



An Agricultural Law Research Article

**Western Grazing: The Capture of Grass,  
Ground, and Government**

**Part 1**

by

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# WESTERN GRAZING: THE CAPTURE OF GRASS, GROUND, AND GOVERNMENT

BY  
DEBRA L. DONAHUE\*

*The western public-land livestock industry provides a context for examining three separate but interrelated aspects of the broad concept “capture”: the legal rule of capture, as it relates to property rights, the capture thesis of interest-group liberalism, and the phenomenon by which the “cowboy” myth has captured so many facets of American life and culture. This article’s objective is to outline and explore a “capture metaphor,” which incorporates, or is informed by, all three aspects. The three concepts share similar threads and together go a long way toward explaining why our unwise public-land grazing policies have continued to the present. The article begins with a brief critique of public-land grazing policy. It then describes how ranchers acquired and maintain their hold on the range, despite lacking any property interest in public lands and despite the severe ecological consequences of livestock grazing in arid environments. The paper outlines the chief beliefs (all derived from the cowboy myth) that drive current range policies—that public-land ranching is a culture worth preserving, supports small communities, and is vital to maintaining open space—and it argues that these myths lack legal, historical, or scientific legitimacy. The paper concludes that, unless checked, continued operation of the capture metaphor is likely to be disastrous for the public lands.*

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## I. INTRODUCTION

The western range livestock industry is a uniquely western American institution. It provides a context for examining three separate but interrelated aspects of the broad concept of "capture": 1) the legal rule of capture, as it relates to establishment of property rights in resources;<sup>1</sup> 2) the capture thesis of interest-group liberalism, which recognizes the ability of narrow interest groups to "capture," or co-opt, the agency and institutions charged with their regulation;<sup>2</sup> and 3) the phenomenon by which the "cowboy myth" has "captured" so many facets of American life and culture.<sup>3</sup> My objective in this article is to explore what I will call the "capture metaphor," which incorporates, or is informed by, all three aspects—the property law concept, the agency capture thesis, and the cowboy cultural phenomenon. This exploration will reveal not only that the three concepts share similar threads, but that together they go a long way toward explaining why the unsound and anachronistic policy of federal public-land grazing has persisted into the twenty-first century.

The article thus begins with a brief critique of public-land grazing policy.<sup>4</sup> The article then examines, through the lens of the capture metaphor, how livestock owners in the late 1800s and early 1900s employed and modified the rule of capture to control the range and its non-mineral resources. It notes the irony of the industry's immense impact on public lands and resources, despite lacking any property interest in those resources. The article probes the disproportionate political clout of public-land livestock producers, revealing how they acquired and have maintained their hold on the range—even to the present time—by capturing the law, government regulators and politicians, the range science discipline, popular culture, and even some conservation organizations. This appropriation of range policy-making and decision-making is aided greatly by the manipulation and uncritical acceptance of western myths rooted in the ranching way of life. Having donned cowboy mythology as if it were a

<sup>1</sup> See *infra* Part III.

<sup>2</sup> See *infra* Part IV.

<sup>3</sup> See *infra* Part V.

<sup>4</sup> Elsewhere I have made a thorough case for removing livestock from at least those public lands where annual precipitation is 12 inches or less, since ecological impacts there are most severe and potentially irreversible. See *generally* DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999). It is neither possible nor necessary to recapitulate that case here. However, I will rely on certain arguments therein—in particular those that attempt to explain the disproportionate political clout of public-land grazers—as they are integral to my purposes in this paper.

Stetson, President Bush and his public lands appointees are perpetuating the capture tradition through their initiatives, language, and role-playing. The result has been to jeopardize further the ecological health of public lands and the legal system in place to protect them. The paper concludes that the extent to which the range livestock industry has exploited the capture metaphor is unequalled and that, unless checked, it is likely to be disastrous for the public lands.<sup>5</sup>

## II. AN OVERVIEW AND CRITIQUE OF PUBLIC-LAND GRAZING POLICY

Livestock grazing has long been the most widespread commercial use of federal public lands, currently occurring on approximately 270 million acres that the Bureau of Land Management (BLM) and the U.S. Forest Service manage in the western United States.<sup>6</sup> But livestock production—both grazing per se and “improvements”<sup>7</sup> undertaken for the benefit or management of livestock—can wreak havoc on the environment. Impacts are both direct and indirect, and include the following: 1) introduction and spread of nonnative plant species (invasive weeds) and diseases, 2) competition with native species for habitat, 3) destruction of rare or sensitive native plants, 4) intentional elimination of native predator and “pest” species, 5) soil compaction, drying, and excessive erosion, and 6) disruption of aquatic systems and hydrological patterns.<sup>8</sup>

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<sup>5</sup> It has been widely argued (and demonstrated) that Bush Administration policies favor commodity interests and the extractive industries at the expense of the environment and public lands. See, e.g., Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,397 (2004) (discussing how the Bush Administration has changed public land policy); Robin Kundis Craig, *The Bush Administration and the Environment: An Overview and Introduction*, 25 *W. NEW ENG. L. REV.* 1 (2003) (discussing the Bush Administration's policy toward the environment and public criticisms of this policy); Bryant Urstadt, *A Four-Year Plague*, *HARPER'S*, May 2004, at 81 (detailing smaller measures the Bush Administration has taken to weaken environmental protection); *Earth Shakers: The Counter-Enviro Power List*, *OUTSIDE*, May 2005, at 112. *But see* Victoria Sutton, *The George W. Bush Administration and the Environment*, 25 *W. NEW ENG. L. REV.* 221 (2003) (concluding the Bush Administration has made significant efforts to regulate in seven areas of environmental protection). Many would likely urge that the Bush Administration is more clearly captured by the oil and gas industry than by any other business interest. I would not disagree. This paper, however, examines the “capture metaphor,” which, as defined herein, is unique to the range livestock industry. I argue that the range livestock industry is unequalled in the extent to which it has exploited and embellished the various notions of capture.

<sup>6</sup> According to the authors of the leading casebook on public land resources, “the great bulk of BLM land is devoted to livestock grazing.” GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 829 (5th ed. 2002) (emphasis added). While this statement is not technically accurate—all lands used for livestock grazing also support many other uses—the authors' choice of words speaks volumes about the impression held by many: that BLM lands are grazing lands.

<sup>7</sup> “Range improvements” include seeding, brush removal, fencing, water developments, etc. See *infra* notes 314–18, 433–35, 539, and accompanying text.

<sup>8</sup> See, e.g., A.J. Belsky & D.M. Blumenthal, *Effects of Livestock Grazing on Stand Dynamics and Soils in Upland Forests of the Interior West*, 11 *CONSERVATION BIOLOGY* 315, 321–24 (1997) (analyzing through case studies the impact of livestock grazing on forests); Thomas L. Fleischner, *Ecological Costs of Livestock Grazing in Western North America*, 8 *CONSERVATION*

According to the Department of the Interior, BLM riparian areas are in their worst condition ever; the dry uplands have not improved under BLM management, and “[w]atershed and water quality conditions would improve to their maximum potential” if livestock were removed from public lands.<sup>9</sup> Similarly, the Forest Service concluded that livestock grazing is the primary cause of species endangerment in arid regions of the West, such as the Colorado Plateau and Arizona Basin.<sup>10</sup> Others have suggested that “livestock grazing may be the major factor negatively affecting wildlife in the 11 western states.”<sup>11</sup> Grazing has also been identified as the number one cause of nonpoint source pollution of surface waters in the western states<sup>12</sup> and the principal cause of desertification in North America.<sup>13</sup> Ungrazed

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BIOLOGY 629, 633–34 (1994) (arguing that livestock grazing has caused the pervasive destruction of native ecosystems in the western United States). DEP’T OF INTERIOR, RANGELAND REFORM ‘94 DRAFT ENVIRONMENTAL IMPACT STATEMENT (1994) [hereinafter RANGELAND REFORM ‘94] (proposing a plan to manage federal rangeland). R.N. Mack & J.N. Thompson, *Evolution in Step with Few Large, Hooved Mammals*, 119 AM. NATURALIST 757 (1982) (discussing the effects of grazing on grassland structure). Stanley W. Trimble & Alexandra C. Mendel, *The Cow as a Geomorphic Agent—A Critical Review*, 13 GEOMORPHOLOGY 233 (1995) (discussing how livestock grazing changes the form and structure of the land, focusing on uplands and riparian areas). The myriad impacts of livestock in western riparian areas, and the high values of these areas as native species habitats and for clean water, are especially well documented. See, e.g., U.S. DEP’T OF AGRICULTURE-FOREST SERVICE, BIOLOGICAL DIVERSITY ASSESSMENT (ROCKY MOUNTAIN REGIONAL OFFICE 1992) (discussing the main concerns to biodiversity in the Rocky Mountain Region); U.S. ENVIRONMENTAL PROTECTION AGENCY, LIVESTOCK GRAZING ON WESTERN RIPARIAN AREAS (1990); A.J. Belsky, et al., *Survey of Livestock Influences on Stream and Riparian Ecosystems in the Western United States*, 54 J. SOIL & WATER CONSERVATION 419 (1999) (discussing the negative effects of grazing on water quality); JOHN HORNING, GRAZING TO EXTINCTION: ENDANGERED, THREATENED, AND CANDIDATE SPECIES IMPERILED BY LIVESTOCK GRAZING ON WESTERN PUBLIC LANDS (1994) (concluding that overgrazing in riparian areas has a negative impact on diversity); R.D. Ohmart, *Historical and Present Impacts of Livestock Grazing on Fish and Wildlife Resources in Western Riparian Areas*, in RANGELAND WILDLIFE, 245–79 (P.R. Krausman ed., 1996); W.S. Platts, *Livestock Grazing*, in INFLUENCES OF FOREST AND RANGELAND MANAGEMENT ON SALMONID FISHES AND THEIR HABITATS 389–423 (W.R. Meehan ed., 1991) (discussing the effects of grazing on salmonid fish and the destruction of their habitat). Between 1991 and 1994, the federal government killed nearly a half million “livestock predators” nationwide. GEN. ACCOUNTING OFFICE, ANIMAL DAMAGE CONTROL PROGRAM: EFFORTS TO PROTECT LIVESTOCK FROM PREDATORS, GAO/RCED-96-3, at 13 (Oct. 1995). All of these were native animals. Most “control” techniques are lethal and preventive; i.e., the predators are killed, but not in the act of preying on livestock.

<sup>9</sup> See RANGELAND REFORM ‘94, *supra* note 8, at 45.

<sup>10</sup> CURTIS H. FLATHER, LINDA A. JOYCE & CAROL A. BLOOMGARDEN, SPECIES ENDANGERMENT PATTERNS IN THE UNITED STATES, GEN. TECH. REP. RM-241 22–23 (1994).

<sup>11</sup> R.D. Ohmart & B.W. Anderson, *Riparian Habitat*, in INVENTORY AND MONITORING WILDLIFE HABITAT 169–99, (B.S. Cooperrider ed. 1986). See also Fleischner, *supra* note 8.

<sup>12</sup> *Preliminary Summary of Findings: Western States Water Council’s Nonpoint Source Pollution Survey I-B-2*, in NONPOINT SOURCE POLLUTION CONTROL WORKSHOP—TECHNICAL ISSUES (July 25–28, 1989). Agriculture as a whole, including grazing, is the chief source of water quality impairment of rivers nationwide. See U.S. ENVTL. PROTECTION AGENCY, NATIONAL WATER QUALITY INVENTORY: 1996 REPORT TO CONGRESS 32 (1997) (identifying nationwide water quality problems and their causes).

<sup>13</sup> See DAVID SHERIDAN, DESERTIFICATION OF THE UNITED STATES 121 (1981) (identifying overgrazing as the “most potent desertification force, in terms of total acreage affected,” in the United States, and reporting that 225 million acres have experienced “severe” or “very severe” desertification). See also Press Release, Blackwell Publishing Ltd., Desertification Alters

sagebrush steppe in the Intermountain Region is among the “most critically endangered ecosystems.”<sup>14</sup> The most severe vegetation changes of the last 5400 years on the Colorado Plateau have been attributed to grazing in the last 200 years.<sup>15</sup> Plainly, western livestock grazing is endangering species and disrupting ecosystem processes on landscape scales at unprecedented rates.<sup>16</sup>

These findings are explained in large part by evolutionary ecology. Within the past two decades range ecologists have come to understand that traditional theories of vegetative succession do not hold true on arid and semiarid lands,<sup>17</sup> particularly where precipitation patterns are highly variable

Regional Ecosystem Climate Interactions (Jan. 18, 2005), [http://www.eurekaalert.org/pub\\_releases/2005-01/bpl-dar011805.php](http://www.eurekaalert.org/pub_releases/2005-01/bpl-dar011805.php) (last visited Nov. 20, 2005) (describing study by Carnegie Institution Dep't of Global Ecology [Stanford] of the “large-scale interactions between ecosystems and the climate during the process of desertification”). According to lead author Dr. Gregory Asner: “Some of these [dry, semi-arid, and sub-humid regions grazed by livestock] are turning into unusable desert so quickly that the United Nations has put the problem at the top of its environmental agenda.” *Id.* The group studied a 500 square mile area of the Northern Chihuahuahua Region of New Mexico. Dr. Asner stated: “[W]e found that a long-term decrease in litter cover is the most evident sign when an area begins to change to desert.” *Id.*

<sup>14</sup> See REED F. NOSS, EDWARD T. LAROE III & J. MICHAEL SCOTT, *ENDANGERED ECOSYSTEMS OF THE UNITED STATES: A PRELIMINARY ASSESSMENT OF LOSS AND DEGRADATION* (BIOLOGICAL REP. 28, APP. B, 1995).

<sup>15</sup> K.L. Cole, N. Henderson & D.S. Shafer, *Holocene Vegetation and Historic Grazing Impacts at Capitol Reef National Park Reconstructed Using Packrat Middens*, 57 GREAT BASIN NATURALIST 315, 315 (1997).

<sup>16</sup> For example, “[a]pproximately 65 percent of the shrublands [on the Snake River plain in southwest Idaho] that existed in 1979 have been destroyed. . . . [A] landscape that once was largely covered by shrublands now has been converted to cheatgrass fields.” Steven T. Knick & Mark R. Fuller, *Radical Change in a Sagebrush Landscape: The Role of Exotic Cheatgrass in Disrupting a System*, in FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY 54, 55 (Michael P. Dombeck, Christopher A. Wood & Jack E. Williams eds., 2003). The conversion was “[a]ided by livestock grazing, failed agricultural practices and drought.” *Id.* Fire intervals decreased from once every 80 years prior to the appearance of cheatgrass to once every three to twenty-seven years in the late 1900s. *Id.* The resulting loss of sagebrush has dramatically transformed small mammal populations, which in turn has led to significant declines in populations of golden eagles and prairie falcons (and likely other species) in this area, which has long been recognized and managed by BLM for its “extremely high concentration of raptors.” *Id.* at 54–56. The authors conclude: “If land managers are unable to break the cycle of cheatgrass and frequent fire, the reasons for which the Snake River Birds of Prey [National Conservation Area] was established will disappear.” *Id.* at 56. See also BRUCE L. WELCH, *BIG SAGEBRUSH: A SEA FRAGMENTED INTO LAKES, PONDS, AND PUDDLES* 15 (United States Forest Service-Rocky Mountain Research Station, General Technical Report RMRS-GTR-144 (2005) (explaining that sagebrush is essential to many species, from microscopic to large mammal).

<sup>17</sup> For purposes of this paper and my policy proposal in *The Western Range Revisited*, DONAHUE *supra* note 4, at 9, “arid or semiarid” denotes those areas receiving twelve inches or less average annual precipitation. Numerous authorities support the view that grazing impacts are most severe in these areas. See, e.g., REED F. NOSS & ALLEN Y. COOPERRIDER, *SAVING NATURE’S LEGACY* 220–41 (1994); RANGELAND REFORM '94, *supra* note 8, 23–30; NATIONAL RESEARCH COUNCIL, COMMITTEE ON RANGELAND CLASSIFICATION, *RANGELAND HEALTH: NEW METHODS TO CLASSIFY, INVENTORY, AND MONITOR RANGELANDS* 18–27, 97–103 (1994) [hereinafter *RANGELAND HEALTH*]; SHERIDAN, *supra* note 13, at 4–9, 11–13, 20–24, 64–65, 120–23; Kenneth D. Sanders, *Can Annual Rangelands Be Converted and Maintained as Perennial Grasslands through Grazing Management?*, in *PROCEEDINGS—ECOLOGY AND MANAGEMENT OF ANNUAL RANGELANDS*, GTR RM-251, at 412 (Stephen B. Monsen & Stanley G. Kitchen eds., 1994).

and where the native vegetation and soil micro-organisms did not evolve with abundant large ungulates.<sup>18</sup> Current models explain that prolonged or excessive disturbance—often by livestock grazing, in combination with altered fire cycles or other factors—can cause vegetation and soil conditions to degrade beyond certain threshold conditions, making the reestablishment of pre-disturbance conditions infeasible.<sup>19</sup> In other words, grazing can cause, and *has caused*, irreversible ecological changes across much of the West.<sup>20</sup>

This knowledge is of special significance for BLM rangelands: The vast majority qualify as arid or semiarid, and native soil micro-organisms and plant species on most of these lands did not co-evolve with large numbers of large ungulates.<sup>21</sup> It should thus come as no surprise that with continued grazing, the condition of these areas has not improved under BLM management.<sup>22</sup> Nevertheless, federal range managers continue to adhere to outdated theories of vegetative succession in environmental assessments and planning documents, disregarding now widely-accepted state-and-transition models of vegetation change.<sup>23</sup> Even when the agency

<sup>18</sup> Mark Westoby, Brian Walker & Imanuel NoyMeir, *Opportunistic Management for Rangelands Not at Equilibrium*, 42 J. RANGE MGMT. 266, 271 (1989); M.H. Friedel, *Range Condition Assessment and the Concept of Thresholds: A Viewpoint*, 44 J. RANGE MGMT. 422, 426 (1991); W.A. Laycock, *Stable States and Thresholds of Conditions on North American Rangelands: A Viewpoint*, 44 J. RANGE MGMT. 427, 427–428 (1991); RANGELAND HEALTH, *supra* note 17, at 36–39.

<sup>19</sup> DONAHUE, *supra* note 4, at 145–51, 158–60, 179. See also BLM, PROPOSED REVISIONS TO GRAZING REGULATIONS FOR THE PUBLIC LANDS, FINAL ENVIRONMENTAL IMPACT STATEMENT, FEIS 04-39, at 3–26 (2004) [hereinafter GRAZING REGULATIONS FEIS] (explaining the inapplicability of Clementsian theory to arid and semiarid rangelands); *supra* sources cited in note 18 (describing current ecological models referred to variously as state-and-transition, altered steady state, or (dis)equilibrium).

<sup>20</sup> Even prior to the formulation and acceptance of these ecological models, numerous authorities had warned—or even assumed as generally accepted fact—that livestock grazing had permanently damaged western lands. See, e.g., GAO-COMPTROLLER GENERAL, PUBLIC RANGELAND IMPROVEMENT—A SLOW, COSTLY PROCESS IN NEED OF ALTERNATE FUNDING, GAO/RCED-83-23, at 11 (1982) [hereinafter GAO, SLOW, COSTLY PROCESS] (“[I]t is widely accepted that past overgrazing permanently damaged our Nation’s public rangelands and that they cannot be restored to their pregrazing state.”); SHERIDAN, *supra* note 13, at 120–23 (noting overgrazing’s contribution to desertification in vast areas of the west). See also DONAHUE, *supra* note 4, 64–66, 114–120 (describing the changes in the physical landscape of rangelands and the political and cultural attitudes that gave rise to them).

<sup>21</sup> See DONAHUE, *supra* note 4, at 133–38, 165 (explaining that cattle do not “substitute” for bison as grassland evolutionary agents); *infra* notes 497–98, 503, 505 and accompanying text. Relatively few BLM lands are found within the Great Plains biome, which *did* support vast herds of bison and thus are *less* susceptible (but not immune) to damage by livestock. *Id.*

<sup>22</sup> RANGELAND REFORM ‘94, *supra* note 8, at 24 (reporting that the condition of upland areas receiving less than twelve inches annual precipitation has not yet improved).

<sup>23</sup> See, e.g., BLM, PROPOSED REVISED GRAZING REGULATIONS DEIS (2004); Thad Box, *Public Rangelands Without Cows?*, 22 RANGELANDS 27, 29 (2000) (querying whether “Clementsian dogma” could be the reason for “range people . . . ignoring their own ecological research”); E-mail from Dr. Elizabeth Painter, plant ecologist, with graduate degrees in botany and range science, and Research Associate at the University of California, to Debra L. Donahue, Winston S. Howard Professor of Law, Univ. of Wyoming (Apr. 21, 2004) (on file with author) (explaining that many range ecologists hired by the livestock industry have ignored traditional succession theories); Elizabeth Painter, Use of “Best Available Science” 1 (Nov. 2004) (unpublished paper, on file with author) (stating that many environmental impact statements (EISs) and

acknowledges the new thinking, it fails to apply it.<sup>24</sup> The conclusion is inescapable: Much of the range science literature, and many agency publications, are propaganda or apology, not sound science or management advice. That “rangelands” *will* or *should* be used for livestock production has been an implicit premise of range research and management decisions.<sup>25</sup> Only rarely have researchers or managers considered whether livestock grazing is an appropriate or sustainable land use.

Congress, however, was well aware in 1934 that western ranges were severely degraded by overgrazing and that many desert lands were simply unsuited to livestock use.<sup>26</sup> For this reason Congress, in the Taylor Grazing

environmental assessments (EAs) “contain inadequate references, use outdated science, and/or rely on unsubstantiated opinions as science”). See also Barron Orr, *Defining Rangeland Management: A Comparison of Three Textbooks*, <http://rangelandswest.org/defined.html> (last visited Nov. 20, 2005) (reporting that in the most recently published range management text, HEADY & CHILD, *RANGELAND ECOLOGY AND MANAGEMENT* (1994), rangeland succession dominates the ecological discussion “despite the trend in some parts of the rangeland management community toward the state and transition model”).

<sup>24</sup> For example, in its recently issued Final Environmental Impact Statement (FEIS) on proposed grazing rule changes, the BLM concedes that “methods to assess the condition of vegetation has [sic] changed over time,” and it outlines the history of ecological thinking from Clements to Westoby and others. GRAZING REGULATIONS FEIS, *supra* note 19, at 3-26; *supra* note 18 and accompanying text. But the FEIS says nothing about the legitimacy of the older theories. Instead, it concludes—citing nothing to support the conclusion—“However, since 1934 the public lands have had managed livestock grazing and conditions have continued to improve.” GRAZING REGULATIONS FEIS, *supra* note 19, at 3-26. The history of implementation of the Taylor Grazing Act, 43 U.S.C. § 315 (1934), belies this conclusion, which also is directly at odds with the agency’s own conclusions in the 1994 *Rangeland Reform DEIS*. See RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (concluding that drier areas of upland habitat have not improved). Indeed, the FEIS continued: “Although conditions have improved, there are still a *number of acres* that are dominated by invasive or exotic weeds and have not returned to the potential natural community.” GRAZING REGULATIONS FEIS, *supra* note 19, at 3-26 (emphasis added). The “number of acres . . . dominated” by one species, cheatgrass, in the Intermountain Region alone exceeds 100 million, and most authorities agree that many cheatgrass-dominated areas have crossed a threshold and thus cannot be restored to their “potential natural community.” See, e.g., Edith B. Allen, *Restoration Ecology: Limits and Possibilities in Arid and Semiarid Lands*, in PROCEEDINGS: WILDLAND SHRUB AND ARID LAND RESTORATION SYMPOSIUM: U.S. Forest Service General Technical Report INT-GTR-315, at 10 (Bruce A. Roundy et al. eds., 1993) (detailing the difficulty in reversing effects of invasive plant species in arid and semiarid rangelands); NOSS & COOPERRIDER, *supra* note 17, at 255 (noting the difficulty of removing cheatgrass). The BLM itself had reported in 2000 that 25 million acres in the Great Basin (a portion of the Intermountain Region) were dominated by exotic annual grasses, and it warned that a “large part of the Great Basin lies on the brink of ecological collapse.” BUREAU OF LAND MANAGEMENT, *THE GREAT BASIN: HEALING THE LAND 1* (2000) [hereinafter *HEALING THE LAND*].

<sup>25</sup> Innumerable examples could be cited. See, e.g., GEN. ACCOUNTING OFFICE, *RANGELAND MANAGEMENT: BLM’S HOT DESERT PROGRAM MERITS RECONSIDERATION*, GAO/RCED-92-12, at 57 (1991) [hereinafter *GAO, HOT DESERTS*] (“Livestock grazing has been, and will continue to be, a part of the western lifestyle. Moreover, domestic livestock grazing will remain one of many multiple uses of America’s public lands.”); BLM, Questions and Answers re: the Proposed Grazing Rule of the Bureau of Land Management, [http://www.blm.gov/nhp/news/releases/pages/2003/pr031205\\_grazing\\_qa.htm](http://www.blm.gov/nhp/news/releases/pages/2003/pr031205_grazing_qa.htm), (last visited Nov. 20, 2005) (“The proposed rule would . . . help grazing continue as one of the legitimate uses of the public lands.”); RANGELAND REFORM ‘94, *supra* note 8, at 5–6. Even some courts have ascribed to the assumption. See, e.g., *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1054 (D. Nev. 1985) (dismissing as “practically unthinkable” a policy choice to remove livestock from BLM lands near Reno, Nevada).

<sup>26</sup> See DONAHUE, *supra* note 4, at 34–35, 194–99.



Act (TGA), authorized the Secretary of the Interior to establish grazing districts on lands “chiefly valuable for grazing or raising forage crops,”<sup>27</sup> or, as the legislative history reveals, lands *not more valuable* for other uses.<sup>28</sup> While grazing continues to be allowed on 170 million BLM acres, the Interior Department has never determined which of its lands are “chiefly valuable” for grazing.<sup>29</sup> Indeed, it seems certain that, while livestock grazing is the most widespread commercial use of public lands, it is by far the *least* valuable.<sup>30</sup> Federal grazing fee revenues (recently *increased* to \$1.79 per animal unit month (AUM))<sup>31</sup> are swamped by the costs of administering the range program.<sup>32</sup> Average returns to ranchers range from negative to two to

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<sup>27</sup> See Taylor Grazing Act, 43 U.S.C. §§ 315–315o-1, 315 (2000).

<sup>28</sup> See DONAHUE, *supra* note 4, at 194–99 (describing early recognition that grazing should be a low priority on public lands).

<sup>29</sup> The BLM recently proclaimed: “More than 160 million acres of public land [i.e., BLM lands] in the western United States have been determined to be *suitable* for livestock grazing . . . .” GRAZING REGULATIONS FEIS, *supra* note 19, at ES-1 (emphasis added). While “suitable” is a far cry from “chiefly valuable,” even this diluted finding has, in fact, been made expressly for few *if any* lands currently grazed. Rather, those lands grazed at the time of passage of the Taylor Grazing Act continue to be grazed. See *infra* text accompanying notes 210–19.

<sup>30</sup> In 1984, Department of Interior economist Robert Nelson wrote: “Almost all economic studies of the costs and returns to ranching have concluded that ranch values far exceed any reasonable estimate of the capitalized value that can be earned from ranching.” Robert H. Nelson, *Ideology and Public Land Policy: The Current Crisis*, in RETHINKING THE FEDERAL LANDS 275, 292 (Sterling Brubaker ed., 1984). The GAO suggested in 1991 that there were few studies of the relative values of public lands for wildlife versus livestock production, and none in the Southwest desert region. It did, however, cite studies of rangeland in central Idaho that determined the “value of public lands for the enhancement of big game animals” alone was \$5–20 per animal unit month (AUM) compared to the \$1.97 per AUM then charged for livestock grazing. See GAO, HOT DESERTS, *supra* note 25, at 50 (citing J. Loomis et al., *Comparing the Economic Value of Forage on Public Lands for Wildlife and Livestock*, 42 J. RANGE MGMT. 134, 137 (1989)). An animal unit month (AUM) is the amount of forage required to feed one cow for one month. See 43 C.F.R. § 4130.8-1 (2004) (defining AUM as “a month’s use and occupancy of range by 1 cow, bull, steer . . . over the age of 6 months at the time of entering the public lands or other lands administered by the Bureau of Land Management; by any such weaned animals regardless of age; and by such animals that will become 12 months of age during the authorized period of use”). More recently, numerous conservation groups and others have demonstrated the relative values of these lands outbidding ranchers for state grazing leases or by paying permittees and convincing federal land managers to retire grazing permits. See generally National Public Lands Grazing Campaign website, Voluntary Permit Buyout Overview: Has This Been Done Before? <http://www.publiclandsranching.org> (last visited Nov. 20, 2005) (explaining permit buyout legislation and describing past permit buyouts).

<sup>31</sup> BLM, BLM and Forest Service Announce 2005 Federal Grazing Fee, [http://www.blm.gov/nhp/news/releases/pages/2005/pr050207\\_grazing.htm](http://www.blm.gov/nhp/news/releases/pages/2005/pr050207_grazing.htm) (last visited Nov. 20, 2005).

<sup>32</sup> A Department of Interior economist, Robert Nelson, estimated that “the true costs of the BLM grazing program” far exceeded the revenues from fees, but even at that he underestimated the shortfall by failing to include opportunity costs or the costs of environmental damage caused by livestock grazing. See Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 339 n.26 (1994) (citing ecst estimates of the BLM grazing program in ROBERT H. NELSON & GABRIEL JOSEPH, U.S. DEPARTMENT OF INTERIOR: AN ANALYSIS OF REVENUES AND COSTS OF PUBLIC LAND MANAGEMENT BY THE INTERIOR DEPARTMENT IN 13 WESTERN STATES (1982)). Nelson estimated that then-current (1994) costs were “probably significantly higher” and that a \$4 per AUM fee might cover BLM’s grazing administration costs alone (excluding overhead, “wildlife mitigation,” etc.). *Id.* Estimates of shortfalls (grazing program costs minus fee revenues) range from \$50 to more than \$100 million

four percent. Only two percent of U.S. beef cattle production is attributable to public lands, an amount easily replaceable by other regions and private-land operators.<sup>33</sup> Similarly, the 18,000 low-wage jobs directly related to federal land grazing could be replaced in a matter of days by normal job and income growth in the national economy.<sup>34</sup>

Nor have the agencies reasonably justified livestock grazing under the planning or management criteria of their principal land management statutes, the Federal Land Policy and Management Act (FLPMA)<sup>35</sup> and National Forest Management Act (NFMA),<sup>36</sup> both passed in 1976.<sup>37</sup> Instead, grazing is rationalized as a means of sustaining small communities, maintaining open spaces on private lands, and preserving an important western way of life and culture.<sup>38</sup> The governing statutes, however, confer on the BLM and Forest Service no authority, much less a mandate, to promote local economic or lifestyle concerns or to regulate development on private lands.<sup>39</sup>

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annually. *See, e.g.*, CHRISTOPHER MCGRORY KLYZA, WHO CONTROLS PUBLIC LANDS? 138 (1996) (reporting an OMB study showing that the government lost more than \$500 million over ten years); KARYN MOSKOWITZ & CHUCK ROMANIELLO, ASSESSING THE FULL COST OF THE FEDERAL GRAZING PROGRAM 1 (2002) (estimating a minimum "full, annual cost" due to BLM and Forest Service grazing of \$128 million; report prepared for the Center for Biological Diversity); Tania Soussan, *Buyout Plan Targets Ranchers; Grazing Permits Would Be Retired*, ALBUQUERQUE J., Jan. 23, 2005, at B1 (reporting results of a study showing that "federal grazing programs cost taxpayers and the government \$128 million to \$500 million a year in rangeland management costs and in damage to public land").

<sup>33</sup> RANGELAND REFORM '94, *supra* note 8, at G-16; THOMAS MICHAEL POWER, LOST LANDSCAPES AND FAILED ECONOMIES 182 (1996).

<sup>34</sup> RANGELAND REFORM '94, *supra* note 8, at 45; POWER, *supra* note 33, at 184-86.

<sup>35</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1785 (2000).

<sup>36</sup> National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 512b, 1600, 1611-1614 (2000) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476).

<sup>37</sup> *See infra* notes 294-95 and accompanying text. FLPMA is codified at 43 U.S.C. §§ 1701-1784; NFMA, at 16 U.S.C. §§ 1600-1614.

<sup>38</sup> *See, e.g.*, BLM, Grazing Information, <http://www.blm.gov/grazing> (last visited Nov. 20, 2005) ("The proposed rule, announced by Interior Secretary Gale Norton in a speech in New Mexico, recognizes the economic and social benefits of public lands ranching, as well as its preservation of open space in the rapidly growing West."); GRAZING REGULATIONS FEIS, *supra* note 19, at i (cover letter by Director Kathleen Clarke), 5-18 (response to comments).

<sup>39</sup> On the contrary, the Federal Land Policy and Management Act of 1976 (FLPMA) directs the agencies to consider the "national interest" and the "nation's need" for resources. *See* 43 U.S.C. § 1701(a)(2), (12). Nowhere does FLPMA suggest that the agencies give priority to the short-term economic interests of any subset of public-land users. *Cf.* Oregon & California Railroad Revested Lands Act, 43 U.S.C. § 1181a (directing that "such portions of the revested [lands which are] classified as timber lands "shall be managed... for permanent forest production, and... [*inter alia*] for the purpose of... contributing to the economic stability of local communities and industries"). *See infra* discussion at notes 300-06, 525-29. Eric Freyfogle has noted the "long-standing issue of whether federal lands should be managed to further the interests of the national public or should be managed with greater emphasis on the interests of the local public." Eric Freyfogle, *Federal Lands and Local Communities*, 27 ARIZ. L. REV. 653, 679 (1985). After pointing out that the Public Land Law Review Commission (PLLRC) had urged "clear consideration of the interests of both," *id.* (citing PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LANDS 33-38 (1970)), he argued that a "statutory public interest provision[ ]" in FLPMA "should be considered violated, in spirit if not in letter, by planning processes that ignore local community interests and desires." *Id.* The provision to which

Furthermore, the agencies' asserted justifications are belied by the facts. First, few if any western communities are dependent economically on public-land grazing.<sup>40</sup> On the contrary, the services and employment opportunities afforded by small towns help sustain public land ranchers.<sup>41</sup> Livestock production comprises a small fraction of the economies of most Western states, with public-land livestock production comprising an even smaller part.<sup>42</sup> Seventy percent of western cattle producers *own* all the land on which they operate; fewer than 23,000 livestock producers (about two percent of one million nationwide) possess federal grazing permits.<sup>43</sup> Second, keeping ranchers on public lands plays no demonstrable role in maintaining *private-land* open space. Private ranch land comprises a tiny fraction of the West's land area, and an even smaller fraction enjoys federal grazing privileges. Absent state or local land-use restrictions, nothing prevents ranchers—including those with federal grazing privileges—from subdividing or developing their private lands. In fact, according to surveys, the loss of federal grazing privileges would not induce most permittees to sell or develop their lands.<sup>44</sup> Even assuming that public-land grazing privileges do play a role in preventing the development of some associated private ranch lands, the "open space" thus preserved is hardly desirable ecologically. As indicated above, livestock grazing in the West promotes the spread of nonnative species and disease, pollution and depletion of water supplies, soil erosion and compaction, and other environmental damage.<sup>45</sup> More appropriate mechanisms for preventing the subdivision of ecologically

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Professor Freyfogle referred, 43 U.S.C. § 1701(a)(5), merely calls on the Secretary of the Interior to "establish comprehensive rules and regulations" for managing the public lands "after considering the views of the general public." *Id.* at 679 n.159. I do not suggest that the BLM should "ignore" the views and desires of local communities in making grazing decisions, but a requirement to *consider* the views of the general public cannot be so construed as to override other, more specific directives in the Act. *See also* GAO, HOT DESERTS, *supra* note 25, at 57 (noting that ranchers "value highly the ability to maintain a traditional ranching lifestyle" and that "this benefit cannot be ignored" by BLM, but not explaining *why* BLM must take it into account).

<sup>40</sup> *See, e.g.*, GAO, HOT DESERTS, *supra* note 25, at 46; Forest Guardians, Wing-Tipped Welfare Cowboys Ride the Range, <http://test.fguardians.org/grazing-reform/cowboy.htm> (last visited Nov. 20, 2005); *infra* notes 525–29 and accompanying text.

<sup>41</sup> *See, e.g.*, POWER, *supra* note 33; Arthur F. Smith & William E. Martin, *Socioeconomic Behavior of Cattle Ranchers, with Implications for Rural Community Development in the West* 54 AM. J. AG. ECON. 217, 223–24 (1972) (describing survey results that 80 percent of ranchers had other income to support their ranch, while 20 percent derived their income from local sources); RANGELAND REFORM '94, *supra* note 8, at 29.

<sup>42</sup> *See, e.g.*, POWER, *supra* note 33, at 182. In some western states, for example, Wyoming and Idaho, *all agricultural activities* contribute only two to three percent of the states' gross products. Sam Western called Wyoming agriculture "largely a ceremonial operation." SAM WESTERN, PUSHED OFF THE MOUNTAIN, SOLD DOWN THE RIVER: WYOMING'S SEARCH FOR ITS SOUL 14 (2002).

<sup>43</sup> *See generally* DONAHUE, *supra* note 4, at 252–53 (summarizing economic statistics).

<sup>44</sup> *See* RANGELAND REFORM '94, *supra* note 8, at 4-122 (reporting that "[m]ost permittees would try to adjust their operations . . . because maintaining the ranching lifestyle is important to them"); Smith & Martin, *supra* note 41.

<sup>45</sup> *See supra* notes 8–20 and accompanying text.

important private lands include local and state land-use regulation and public incentives, including tax breaks.<sup>46</sup>

The agencies' final justification also lacks merit. There never has been a single identifiable ranching "way of life."<sup>47</sup> Federal grazing permit holders include banks, large corporations, grazing associations, wealthy individuals, and small family operations. Only a minority of permittees have been in the business for more than a generation.<sup>48</sup> For some, ranching is a hobby or a tax write-off. Even though most are small operators, nearly all of them depend on other, non-ranch income to support themselves.<sup>49</sup>

The foregoing facts literally cry out for an accounting: *Why* does public-land livestock grazing continue, given its minimal benefits, our current understanding of its huge ecological costs, and the absence of a legal mandate? The following parts of this article attempt an explanation.

### III. THE RULE OF CAPTURE

#### A. Background

The rule of capture, though of ancient origins, is a property law concept familiar to all first-year law students<sup>50</sup> and of continuing fascination to legal scholars.<sup>51</sup> A "first-in-time allocation scheme,"<sup>52</sup> the rule is based on the maxim that "first possession is the root of title."<sup>53</sup> Thus, a person acquires possession—a property interest—of a common-pool or fugitive resource<sup>54</sup> by capturing and holding it. At common law, one who captured a wild animal, for example, thereby acquired "occupation" or possession of it (though not

<sup>46</sup> See DONAHUE, *supra* note 4, at 276.

<sup>47</sup> See *id.* at 268–72 (discussing common misconceptions about the role played by cowboys and ranching generally in Western heritage and culture). The range wars further attest to the differences among early ranchers.

<sup>48</sup> *Id.* at 263–64.

<sup>49</sup> See, e.g., RANGELAND REFORM '94, *supra* note 8, at 3–64 (stating that "[i]n 1987, 85 percent of beef cattle ranches had less than \$25,000 annual sales, most operators worked full-time off the ranch, and operations were well suited to small-scale production"); GAO, HOT DESERTS, *supra* note 25, at 48–49 (stating that "[m]any livestock operators are able to continue ranching because they supplement their income with money from outside sources"); POWER, *supra* note 33, at 186 (asserting that "almost 80 percent of the income received by beef-raising operations comes from nonfarm sources," thus making cattle-raising operations feasible); Smith & Martin, *supra* note 41.

<sup>50</sup> See any property law casebook, for instance, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 19–59 (3d ed. 1991) (describing the development of the rule of capture, with specific discussion of the rule as applied to wild animals and fugitive resources). The rule is usually introduced through the case, *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

<sup>51</sup> This symposium issue, and the conference that spawned it, is a prime example. See also generally DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 98–200 (2002) (outlining the historical and modern-day applications of the rule of capture as applied to wildlife).

<sup>52</sup> *Id.* at 119.

<sup>53</sup> Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 75 (1985).

<sup>54</sup> Fugitive resources include surface and groundwater, wild animals, oil and natural gas, etc. E.g., Henry T. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1028 (2004) ("[C]ommon-law courts analogized oil and gas to other fugitive resources, especially wild animals, and concluded that [they] are subject to 'rule of capture.'").

an absolute interest in it).<sup>55</sup> Similarly, groundwater may be claimed by pumping and removing it from an aquifer.<sup>56</sup>

As Professors Goble and Freyfogle have pointed out, no one questioned that property rights *could* be established in the fox in *Pierson v. Post*; the only issue was what acts were sufficient to demonstrate possession.<sup>57</sup> Mere pursuit was insufficient. The court ruled that possession required acts manifesting a person's "unequivocal intention of appropriating the animal to his individual use"; such acts demonstrated that the appropriator had "deprived [the animal] of his natural liberty, and brought him within his certain control."<sup>58</sup> In other words, a wild animal becomes the property of the first person to trap or kill it or to mortally wound it, so long as that person does not abandon pursuit.<sup>59</sup> The rule was justified in part on "certainty, and [on] preserving peace and order."<sup>60</sup> Further, it rewarded those persons who, "by their industry and labor," apprehended the animal.<sup>61</sup> Professor Rose summarized *Pierson's* "two great principles" for defining possession as: "(1) notice to the world through a clear act, and (2) reward to useful labor."<sup>62</sup>

The act of obtaining possession of something pursuant to the rule of capture is commonly phrased as "reducing it to possession."<sup>63</sup> This common-law expression can be seen as arising directly from the meaning of capture: "to take, seize, or catch esp. as captive or prize by force, surprise, stratagem, craft, or skill: as . . . to subdue into surrender and loss of independence . . . to get control or secure domination of."<sup>64</sup> The aptness of the expression

<sup>55</sup> See, e.g., GOBLE & FREYFOGLE, *supra* note 51, at 104 (describing common law approaches to possession); see also *id.* at 98–200 (discussing the rule of capture).

<sup>56</sup> See, e.g., A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 546 (5th ed. 2002) (citing JACK HIRSHLEIFER, JAMES C. DE HAVEN, & JEROME W. MILLIMAN, WATER SUPPLY: ECONOMICS, TECHNOLOGY, AND POLICY 59–64 (1960)).

<sup>57</sup> 3 *Caines* 175, 178 (N.Y. Sup. Ct. 1805); GOBLE & FREYFOGLE, *supra* note 51, at 119. Or, as the authors phrased the question elsewhere: "first in time to do what?" *Id.*

<sup>58</sup> *Pierson*, 3 *Cai.* at 178.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 179.

<sup>61</sup> *Id.* at 178. The New York Supreme Court's words reflect John Locke's view of property rights as embedded in and arising from human "labour." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27 (J.W. Gough, ed., Oxford 1976) (1679–1683) ("Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.").

<sup>62</sup> Rose, *supra* note 53, at 77.

<sup>63</sup> *E.g.*, *Spring Valley Waterworks v. Schottler*, 110 U.S. 347, 374 (1884) (Field, J., dissenting) (cited in GOBLE & FREYFOGLE, *supra* note 51, at 125). As Justice Field put it, "The wild bird in the air belongs to no one, but when the fowler brings it to earth and takes it into his possession it is his property. He has *reduced it to his control by his own labor*, and the law of nature and the law of society recognize his exclusive right to it." *Id.* (emphasis added). See also Myrl Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 792 n.70 ("At common law, overlying surface owners possessed an absolute right to reduce to possession any water they could extract from a well drilled on their property.") (internal citation omitted); Smith, *supra* note 54, at 1028 ("Landowners are privileged to pump and they own any oil they reduce to possession at the surface.").

<sup>64</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 334 (1986). See also MERRIAM-WEBSTER'S DICTIONARY OF LAW (1996) (defining "reduce" as "[t]o convert (a chose in action) into a chose in possession (enforcement action sought to reduce to possession her property interest

becomes apparent when one contemplates the transformed state of the thing thus possessed or subjugated. A loose fish becomes a fast fish;<sup>65</sup> a live animal is caught or killed. Whether foxes or wild birds or water in a stream, the thing captured becomes *less* than it was—diminished in freedom or mobility, in range of functions, in naturalness. Land itself—staked out, fenced off, plowed, leveled, or burned—becomes a fragment of a prior whole, disconnected and potentially dysfunctional.<sup>66</sup> As explained earlier, the implications of using livestock to “reduce to possession” arid and semiarid lands include the loss or diminishment of native species, soil, and water, leading potentially to desertification.<sup>67</sup>

Capture is also a self-help rule.<sup>68</sup> Professor Krier explains that the “law of self-help is chiefly concerned with considering which acts of bypassing the formal legal system are to be privileged, which are not, and why.”<sup>69</sup> Self-help rules can arise when no law governs the acquisition of property interest in a particular resource, or when the applicable law is not enforced or perceived as inappropriate.

Wild animals are not the only captive resources. In the West, both historically and today, the rule of capture also has been applied to land, water, timber, and minerals. On the frontier, the rule evolved naturally to a “law of the rush:”<sup>70</sup> the rush to acquire the first and, hence, best rights to bison, water, grass, gold, the land itself. The rushes of the 1800s and early 1900s were undertaken by persons seeking to exploit free resources for profit, as well as by emigrants seeking new homes.<sup>71</sup> The “vacant and unenclosed” public-domain lands were irresistibly attractive to those who would produce cattle and sheep—whether for profit or subsistence—from free federal grass and water.

Unregulated operation of the rule of capture results in depletion and eventual extinguishment of finite, common-pool resources, such as oil or gas. Even renewable resources, such as animal populations and groundwater, will be depleted if consumed at rates that exceed the recruitment or recharge rate, or will be degraded if used injudiciously (e.g., animal populations can be weakened by overharvest of certain age classes

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in the . . . determination of money damages—*Haynes v. Contat*, 643 N.E.2d 941 (1994))”, available at <http://www.answers.com/topic/reduce>; THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2004) (defining “reduce” as “2. To bring to a humbler, weaker, difficult, or forced state or condition; especially: To gain control of; conquer”), available at <http://www.answers.com/topic/reduce>.

<sup>65</sup> Rose, *supra* note 53, at 88 n.61 (referring to a chapter in *Moby Dick* involving litigation over a harpooned whale that got away and was recovered by a second crew) (HERMAN MELVILLE, *MOBY DICK* ch. 89 (1st ed., London 1851)).

<sup>66</sup> These are conservation biology concepts. See generally DONAHUE, *supra* note 4, at 180–87 (discussing the ecological dangers associated with fragmented public lands, and the benefits of landscape-scale conservation strategies).

<sup>67</sup> See *supra* notes 8–20 and accompanying text.

<sup>68</sup> James E. Krier, *Capture and Counteraction: Self-Help by Environmental Zealots*, 30 U. RICH. L. REV. 1039, 1040 (1996). As a self-help rule, capture is distinct from other self-help rules that were developed to redress injuries. *Id.* at 1040.

<sup>69</sup> *Id.* at 1043.

<sup>70</sup> GOBLE & FREYFOGLE, *supra* note 51, at 124.

<sup>71</sup> See *infra* notes 97, 103–05, 111–14 and accompanying text.

or by isolation from other populations; aquifers can be polluted). This phenomenon is known as the "tragedy of the commons," named for the classic explanation by Garrett Hardin.<sup>72</sup>

Hardin's prime example of the tragedy was "a pasture open to all." As he explained it, every herdsman with access to the commons will attempt to "maximize his gain" by continually adding another animal to his herd. "Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. . . . Freedom in a commons brings ruin to all."<sup>73</sup> In other words, a resource available to all, without regulation, will be overused because it is in no one's interest to conserve. Some other user will simply appropriate to himself what another user doesn't take. Consistent with this principle, the western-range version of the capture rule contained an implicit prerequisite—"a prior and better right" existed, "*at least if the [range] was stocked to its fair capacity.*"<sup>74</sup> It also suggests an additional reason for the overgrazing usually attributed to the "tragedy of the commons" principle: the notion (widely held among stockmen) that grass not grazed is "wasted."<sup>75</sup>

As discussed more fully below, even stockgrowers admitted that the public domain was overgrazed by the early-1880s.<sup>76</sup> Writing in 1968, Hardin asserted: "Even at this late date, cattlemen leasing national land on the western ranges demonstrate no more than an ambivalent understanding [of the logic that leads to the tragedy], in constantly pressuring federal authorities to increase the head count to the point where over-grazing produces erosion and weed-dominance."<sup>77</sup> Unfortunately, all parties involved have misunderstood both the extent of the "tragedy" and the ecological realities that combine to produce it. Overgrazing is not simply the over-use

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<sup>72</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin applied the principle to unregulated use of a grazing pasture, ocean fisheries, and national parks, among other things.

<sup>73</sup> *Id.* at 1244.

<sup>74</sup> Healy v. Smith, 83 Pac. 583, 587 (Wyo. 1905), *quoted in* Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 163 (1967). Compare *McShan v. Pitts*, 554 S.W.2d 759, 763 (Tex. App. 1977) (citing *McDonnold v. Weinacht*, 465 S.W.2d 136, 144 (Tex. 1971) (Pope, J., concurring) (observing that "active and total use to the limits of a pasture's capacity and to the exclusion of all others' . . . will give the required notice of the hostile claim" under Texas's adverse possession law). A requirement for full stocking would seem to accord with Locke's "labour"-based theory of property, which underpins the rule of capture (i.e., he who mixes his labor with the resource is entitled to possession of it). See *supra* note 61 and accompanying text.

<sup>75</sup> See DONAHUE, *supra* note 4, at 29, 31 and sources cited therein. "[O]vergrazing of ranges has been the besetting sin of stockmen since Biblical times," asserted A.P. Atkins, past president of the American Society of Range Management. A.P. Atkins, *Report of the President, 1955*, 9 J. RANGE MGMT. 63, 63 (1956). Of course, ranchers also have long believed that the early settlers converted "barren wasteland into productive farms and ranches." 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, 518 (1993-94). Attorneys Falen and Budd-Falen are both from ranching families.

<sup>76</sup> See DONAHUE, *supra* note 4, at 31-32. A BLM-sponsored agency "biography" reports that ranges were overstocked by the 1870s. JAMES MUHN & HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM 35 (1988).

<sup>77</sup> Hardin, *supra* note 72, at 1245.

of forage. The feeding and other behavior of a non-native ungulate in an arid environment, if sustained long enough or at high use levels, can result in erosion, soil compaction, reduction of soil microorganisms, depletion and degradation of scarce water supplies, displacement of or disadvantage to native animals, weakening or removal of preferred native plants, introduction of non-native plants and pathogens, disruption of nutrient and fire cycles and, ultimately, desertification.<sup>78</sup>

In the control of ranchers motivated by short-term profits and lacking an understanding of ecology, livestock became an inadvertent instrument, if not a willfully wielded tool, for capturing not just forage but entire ecosystems and landscapes.<sup>79</sup> Within the bounds of his "spread"—which included both privately owned land and government-owned lands used without permission—a rancher claimed full rights to the land, his own and all unbranded livestock, all wild animals, all vegetation, and any water source. These rights included the right to exclude (or in some instances to kill) trespassers, including Indians; to kill wolves, coyotes, eagles, and prairie dogs, indeed any native animal deemed to be a nuisance or a livestock competitor; to remove undesirable native vegetation (e.g., sagebrush) and replace it with more useful plants (i.e., livestock feed); and to divert streams from their channels.

Viewed as something to be captured and possessed, land and its produce are valued not for themselves but as a means to wealth. Thus, economists have referred to "captur[ing]" the "value of these assets [livestock and arid land]" and "captur[ing] gains from economies of scale in certain activities [e.g., roundups]."<sup>80</sup> Commodified in this way, soil, water, plants and animals, and the land itself, become mere currency.<sup>81</sup> When the land is plentiful and perceived as inexhaustible, as it was on the frontier, it is plundered all the more rapidly, by the most efficient, if wasteful, means.<sup>82</sup>

Hardin, a biologist, not a lawyer, did not explicitly invoke the rule of capture. His concern was with the causes of the tragedy, which he traced chiefly to lack of regulation coupled with overpopulation, and with potential

<sup>78</sup> See DONAHUE, *supra* note 4, at 118–23. See also *supra* notes 13–21 and accompanying text.

<sup>79</sup> Grazing is a land-intensive activity. As William Cronon noted regarding colonial New England, a relatively productive environment compared to the West, "The livestock of the colonists . . . required more land than all other agricultural activities put together." WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 139 (1983). By comparison, the land area required for livestock production in the interior West may be ten times greater or more. Cronon further reported: "Grazing animals were among the chief agents in transmitting to America one of the central—albeit unapplauded—characters of European agriculture: the weed." *Id.* at 142. By 1672, "no fewer than twenty-two European [weed] species . . . had become common in the area around Massachusetts Bay," attributable to planting and cattle keeping by the English. *Id.* at 143.

<sup>80</sup> Terry L. Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 172, 174 (1975).

<sup>81</sup> CRONON, *supra* note 79, at 161.

<sup>82</sup> See, e.g., *id.* at 116 (describing girdling of trees as an easy method of clearing lands for agricultural use). "[C]olonial farmers treated their land as a resource to be mined until it was exhausted, rather than one to be conserved for less intense but more perennial use." *Id.* at 152–53.



solutions, for which he turned to the law and to education.<sup>83</sup> As we shall see, developments in the law since Hardin wrote in 1968 have done little to ameliorate conditions on the western range, and time is running out for education to play an effective role in averting tragedy.

As suggested by the question "first in time to do what?,"<sup>84</sup> the particular formulation of the rule of capture varies by resource or activity and by jurisdiction.<sup>85</sup> Applied to public-land grazing, the rule fits somewhat awkwardly. First, vegetation, which is rooted in the soil, is not exactly "fugitive" in the sense of wild animals or mobile oil and gas deposits. Nevertheless, early cattlemen and sheepmen understandably desired to make use of the forage before someone else did. The forage was fleeting in another sense: it was seasonal. Production in the next year might be poor, and whatever might remain of the prior year's forage would be less palatable and nutritious. Second—and ironically—while current grazing on federal lands can be traced to the historical "capture" of forage on those lands, neither that capture nor the future exercise of "rights" by the initial captors' successors resulted in the acquisition of a property interest in the forage or the land.<sup>86</sup> In other words, the self-help customs by which stock producers acquired privileges to use public forage<sup>87</sup> failed to achieve the rule's object—"possession" or ownership. Still, ranchers have not been ousted from public lands. They define their "ranch" in terms of both their private holdings and the federal allotments on which their stock is permitted to graze. Their grazing permits have value, which is capitalized into the value of the ranch.<sup>88</sup> Finally, this tenure has immense physical ramifications for the land and other land uses.<sup>89</sup>

<sup>83</sup> Hardin, *supra* note 72, at 1248 ("[T]he commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another.")

<sup>84</sup> See GOBLE & FREYFOGLE, *supra* note 51, at 119 (questioning which acts were necessary to demonstrate possession).

<sup>85</sup> Anderson and Hill cite de Tocqueville for the proposition that "the American frontier was a crucible for testing new institutions," especially for establishing property rights. Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489, 498 (2002) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1946)).

<sup>86</sup> See 43 U.S.C. §§ 315b, 1752(h) (2000) (stating that the issuance of grazing permits creates no property interest in the land); *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1171 (10th Cir. 1998), *amended on reh'g*, 167 F.3d 1287, 1309 (1999), *aff'd*, 529 U.S. 728 (2000) (stating that the renewal or revocation of grazing permits is at the discretion of the Secretary of the Interior). Consider Professor Michael Blumm's comment: "Laws which grant private property rights in water and mineral resources with little or no consideration of the public interest are a major cause of the enormous amount of environmental destruction in the West." Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 406 (1994). Yet the damage wrought by public-land livestock grazing, which involves no private property interests in the federal lands, is a problem of even greater magnitude.

<sup>87</sup> See *infra* notes 115–35 and accompanying text.

<sup>88</sup> See *United States v. Fuller*, 409 U.S. 488, 490 (1973); *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1163 (10th Cir. 1998), *amended on reh'g*, 167 F.3d 1287, 1309 (1999), *aff'd*, 529 U.S. 728 (2000); RANGELAND REFORM '94, *supra* note 8, at 29.

<sup>89</sup> See *supra* discussion at notes 6–22.

This minimal introduction to the rule of capture and use of common-pool resources provides a framework for examining the public-land forage resource.

### B. Public Domain Grazing<sup>90</sup>

The western range livestock industry got its start in the 1870s following the Civil War.<sup>91</sup> Cattle, initially longhorns, from Texas and Mexico, were driven north and west for sale—to towns, railroad crews, other cattle operations, and to Midwestern markets via the railroad.<sup>92</sup> The industry operated first in the Great Plains, from Texas to Nebraska, Wyoming, Montana, and the Dakotas, on lands belonging to the federal government but by and large in the possession of no one. They fed along the way on public-domain forage. Indeed, the earliest cattle drovers wanted only the water and forage on which to sustain and fatten their animals until they could be sold. Cattle were a relatively efficient means of capturing a resource—grass—which otherwise would have gone to waste.<sup>93</sup> Cattle and sheep grazing were seen as appropriate uses of land perceived as “not good for anything else.”<sup>94</sup>

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<sup>90</sup> “Public domain” is a term of art generally applied to federal public lands available for disposal. It is often used to refer to those lands that came under the administration of BLM in 1946. In this context, it excludes national forests, in which grazing was regulated by permit prior to 1900. See *infra* note 147.

<sup>91</sup> Cattle and sheep were introduced by Spanish settlers and missionaries much earlier in the Southwest, principally California and New Mexico. But those livestock remained on lands granted by Spain or Mexico. Some livestock industry advocates today claim a 400-year-old history for a North American ranching “culture,” based on the limited introduction of domestic livestock to the Southwest by the Spanish in 1540. This stratagem enables them to characterize ranching as “virtually an indigenous society,” on a par with the “First Americans.” See Richard L. Knight, *The Ecology of Ranching*, in *RANCHING WEST OF THE 100TH MERIDIAN: CULTURE, ECOLOGY AND ECONOMICS*, 123, 137 (Richard L. Knight et al. eds., 2002); cf. *id.* (asserting that “western ranching has spanned the time scale from the First Americans to the astronauts”). Based on the cowboy myth, aggrandized in this and other ways, the government and others tout the ranching “custom and culture” as a basis for federal land policies. See *infra* Part V.

<sup>92</sup> See generally WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 207–44 (1931) (recounting the development of the Great Plains “cattle kingdom”). In 1860 there were about four million cattle in Texas; by 1884 cattle numbered 35–40 million in the seventeen western states, and even stockgrowers admitted that ranges were overgrazed. See DONAHUE, *supra* note 4, at 31.

<sup>93</sup> Cattle actually eat other types of vegetation as well, but “grass” is the common expression for the forage resource. See, e.g., DONAHUE, *supra* note 4, at 137 (describing the feeding habits of most ungulates as “complex”). Consider this unanimous resolution at the close of a West Texas cattlemen’s meeting in 1898, recounted in PAUL SHEPARD, *NATURE AND MADNESS* 1–2 (1982): “Resolved, that none of us know or care to know anything about grasses, native or otherwise, outside the fact that for the present, there are lots of them, the best on record, and we are after getting the most out of them while they last.”

<sup>94</sup> The Euro-American attitude that a resource unused by man would be “wasted,” while distinctly characteristic of stockmen, was common during the 1700s and 1800s with respect to all natural resources. Because resources were perceived as unlimited, no cause existed for conserving them. This notion and the view that some country “isn’t good for anything but grazing” are attitudes that survive to this day. E.g., Press Release, Office of the Press Secretary, President Gives Tour of Crawford Ranch (Aug. 25, 2001), <http://www.whitehouse.gov/news/releases/2001/08/20010825-2.html> (last visited Nov. 20, 2005) (quoting George W. Bush as saying “the property is only good for grazing, and it’s pretty thin at that,” about a portion of his “ranch” in Crawford, Texas); Dick Dorworth, Commentary, In the Dark About Cows and Taboos, Idaho

Before long, however, operators sought land of their own and/or secure rights to government lands on which they could produce livestock.

The livestock industry is a frontier phenomenon whose roots can be traced to the Louisiana Purchase and Lewis and Clark's epic expedition. Historian James P. Ronda described "America's triumphant westward expansion [as] a movement that brought civilization and progress to a savage wilderness."<sup>95</sup> To Meriwether Lewis and William Clark, the "vanguard" of that movement, and their contemporaries, "civilization and progress" meant making the West "safe for cows, corn and capital at the expense of bison, prairie grasses and cultures not fitting the expansionist agenda."<sup>96</sup> An 1889 Wyoming territorial document was typical of this prevailing sentiment. Entitled *Resources of Wyoming, 1889: The Vacant Public Lands and How to Obtain Them*, it advertised to "homeseekers and investors" the availability of "Millions of Acres [of] Free Land in Wyoming."<sup>97</sup> Oblivious of the irony, the report's author also noted that the "vacant" and "unoccupied" public lands of the territory were home to 125 species of birds, "peaceful" Indians, and abundant wild game.<sup>98</sup> The author proclaimed that "the greater part of Wyoming is adapted to grazing" and the "chief industry" was "stock raising."<sup>99</sup> Furthermore, "[f]armers can pasture their stock on the Government land free of expense."<sup>100</sup> The report was submitted "with the sincere hope that it may attract the intelligent interest of capitalists and progressive settlers."<sup>101</sup>

The report's distinction between "farmers" or "settlers," on the one hand, and the "industry" of "stock raising," on the other, was not accidental.

Mountain Express, <http://www.mtexpress.com/2001/01-02-21/01-02-21dorworth.htm> (last visited Nov. 20, 2005) (describing a statement printed on a bookmark for American National Cattlewomen, Inc., by Merial, an animal pharmaceutical company, which observed that "the land [cattle] graze can't be used for anything else").

<sup>95</sup> James P. Ronda, *Why Lewis and Clark Matter*, SMITHSONIAN MAGAZINE, Aug. 2003, available at <http://www.smithsonianmag.si.edu/smithsonian/issues03/aug03/presence.html>.

<sup>96</sup> *Id.* See also CASS G. BARNES, *THE SOD HOUSE 78-79* (University of Nebraska Press 1970) (1930) ("Indians and buffaloes . . . were obstacles that had to be removed before the natural resources could be utilized."); *id.* at 82 ("Indian, buffalo, elk, deer, [and] antelope . . . had to go before the white man functioned successfully."). Sadly, several fish and plant species named for Lewis or Clark have since been listed as threatened, endangered, or rare by the federal and state governments. See, e.g., USDA-Natural Resources Conservation Service, *The PLANTS Database*, [http://plants.usda.gov/cgi\\_bin/topics.cgi?earl=plant\\_profile.cgi&symbol=LEWIS](http://plants.usda.gov/cgi_bin/topics.cgi?earl=plant_profile.cgi&symbol=LEWIS) (last visited Nov. 20, 2005) (reporting that the *Lewisia congonii* is threatened and endangered); Ed Lowry, *Breeding System and Population Size Effects on Reproductive Fitness over an Environmental Gradient* (2004), <http://abstracts.co.allenpress.com/pweb/esa2004/document/?ID=38503> (last visited Nov. 20, 2005) (reporting that "six of the fifty-nine taxa in the genus [*Clarkia*] are endangered or extinct, and an additional twenty-one are rare or uncommon"). Cf. Jerome E. Freilich *et al.*, *Ecological Effects of Ranching: A Six-Point Critique*, 53 BIOSCIENCE 759, 763 (Aug. 2003) (noting the "unimaginable beauty" of the West described in Lewis and Clark's diaries, before asserting: "Exactly how different is today's landscape? That is a question rangeland scientists should be working to answer.").

<sup>97</sup> S.D. SHANNON, SECRETARY OF THE TERRITORY, *RESOURCES OF WYOMING, 1889: THE VACANT PUBLIC LANDS AND HOW TO OBTAIN THEM* (quote on front and back covers) (1889).

<sup>98</sup> See *id.* at 15-16.

<sup>99</sup> *Id.* at 3.

<sup>100</sup> *Id.* at 68.

<sup>101</sup> *Id.* at 4.

Range livestock production was widely considered an industry; indeed, the large cattle operations smacked of monopolism.<sup>102</sup> Stockmen, moreover, were merely a “temporary first wave of settlement.”<sup>103</sup> In contrast, agriculture *was* the settlement vision of national policy—the peopling of the West by Jefferson’s yeoman farmers.<sup>104</sup> The distinction was prominent in federal land policies. Until 1862 the public domain was open to all, free to use, if not actually take. In that year the Homestead Act<sup>105</sup> made lands free for the taking as well, but only by small farmers and with certain preconditions. Despite early and persistent lobbying by stockgrowers for some form of federal protection or largesse,<sup>106</sup> Congress did not pass homestead legislation for stockraising purposes until 1904, and this law (the Kincaid Act<sup>107</sup>) applied only to Nebraska. Not until 1916 did a general law authorize homesteads for ranching, rather than farming, purposes.<sup>108</sup> Even then claims were limited to 640 acres, far less than the thousands of acres required by many ranches.<sup>109</sup> Stockmen had to wait for a general leasing law until 1934.<sup>110</sup>

Meanwhile, the federal government “suffered,” but never officially invited, open-range grazing.<sup>111</sup> As the Supreme Court put it in 1890:

We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.<sup>112</sup>

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<sup>102</sup> See generally DONAHUE, *supra* note 4, at 19–27 (discussing the effect of the livestock industry on the failure of public domain leasing proposals).

<sup>103</sup> PHILLIP O. FOSS, *POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN* 31 (1960).

<sup>104</sup> See generally DONAHUE, *supra* note 4, at 22–28 (contrasting ranchers and “home-builders” and discussing how they were perceived by the public and in the political arena).

<sup>105</sup> Homestead Act of 1862, ch. 561, 26 Stat. 1097 (previously codified at 43 U.S.C. §§ 161–284 (1970) (repealed 1976)). For a discussion of the Homestead Act, see FOSS, *supra* note 103, at 19–23.

<sup>106</sup> See FOSS, *supra* note 103, at 14–30, 44–50 (discussing proposed land policies); DONAHUE, *supra* note 4, at 12–30 (discussing stockgrowers’ lobbying efforts).

<sup>107</sup> Kincaid Act, ch. 1801, 33 Stat. 547 (previously codified at 43 U.S.C. §§ 222–224 (1970) (repealed 1976)).

<sup>108</sup> Stockraising Homestead Act, 39 Stat. 862, 862–65 (1916).

<sup>109</sup> Homestead laws were neither designed, nor effective, for facilitating stockraising. Congress failed to recognize the physical and climatic limits of the arid West and authorized homestead claims too small (initially 160 acres, eventually increased to 320 or 640 acres) to meet ranchers’ needs for large swaths of country. See generally FOSS, *supra* note 103, at 39–42 (discussing the unsuitability of the homestead laws to the western range region).

<sup>110</sup> Taylor Grazing Act, 48 Stat. 1269, 1269–75 (1934).

<sup>111</sup> See *Buford v. Houtz*, 133 U.S. 320, 326 (1890); H.R. Ex. Doc. No. 267, 48th Cong. 2d Sess. 41 (1884–85) (statement of Joseph Nimmo, Treasury Department official).

<sup>112</sup> *Buford*, 133 U.S. at 326. The view that the native grasses were “adapted to the growth and fattening of domestic animals,” *id.*, was widely held but of limited accuracy. The failure of many ranchers and policymakers then and now to recognize the ecological limits of arid western rangelands has hindered the formulation of sensible, sustainable management policy. See

Stockowners needed no formal invitation to take what was plainly available for the taking.<sup>113</sup> The implied license was exercised by large operators in the cattle and sheep industries, as well as by small homesteaders. Some operators held or claimed land under the homestead or preemption laws; others were exclusively itinerant. All attempted to establish "range rights" to lands they did not own.<sup>114</sup> These circumstances were—as countless western films and novels have dramatized—a recipe for trouble.

The operation of the two principles of capture—"notice to the world through a clear act," and "reward to useful labor"<sup>115</sup>—were plainly evident in the establishment of range rights.<sup>116</sup> The following discussion draws heavily from a 1967 law review article about the early range cattle industry.<sup>117</sup> The author was not concerned explicitly with the rule of capture, but her descriptions of industry customs and practices illustrate graphically the influence of the rule on this era and on the law. Early stockmen, she suggests, were the prototypical rugged individualists, possessed of an independent nature, a spirit of adventure (or avarice), the ability to "rough it," and a disregard for federal land laws.<sup>118</sup> This individualism "resulted in a lack of solid social institutions or restraint and [in] new, simple kinds of rules and laws" on the western range—rules developed and enforced by the stockmen themselves.<sup>119</sup> Put simply, the western "cattle industry developed outside the law";<sup>120</sup> its proponents adapted the rule of capture to fit unique, western conditions.<sup>121</sup> Stockgrowers "learned how to take and hold the grazing land they needed by a system of dividing land according to range rights, by controlling the land by water rights or by force, by taking land first

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*generally* DONAHUE, *supra* note 4, at 181–82 (describing unheeded warnings about the irreversible damages of grazing in arid ecosystems).

<sup>113</sup> According to one commentator, it was widely believed that "the Public Domain was to be used for individual and private rather than for general social welfare." Scott, *supra* note 74, at 155.

<sup>114</sup> *Id.* at 162–63.

<sup>115</sup> Rose, *supra* note 53, at 77.

<sup>116</sup> See *generally* Anderson & Hill, *supra* note 85, at 499–505 (stating that individuals initially claimed rangeland by possession posting signs and placing ads in local newspapers).

<sup>117</sup> See Scott, *supra* note 74 (examining the influence of the cattle industry on the development of land use law).

<sup>118</sup> See *id.* at 155 (asserting that frontier conditions isolated cattlemen from civilized society, resulting in reduced adherence to official laws); see also FOSS, *supra* note 103, at 198 ("stockmen have traditionally been one of the most individualistic and independent groups in the nation"); Anderson & Hill, *supra* note 85, at 498–99 (describing the American frontier as a testing ground for property rights). Compare T.A. LARSON, WYOMING: A HISTORY 110 (1984) (attributing "the making of the cowboy" to distance "from the civilizing institutions—law, in particular").

<sup>119</sup> See Scott, *supra* note 74, at 155 (citing HILL, THE PUBLIC DOMAIN AND DEMOCRACY 143 (1910)). See also *generally* Anderson & Hill, *supra* note 80, at 169–75 (explaining that cattlemen established alternative decision-making mechanisms to enforce property rights because traditional mechanisms were too costly to implement on the frontier).

<sup>120</sup> Scott, *supra* note 74, at 156.

<sup>121</sup> Cf. Krier, *supra* note 68; *supra* notes 68–69 and accompanying text (explaining self-help rules).

and possessing it physically.”<sup>122</sup> “Finally, if there was no other way to preserve the needs of the cattle industry, the participants ignored or disobeyed positive laws that did not conform to those needs.”<sup>123</sup>

Stockmen were thus able to establish operations over millions of acres, while acquiring legal title to only a fraction (if any) of the total ranch area.<sup>124</sup> The wealthiest bought lands from railroads, states, or the U.S. government, but most “defied and evaded laws, and set up an extra-legal system of landholding.”<sup>125</sup> Stockmen arriving in an area might publish “notices” of their land claims in local newspapers.<sup>126</sup> They asserted rights to streams or springs, legally or by force, thereby controlling large areas in country where water sources are few and widely scattered.<sup>127</sup> Sometimes the entire flows of streams were diverted to force out downstream settlers.

Stockgrowers subverted the homestead laws by using various tactics, including establishing claims in the names of fictitious entrymen or family members and ranch hands who promptly transferred title to them.<sup>128</sup> They falsely asserted prior claims to lands claimed by homesteaders who could not afford the administrative or court costs of proving their claims.<sup>129</sup> They cut homesteaders’ fences or ran them off, using force, violence, or intimidation.<sup>130</sup> They constructed fences of their own, sometimes enclosing vast areas that they did not own.<sup>131</sup> Stockgrower associations sometimes hired gunmen to preclude outsiders and protect members’ claims to their

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<sup>122</sup> Scott, *supra* note 74, at 181–82.

<sup>123</sup> *Id.* at 182.

<sup>124</sup> See, e.g., Anderson & Hill, *supra* note 85, at 503–04 (describing a purchase of “a 160-acre ranch”—meaning 160 acres of private land, probably a homestead, plus “customary range rights”—by Swan Land & Cattle Co. in 1884 for \$768,850).

<sup>125</sup> Scott, *supra* note 74, at 159. See also Anderson & Hill, *supra* note 85, at 500 (noting that cowboys contracted with one another to enforce property rights).

<sup>126</sup> Scott, *supra* note 74, at 163–64. There was no backing in the law for such notices, of course.

<sup>127</sup> As one Colorado rancher put it, “I have two miles of running water . . . . The next water from me in one direction is twenty-three miles; now no man can have a ranch between these two places. *I have control of the grass the same as though I owned it.*” *Id.* at 162 (quoting testimony before the Public Land Commission in 1879) (emphasis added).

<sup>128</sup> *Id.* at 171.

<sup>129</sup> *Id.* at 172–73.

<sup>130</sup> “Public opinion backed by force, gave the [ranchers claiming the use of the range] the right to use it without fear of intrusion.” *Id.* at 163. In the feature-length film “Open Range,” one character remarked that open-range cattle operators hated the homesteaders and squatters even worse than they hated the Indians. OPEN RANGE (Touchstone Pictures 2003). Anderson and Hill warn that “one must be careful not to overemphasize the role of violence in the West,” but they readily concede that “[v]iolence, however, was used, and the typical characterization of the West as wild does have at least a partial basis in fact.” Anderson & Hill, *supra* note 85, at 504.

<sup>131</sup> Concerned that proliferating barbed wire fences were interfering with settlement and other lawful uses of the public domain, Congress passed the Unlawful Inclosures Act in 1885. 43 U.S.C. §§ 1061–1066 (2000). The Act prohibited all inclosures of public lands, *id.* § 1061, the assertion of an exclusive right to use or occupy such lands, *id.*, or the obstruction of access to or passage across the public domain “by force, threats, intimidation, or by any fencing,” *id.* § 1063. See also Anderson & Hill, *supra* note 85, at 508–09 (summarizing the legal proceedings brought to abate illegal fences and the vast areas enclosed by such fences in 1885–86, and citing PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 468 (1968)).

land, or they passed illegal regulations declaring a range "closed."<sup>132</sup> One association required that anyone wishing to run cattle in an area must post a \$3,000 deposit, thus preventing entrance by homesteaders and small operators.<sup>133</sup> More subtle tactics included the exclusion of newcomers from membership in stockmen associations and sharing in benefits, such as use of corrals.<sup>134</sup> Large operators built hundreds of miles of barbed-wire fence, obstructing access to millions of federal acres, even after Congress banned the practice in 1885.<sup>135</sup> By simply keeping livestock on the lands he claimed, a rancher could maintain "possession" of the land. Indeed, by buying a herd *in situ*, one acquired possession and "ownership" of both the stock and the land on which they grazed.

These practices can readily be seen as *instruments* of capture: livestock were used not only for laying claim to the forage *per se*, but also for capturing the water and land needed to sustain the stock. Fences "captured" the enclosed lands, physically excluding others and their livestock. Dikes, ditches, and dams diverted or otherwise captured water. In this dry country, the person who controlled the water would control potentially vast areas of land.

At its simplest, the range capture rule recognized "a prior and better right in the first occupants of any range."<sup>136</sup> In practice, however, operation of the rule could be a bit messy. False assertions or brute force could trump prior, legitimate claims. Even the Wyoming Supreme Court acknowledged that the "moral obligation supposed to rest upon one owner of livestock . . . did not prevent the territory of a prior occupant from being more or less invaded, if not by former neighbors then by strangers or newcomers."<sup>137</sup> Moreover, a requirement to graze lands to their capacity, in order to maintain range rights, sprang up in certain areas and was endorsed by some courts.<sup>138</sup> This unique, utilitarian variation on the rule of capture allowed a subsequent "captor" to oust the one currently in possession of the land and the forage. Such competition and "claim-jumping" were, along with

<sup>132</sup> DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH 24 (1983).

<sup>133</sup> See Anderson & Hill, *supra* note 85, at 500-01.

<sup>134</sup> See Anderson & Hill, *supra* note 85, at 500-01 (summarizing the development of cattlemen associations in several western states and detailing tactics used by associations to discourage outsiders from moving into the area); Scott, *supra* note 74, at 166 (describing stockgrower associations' attempts to prevent outside parties from using corrals and participating in roundups). Such exclusionary tactics, stemming from the "first in time, first in right" principle generally, characterize a view widely held in largely rural western states today: that "natives" (i.e., native human inhabitants) are somehow superior to "newcomers" and "outsiders." "Native" bumper stickers are a common sight. An elderly acquaintance of mine in the 1970s, who had fur trapped seasonally in North Park, Jackson County, Colorado, for decades, once said: "The folks around here don't accept you if you aren't a fifth-generation Jackson County-ite."

<sup>135</sup> See Unlawful Inclosures Act, 23 Stat. 321, 43 U.S.C. §§ 1061-1066 (2000).

<sup>136</sup> Healy v. Smith, 83 P. 583, 587 (Wyo. 1905), *quoted in* Scott, *supra* note 74, at 163. See also Anderson & Hill, *supra* note 85, at 499-500 (citing ERNEST STAPLES OSGOOD, THE DAY OF THE CATTLEMAN 83 (1929)).

<sup>137</sup> Healy, 83 P. at 587.

<sup>138</sup> See Scott, *supra* note 74, at 163 (citing Healy v. Smith, 83 P. 583 (Wyo. 1905)).

overgrazing and land abuse, the inevitable consequences of the dearth of regulation on the public domain.<sup>139</sup>

As noted earlier, the rule of capture has been modified to fit different resources in different places and at different times. Unique adaptations were required for public-domain grazing. Arguably, the range livestock version of the rule looks more like the view of the dissenting judge in *Pierson v. Post*, “who would have made the definition of first possession depend on a decision of [the fox] hunters”—or, in this case, the decision of those engaged in livestock production on the land.<sup>140</sup> “The [*Pierson*] majority’s clear act rule,” Professor Rose explains, “undoubtedly referred to a wider audience and a more widely shared set of symbols.”<sup>141</sup>

The common law gives preference to those who . . . have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by “possession,” separated for oneself property from the great commons of unowned things.<sup>142</sup>

Range customs developed as they did in part because there was no commonly understood and shared set of symbols. No other resource resembled the western forage resource—valuable only if it could be captured over large areas.

Furthermore, due to the size and seasonality of livestock ranges, many early livestock operators were essentially nomadic pastoralists.<sup>143</sup> Professor Rose expressed doubt as to “whether the claims of any nomadic population could ever meet the common law requirements for establishing property in land.”<sup>144</sup> North American Indians are a prime example. Those who moved seasonally to resources were viewed by early Europeans as lacking “ownership” of the lands used because the lands were not “possessed,” nor had sufficient labor been invested in them.<sup>145</sup> Frontier experiments in nomadic pastoralism—large, itinerant sheep operations being the prime example—also generally failed to establish any rights in federal lands. Operation of the range rules described above, progressively favored the *landed* stockmen as, ultimately, did federal law.<sup>146</sup>

<sup>139</sup> See *supra* notes 72–75 and accompanying text (describing the “tragedy of the commons”).

<sup>140</sup> See Rose, *supra* note 53, at 85.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 88.

<sup>143</sup> Most livestock production in the West, however, was undertaken for profit not subsistence. See WEBB, *supra* note 92, at 207–44 (describing historical grazing practices).

<sup>144</sup> Rose, *supra* note 53, at 87.

<sup>145</sup> See *id.* (noting that under early American possession principles, Indians could not own land because they had not improved land sufficiently to take possession); CRONON, *supra* note 79, at 55–57 (describing conflict between New England colonists’ concept of land possession with Indians’ nomadic use of land); *cf.* Johnson v. M’Intosh, 21 U.S. 543, 590 (1823) (stating “[t]o leave [Indians] in possession of their country, was to leave the country a wilderness”).

<sup>146</sup> See *infra* text at notes 204–19, 222, 227–31 (describing the Taylor Grazing Act and its early implementation).



Overstocking and deteriorating range conditions became increasingly apparent. While free grazing was halted on forest reserves by the turn of the century, a laissez-faire regime prevailed on the public domain until 1934.<sup>147</sup> When Congress finally passed the Taylor Grazing Act (TGA),<sup>148</sup> it had long been aware that portions of the West were becoming deserts as a result of grazing and drought.<sup>149</sup> Numerous factors had forestalled efforts to correct the situation.<sup>150</sup> Members of Congress and stockgrowers disagreed as to appropriate solutions. Some groups favored disposal of public domain lands either to the states, which presumably would sell them to private interests, or to livestock operators directly. Others favored retention of federal title, with grazing authorized by lease or permit, as in the forest reserves. Which camp one was in depended, of course, on the perceived benefits or disadvantages. Many stockmen preferred a leasing system that would allow them to avoid property taxes, but views and interests varied between landed and itinerant stockgrowers, and between farmers and ranchers. Some states preferred privatization for the potential tax revenues, but they uniformly rejected a proposal by the Hoover Commission to transfer the public domain lands, *sans* minerals, to states. General economic conditions and a rivalry between the Departments of Agriculture and Interior also played roles.<sup>151</sup>

In the end, the congressional solution, the TGA, authorized a permit or leasing system administered by the Secretary of the Interior, on areas he deemed "chiefly valuable for grazing and raising forage crops."<sup>152</sup> The statute, which conferred broad discretion on the Secretary of the Interior, directed him to "do any and all things necessary" to "stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range."<sup>153</sup> Preference in issuance of permits would be given to persons engaged in the livestock industry who owned private land and/or water rights—arguably, a new rule

<sup>147</sup> A permit has been required for grazing livestock on the national forests (forest reserves) since approximately 1900. *See generally* *United States v. Grimaud*, 220 U.S. 506 (1911). A permit has been required on lands now managed by BLM since the 1930s. Taylor Grazing Act, 43 U.S.C. § 315b.

<sup>148</sup> 48 Stat. 1269–75, 43 U.S.C. §§ 315–315r.

<sup>149</sup> *See, e.g.*, WESLEY CALEF, PRIVATE GRAZING AND PUBLIC LANDS: STUDIES OF THE LOCAL MANAGEMENT OF THE TAYLOR GRAZING ACT 133 (1960) (attributing the creation of the Taylor Grazing allotments to the difficulties of common allotments); FOSS, *supra* note 103, at 196 (arguing that rapid deterioration of the public range led to the stockmen's realization that federal land regulation was necessary); KLYZA, *supra* note 32, at 110 (attributing the enactment of the Taylor Grazing Act to the need for federal regulation of public range lands). *See also* DONAHUE, *supra* note 4, at 31–36, 197–98 (explaining that Congress was aware that overgrazing was causing desertification).

<sup>150</sup> *See generally* DONAHUE, *supra* note 4, at 31–36; KLYZA, *supra* note 32, at 12–14, 110–13.

<sup>151</sup> *See generally* DONAHUE, *supra* note 4, at 31–36 (assessing the differences of opinion between the Departments of Agriculture and Interior regarding range management); KLYZA, *supra* note 32, at 12–14, 110–13 (discussing the roles played by the Department of Agriculture and Interior in drafting the Taylor Grazing Act).

<sup>152</sup> Taylor Grazing Act, 43 U.S.C. § 315 (2000).

<sup>153</sup> Taylor Grazing Act, 48 Stat. 1269 (1934). "The phrase 'stabilize the livestock industry dependent upon the public range' is 'almost synonymous with 'maintain the status quo on the public range.'" FOSS, *supra* note 103, at 204.

of capture—and only permit holders (or lessees of isolated parcels) would be allowed to run stock on federal lands. A fee would be charged, not to make a profit but only to recover administration costs.<sup>154</sup> The TGA might have been seen as a legislative ratification of the rule of capture, as translated into range rights. But section 3 of the TGA (should have) laid that notion to rest: Grazing was deemed a privilege; establishment of a grazing district or receipt of a permit would “not create any right, title, interest, or estate in or to the [federal] lands.”<sup>155</sup> Permit renewal, like permit issuance, would be at the Secretary’s discretion.<sup>156</sup>

Most stockmen who received permits, however, undoubtedly believed that they had won rights to the forage and to the land that produced it.<sup>157</sup> And even if the range users had failed to capture a property interest in the forage, they accomplished the next best thing: capture and control of the officials assigned to govern their use of it.

#### IV. THE CAPTURE THESIS

##### *A. Background and Criticisms*

My task here is modest: I hope to demonstrate anecdotally and by deductive reasoning the *fact* of public-land ranchers’ domination, by enumerating the “institutions” which they influence and the mechanisms of that influence, and to relate that domination to our short-sighted and foolhardy public-land grazing policies.<sup>158</sup> Yet, in another sense my goal is ambitious because I do hope to affect an outdated policy that directly affects more than 260 million public-land acres in the West and, indirectly, the broader landscapes in which those lands are found. Accordingly, the following brief comments concerning capture theory focus on assumptions and features that lend themselves to the circumstances of public-land grazing.<sup>159</sup>

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<sup>154</sup> See KLYZA, *supra* note 32, at 113 (Secretary Ickes promised “not to base fees on fair market value but on the cost of administering the program.”).

<sup>155</sup> Taylor Grazing Act, 43 U.S.C. § 315b (2000).

<sup>156</sup> See *id.* (stating that “[s]uch permits shall be for a period not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior”).

<sup>157</sup> See KLYZA, *supra* note 32, at 130 (“To many ranchers, the grazing permits (and the low fees attached to them) were a property right.”). See also Falen & Budd-Falen, *supra* note 75, at 506 (stating that “many ranchers consider their preferences to be an equitable estate, a type of property right”).

<sup>158</sup> This article does not recommend a new public-land grazing policy or even a new approach to policy making. “Debates about goal choice tend to assume that establishing the case for a goal automatically demonstrates the need for action by a particular institution.” Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959, 965 (1997). “But the superiority of alternative institutions . . . must be separately established, not assumed.” *Id.* (citing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)). In a prior work I did attempt to justify a new grazing policy, for landscape-scale tracts of arid and semi-arid BLM lands. See DONAHUE, *supra* note 4.

<sup>159</sup> Being neither a political scientist, an economist, nor a public choice scholar, I will mold the thesis to serve my purposes and to better explain realities in the public-land ranching arena.

The notion that industry can “capture” or co-opt Congress or an agency—specifically, an agency that Congress establishes, nominally to regulate the industry’s activities, but actually to perpetuate the capture<sup>160</sup>—has waxed, waned, and evolved since its origins in the 1950s.<sup>161</sup> Initially applied to business lobbies and independent regulatory agencies, interest-group theory was extended by public choice scholars<sup>162</sup> to other interest groups and to all political institutions.<sup>163</sup> The logic has since been extended by some scholars to courts and to the market.<sup>164</sup> Common wisdom seems to be that the influence of capture theory has waned.<sup>165</sup> Nevertheless, it has “had a pronounced influence on public law”<sup>166</sup> and continues to be popular especially among law and economics scholars, as well as the public.<sup>167</sup> I believe that the basic theory illuminates the mechanisms by which public-land ranchers dominate federal policies affecting their operations.

Viewed broadly, capture refers to the ability to influence, if not actually dictate, policy. The policy preferences of industries, agencies, legislators, and voters depend on the values held by each and on the information each

<sup>160</sup> See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 105, 121 (2000).

<sup>161</sup> See Erlanger & Merrill, *supra* note 158, at 960 n.2 (tracing the “intellectual origins of capture theory” to MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), and the “vastly influential” THEODORE LOWI, THE END OF LIBERALISM (1969)).

<sup>162</sup> “[P]ublic choice scholarship is characterized primarily by its use of the tools of economic analysis to analyze politics and law. . . . [A]t its core, public choice scholarship is more of a ‘how’ than a ‘what,’ more of an analytical method than a particular set of conclusions.” Spence & Cross, *supra* note 160, at 100. Nevertheless, Spence and Cross argue that “it is fair to associate public choice scholarship with one kind of conservatism . . . the philosophically conservative view of citizen participation that is associated with the classical liberalism of Madison and Locke.” *Id.* at 103.

<sup>163</sup> See, e.g., Erlanger & Merrill, *supra* note 158, at 959–61 (citing, *inter alia*, DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)). Erlanger and Merrill begin with a brief discussion of “the conventional wisdom about interest groups and their perceived impact on public law,” dividing the latter half of the twentieth century into “three phases.” *Id.* at 959 (analyzing NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994)). The mid-1960s to the early 1980s is considered the “heyday of ‘capture theory,’” or the height of “pessimism about interest groups.” *Id.* at 960.

<sup>164</sup> See, e.g., Erlanger and Merrill, *supra* note 158, at 963 n.4 (citing Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L. J. 31 (1991); Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565 (1995); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982) (all applying interest-group theory to the courts); and KOMESAR, *supra* note 163 (further extending the theory to markets).

<sup>165</sup> See, e.g., PAUL CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 338 (1981) (referring to “mounting evidence that the capture theory did not reflect the real world”). See also Spence & Cross, *supra* note 160, at 121 (referring to “the now hoary theory of agency capture”); *id.* at 22 n.104 (citing opinions regarding applicability and viability of the theory); *id.* at 122 (“No family of public choice models seems more irrelevant yet is more widely cited than capture models.”). Cf. CULHANE, *supra*, at 338 (“That the capture thesis remains popular in the face of opposing evidence indicates how thoroughly accepted it was by its adherents.”).

<sup>166</sup> Erlanger & Merrill, *supra* note 158, at 961.

<sup>167</sup> Spence & Cross, *supra* note 160, at 122. See, e.g., KLYZA, *supra* note 32, at 140 (asserting in 1996 that “[i]nterest-group liberalism . . . has dominated the grazing policy regime”).

possesses.<sup>168</sup> The agency capture theory is one of “three discrete [public choice] arguments about why *agency* values do not conform to *public* values”; the other two are agency self-interest and agency policy bias, or “tunnel vision.”<sup>169</sup> The self-interest school of thought posits that agencies are motivated to maximize their budgets or to interpret their statutory mandates to expand their discretion. Agencies’ values will thus diverge from those of voters, leading agencies to act in ways contrary to the public interest.<sup>170</sup> At least two scholars have pointed out the lack of “empirical evidence to support the notion that self-interest actually determines [agency policy] choices,” and they argued that “strongly held policy values and professional norms are at least as likely as any resource implications to guide [agency] decisions.”<sup>171</sup> The self-interest argument may or may not be consistent with the capture theory, depending on whether the regulated industry considers itself benefited by greater agency resources and management discretion.<sup>172</sup> The “tunnel-vision” view, on the other hand, is in tension with capture theory.<sup>173</sup> It stems from the premise that an agency’s values are also affected by its structure. Bureaucrats will adhere to the mission of their agency and thus be loyal to the values of the legislative coalition that succeeded in establishing the agency’s mission.<sup>174</sup> Spence and Cross interpret this to mean that “the statutory mission locks in agency values over time,” whereas the values of politicians “remain unconstrained by any particular institutional focus.”<sup>175</sup> The result is that, “[a]s time passes, agencies may become populated by an unrepresentative sample of the population, a sample that is more dedicated to the agency’s mission than [is] the population as a whole.”<sup>176</sup>

The third explanation as to why agency values do not conform to public values is the one of interest here, the capture theory. There are various versions of the theory, and I will suggest that another, broader version applies in the arena of public-land grazing. “One variant of capture theory focuses on information [as a determinant of preferences], suggesting that industry captures an agency by virtue of the pervasive presence of industry information in agency policymaking proceedings over the long term.”<sup>177</sup>

<sup>168</sup> See generally Spence & Cross, *supra* note 160.

<sup>169</sup> *Id.* at 116–23 (emphasis added).

<sup>170</sup> See *id.* at 113. Legislators similarly are motivated in part by self interest. According to one analysis, “the behavior of members of Congress is dictated by three basic goals: achieving reelection, gaining influence within the House, and making good public policy.” FARBER & FRICKEY, *supra* note 163, at 21 (citing RICHARD FENNO, CONGRESSMEN IN COMMITTEES 1 (1973)).

<sup>171</sup> See Spence & Cross, *supra* note 160, at 117.

<sup>172</sup> See, e.g., *infra* text accompanying notes 245–46 (describing BLM’s undue reliance on stockgrowers for its budget).

<sup>173</sup> Indeed, in Spence and Cross’s view, agency bias is “directly contradictory” to capture theory. Spence & Cross, *supra* note 160, at 122. The agency bias theory “suggests that agencies will over-regulate” because of over-zealous or power hungry bureaucrats. *Id.* at 119.

<sup>174</sup> *Id.* at 115. This is reinforced by the likelihood that agencies will also tend to attract employees who are inclined to support the agency’s mission. *Id.* at 119.

<sup>175</sup> *Id.* at 115.

<sup>176</sup> *Id.* (citing HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1967)).

<sup>177</sup> *Id.* at 114. The industry’s information monopoly may result because the public “loses

Another points to "the complicity of congressional committees" that oversee the operations of the agency and their efforts on behalf of the regulated industry.<sup>178</sup> In my view it elevates theory over fact (or form over substance) to suggest that, because elected politicians may be more susceptible to capture than agencies, the agency capture thesis is irrelevant.<sup>179</sup> As Spence and Cross acknowledge, regulated groups "not confident of their prospects in the agencies" also rely on their congressional representatives and the courts to further their interests.<sup>180</sup>

Plainly, not all groups or industries are (equally) successful at capturing political institutions. Free-rider problems, for instance, hamper the ability of large, loosely organized (or unorganized) groups to influence policy making.<sup>181</sup> Some scholars believe that "interest group politics is skewed dramatically toward narrow economic interests."<sup>182</sup> According to Professors Daniel Farber and Phillip Frickey:

Group influence is likely to be strongest when the group is attempting to block rather than obtain legislation; when the group's goals are narrow and have low visibility; when the group has substantial support from other groups and public officials (who are themselves important figures and not merely referees of the group's struggle); and when the group is able to move the issue in a favorable forum such as a sympathetic congressional committee. "Depending on the configuration of a large number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources—the effect of organized pressure on Congress can range from insignificant to determinative."<sup>183</sup>

As we shall see, the factors that, according to this view, tend to foster group influence describe the public-land grazing arena remarkably well.

### *B. Capture Theory Expanded to Fit Public Land Ranching*

Marion Clawson, the BLM's first director, once opined that the range livestock industry's "influence is probably greatest in a negative way, in the prevention of the measures it opposes."<sup>184</sup> This insight is consistent with the first of Professors Farber and Frickey's observations, i.e., that group influence will be strongest when the group is "attempting to block rather than obtain legislation."<sup>185</sup> It also greatly reduces the force of one argument

interest in agency policymaking." *See id.* at 105 n.37.

<sup>178</sup> *See id.* at 114.

<sup>179</sup> *See id.* at 122–23.

<sup>180</sup> *See id.* at 123. "While courts may not be directly captured by special interests," these authors concede, "they can be readily manipulated by those interests . . . [because] [c]ourts are reactive and have their agenda set by litigants, who typically represent typical factional interests." *Id.* at 140.

<sup>181</sup> *See, e.g.,* FARBER & FRICKEY, *supra* note 163, at 37, 123.

<sup>182</sup> *See, e.g., id.* at 19 (citing KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986)).

<sup>183</sup> *Id.* (quoting SCHLOZMAN & TIERNEY, *supra* note 182, at 317).

<sup>184</sup> MARION CLAWSON, THE WESTERN RANGE LIVESTOCK INDUSTRY 381 (1950).

<sup>185</sup> *See supra* text accompanying note 183. This section of the article will discuss how

against the capture thesis: that "interest groups do not generally rush to Congress and plead, 'Regulate us!'"<sup>186</sup> Thus, while ranchers have failed to secure property rights in federal rangelands, they have largely succeeded in resisting grazing fee increases and in preventing or undoing more stringent land-use regulations. Public-land ranchers also conform to the second factor above; their "goals are narrow and have low visibility" among the general public.<sup>187</sup> Public-land ranchers are a small group, and their goals are essentially to maintain (and to strengthen, if possible) their privileges to use public lands, to keep fees low, and to minimize federal regulation of their use of public lands. Relatively few Americans outside the West have heard of the Bureau of Land Management, FLPMA, or the Taylor Grazing Act. Fewer still are aware of the ecological impacts of grazing or understand that ranchers lack any property interest in the federal lands. "Low visibility" on such matters is bound to make it easier for regulators and congressional representatives to ignore or gloss over the consequences of maintaining the status quo.

Third, ranchers also enjoy substantial support from public officials (who are themselves important figures).<sup>188</sup> They have long had powerful supporters in Congress, especially in the Senate and on the relevant committees,<sup>189</sup> as well as in western governors' mansions and state legislatures. For years, permittees essentially dictated whether and how they would be regulated by BLM and its predecessor, the Grazing Service. While national forest grazing was regulated at an earlier date, in general graziers on both sets of lands have been and continue to be subject to lax regulation, at least until the managing agency is sued to enforce its rules or the mandates of other environmental legislation. But public-land ranchers' influence is enhanced, and uniquely so, by "substantial support from other groups."<sup>190</sup> The Sagebrush Rebellion, wise-use, and county movements represent coordinated efforts by commodity interests, including (if not led by) ranching, to oppose perceived overregulation by federal management agencies and the ascendancy of environmental interests.<sup>191</sup> There is ample

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Professors Farber and Frickey's factors fit public-land ranching.

<sup>186</sup> See Spence & Cross, *supra* note 160, at 122. Of course, in the years leading up to passage of the Taylor Act, some livestock interests (primarily the livestock associations and large cattle producers) did "rush to Congress," repeatedly. The regulation they sought was protection of their "rights" and the exclusion of others.

<sup>187</sup> See *supra* text accompanying note 183.

<sup>188</sup> See *supra* text accompanying note 183. (referring to group influence on legislation in general).

<sup>189</sup> One of the most telling examples I have encountered is described in my book. See DONAHUE, *supra* note 4, at 69 (describing a May 11, 1945, hearing on grazing fees, chaired by one of ranching's staunchest supporters, Nevada Senator McCarran, the record of which does not mention that the date was V-E Day (citing WILLIAM VOIGT, JR., PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT 286-87 (1976))).

<sup>190</sup> See *supra* text accompanying note 183.

<sup>191</sup> See Charles Davis, *Politics and Public Rangeland Policy*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 74, 85 (Charles Davis ed., 1997). See also *infra* note 268 and accompanying text (noting Culhane's observation regarding the livestock industry's new role in "important alliances" of public-lands "consumptive users"); *infra* note 387 (noting BLM director's allusion to laying to rest the "Bureau of Landscapes and Monuments" and restoring

reason to believe that commodity interests, such as the minerals industries, try to associate their aims with the historically favored livestock industry, whose icons are the cowboy and the family rancher.<sup>192</sup> Still more recently, public-land ranchers have “captured” the hearts and minds—and thus garnered the political support—of The Nature Conservancy and various local conservation groups. Specifically, these groups have bought into ranchers’ culture and open-space arguments,<sup>193</sup> which has resulted in collaborative ranching efforts, a burgeoning literature, and increased support for ranchers at the federal, state, and county levels.

The foregoing application of Professors Farber and Frickey’s first three factors largely explains why ranchers also demonstrate the fourth, the ability “to move [their] issue in a favorable forum such as a sympathetic congressional committee.”<sup>194</sup> Due to the industry’s hefty, if variable, influence, ranchers have been able to advance their agenda, or resist environmentalists’ reform efforts, through:

- congressional committees, as when livestock interests convince appropriations committees to attach riders exempting grazing permit re-issuance from environmental assessment requirements;
- land management agencies, e.g., through both general rulemaking and monitoring and enforcement activities in particular field offices; and
- some lower federal courts, for instance, when efforts to resist unwanted rulemaking fail.

Paul Culhane conducted empirical research in the 1970s on the BLM and Forest Service and their constituencies—including grazing interests—and essentially rejected the theory’s applicability to these agencies. After defining “capture” as meaning that “an agency faced by a hostile and homogeneous constituency has come to identify with its captors and abandoned the pursuit of its proper mission,” Culhane concluded that the “behavior of neither the Forest Service nor the BLM fits that description.”<sup>195</sup> Somewhat inconsistently, however, he conceded that his study results “confirm that a large local livestock constituency (or one with very well developed access or very strong views) can stave off reductions in range use down to carrying capacity.”<sup>196</sup> Culhane got it right, however, when he

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the “Bureau of Livestock and Mining”).

<sup>192</sup> My conviction as to this point comes from 35 years of living and working in the West, in particular, in Nevada and Wyoming. These states, which are heavily dependent on their mineral and tourism industries, more often tout their cowboy heritage, and mineral interests often rely on support from agriculture to pass favorable state legislation. *See also infra* notes 268, 483 and accompanying text.

<sup>193</sup> *See infra* note 485 and accompanying text.

<sup>194</sup> *See supra* text accompanying note 183.

<sup>195</sup> *See* CULHANE, *supra* note 165, at 336; *see also id.* at xiv (asserting that his findings offered “a powerful caveat to this theory of agency capture”).

<sup>196</sup> *Id.* at 333. His study showed that grazing leases averaged 112% of carrying capacity. *Id.* at 339. *Cf.* Blumm, *supra* note 86, at 421 (accepting that “Culhane’s claim that land managers are not inevitably captured may be right,” but observing that “generally land managers produce

concluded that the “simplest version of the capture thesis, as applied to public land management, is plainly wrong.”<sup>197</sup> A more complex and realistic version of the capture thesis, applicable to public-land ranching, emerges from the preceding brief consideration of interest group influence factors.<sup>198</sup> The rest of this part details how public-land grazing conforms to this version of capture theory, and expands the analysis to encompass the still-broader implications of the metaphor propounded in this article.

### *1. Capture of the Grazing Service and BLM in the Taylor Act Era*

Clawson’s insights again provide a useful starting point. Although he observed that ranchers’ political influence “differs in no essential respect” from that of other economic groups, he did note that their influence is “more powerful, in relation to the number of people involved,” and he suggested a unique, social origin for that influence:

Many of the oldest and best known families . . . are and always have been identified with range livestock production. The early pioneers were frequently ranchers. . . . Some of the families established then have remained active in the range industry, or sympathetic with it if engaged in other business. . . . These old and prominent families give the limited population engaged in the range industry more leadership, more prestige, and more political influence. . . .<sup>199</sup>

This influence was “powerful,” even “decisive at times, over government within [the stockmen’s] states and over their Congressional delegations.”<sup>200</sup> It is significant for our purposes that ranchers retained this stature and the accompanying influence, even as newcomers to the West and those with no ties to original settlers acquired ranches and federal grazing permits.<sup>201</sup> As two agricultural economists put it in 1972, ranch buyers hope to “capture” the social benefits of ranch ownership.<sup>202</sup> To this day ranches are acquired or retained in part for the prestige that accrues to the owners.<sup>203</sup>

The Taylor Grazing Act (TGA)<sup>204</sup> institutionalized the industry’s social status and political power. Considered the first regulation of grazing on the

more commodities under the rubric of multiple use than can be economically or environmentally justified”).

<sup>197</sup> CULHANE, *supra* note 165, at 333–34 (noting “[t]hat version is predicated on the assumption[s] that, since rangers and area managers work in rural communities whose economies are dominated by the livestock and forest products industries, land managers’ local constituencies consist solely of consumptive users,” and that “a decision maker’s policies are primarily determined by his constituency”). Indeed, public-lands politics itself is far from simple. On the other hand, it is fair to say that widely held views of public-lands ranching are *simplicistic* and that they skew public-land decisionmaking when livestock interests are involved.

<sup>198</sup> To remind readers, these factors were outlined by Professors Frickey and Farber, summarizing work by Schlozman and Tierney. See *supra* note 183 and accompanying text.

<sup>199</sup> DONAHUE, *supra* note 4, at 73 (citing and quoting CLAWSON, *supra* note 184, at 12–13).

<sup>200</sup> See *id.* at 67 (quoting CLAWSON, *supra* note 184, at 11).

<sup>201</sup> See *id.* at 73 (citing Smith & Martin, *supra* note 41, at 219).

<sup>202</sup> See *id.* at 73–74 (citing Smith & Martin, *supra* note 41, at 219).

<sup>203</sup> See CALEF, *supra* note 149, at 130.

<sup>204</sup> 48 Stat. 1269–75, 43 U.S.C. §§ 315–315r (2000).



public domain, the TGA was largely ineffective—its impotence due primarily to the inordinate influence of those it aimed to regulate. Phillip Foss was a prominent critic of the early BLM, and his study of the agency and its “capture” by the livestock industry is a classic.<sup>205</sup> He described the stockmen’s political power as a “monopolitical” system,<sup>206</sup> and grazing decisionmakers (advisory boards and permittees, agency managers, and western legislators) as “a special private government,” which in many ways “functions as a private, commercial organization.”<sup>207</sup> “There are few groups of comparable size, if any,” Foss asserted, “which are as politically powerful as are the western stockmen.”<sup>208</sup>

Many other scholars and commentators have described the capture of the BLM by those it regulates (and, not incidentally, the capture by those regulated of rights in the land). Even capture theory critic Paul Culhane wrote: “For many years Grazing Service, and later BLM, field managers stood in [a] vassal relationship to the district advisory boards . . . .”<sup>209</sup> Grant McConnell described the TGA system as a “capture of formal power for the benefit of established stockmen.”<sup>210</sup> It was “the best of two worlds for established stockmen: it secured the benefits of the public lands as though they were privately owned, but largely avoided the costs of private ownership.”<sup>211</sup> Moreover, fees were “largely spent for improvements on the land for the users’ benefit.”<sup>212</sup> Christopher McGrory Klyza said bluntly that the TGA was “designed to give ranchers control of grazing policy.”<sup>213</sup> He explained: “passage of the Taylor Grazing Act resulted in policies that were controlled by the regulated interest group and the local elites that comprised the livestock industry, establishing a captured policy regime justified by the privileged idea of interest-group liberalism.”<sup>214</sup> In other words, “the grazing lands were managed *as if they were private property*.”<sup>215</sup> Similarly, Wesley Calef concluded from his studies of grazing in the Middle Rocky Mountain basins that “permittees with individual allotments use them almost exactly as if they were private property; that is, they turn out as many stock as they wish at any time.”<sup>216</sup> Calef reinforced Klyza’s point about “local elites” with the observation that many of the larger ranchers elected to advisory boards “were urban dwellers—bankers, real estate dealers, lawyers, lumbermen, or

<sup>205</sup> See FOSS, *supra* note 103. Note that the BLM was created in 1946 by consolidating the Grazing Service and the General Land Office. Foss’s criticisms relate to both the BLM and to its predecessor, the Grazing Service.

<sup>206</sup> FOSS, *supra* note 103, at 137.

<sup>207</sup> *Id.* at 201. This can be seen as the “form of covert delegation [that] results when a legislature essentially cedes its authority to private interests.” See FARBER & FRICKEY, *supra* note 163, at 136 (discussing ways that Congress gives power to interest groups).

<sup>208</sup> FOSS, *supra* note 103, at 198.

<sup>209</sup> CULHANE, *supra* note 165, at 91.

<sup>210</sup> GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 209 (1967).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> KLYZA, *supra* note 32, at 109 (further observing that the TGA “initiated a captured policy pattern”).

<sup>214</sup> *Id.* at 115.

<sup>215</sup> *Id.* at 115–16 (emphasis added).

<sup>216</sup> CALEF, *supra* note 149, at 133.

merchants. They were active in political life and alert to legislative actions affecting their interest.<sup>217</sup> Foss too described stockmen as “rank[ing] high in wealth, prestige, and influence.”<sup>218</sup> That most TGA permittees were the wealthier stockmen was in part a product of the operation of the range-rights version of the rule of capture and in part due to the date of the Act’s passage: smaller, marginal operations had gone out of business during the Great Depression.<sup>219</sup>

It is unnecessary here to describe Taylor Grazing Act provisions in detail or to provide a thorough account of the Act’s implementation.<sup>220</sup> For our purposes, the most significant features of the Act, as implemented, include:

- low grazing fees;<sup>221</sup>
- preference to existing, mostly large operations,<sup>222</sup>
- appointment of district range advisory boards, filled with permittees elected by their peers, which determined who would receive permits and subsequently oversaw administration of grazing.<sup>223</sup>

<sup>217</sup> *Id.* at 63. Calef also reports that the national board was chiefly representative of “the views of the most influential livestock men—the large-scale ranchers.” *Id.* at 77.

<sup>218</sup> FOSS, *supra* note 103, at 198.

<sup>219</sup> See Sally K. Fairfax, *Coming of Age in the Bureau of Land Management: Range Management in Search of a Gospel*, in NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, *DEVELOPING STRATEGIES FOR RANGELAND MANAGEMENT 1715, 1722* (Westview Press 1984) [hereinafter *DEVELOPING STRATEGIES*] (discussing range allocation after passage of the TGA).

<sup>220</sup> Readers seeking such comprehensive accounts are encouraged to consult: FOSS, *supra* note 103, at 57–72; E. LOUISE PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLITICS 1900–1950*, at 214–31 (1951); George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 40–41 (1982).

<sup>221</sup> Fees were set initially at five cents per AUM in 1936 and remained there through 1946. By 1968 the fee had increased to only thirty-three cents. See MUHN & STUART, *supra* note 76, at 81, 136. An AUM is the amount of forage required to feed one horse, a cow-calf pair, or five sheep or goats for a month. *Id.* at 39.

<sup>222</sup> Cf. 43 U.S.C. § 315b (2000) (directing that “[p]reference shall be given in the issuance of grazing permits to those . . . who are landowners engaged in the livestock business . . . or owners of water or water rights”). See also *supra* notes 210–19 and accompanying text (describing the power of stockmen in the BLM).

<sup>223</sup> The 1934 Act required “cooperation with local associations of stockmen.” See 43 U.S.C. § 315h (2000) (directing Secretary of Interior to write cooperation rules). Farrington Carpenter, the first grazing director, relied on this authority to establish local, or district, grazing advisory boards. Congress amended the Act in 1939 to require the Secretary to consult with these bodies. 43 U.S.C. § 315o-1. See DONAHUE, *supra* note 4, at 75 (criticizing role of advisory boards in BLM); see also *infra* note 226 (noting background of range professionals). Boards were established at the state and national levels in 1940; they were endorsed by Congress in a 1949 amendment. See also CALEF, *supra* note 149, at 56; GARY D. LIBECAP, *LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING 54–55* (1981) (discussing the power of advisory boards); Todd M. Olinger, Comment, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 U. COLO. L. REV. 633, 652–55 (1998) (outlining creation and power of early advisory boards). The BLM referred to the district boards

- maintenance of the same stocking levels for decades, while “adjudication” proceeded;<sup>224</sup>
- the lack of adequate resources for agency supervision;<sup>225</sup> and
- the lack of trained range professionals until at least the 1950s.<sup>226</sup>

These features combined to produce “home-rule on the range,” maintain the status quo in terms of users and stocking levels, and entrench the power of range livestock producers.<sup>227</sup> Advisory boards, whose recommendations “were almost always followed,”<sup>228</sup> were particularly instrumental. According to Gary Libecap, advisory board “influence over almost every aspect of range management made them essential institutions for advancing the interests of ranchers and for restricting bureaucratic authority.”<sup>229</sup> Indeed, the boards’ “political power gave stock owners formal,

as “home-rule on the range,” saying it was “successful and ensured the cooperation and help of ranchers in implementing” the TGA. MUHN & STUART, *supra* note 76, at 39. “[P]opular election allayed suspicion and facilitated cooperation by [stockmen] who had never known regulation . . . .” *Id.* at 65 (statement in 1951 of National Advisory Board Council Chair A.D. Brownfield). Brownfield concluded that the “advisory board system has made ‘home rule’ on the range work.” *Id.*

<sup>224</sup> See LIBECAP, *supra* note 223, at 52. Libecap explains that annual, renewable permits were issued until range carrying capacities could be determined—on the basis of which ten-year permits would be issued. Stockmen preferred the annual permits, which were issued at existing stocking levels per advisory board recommendations. As a result of these pressures, the first ten-year permit was not issued until 1940, and “adjudication” was not complete until 1967. *Id.*

<sup>225</sup> The situation was so bad in 1947 that the district grazing boards themselves paid, out of grazing fees intended for range improvement, the salaries of BLM employees. See MUHN & STUART, *supra* note 76, at 57. See also *infra* notes 244–46 and accompanying text (discussing agency budgets and stockmen influence).

<sup>226</sup> See CULHANE, *supra* note 165, at 92; see also KLYZA, *supra* note 32, at 111 (noting that the Society for Range Management formed in 1948). Early Grazing Service employees “tended to be former ranchers or ranchers’ sons.” CULHANE, *supra* note 165, at 104. Calef noted (c. 1960) that “most grazing technicians are westerners and many of them have close ties with the western livestock industry. Some of these men feel that their only important function is to ‘maintain order on the range’ . . . . Some older technicians feel that is all the Bureau should do.” CALEF, *supra* note 149, at 78–79.

<sup>227</sup> KLYZA, *supra* note 32, at 113. Klyza credits Colorado Representative Taylor, sponsor of the legislation, with coining the term “home rule on the range.” *Id.* Even the BLM used “home-rule on the range” to refer to the boards, saying they “ensured the cooperation and help of ranchers in implementing” the TGA. MUHN & STUART, *supra* note 76, at 39.

<sup>228</sup> LIBECAP, *supra* note 223, at 49. The first director of the Division of Grazing (later, the Grazing Service, which was combined with the General Land Office in 1946 to form the BLM), Farrington Carpenter, was a Colorado rancher. It was his decision to let the stockmen decide how the range should be parceled out and to establish district advisory boards to oversee the Act’s administration. According to Carpenter “in practice, [the district boards’] advice was followed in 98.3 percent of the cases.” KLYZA, *supra* note 32, at 114 (citing Carpenter). The power of these boards was of concern to the Interior Department as early as 1935. Concurrently, Western legislatures, in which stockmen also served or were otherwise well represented, “attempted to expand the boards’ power by giving them authority over the expenditure of [the states’ share of] funds received from grazing fees.” LIBECAP, *supra* note 223, at 53–54.

<sup>229</sup> LIBECAP, *supra* note 223, at 53.

near proprietary rights to federal lands for nearly thirty years” after the enactment of the TGA.<sup>230</sup>

Even though the TGA limited the number of operators using public domain ranges, it “institutionalized [the pre-existing] high level of use for many years.”<sup>231</sup> The Interior Secretary never made the “chiefly valuable” determinations envisaged by the Act,<sup>232</sup> and grazing continued in essentially all areas where it had been conducted prior to 1934, despite erosion and resource degradation. The range science profession began to develop in the 1950s, and by 1960 most BLM technicians were required to have a degree in range management.<sup>233</sup> Nevertheless, range decisions continued to be dictated by the permittees themselves, via advisory board “recommendations,”<sup>234</sup> or imposed from without, usually via pressure from congressional offices. Professor Charles Davis cited one-sided “congressional hearings on proposed grazing fee hikes in 1963” to demonstrate that the ranchers’ “subgovernment was clearly in control of the [range] policy agenda.”<sup>235</sup>

The TGA authorized the reduction of livestock numbers or the termination of grazing,<sup>236</sup> but that authority was “used with the utmost circumspection.”<sup>237</sup> Cuts in numbers were “rarely made unless there [was] almost universal approbation from the permittees concerned.”<sup>238</sup> Even permittees who seldom used their full AUM authorization vehemently resisted any cuts, as AUM numbers were capitalized into the value of the permit and would enhance the price that could be received for the ranch if it were sold.<sup>239</sup> Any reduction in grazing levels proposed by the BLM was automatically opposed. Permittees sometimes attempted to avoid cuts by arranging for an independent survey of range conditions to counter the results of a government study,<sup>240</sup> but their usual strategy was political. When permittees “directly and through their state and national livestock associations [brought] sufficient pressure to bear on their U.S. senators,” the

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<sup>230</sup> *Id.* at 46.

<sup>231</sup> CULHANE, *supra* note 165, at 89.

<sup>232</sup> See 43 U.S.C. § 315 (2000) (authorizing establishment of grazing districts on public lands, “which in [the Secretary’s] opinion are chiefly valuable for grazing and raising forage crops”).

<sup>233</sup> See CALEF, *supra* note 149, at 261–62. *But cf.* CULHANE, *supra* note 165, at 104–105 (suggesting that not until the 1970s were significant numbers of BLM employees and perhaps all managers college trained).

<sup>234</sup> See *supra* notes 223–25 and accompanying text (discussing the relationship between the stockmen, the boards, and the BLM).

<sup>235</sup> Davis, *supra* note 191, at 76 (reporting that “a sizeable number of ranchers (over 100), western legislators, and governors testif[ie]d about the deleterious economic effects that a fee hike would wreak on western communities. A single state wildlife organization offered token support for the notion that the existing fee structure was an unjustifiable subsidy . . .”). Similar hearings were held, and testimony received, in 1969. *Id.* at 80.

<sup>236</sup> See generally 43 U.S.C. §§ 315, 315a, 315b (giving the Secretary of the Interior authority to protect, administer, regulate, and improve grazing districts).

<sup>237</sup> CALEF, *supra* note 149, at 135.

<sup>238</sup> *Id.* at 135, 259–60 (discussing the success of the livestock industry in garnering political support in disagreements with the BLM).

<sup>239</sup> See *id.* at 136, 240 (discussing the capitalized value of grazing permits).

<sup>240</sup> See *id.* at 140 (claiming independent surveys were more likely to yield results satisfactory to the ranchers).

reductions would not be made.<sup>241</sup> Calef offered Wyoming's senators as an example: "[They] are completely responsive to and sympathetic with the objectives and interests of the livestock growers in Wyoming."<sup>242</sup> Indeed, both the BLM and Interior were "thoroughly aware of the possible effects of senatorial hostility. In short, only under the most extreme circumstances would the [BLM] oppose its views to those of the [livestock] association."<sup>243</sup>

Neither the Grazing Service nor the BLM was ever well staffed, and limited resources have constrained the agency's ability to manage.<sup>244</sup> Stockmen were influential here too, because they wielded tremendous influence over the agency's budget through their connections with congressional committees.<sup>245</sup> Klyza claimed that low budgets and inadequate personnel forced BLM to rely on ranchers "because their cooperation is required to implement" grazing programs.<sup>246</sup> Such reliance indirectly, of course, enhanced the political power of grazing permittees. Scarce resources and stockmen's political clout resulted in lax enforcement. Livestock trespass was "difficult to detect, hard to prove, and difficult to punish."<sup>247</sup> Managers shied away from taking action against trespass, knowing that any such efforts would be resisted by stockgrowers and denounced by their powerful advocates.<sup>248</sup> Thus, few trespass actions were brought; punishment when it occurred was mild and scarcely served to deter such conduct.<sup>249</sup> Noting that "permits are rarely revoked even under the most extreme provocation," Calef concluded: "The impotency of BLM officials to enforce legally the range rules . . . is disgraceful."<sup>250</sup>

Another product of stockmen's political influence was continued low grazing permit fees.<sup>251</sup> Calef concluded that "government forage was being

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 212.

<sup>243</sup> *Id.*

<sup>244</sup> See MUHN & STUART, *supra* note 76, at 81, 136.

<sup>245</sup> See generally DONAHUE, *supra* note 4, at 68-69 (arguing that ranchers' influence in Congress resulted in their inflated impact on national politics). See also *supra* notes 169-72 and accompanying text (regarding the potential connection between agency self-interest and the capture theory).

<sup>246</sup> KLYZA, *supra* note 32, at 125. Klyza illustrates the BLM's disproportionately low resources by comparing its and the U.S. Forest Service's budgets, employee numbers, and acres managed in 1978, 1983, and 1988. *Id.*

<sup>247</sup> CALEF, *supra* note 149, at 141.

<sup>248</sup> See generally DONAHUE, *supra* note 4, at 68-69. After publication of my book, *The Western Range Revisited*, I was contacted by a retired BLM range conservationist. He related how his attempts to police BLM grazing permittees in the Rawlins, Wyoming, area had met with resistance from his superiors, and how he ultimately was pressured to resign or accept an unwanted transfer. See also *infra* notes 401-403 and accompanying text (describing current examples of this kind of retaliation).

<sup>249</sup> CALEF, *supra* note 149, at 142-43. Calef concluded: "Probably trespass charges have almost no impact on trespass activity." *Id.* at 142.

<sup>250</sup> *Id.* at 143. Calef illustrates his point with the story of one recalcitrant permittee, summarizing: "After several years of constant trespass and difficulty, with several unsettled trespass counts standing against him, and with an assault [against a BLM employee] action pending against him, [the permittee] retained precisely the same range permit that he had held for more than a decade." *Id.* at 144. Cf. *infra* notes 392-400 and accompanying text (chronicling the modern tale of rancher Frank Robbins).

<sup>251</sup> See *supra* note 32. For a history of grazing fees, see generally MUHN & STUART, *supra* note

leased for only a third or a fourth of its minimum value,” and the revenues produced fell far short of covering administration costs.<sup>252</sup> Overgrazing also continued in many areas—a result of a lack of range inventory data, inadequate agency resources and personnel, and permittee noncompliance.<sup>253</sup> Concerning Wyoming’s Bighorn Basin, where “heavy grazing pressure ha[d] resulted in widespread induced erosion” and halogeton invasion, Calef wrote, “[t]o the observer, it appears that the ranchers administer the range about to suit themselves, at least so far as stocking rates are concerned. It is also my distinct impression that the district technicians think the range not just overgrazed, but so seriously overgrazed that . . . the situation is practically hopeless.”<sup>254</sup>

Calef provides a thoughtful and realistic explanation as to how and why early “relationships between the BLM and western ranchers [were] . . . biased in a way favorable to the ranchers.”<sup>255</sup> Among other factors,

nearly all [BLM] technicians are hired from agricultural colleges of the western states. Some BLM staff members are former ranchers, while others are ranchers’ sons. Nearly all are westerners. Consequently there is among most BLM personnel a strong feeling of identification and solidarity with the ranching interest, and a latent feeling of being westerners as opposed to easterners. So basic and pervasive is this identification with the range livestock industry that many members of the bureau in all probability are wholly unaware of it most of the time. Since much of their time is spent in “negotiating” with ranchers about one problem or another, they probably feel consciously antagonistic toward the latter more often than otherwise; but such differences are analogous to quarrels within a family. *Fundamentally the point of view of both parties is the same.*<sup>256</sup>

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76; Nelson, *supra* note 32, at 337–39; GAO, SLOW, COSTLY PROCESS, *supra* note 20, at 33–34, 60.

<sup>252</sup> CALEF, *supra* note 149, at 176–77. As we will see, all experts and studies of the situation have since agreed with Calef’s general assessment.

<sup>253</sup> Recall Garrett Hardin’s observation in 1968 that “cattlemen leasing national land on the western ranges . . . constantly pressur[e] federal authorities to increase the head count to the point where over-grazing produces erosion and weed-dominance.” Hardin, *supra* note 72, at 1245; see *supra* text at note 77.

<sup>254</sup> CALEF, *supra* note 149, at 245–46. Halogeton is an exotic weed, poisonous to livestock, which invades areas where the soil and vegetation have been significantly disturbed, as by grazing. Apparently, about 22 million acres of the West had been invaded or were threatened by halogeton by 1951. See MUHN & STUART, *supra* note 76, at 64. In 1952 Congress passed the Halogeton Control Act, which “provided BLM with badly needed range restoration funds.” Marion Clawson, BLM’s director in 1952, wrote about the issue, apparently oblivious of the irony in his words: “The spread of . . . halogeton into various western grazing areas enabled us . . . to obtain a supplemental appropriation to reseed depleted ranges—which was desirable irrespective of the halogeton [sic].” *Id.* at 61 (emphasis added). Halogeton is today an increasing problem in the BLM Rawlins field office, where proliferating roads servicing oil and gas activities are contributing to the spread of the weed nearly everywhere. Personal communication from Andy Warren, Supervisory Range Conservationist, Bureau of Land Mgmt., Oct. 1, 2004 (during a field tour of the district).

<sup>255</sup> See CALEF, *supra* note 149, at 261–62. Calef’s investigations were reported in 1960.

<sup>256</sup> *Id.* at 261–62 (emphasis added). Calef commented that “a district manager who strongly antagonizes the local livestock interest will soon find himself and his family largely isolated from the social life of the community.” *Id.* at 262. But, of course, managers “rarely antagonize[d]

Calef's studies led him to conclude that the BLM "did not exert sufficient control over range grazing use" to ensure conservation of federal resources in the Middle Rocky Mountain basins and, further, that this lack of control resulted chiefly from BLM's "political weakness."<sup>257</sup> He also sounded another warning: "Western range livestock ranchers are slowly building *proprietary rights* to the Taylor lands through use, and the assignment of individual allotments will accelerate the trend."<sup>258</sup> Developments over the ensuing forty-five years seemed to validate Calef's prediction.<sup>259</sup>

This early period of range regulation reveals a striking convergence between the process and consequences of 1) capturing range rights, and 2) capturing the agency charged with administering the range. Both phenomena involve graziers making use of the political system while operating outside or at the edges of the law; both favor the strong (economically and/or politically) over the weak. Each resulted in wreaking havoc on the land. By neither means did graziers secure a *legal* property interest in public lands, but each contributed to the appearance of such an interest and to ranchers' conviction in the justness of their claims. In other words, with respect to the range resource, operation of the property rule of capture and the agency capture thesis differ more in their labels than in their function or effect.<sup>260</sup>

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the ranching community." *Id.* Calef believed that the "selective character of [its] personnel recruitment program" was a major factor in BLM's inability to exert sufficient control over public land grazing. *Id.* at 250, 261-62.

<sup>257</sup> *Id.* at 250.

<sup>258</sup> *Id.* (emphasis added); see also *id.* at 262 (opining that the creation of proprietary rights in federal lands as a result of administrative action was a "highly unfavorable development"). Klyza later asserted that "[i]mplied property rights for ranchers were further strengthened [by FLPMA]," and that "the captured policy pattern remained." KLYZA, *supra* note 32, at 126.

<sup>259</sup> For example: In 1997, Klyza wrote: "To many ranchers, the grazing permits (and the low fees attached to them) were a property right." KLYZA, *supra* note 32, at 130. A 1991 *Washington Post* article reported, *inter alia*, that many ranchers "long have treated [public lands] essentially as their own" and "contend that grazing permits are akin to property rights." See BLM REAUTHORIZATION AND GRAZING FEES, HEARING BEFORE THE HOUSE SUBCOMM. ON NATIONAL PARKS & PUBLIC LANDS, COMM. ON INTERIOR & INSULAR AFFAIRS, Ser. No. 102-2, at 44, 46 (Mar. 12, 1991) [hereinafter GRAZING FEES HEARING] (reproducing John Lancaster, *Public Land, Private Profit*, WASH. POST, Feb. 17, 1991, at A1). The article was the subject of a point-by-point analysis, supporting the ranching industry, prepared by a New Mexico congressman's staff. See *id.* at 48-52 (reacting to Lancaster, *supra*). In 1993 two public-lands lawyers and ranching advocates argued that, "while a grazing permit is not property although, [sic] it is based on an adjudicated prior right, a preference, which is a property right." Falen & Budd-Falen, *supra* note 75, at 524. See also *Public Lands Council v. U.S. Dep't of Interior Sec'y*, 929 F. Supp. 1436, 1441 (D. Wyo. 1996) (repeatedly referring to ranchers' "rights" in opinion striking down several challenged provisions of the 1995 Clinton-Babbitt grazing regulations), *rev'd in part & aff'd in part*, 154 F.3d 1160 (10th Cir. 1998); *amended on reh'g*, 167 F.3d 1287 (1999), *aff'd*, 529 U.S. 728 (2000). See generally Davis, *supra* note 191 (discussing the management of western public rangelands).

<sup>260</sup> GATES, *supra* note 131, at 628 (citing and paraphrasing Bernard de Voto, *The West Agained Itself*, HARPER'S MAGAZINE, Jan. 1947, at 194). In this vein, note the overtones of both the rule of capture and the capture thesis in the following excerpt:

[Stockmen] kept out the homesteader by terror or bankrupted him if he could not be otherwise eliminated, squeezed out the small stockman by grabbing the water rights and even resorting to murder. Though they owned but a minute fraction of the range they convinced themselves that [all of] it was theirs and tried to gain title through the final

## 2. Capture in the Modern Era: FLPMA and PRIA

“Political pressure from the livestock industry from 1934 to 1976 effectively hamstrung implementation of the [Taylor Grazing Act].”<sup>261</sup> Negative reactions to this overt political influence and to continued overgrazing, along with increasing interest in other public land resources, led politicians and other public land users and interest groups to call for reforms. Between 1964 and 1980—the heyday of the environmental movement<sup>262</sup>—Congress enacted several pieces of relevant legislation.<sup>263</sup> While all of these acts affect livestock interests directly or (more often) indirectly, most significant for our purposes are the National Environmental Policy Act (NEPA) and BLM’s organic act, FLPMA. This section considers whether these “environmental” laws and other events of this period enhanced or undermined either the degree to which the BLM remained captured by public land ranchers or the legitimacy of ranchers’ claims to public rangelands. It demonstrates that the range livestock industry’s political clout—and the agencies’ concomitant subservience—have persisted both because and in spite of FLPMA.<sup>264</sup>

One might have expected that growing environmental awareness, greater experience and better scientific education of agency officials, and increasing recreational use of public lands would have led to a decline in the ranching industry’s influence.<sup>265</sup> Paul Culhane’s research in the late 1970s

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liquidation of the public domain. They paid in fees only a small part of the value of the forage; in effect, they received a subsidy from the Federal Treasury. Worst of all, they plundered the public lands by overgrazing, destroying the natural forage and leaving only desert areas covered with weeds unfit for forage.

*Id.*

<sup>261</sup> SHERIDAN, *supra* note 13, at 23. The pressure did not end in 1976, but Congress did pass further legislation, designed in part to improve range conditions and to strengthen agency management generally. See Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784 (2000).

<sup>262</sup> Public land laws in the 1970s comprised the “greatest outpouring of legislative activity in any single decade in the history of the public lands.” Nelson, *supra* note 32, at 336.

<sup>263</sup> *E.g.*, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4370e (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1784 (2000); Federal Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251–1387 (2000); Wilderness Act, 16 U.S.C. §§ 1131–1136 (2000); Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§ 1901–1908 (2000); Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1543 (2000).

<sup>264</sup> Additional factors behind the industry’s influence with the BLM, which are not described elsewhere, include the congressional committee system and the organization of the BLM bureaucracy by states. State BLM offices enable more direct access to (and thus pressure on) BLM officials by state congressional delegations—and by permittees who have the ear of their congressional representatives. See *generally* DONAHUE *supra* note 4, at 68–72, 77–80; COGGINS, WILKINSON & LESHY, *supra* note 6, at 143.

<sup>265</sup> In 1985, then-Assistant Professor Eric Freyfogle wrote: “Although politically limited in their ability to make massive reductions in grazing permits, the BLM and Forest Service nonetheless possess clear legal authority to halt grazing on particular land parcels. . . . [G]razing activities are governed by recent legislation that restrains agency discretion by mandating greater concern for land conservation and for the maintenance of long-term land productivity.” Freyfogle, *supra* note 39, at 673 (citing Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1712(c)(3), 1732(b)).



compiled some evidence in support of this conclusion. Notably, he reported that the power of the district advisory boards had been "undermined," apparently as a result of the BLM finally making headway in the 1960s on stocking reductions—the boards' "primary issue"—and because of the agency's broadened constituencies.<sup>266</sup> But livestock interests retained the influence they had long held in many other respects:

Many local government officials . . . , including a number of town mayors and most county commissioners, were stockmen; almost all the irrigation groups, and many of the conservation . . . districts were led by or primarily served stockmen. Finally, stockmen were a primary constituency or customer group for all the local government officials, local businessmen, and realtors in the sample, irrespective of formal affiliations with the livestock industry.<sup>267</sup>

Moreover, Culhane reported, the livestock industry had a new role and a new source of influence: it was "usually at the center" of "important alliances" of public lands "consumptive users, including loggers and miners."<sup>268</sup> Culhane believed that the U.S. Forest Service and BLM were using the environmental movement as a "tool" to "reinforce the resource-protection half of the multiple-use policy."<sup>269</sup> But he also asserted: "Forest Service and BLM officials had a real commitment to accommodating economic uses of the public lands or 'economic demands' or the 'needs of the people.' They were not committed to recreation or Wilderness as primary uses of the public lands."<sup>270</sup> Culhane concluded that the two agencies were "variably captured" by their interest groups, and that the livestock industry's "influence was on the wane."<sup>271</sup>

The push-pull between environmental and commodity interests, which Culhane observed, was a sign of the times. Shortly after passage of NEPA in 1969, the Public Land Law Review Commission (PLLRC) released its monumental report, *One Third of the Nation's Lands*.<sup>272</sup> Congress created the Commission to review all federal land management laws and make recommendations,<sup>273</sup> but the Commission's report had special significance for the BLM.<sup>274</sup> The PLLRC recommended, *inter alia*, that Congress give the

<sup>266</sup> CULHANE, *supra* note 165, at 247-48.

<sup>267</sup> *Id.* at 180.

<sup>268</sup> *Id. Cf. supra* text at notes 191-92 (noting ranchers' role in Sagebrush Rebellion and Wise Use and county movements and the association of ranching and the minerals industries).

<sup>269</sup> CULHANE, *supra* note 165, at 228.

<sup>270</sup> *Id.* at 229.

<sup>271</sup> *Id.* at 334.

<sup>272</sup> PLLRC, ONE THIRD OF THE NATION'S LANDS (1970) [hereinafter PLLRC REPORT]. See generally DONAHUE, *supra* note 4, at 239-45 (discussing some of the Report's grazing-related findings and recommendations).

<sup>273</sup> See Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (establishing the Public Land Law Review Commission to study the administration of the public lands of the United States).

<sup>274</sup> At the same time it created the PLLRC, Congress enacted the Classification and Multiple Use Act (CAMUA), conferring on BLM temporary land use management and classification authority. Act of Sept. 19, 1964, Pub. L. No. 88-607, 78 Stat. 986. The CAMUA expired in 1970 by its own terms, after the PLLRC's report was issued. Pub. L. No. 88-607, 78 Stat. 986, 986-88 (previously codified at 43 U.S.C. §§ 1411-1418 (2000)) (enacted 1964, expired 1970). The CAMUA stated that it was "consistent and supplemental to the Taylor Grazing Act." *Id.* The

BLM a multiple-use mandate, like that possessed by the Forest Service. It advised that lands "chiefly valuable for specified purposes," including grazing, "be made available for disposition on certain conditions and to a limited extent."<sup>275</sup> But it urged that retained federal lands should be managed for the "broadest range of values they can produce," "to encourage the highest and best use," and to obtain fair market value for resources, including forage.<sup>276</sup> The Commission further advised that "frail and deteriorated lands," including overgrazed lands with steep slopes and those "in delicate ecological balance," be "classified not suitable for grazing."<sup>277</sup>

The PLLRC report led to passage of FLPMA in 1976, although few of the Commission's grazing-related recommendations were enacted in the legislation.<sup>278</sup> On the other hand, the Commission's pointed criticism of district grazing boards<sup>279</sup> helped prompt passage of the Federal Advisory Committee Act (FACA) in 1972,<sup>280</sup> which in turn led to significant changes in the BLM advisory board system.<sup>281</sup> District grazing boards were terminated at the end of 1974, and new multiple-use advisory boards were set up administratively.<sup>282</sup> Livestock interests unsuccessfully challenged these changes in court.<sup>283</sup> In 1976 Congress authorized multiple use "advisory councils" in FLPMA,<sup>284</sup> two years later it made consultation with the councils mandatory in the Public Rangelands Improvement Act of 1978 (PRIA).<sup>285</sup> FLPMA also reauthorized district grazing boards (renamed district advisory

Taylor Grazing Act remained in effect, but the BLM had no general statutory authority to manage public lands for other uses until passage of FLPMA.

<sup>275</sup> See DONAHUE, *supra* note 4, at 240 (citing PLLRC REPORT, *supra* note 272, at 48, 115-16).

<sup>276</sup> *Id.* at 240-41.

<sup>277</sup> See *id.* (citing PLLRC REPORT, *supra* note 272, at 38, 42, 45-56).

<sup>278</sup> As enacted FLPMA does express a general policy that the "United States receive fair market value" for public-land resources, 43 U.S.C. § 1701(a)(9), but the policy is subject to statutory exceptions. See FLPMA, 43 U.S.C. § 1701(a)(9) (declaring United States policy to "receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute"). Grazing fees enjoy such an exception. See 43 U.S.C. § 1905 and Executive Order No. 12548 (Feb. 14, 1986) (extending indefinitely the Public Rangelands Improvement Act of 1978 (PRIA) grazing fee formula, which was designed to keep fees artificially low).

<sup>279</sup> See PLLRC REPORT, *supra* note 272, at 289 (discussing criticism of district grazing boards).

<sup>280</sup> Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. §§ 1-15 (2000).

<sup>281</sup> See, e.g., CULHANE, *supra* note 165, at 256-57 (describing changes to the advisory board system resulting from the passage of FACA); W. Herbert McHarg, *The Federal Advisory Committee Act: Keeping Interjurisdictional Ecosystem Management Groups Open and Legal*, 15 J. ENERGY, NAT. RESOURCES. & ENVTL. L. 437, 447 nn. 75-81 (1995) (describing the abolition of advisory boards). FACA essentially required abolition of advisory groups like the district grazing boards. See 5 U.S.C. App. § 14 (directing termination of advisory committees, with exceptions).

<sup>282</sup> See CULHANE, *supra* note 165, at 257 (referring to FLPMA requirement establishing grazing boards).

<sup>283</sup> See *id.* at 257 (citing *Carpenter v. Morton*, 424 F. Supp. 603 (D. Nev. 1976)).

<sup>284</sup> 43 U.S.C. § 1739; CULHANE, *supra* note 165, at 257.

<sup>285</sup> See 43 U.S.C. § 1904(c) (directing the distribution of funds after careful and considered consultation with advisory councils, district grazing advisory boards, and other interested parties); CULHANE, *supra* note 165, at 257.

councils), but their role was watered down—confined to advising on allotment management plans (AMPs) and use of range-betterment funds—and temporary.<sup>286</sup>

Passage of general management authority for BLM was nearly thwarted by one narrow interest group—the range livestock industry. Klyza explained that the House Public Lands Subcommittee was dominated by westerners in the mid-1970s (as it had been for many years), and that this subcommittee disproportionately influenced the character of the bill that became FLPMA.<sup>287</sup> Livestock interests opposed three provisions in the House FLPMA bill: a fee formula tied to private forage costs, a \$2.00 per AUM grazing fee “floor,” and a provision for AMPs.<sup>288</sup> The grazing fee formula proved the final sticking point. The issue was resolved in conference largely in the industry’s favor, but still there were “rumors that disgruntled grazing interests would attempt to have the bill killed on the floor of the House.”<sup>289</sup> Even after Interior Department support for the compromise secured its passage in Congress, die-hard grazing interests tried, but failed, to convince President Ford to pocket veto the bill.<sup>290</sup>

FLPMA, which passed in October 1976, seemed to bear out Clawson’s explanation of ranchers’ political influence as “greatest . . . in [the] prevention of the measures it opposes.”<sup>291</sup> Referring to the livestock industry, Klyza opined that FLPMA “represented cracks in the privilege of interest-group liberalism. But not severe ones.”<sup>292</sup> The statute neither curtails grazing on any lands nor directs any specific changes in grazing management practices—despite the recommendations of the PLLRC<sup>293</sup> and some environmental groups, and Congress’s express acknowledgement in the Act that “a substantial amount of the Federal range land is deteriorating in quality.”<sup>294</sup> On the other hand, the Act does nothing to change the nature of the interest in a grazing permit; it reiterates the Taylor Act pronouncement that a permit creates no right, title, interest, or estate in or to the lands.<sup>295</sup> In essence, FLPMA’s grazing provisions, which apply to both BLM and the Forest Service, clarify the TGA.<sup>296</sup> FLPMA specifies general permit terms and conditions and provides further that grazing permits may be cancelled,

<sup>286</sup> See 43 U.S.C. § 1753(b) (providing that grazing advisory board authority expired at the end of 1985). FLPMA dictated that operation of these boards and the multiple-use councils would be subject to FACA. See 43 U.S.C. §§ 1739, 1753.

<sup>287</sup> See KLYZA, *supra* note 32, at 126 (noting, specifically, that the measure was more pro-commodity than was Congress as a whole).

<sup>288</sup> *Id.* at 119–20 (noting that ranchers were incensed by AMPs—in which “bureaucrats would be telling ranchers how to ranch”).

<sup>289</sup> *Id.* at 122 (explaining that the grazing fee formula issue was resolved in conference by substituting a one-year freeze on fees and a requirement for a one-year study).

<sup>290</sup> *Id.* at 122–23.

<sup>291</sup> CLAWSON, *supra* note 184, at 381.

<sup>292</sup> KLYZA, *supra* note 32, at 140.

<sup>293</sup> See generally DONAHUE, *supra* note 4, at 246 (describing FLPMA’s incorporation of PLLRC concepts and changes from the Taylor Grazing Act).

<sup>294</sup> Federal Land Policy Management Act of 1976, 43 U.S.C. § 1751(b)(1) (2000).

<sup>295</sup> *Id.* § 1752(h) (referring to 43 U.S.C. § 315(b)).

<sup>296</sup> See *id.* §§ 1751–1753 (describing range management, particularly with respect to use of funds, studies, leases and permits, and grazing advisory boards).

suspended, or modified; that grazing may be discontinued to devote the land to a public purpose; and that a permit holder has first priority for renewal *if* the land remains available for grazing, the permittee accepts the new conditions, *and* the permittee is in compliance with regulations.<sup>297</sup> FLPMA set forth provisions for AMPs, which are discretionary,<sup>298</sup> and maintained grazing fees, pending completion of a comprehensive study of the value of grazing on federal lands.<sup>299</sup>

On the other hand, FLPMA contains numerous prescriptions for public-land management, several of which should have implications for grazing management. Its policy and planning provisions are particularly noteworthy. Lands are to be managed in the national interest, for the sustained yield of multiple resources—including grazing, wildlife and fish, watershed, recreation, and natural scenic and scientific values—without impairing the land's productivity.<sup>300</sup> The Act directs the BLM to weigh long-term benefits to the public (versus short-term private benefits) when it allocates lands for various uses,<sup>301</sup> and to consider the "relative scarcity of values" and the availability of alternate means and sites for realizing those values.<sup>302</sup> The Secretary is authorized to "totally eliminate[ ]" so-called "principal" uses (including grazing) from areas of public lands.<sup>303</sup> FLPMA's "bottom line": in managing the public lands the BLM must "take any action necessary to prevent unnecessary or undue degradation."<sup>304</sup>

As I have argued elsewhere, these and other provisions of FLPMA authorize, if they do not mandate, the cessation of grazing on a sizeable portion of BLM lands.<sup>305</sup> But the statute has not been employed to that end,

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<sup>297</sup> See *id.* § 1752 (regarding grazing leases and permits).

<sup>298</sup> *Id.* § 1752(d).

<sup>299</sup> See *id.* § 1751(a) (requiring the Secretary of Agriculture and the Secretary of the Interior to conduct a study considering the cost of production associated with livestock grazing, differences in forage values, and other factors that relate to the reasonableness of fees).

<sup>300</sup> See *id.* § 1712(c)(1) (directing that, in developing and revising land use plans, the "Secretary shall . . . use and observe the principles of multiple use and sustained yield"). See also *id.* §§ 1702(c) (defining "multiple use"), 1702(h) (defining "sustained yield"), 1701(a)(2) (referring to the national interest), 1701(a)(8) (concerning protection of, *inter alia*, ecological, environmental, historical, and recreational values), 1701(a)(12) (concerning the Nation's need for domestic sources of food and fiber).

<sup>301</sup> *Id.* § 1712(c)(7).

<sup>302</sup> *Id.* § 1712(c)(6).

<sup>303</sup> See *id.* § 1712(e)(2) (directing that management decisions that totally eliminate one or more principal or major uses be reported to Congress); see also *id.* § 1702(l) (defining "principal or major uses").

<sup>304</sup> *Id.* § 1732(b).

<sup>305</sup> See generally DONAHUE, *supra* note 4, at 203–18. The argument (based on the provisions cited in the text) goes something like this: Public-land grazing yields only short-term private benefits, not long-term benefits to the public. There is no scarcity of livestock forage in the nation, and alternate means and sites for realizing public-land forage values are readily available. Public lands produce only about two percent of national forage needs, and private land production could easily be increased by that amount. *Id.* at 253. In fact, worldwide production of livestock is one of "[o]nly four ecosystem services [that] have been enhanced in the last 50 years." *Attention to Ecosystem Services Is Needed to Achieve Global Development Goals, Experts Say*, U.S. WATER NEWS, June 2005, at 10 (reporting release of a four-year international scientific study, the Millennium Ecosystem Assessment Synthesis Report). In contrast, the decline of many ecosystem services, such as freshwater, is undoubtedly due at

nor has the BLM justified livestock grazing using any of these criteria. Indeed, despite the ecological impacts and miniscule economic importance of public-land grazing, the agency and others rationalize its continuance as a means of sustaining small communities, preserving an important western way of life and culture, and maintaining open space.<sup>306</sup> None of these justifications can be found in FLPMA or other authorizing legislation, and (as we will see shortly) none survives critical examination.

Recognizing that “vast segments of the public rangelands [were] producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits,”<sup>307</sup> and perhaps realizing that FLPMA would be ineffectual in reversing these trends Congress took action again just two years later. In PRIA<sup>308</sup> it declared that “*the goal of [public rangeland] management shall be to improve the range conditions so that they become as productive as feasible [for all rangeland values].*”<sup>309</sup> But

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least in part to the negative ecological effects of livestock grazing. See MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: BIODIVERSITY SYNTHESIS 37 (2005) available at <http://www.millenniumassessment.org/en/Products.Synthesis.aspx> (noting that the livestock production ecosystem service has come at high costs to other ecosystems); see also *supra* notes 8–16 and accompanying text (discussing ecological degradation from grazing). Most important, grazing is causing both “unnecessary” and “undue degradation” on large portions of the public lands, especially in riparian areas and in arid and semi-arid uplands. See generally DONAHUE, *supra* note 4; *supra* notes 17–19 and accompanying text. Indeed, in some cases, grazing has caused *irreversible* changes to soil and water conditions and to native biota. See *supra* note 20 and accompanying text.

<sup>306</sup> See, e.g., Press Release, BLM, BLM Publishes Final Environmental Impact Study on Changes to Grazing Regulations, June 16, 2005, at [http://www.blm.gov/nhp/news/releases/pages/2005/pr050616\\_grazing.htm](http://www.blm.gov/nhp/news/releases/pages/2005/pr050616_grazing.htm) (last visited Nov. 20, 2005) (characterizing grazing “as a vital use of public lands in the rural West”); Press Release, BLM, Fact Sheet on the BLM’s New Grazing Regulations (June 16, 2005), [http://www.blm.gov/nhp/news/releases/pages/2005/pr050616\\_grazing\\_factsheet.pdf](http://www.blm.gov/nhp/news/releases/pages/2005/pr050616_grazing_factsheet.pdf) (last visited Nov. 20, 2005) (highlighting key points of the new grazing rule); and Press Release, BLM, Questions & Answers on the BLM’S New Grazing Regulations (June 16, 2005), [http://www.blm.gov/nhp/news/releases/pages/2005/pr050616\\_grazing\\_q&a.pdf](http://www.blm.gov/nhp/news/releases/pages/2005/pr050616_grazing_q&a.pdf) (last visited Nov. 20, 2005) (answering common questions about the new grazing rule); RANGELAND REFORM ‘94, *supra* note 8, at 46; Natural Res. Def. Council, Inc. v. Hodel, 624 F. Supp. 1045 (D. Nev. 1985), *aff’d*, 819 F.2d 927, 1062–63 (9th Cir. 1987) (recognizing BLM’s “ecologically insensitive pattern of management of public land” but declining to overturn BLM decisions). See generally Brian W. Sindelar et al., *Holistic Resource Management: An Approach to Sustainable Agriculture on Montana’s Great Plains*, 50 J. SOIL & WATER CONSERVATION 45 (1995); Thomas M. Quigley & E.T. Bartlett, *Livestock on Public Lands: Yes!, in* CURRENT ISSUES IN RANGELAND RESOURCE ECONOMICS (Frederick W. Obermiller ed., Oregon State University Extension Service Rep. 852 (Feb. 1990)). See also *infra* notes 525–37 and accompanying text.

<sup>307</sup> Public Rangeland Improvement Act (PRIA), 43 U.S.C. § 1901(a)(1).

<sup>308</sup> *Id.* §§ 1901–1908.

<sup>309</sup> *Id.* § 1903(b) (emphasis added). Professor Coggins has called this the “most important provision in all the range management statutes.” George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple-Use Mandate*, 14 ENVTL. L. 1, 115–16 (1983). “Range condition” is defined to mean

the quality of the land reflected in its ability . . . to support various levels of productivity . . . , [that] relates to soil quality, forage values . . . , wildlife habitat, watershed and plant communities, the present state of vegetation of a range site in relation to the potential plant community for that site, and the relative degree to which the kinds, proportions, and amounts of vegetation in a plant community resemble that of the desired plant community for that site.

despite its continuing, serious concerns about range conditions, Congress provided the agencies no additional authority in PRIA to achieve “the goal” of public rangeland management—perhaps because it believed none was necessary,<sup>310</sup> but more likely because it was unable to reach agreement on stiffer measures to address the ongoing problems.<sup>311</sup> In other words, PRIA too reflects Clawson’s view of the livestock industry’s influence.<sup>312</sup> The dithering that characterized the grazing fee debate throughout this period makes it painfully obvious that Congress would have been unable to achieve consensus on any substantive grazing reforms.<sup>313</sup>

On the other hand, stockmen did succeed in PRIA in convincing Congress to rely even more heavily on “range improvements.”<sup>314</sup> PRIA authorized the appropriation of federal funds for these improvements, providing that such funds would be in addition to the fifty percent of grazing fee revenues, which FLPMA had directed be devoted to such purposes.<sup>315</sup> Despite the statute’s broad definitions of “range condition” and “range improvement,”<sup>316</sup> the lion’s share of funds (by one account, 96.5% of accounted funds<sup>317</sup>) has gone, not to improve overall range conditions, but to enhance livestock forage production or otherwise improve conditions for livestock.<sup>318</sup>

43 U.S.C. § 1902(d).

<sup>310</sup> In fact, PRIA cites applicable law, including FLPMA, in noting the Secretaries’ authority to determine that “grazing uses should be discontinued (either temporarily or permanently).” 43 U.S.C. § 1903(b).

<sup>311</sup> Alternatively, Congress might have been more interested in “imagery” and “theater.” *Cf.* Nelson, *supra* note 32, at 335.

<sup>312</sup> See CLAWSON, *supra* note 184 and accompanying text (noting Clawson’s view of the livestock industry’s political influence as “greatest in a negative way”). Davis indirectly corroborates this point in noting that certain provisions in FLPMA and PRIA, “though distasteful [to the “pro-grazing coalition”], could be tolerated since the political quid pro quo was the preservation of their primary policy goal—the new grazing fee formula within PRIA that favored livestock interests.” Davis, *supra* note 191, at 91.

<sup>313</sup> See *infra* discussion at notes 319–43 (tracing the successes of public lands ranchers at preventing grazing fee hikes).

<sup>314</sup> See 43 U.S.C. § 1904. Relying on so-called range improvements to improve range conditions is uneconomic and unrealistic. See generally DONAHUE, *supra* note 4, at 126–32, 216–17, 219–20, 254–55, 276–81 (discussing “range improvements,” including their economics and their largely negative impacts on native species).

<sup>315</sup> See 43 U.S.C. § 1904(a) (authorizing additional appropriations and citing 43 U.S.C. §§ 1748, 1751).

<sup>316</sup> “Range improvement” is defined as an activity or program designed to have one of various beneficial outcomes—such as improved forage production, stabilized soil and water conditions, or wildlife habitat—each of which is subsumed in the definition of “range condition.” 43 U.S.C. § 1902(f). See *supra* note 309. “The term includes, but is not limited to, structures, treatment projects, and use of mechanical means to accomplish the desired results.” 43 U.S.C. § 1902(f).

<sup>317</sup> See Anna M. Gillis, *Should Cows Chew Cheatgrass on Commonlands?*, 41 *BIOSCIENCE* 668, 675 (1991) (citing statistics provided by Johanna Wald, Natural Resources Defense Council).

<sup>318</sup> See, e.g., GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: BLM’S RANGE IMPROVEMENT PROJECT DATABASE IS INCOMPLETE AND INACCURATE, GAO/RCED-93-92, at 7 (1993) (reporting, with qualifications, that “livestock grazing management was the primary objective of 71 percent” of projects completed in FY1990 and 1991).

PRIA and its aftermath further reflect the industry's stranglehold on the national government with respect to grazing fees. Recall that in FLPMA Congress had frozen grazing fees, pending completion of a study of the value of federal-land grazing.<sup>319</sup> The resulting report was ineffectual, concluding only: "The fee system should collect fair market value for use of the forage resource."<sup>320</sup> It documented the "many other users of the Federal lands in addition to grazing permittees," noting that these "segments of the general public are also concerned about grazing fee levels."<sup>321</sup> The BLM and Forest Service then proposed raising the grazing fee to \$1.89, with annual increases thereafter of no more than \$0.12 per AUM until a level of \$2.38 was reached.<sup>322</sup> National stockgrower associations objected that the proposed increases were "unfair and unrealistic," even though the agencies countered that rates the next year would be even higher if the then-current formula were left in place.<sup>323</sup> In PRIA Congress passed another one-year moratorium on fees and ordered a new study.<sup>324</sup> The study confirmed that federal grazing fees remained "far below rental rates for comparable western private rangelands."<sup>325</sup> PRIA also established a new, experimental grazing fee formula, effective through 1985.<sup>326</sup> This formula—based on cattle prices, permittees' costs of production, and ability to pay—resulted in the first grazing fee increase for BLM lands since 1976. But the fee was still low (\$1.89) and dropped each year from 1981–85.<sup>327</sup> By comparison, fees on state lands ranged from \$1.43 to \$14.00 per AUM in 1985; fees on private lands averaged \$6.87; and fees on other federal lands averaged \$6.53.<sup>328</sup>

When it came time to renew or replace the fee formula in 1985, Congress seemed paralyzed. Environmentalists called for a fee that reflected fair market value; ranchers urged that the current low fee was justified and should be maintained. Ranchers—joined by the BLM—rejected environmentalists' charge that there was any connection between grazing fees and ecological conditions on grazing allotments.<sup>329</sup> Ranchers also opposed proposals to remove livestock from "unsuitable lands."<sup>330</sup> Presaging

<sup>319</sup> See 43 U.S.C. § 1751(a) (providing that "the grazing fee charge then in effect . . . shall remain the same until such report has been submitted to Congress").

<sup>320</sup> STUDY OF FEES FOR GRAZING LIVESTOCK ON FEDERAL LANDS—A REPORT FROM THE SECRETARY OF THE INTERIOR AND THE SECRETARY OF AGRICULTURE 1-7 (1977) [hereinafter STUDY OF FEES]. *But see infra* note 344 (noting former Interior economist Robert Nelson's view that the "fair market value" has no reasonable meaning applied to federal grazing lands).

<sup>321</sup> STUDY OF FEES, *supra* note 320, at 3-3.

<sup>322</sup> KLYZA, *supra* note 32, at 131-33.

<sup>323</sup> *Id.* at 130-31.

<sup>324</sup> Nelson, *supra* note 32, at 337. The study, which was completed in 1986, cost several million dollars. *See id.* (citing U.S. DEPARTMENTS OF AGRICULTURE AND INTERIOR, GRAZING FEE REVIEW AND EVALUATION: FINAL REPORT, 1979-85 (1986) [hereinafter 1986 GRAZING FEE REVIEW]).

<sup>325</sup> GRAZING FEES HEARING, *supra* note 259, at 254.

<sup>326</sup> Public Rangelands Improvement Act of 1978, 43 U.S.C. § 1905 (2000); KLYZA, *supra* note 32, at 130-31; Nelson, *supra* note 32, at 338-39.

<sup>327</sup> GAO, SLOW, COSTLY PROCESS, *supra* note 20, at 33-34.

<sup>328</sup> KLYZA, *supra* note 32, at 135. *See also* GRAZING FEES HEARING, *supra* note 259, at 254 (noting the average rates received by BLM permittees who *subleased* their allotments).

<sup>329</sup> KLYZA, *supra* note 32, at 136.

<sup>330</sup> *Id.* at 137.

defenses that continue to be heard in the twenty-first century, Utah senator Jake Garn asserted that a “fee hike would ‘destroy the family rancher’s way of life and the spirit or even the existence of some western communities.’”<sup>331</sup> Ranchers were unable to counter assertions that livestock outnumbered big game animals on BLM lands by nearly three to one (4.3 million compared to 1.5 million),<sup>332</sup> the fact that sixty percent of rangelands remained in unsatisfactory condition,<sup>333</sup> or OMB studies showing that the government had lost more than \$500 million over the past ten years by not charging fair market value for grazing privileges.<sup>334</sup> Nevertheless, the ranchers’ stubborn resistance paid off. The OMB bowed to political pressure, explaining that the issue “is of great political sensitivity.”<sup>335</sup> Congress simply failed to act.<sup>336</sup>

In 1986 President Reagan stepped into the lurch after a cadre of western Republican senators led by his personal friend, the powerful Paul Laxalt (R-Nev.), interceded on behalf of public-lands ranchers.<sup>337</sup> Acting by executive order, Reagan extended indefinitely the PRIA fee formula, a complex scheme designed to keep fees low.<sup>338</sup> The order provided for a minimum fee of \$1.35 per AUM and limited any annual increase or decrease to no more than twenty-five percent of the prior year’s fee, but it otherwise left the status quo unchanged.<sup>339</sup> The Reagan Administration claimed that this formula would “maintain [the] stability of the western livestock industry.”<sup>340</sup> The *Washington Post* chastised the Administration: “In a year

<sup>331</sup> *Id.* See also GRAZING FEES HEARING, *supra* note 259, at 254 (statement of Cathy Carlson, National Wildlife Federation, citing 1986 GRAZING FEE REVIEW, *supra* note 324, at 15 fig.2.2). Carlson also cited a Colorado State University study, which “corroborated” the federal grazing fee study by examining 900 subleases of BLM grazing allotments. The average sublease rate was \$7.76, nearly four times the federal fee at the time (\$1.97). *Id.* (citing C. KERRY GEE & ALBERT MADSEN, THE COST OF SUBLEASING FEDERAL GRAZING PRIVILEGES 8 (Aug. 1986)).

<sup>332</sup> KLYZA, *supra* note 32, at 136. Livestock compete with big game animals (deer, elk, pronghorn antelope, bighorn sheep, etc.) and most all other native wild animals for habitat (forage, water and space). Public-land management practices contributed—sometimes intentionally, sometimes inadvertently—to the disproportionate populations noted in the text. See, e.g., COGGINS, WILKINSON & LESHY, *supra* note 6, at 803–04 (describing a 1979 grazing EIS prepared by East Roswell, New Mexico, BLM, which documented that BLM had been authorizing livestock use at a level that exceeded available forage by more than thirty-three percent, and which stated the agency’s intention to allocate ninety-six percent of available forage to livestock!).

<sup>333</sup> KLYZA, *supra* note 32, at 136.

<sup>334</sup> *Id.* at 138.

<sup>335</sup> *Id.* at 138 (quoting OMB Director James Miller).

<sup>336</sup> Nelson, *supra* note 32, at 337–38 & n. 22 (noting that determination of the grazing fee has fallen to the administration since 1986). Congress did order a “fee update,” which resulted in yet another study in 1993. See *id.* About the same time a GAO study reported its unsurprising finding that “fees charged ranchers do not cover either the government’s costs to manage the grazing program or the cost to better manage and improve the lands so that they will remain a productive public resource in the future.” GEN. ACCOUNTING OFFICE, NATURAL RESOURCES MANAGEMENT ISSUES, GAO/OCG-93-17TR, at 19–20 (Dec. 1992).

<sup>337</sup> KLYZA, *supra* note 32, at 138.

<sup>338</sup> *Id.* (citing Exec. Order No. 12,548, 51 Fed. Reg. 5985 (Feb. 19, 1986)).

<sup>339</sup> Exec. Order No. 12,548, 51 Fed. Reg. 5985 (Feb. 19, 1986).

<sup>340</sup> KLYZA, *supra* note 32, at 138 (quoting Interior Secretary Donald Hodel and Agriculture Secretary Richard Lyng, as quoted elsewhere). The fee formula was challenged by nine environmental groups, but the litigation was unsuccessful. See *id.* at 139. See also *supra* note



when so many other forms of federal support are in jeopardy, there is no excuse for exempting these [grazing fees.]”<sup>341</sup> The Reagan/PRIA formula remains in effect today; both the House of Representatives and the Clinton Administration tried, but failed, to replace it.<sup>342</sup> In 2005 the formula produced an increase in the fee to \$1.79—ten cents less than the rate charged more than twenty-five years ago.<sup>343</sup>

Public-land ranchers argued that low fees promote the public interest by “helping marginal ranchers stay in business.”<sup>344</sup> They also claimed that increasing the fee would force some ranchers out of business, thus reducing the number of livestock grazing federal lands and, correspondingly, the revenues to the government.<sup>345</sup> Both arguments are simplistic. The former ignores the drain on the federal Treasury required to subsidize “marginal” ranchers, the fact that ranching comprises at best a narrow piece of the “public interest” in public lands, and the adverse ecological impacts of livestock grazing. The latter overlooks the obvious fact that, as long as the fee remained low compared to lease fees for other lands, there would be a demand for federal permits. It also ignores what was widely known at the time—that many BLM permittees were making a profit by *subleasing* their allotments at higher rates.<sup>346</sup>

Klyza cites the government’s chronic inability to raise grazing fees as evidence that “[i]nterest-group liberalism has dominated the grazing policy regime.”<sup>347</sup> Indeed, the mere fact that public-land ranchers have been able to keep Congress’s focus on *grazing fees*, a “minor matter” in the overall grazing policy debate,<sup>348</sup> rather than on the deteriorating ecological condition of many public lands, reflects the industry’s political prowess. The same tactic has helped to prevent erosion of ranchers’ public-land “rights.”

153 (concerning the TGA objective to stabilize the public-land livestock industry).

<sup>341</sup> KLYZA, *supra* note 32, at 138 (quoting *Editorial: User Fees*, WASH. POST, Feb. 3, 1986, at A14).

<sup>342</sup> See, e.g., KLYZA, *supra* note 32, at 138–39; Nelson, *supra* note 32, at 339.

<sup>343</sup> See KLYZA, *supra* note 32, at 133 (discussing the applicable formula).

<sup>344</sup> *Id.* at 140. Professor Robert Nelson doubts “that the concept fair market value makes any real sense in the actual circumstances of federal grazing.” Nelson, *supra* note 32, at 338 (pointing to the unreasonableness of setting a single fee for all federal lands, given the “enormous variation of economic and other conditions”).

<sup>345</sup> See GRAZING FEES HEARING, *supra* note 259, at 516 (testimony of Nevada Cattlemen’s Association). Even Cy Jamison, BLM Director, echoed this sentiment. See KLYZA, *supra* note 32, at 156.

<sup>346</sup> See GRAZING FEES HEARING, *supra* note 259, at 254 (reporting results of a Colorado State University study).

<sup>347</sup> KLYZA, *supra* note 32, at 140. This domination was dramatically illustrated by “a filibuster by Western Senators to stop a rise in federal grazing fees [which] held up the \$12 billion Interior budget” in October 1993. See Scott W. Reed, *The County Supremacy Movement: Mendacious Myth Marketing*, 30 IDAHO L. REV. 525, 528 n.11 (1993–94) (discussing the fair market value of grazing on federal land).

<sup>348</sup> Professor (and former Interior Department economist) Robert Nelson termed the grazing fee issue a “minor factor” in terms of “financial impacts on the federal government.” Nelson, *supra* note 32, at 339. However, Nelson also notes the “large[ ] social waste” caused by “the excessive amount of time the fee occupies of top decision-makers,” including the President, secretaries of Interior and Agriculture, and director of OMB. *Id.*

V. THE CAPTURE METAPHOR: THE EXPANDING CONTOURS OF CAPTURE, 1980 TO THE PRESENT

This part explores the phenomenon by which cowboy mythology has captured, not only politics, but many other facets of American life and culture, and it critiques the principal myths that have spawned this capture and upon which public rangeland policy increasingly relies.<sup>349</sup> While public-land ranchers still lack a property interest in their grazing privileges and wield a power that, arguably, is chiefly inertial,<sup>350</sup> their place on the western range seems more secure than ever. Banking on their cowboy image—dusted off and polished up—and on Americans' frontier nostalgia, ranchers are lassoing an ever-expanding range of interests in support of their narrow cause.<sup>351</sup> They also are diversifying their tactics, becoming more creative and more vocal.<sup>352</sup>

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<sup>349</sup> Many of these examples are recounted in my book *The Western Range Revisited*, cited *supra* note 4. More recent (post-1999) illustrations are also offered. Not a day goes by but that newspapers, radio, and e-mail yield additional evidence in support of this article's premise. While the discussion does not exhaust the potential illustrations, it may exhaust readers. I ask the believers' patience; this cumulative evidence is proffered with the skeptics in mind.

<sup>350</sup> Recall Clawson's observation that stockgrowers' "influence is probably greatest in a negative way." CLAWSON, *supra* note 184, at 381.

<sup>351</sup> According to Davis, the pro-grazing "coalition" in the 1960s "consisted primarily of livestock associations, federal legislators and governors representing western states, and, occasionally, BLM and Forest Service officials." Davis, *supra* note 191, at 85. He continues:

The coalition has maintained this core of regional support . . . and has gradually expanded its organizational base as well. Among the more visible new participants are umbrella groups such as the Public Lands Council and the Wise Use Movement . . . Other allies include several natural resource economists who are based at western state universities and state banking associations operating within public land states.

*Id.* at 85–86.

<sup>352</sup> For example, Arizona rancher and California investment banker Jim Chilton won a jury verdict—\$100,000 in compensatory damages and \$500,000 in punitive damages—against the Center for Biological Diversity (CBD) in January 2005. See Mitch Tobin, *Rancher Wins \$600K in Suit Against Enviro*, ARIZONA DAILY STAR, Jan. 22, 2005, at A1, available at <http://www.dailystar.com/dailystar/news/58068.php> (last visited Nov. 20, 2005). CBD had criticized the condition of Chilton's 21,500-acre national forest grazing allotment and published on its website photos taken on Chilton's allotment, which the jury found were not representative of the condition of the allotment as a whole. See *id.* Somewhat ironically, Chilton's wife Sue served until recently as chair of the Arizona Game & Fish Commission, and the Arizona Game & Fish Department has cited grazing as a factor in the status of well over half of the state's imperiled species. See Robert Witzeman, *Seventy of Arizona's 116 State Threatened or Endangered Species Have Cattle Grazing as a Causal Factor in Their Imperilment*, <http://rangenet.org/directory/witzemanr/seventy.html> (last visited Nov. 20, 2005). Nevada rancher and property-rights poster child Wayne Hage provides another example. Hage's ongoing war against the Forest Service and BLM has included challenges to the introduction of elk to his grazing allotment, reduction of his grazing privileges, and attempts to regulate his ditch maintenance activities—all alleged to be takings of his water and ditch rights. A case is currently pending before Chief Judge Loren Smith in the U.S. Court of Federal Claims. See Margaret H. Byfield, *Every American's Case*, CORNERSTONE, Sept. 12, 2004, available at <http://www.stewards.us/cornerstone/sept2004/cssept04-1.asp> (recounting Hage's trial before the U.S. Court of Federal Claims in September 2004). See also *Hage v. United States*, 51 Fed. Cl. 570 (Cl. Ct. 2002) (discussing the facts of the case and deciding on motions for summary judgment). See also Kathryn M. Casey, Comment, *Water in the West: Vested Water Rights Merit Protection*

Two measures introduced during the current session of Congress reflect the potency of the cowboy image and its place at the fore of current public-land politics. The U.S. Senate approved a resolution introduced by Wyoming (the "Cowboy State") Senator Craig Thomas to establish a "National Day of the Cowboy."<sup>353</sup> The resolution proclaims that "the cowboy embodies honesty, courage, integrity, compassion, respect, a strong work ethic, and patriotism" and is an "excellent steward [of] the environment," and it asserts that "to recognize the American cowboy is to acknowledge America's ongoing commitment to an esteemed and enduring code of conduct."<sup>354</sup> Arizona Congressman Rick Renzi has offered a "Cattleman's Bill of Rights Act," which is based on findings, *inter alia*, that "[r]anching is an important part of the culture and economies of many rural communities," and that "ranchers provide betterments and improvements to the land they work."<sup>355</sup> Among other things, this measure would require range managers of the Departments of Agriculture and Interior to attend "sensitivity training"

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*under the Takings Clause*, 6 CHAP. L. REV. 305 (2003).

<sup>353</sup> S. Res. 85, 109th Cong. (2005). See Press Release, Office of Sen. Craig Thomas, Thomas Sponsors "National Day of the Cowboy" Legislation, available at [http://www.senate.gov/~thomas/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=386&Month=3&Year=2005](http://www.senate.gov/~thomas/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=386&Month=3&Year=2005); *National Cowboy Day Campaign Update*, <http://www.cowboyday.com/update.php> (last visited Nov. 20, 2005) (reporting that the Senate passed the resolution on May 12, 2005, and that National Day of the Cowboy would first be celebrated on July 23, 2005). Thomas is neither a rancher nor a cowboy. But as an elected representative of the Cowboy State, he is depicted on his official website wearing the obligatory cowboy hat. See Craig Thomas, United States Senator (R-Wy), <http://thomas.senate.gov/index.cfm?FuseAction=Biography.Home> (last visited Nov. 20, 2005). The resolution was the brainchild of American Cowboy Magazine, whose publisher called the "American cowboy . . . an icon" and cited "the profound contributions that cowboys have made to this nation." Thomas Sponsors "National Day of the Cowboy" Legislation, *supra*.

<sup>354</sup> S. Res. 85, 109th Cong. (2005).

<sup>355</sup> H.R. Res. 411, 109th Cong. (2005). The bill's findings include:

(1) Ranching is an important part of the culture and economies of many rural communities throughout the West, and the rural West depends on a healthy and thriving ranching industry.

(2) Ranchers have a vested interest in their ranchland . . .

(3) Congress has a responsibility . . . to ensure the continued viability of Americans to produce the food and fiber needed for United States and world markets, and dispersed agriculture, such as ranching, can help secure this food and fiber supply.

....

(6) American ranchers provide betterments and improvements to the land they work, providing a symbiotic relationship between the land and cattle.

....

(8) The United States has a vital interest in protecting and promotion the American ranching industry.

*Id.* § 2(a). The grazing bill introduced by Senator Pete Domenici (R-NM) in 1995 recited similar findings. See DONAHUE, *supra* note 4, at 71-72, 256, 275.

courses, which would address “[q]uality of life impacts on livestock ranchers,” “[e]conomic and production impacts,” and the “[b]iodiversity benefits” of public-land ranching.<sup>356</sup>

Admittedly, a concocted version of ranching, rooted in cowboy mythology, has existed since Teddy Roosevelt romped in Dakota Territory and Buffalo Bill Cody hit the road with his “Wild West” traveling show. But the Thomas and Renzi bills, which idealize cowboys and ranching, and similar recent developments demonstrate that romance has been converted into a political mantra and a real threat to sound public-land management. Given our current understanding of the potentially irreversible ecological impacts of grazing,<sup>357</sup> policy makers should view the arguments in favor of ranching more, not less, critically. Instead, the myths gain strength.

### A. Cowboys in the White House

Public-land grazing policies and politics have become more unabashedly pro-rancher under two cowboy presidents. The first was Ronald Reagan.<sup>358</sup> Not only had Reagan played the part in Hollywood movies,<sup>359</sup> he owned a ranch, wore a cowboy hat, “rode a horse, and said all the right things about gun control and rugged individualism.”<sup>360</sup> He embodied and reinforced what Americans had always been told, directly or subliminally—that cowboys are good guys and can be trusted. He endeared both public-land ranchers and western states’-rights advocates when, circa 1980, he famously declared “count me in as a Sagebrush Rebel.”<sup>361</sup> In this simple statement he conveyed both his antipathy toward big (federal) government and his pro-private-enterprise views—hallmarks of public lands management during his tenure.

Davis’s description of the “philosophical orientation” of the Reagan Administration as “quite compatible with the policy preferences of the traditional range policy subgovernment” seems a gross understatement.<sup>362</sup> In fact, the Reagan Administration “slashed” the BLM’s budget,<sup>363</sup> removed agency personnel in environmental positions to increase the number of commodity-oriented positions,<sup>364</sup> and, under three pro-development, anti-preservation interior secretaries, “minimize[d] enforcement of grazing

<sup>356</sup> H.R. Res. 411 § 6.

<sup>357</sup> See *supra* Part II (discussing the adverse environmental effects of grazing).

<sup>358</sup> The second, George W. Bush, is considered *infra* at notes 382, 384.

<sup>359</sup> Professor Nelson has posited a “government as theater” theory to explain why “fierce controversy [has] continued for so many years over such a minor matter as the grazing fee.” Nelson, *supra* note 32, at 339. Nelson’s hypothesis is especially intriguing, given that public-land grazing policies took a turn for the worse when the White House became home to a screen star. See *infra* notes 363–367 (describing Reagan’s policies).

<sup>360</sup> See Ed Quillen, *The Mountain West: A Republican Fabrication*, HIGH COUNTRY NEWS (Colorado), Oct. 13, 1997, at 8–9 (citing “Reaganomics” as an example of the strength of the “western myth,” which “transcends economic self-interest”).

<sup>361</sup> See KLYZA, *supra* note 32, at 14; C. BRANT SHORT, RONALD REAGAN AND THE PUBLIC LANDS 36 (1989) (noting “Reagan’s endorsement of the Rebellion” as a presidential candidate).

<sup>362</sup> Davis, *supra* note 191, at 83.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*