, Pub. L. No. 95-514, 92 Stat. 1803 (1978) (codified as amended at 43 U.S.C. §§ 1901-08 (1988)).

86. Gardner, *supra* note 83, at 165.

87. *Id.*; *see also* Ronald N. Johnson & Myles J. Watts, *Contractual Stipulations, Resource Use, and Interest Groups: Implications from Federal Grazing Contracts*, 16 J. ENVTL. ECON. & MGMT. 87, 95 (1989).

88. Gardner, *supra* note 83, at 158-169.

89. Even though the BLM has administered federal rangeland for nearly 60 years, there is little consensus about the quality of the range or whether it is improving or deteriorating. For a summary of the issues, see GARDNER, *supra* note 78, at 6-14.

90. *Id.* at 74-75.

91. LIBECAP, *supra* note 35, at 78-102.

competing for the use of federal lands, the agencies cannot reconcile numerous objectives, especially when they have their own separate interests. Accordingly, property rights remain at the heart of the debate over use of federal lands. The importance of the interests at stake makes it unlikely that the more radical policies Anderson and Leal have outlined for the granting of private property rights will be adopted.

IV. Conclusion

This article has focused on federal lands and the likelihood that the assignment of private property rights and associated reliance upon market processes to meet environmental concerns is in their future. The amount of land at issue is huge by any measure. Given the general support provided to the private ownership of assets of all kinds in the United States, public ownership of nearly one-third of the land is an anomaly. Since the General Revision Act of 1891, the federal government has attempted to reverse the rapid divestiture of federal lands that began in 1785. This paper offers some explanations for the adoption of that law, but these are incomplete. Certainly, the retention of *so much* land under government ownership goes beyond political struggles among private claimants over allocation, to ideological beliefs regarding conservation and bureaucratic management of land that gained prominence among certain influential groups in the late Nineteenth Century. The development of this policy did not occur in a vacuum, but corresponded to other profound changes in the American economy and the role of government in the society.

The legacy of these struggles remains. The Forest Service and the BLM have jurisdiction over nearly one-half billion acres of land. They are active in the legislative process that results in mandates for management, and have considerable discretion in the policies adopted to implement those mandates. That discretion comes not only from the control of information regarding federal lands, the forging of links to influential committee chairs, and the cultivation of important constituent ties, but also through the very structure of the civil service system.[92]

92. Ronald N. Johnson & Gary D. Libecap, *Agency Growth, Salaries and the Protected Bureaucrat*, 27 Econ. Inquiry 431 (1989); Ronald N. Johnson & Gary D. Libecap, *Bureaucratic Rules, Supervisor Behavior, and the Effect on Salaries in the Federal Government*, 5 J.L. Econ. & Organization 53 (1989); Ronald N. Johnson & Gary D. Libecap, Patronage

Civil service rules give federal supervisors only limited means to reward or punish their subordinates. If Congress and the President desire to advance new policies regarding land use and the environment, they must gain the support of the rank and file employees within the Forest Service and the Bureau of Land Management, or the policies will have little chance of success.[93]

The structure of bureaucratic management of federal lands provides an important obstacle to the kinds of private alternatives Anderson and Leal outline. Private property rights by their very nature would remove discretion or jurisdiction over the federal lands from agency officials. Furthermore, many of the constituent groups that receive subsidies and other benefits from federal agencies in the crafting of political coalitions also have much to lose. The nature of the coalitions is dynamic, reflecting the changing political fortunes of constituents. Agency officials are adept at interpreting these shifts and using their discretion to respond to them. Private property rights would not only disrupt established procedures and political coalitions, but would also limit the ability of agency personnel to react to new political conditions, as well as to implement the policies they personally desire. Thus, although there are important environmental issues to be addressed regarding the use of public lands, it is unlikely that private property rights or even a semblance of them will have a long-run future as a viable policy option.

TO MERIT AND CONTROL OF THE FEDERAL GOVERNMENT LABOR FORCE, *supra* note 62. The civil service system, which outlines the hiring, firing, promotion, and salaries of federal white-collar employees (some 72% of the federal civilian labor force), provides for additional bureaucratic discretion.

93. Johnson & Libecap, *Agency Growth*, *supra* note 92, at 431.