

Lewis & Clark Law School

Lewis & Clark Law School Digital Commons

Faculty Articles

Faculty Scholarship

2016

Antimonopoly in American Public Land Law

Michael Blumm

Lewis & Clark Law School, blumm@lclark.edu

Kara Tebeau

Follow this and additional works at: https://lawcommons.lclark.edu/faculty_articles

Recommended Citation

Michael Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 *Geo. Env't L. Rev.* 155 (2016).

Available at: https://lawcommons.lclark.edu/faculty_articles/60

This Article is brought to you for free and open access by the Faculty Scholarship at Lewis & Clark Law School Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Lewis & Clark Law School Digital Commons. For more information, please contact sarahjohnson@lclark.edu.

Antimonopoly in American Public Land Law

MICHAEL C. BLUMM*
KARA TEBEAU**

ABSTRACT

American public land law is often thought to be divided into historical eras such as the Disposition Era, the Reservation Era, and what we call the modern era. We think that an overarching theme throughout all public land law eras is antimonopoly. Antimonopoly policy has permeated public land law for the more than two-and-a-half centuries since the United States' founding. In this article, we show the persistence of antimonopoly sentiment throughout the history of American public land law, from the Confederation Congress to Jacksonian America to the Progressive Conservation Era and into the modern era.

Antimonopoly policy led to widespread ownership of American land, perhaps America's chief distinction from England and Europe. The policy fostered acreage limits in federal grants, a preference for bona fide settlers and, eventually, an evolution from land sales to free land under the Homestead Act. Antimonopoly principles were also present in public timber, mining, and rangeland policies from the earliest days. In the Progressive Conservation Era, antimonopoly fueled a public land withdrawal and reservation movement, landmark leasing and licensing programs that maintained public control over fuel minerals and waterways, and the first explicit federal policy concern over future generations. The modern era has seen the codification of multiple use management, the enactment of comprehensive land planning statutes, and the rise of species concerns, among other antimonopoly policies.

Although antimonopoly policies seem to be under some threat from recent Congresses, a turn toward monopoly would amount to a renunciation of centuries of public land policy. This history strongly counsels against these proposals. However imperfectly realized on the ground, antimonopoly has always been a cardinal feature of public land law and policy. Antimonopoly is in fact deeply embedded in the nation's identity as a reflection of republican values of individualism and equal opportunity.

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | Introduction..... | 2 |
| II. | From a "Blank Slate": the Ordinances of 1785 and 1787..... | 4 |
| III. | Land Disposition through the Homestead Act..... | 9 |
| | A. Credit Sales | 10 |
| | B. Cash Sales | 11 |
| | C. Preemption Sales and Graduated Pricing..... | 12 |
| | D. The Homestead Act..... | 14 |
| | E. Railroad Grants and Rising Antimonopoly Sentiment | 16 |
| IV. | Natural Resources Development in the Nineteenth century | 18 |
| | A. Antimonopoly in Early Timber Management..... | 18 |
| | B. Antimonopoly in Early Mining Law..... | 21 |
| | C. The Antimonopoly Battle over Rangelands..... | 22 |
| V. | Antimonopoly and Conservation | 26 |

| | | |
|------|---|----|
| A. | Reservation and Withdrawal..... | 27 |
| 1. | Timberland Reservations | 27 |
| 2. | Coal, Oil, and Gas Withdrawals | 28 |
| B. | Economies of Scale and Efficient Development for the Public Good..... | 29 |
| C. | The Mineral Leasing Act | 32 |
| D. | Conservation for Future Generations..... | 34 |
| E. | Managing Grazing Lands..... | 35 |
| F. | Beyond the Progressive Era: Antimonopoly and Grazing on Lands Outside National Forests | 36 |
| VI. | Antimonopoly in Modern Public Land Statutes | 38 |
| A. | Multiple Use..... | 39 |
| B. | Land and Resource Planning Under NFMA and FLPMA..... | 42 |
| C. | Prioritizing Subsistence Uses in Alaska | 44 |
| D. | Ensuring Public Access..... | 45 |
| 1. | The Public’s Recreational License..... | 46 |
| 2. | R.S. 2477 Highway Rights-of-Way | 47 |
| 3. | Sacred Sites..... | 49 |
| VII. | Conclusion | 50 |

I. INTRODUCTION

John Locke maintained that an individual can acquire as much property “as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others.”¹ When mixed with his labor, it becomes his, and no other person has a right to it, “at least where there is as enough, and as good left in common for others.”² American political thinkers interpreted these Lockean appropriation principles as limits on the amount of property that could be individually privatized in order to ensure equitable sharing, and criticized speculators.³ Locke’s ideas—bedrock principles of the Founding generation⁴—promoted the antimonopoly ideal of widespread use.⁵ Jefferson grounded his agrarian ethic in Locke’s interpretation of the laws of nature: “Whenever there is in

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School.

** J.D. *cum laude* 2015, Lewis and Clark Law School, Certificate in Environmental and Natural Resources Law.

¹ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 31 (1690).

² *Id.* § 27.

³ See generally Richard J. Ellis, *Radical Lockeanism in American Political Culture*, 45 W. POL. Q. 825 (1992) (describing the egalitarian interpretation of Lockeanism espoused by Thomas Paine, Jacksonian Democrats, populists, and others).

⁴ See CARL BECKER, THE DECLARATION OF INDEPENDENCE, A STUDY IN THE HISTORY OF POLITICAL IDEAS 27 (1922) (explaining that “So far as the ‘Fathers’ were, before 1776, directly influenced by particular writers, the writers were English, and notably Locke. . . . [T]he Declaration [of Independence] in its form, in its phraseology, follows closely certain sentences in Locke’s [S]econd [T]reatise on [G]overnment.”).

⁵ See KAREN IVERSON VAUGHN, JOHN LOCKE: ECONOMIST AND SOCIAL SCIENTIST 59 (1980) (describing Locke’s distrust of monopolistic privilege); LOCKE, *supra* note 1, § 36 (“Nature did well in setting limits to private property through limits to how much men can work and limits to how much they need. No man’s labour could tame or appropriate all the land; no man’s enjoyment could consume more than a small part; so that it was impossible for any man in this way to infringe on the right of another, or acquire a property to the disadvantage of his neighbor . . .”).

any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The small land holders are the most precious part of a state.”⁶ Thus he, other Founders, and their successors sought to implement policies that would avoid monopolization of public land and associated natural resources and put them instead into the hands of numerous users, fostering both egalitarianism and democracy.

Antimonopoly principles pervade the history of federal natural resources management, which is rife with examples of limits on the terms, amounts, types of interest, and conditions imposed on the privatization of public resources.⁷ Limiting private property rights in public resources allowed for their widespread distribution,⁸ the mixing of private and public uses, and possible reversion to the public for failure to perform specified conditions. In numerous ways, the federal government retained property interests for the public when disposing of public lands and resources in order to promote broad-based resource sharing and avoid monopolization.⁹

This article illustrates how public land law has consistently reflected a philosophy of distributional equity in allocating public resources, a philosophy that is at the heart of American democratic thought. Long before and well after Congress passed the Sherman Antitrust Act,¹⁰ public land policy attempted to limit private acquisition of public resources to prevent monopoly and avoid speculation. This policy was sometimes overcome in practice by monopolistic forces. Nevertheless, antimonopoly has been a persistent theme throughout the history of American public land law.

We consider five stages of the development of the antimonopolistic impulse in public land law. Part II of this article begins with a discussion of the first federal land ordinances, which rejected concentrated land ownership and initiated a tradition of protecting navigable waters as public highways. Part III recounts the era of federal land disposition through homesteading and the rise of the anti-railroad-monopoly movement, explaining a decades-long evolution of land policies

⁶ Letter from Thomas Jefferson to Edmund Pendleton (Aug. 13, 1776), *cited in* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 62 (Public Land Law Rev. Comm’n 1968).

⁷ David Schorr has argued that the historical private/commons formula does not adequately explain the American democratic ideal of distributive justice in natural resources. DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER 7, 30–31 (2012) (discussing the origins of Western water rights in Colorado and arguing that “[t]he Lockean and Jeffersonian view of acquisition from the public domain, requiring work as a condition of appropriation and limiting the scope of rights to the amount a person could directly use, led directly to the requirement for water claims, both in its direct form and indirectly through the miners’ laws’ limits on appropriations calibrated to the amount one person could reasonably use; and the abrogation of riparian ownership [the Eastern system of water rights] . . . was a manifestation of anti-monopolism and anti-speculation ideology, directed against the potential concentration of water wealth in the hands of those who could afford to buy up the riparian lands of the arid-country streams.”). This article discusses how that Lockean impulse influenced American public land disposition and use over time.

⁸ For example, the dominant view of water rights in the American West, as David Schorr noted, is that the privatization of water rights in the Western “first in time, first in right” system reflected a natural capitalist transition from public resource to private property. *Id.* at 7. However, Schorr’s account of the rise of water appropriation principles in Colorado included a strong element of equitable distribution, as embodied in the concept of beneficial use, which limited the scope of rights to the amount a person could directly use—an antimonopolistic, anti-speculative sentiment which arose out of the codes of Colorado’s mining districts. *Id.* at 7, 30–31. Schorr’s account revealed that the Colorado Doctrine of water rights was more concerned with preventing concentrated control over water than with encouraging private wealth maximization.

⁹ See *infra* notes 276–80, 316–21, 414–15 (describing leasing systems, permitting schemes, and surface access provisions).

¹⁰ The Sherman Antitrust Act of 1890, 26 Stat. 209 (codified at 15 U.S.C. §§ 1–7 (1890)).

from large sales to free grants of a limited acreage to yeoman farmers and bona fide settlers. Part IV describes the roots of American policies toward managing extractive resources—a progression including leasing, term limits, acreage limitations, diligent pursuit requirements, and protection of public access to the public domain. Part V considers the evolution of antimonopoly policies during the Progressive Era, including the rise of resource conservation and the first concern for intergenerational equity. Part VI briefly assesses some modern public land laws, examining the ways in which they promote widespread use by diverse users, limit commercially extractive uses on certain lands, require land planning,¹¹ and uphold public access to the public lands.

We conclude that the antimonopoly impulse has been a persistent, core element of American public land law for more than two centuries, spreading the benefits of public natural resources widely and promoting something resembling egalitarian wealth distribution. Over the years, two major dimensions of antimonopoly have emerged: policies promoting (1) widespread resource ownership and use, as opposed to concentrating resources in the hands of the few; and (2) multiple uses of public lands, instead of single uses. Today, antimonopoly sentiment continues to emphasize intergenerational equity and has expanded its focus to embrace wildlife, including habitat concerns. However, private rights to public property are commonly renewed and protected by bureaucratic inertia.¹² And the paradigm of multiple-use affords land managers virtually unreviewable administrative discretion.¹³ In recent years, Congress has frequently entertained monopolistic policy proposals, a development that would roll back centuries of antimonopoly policy and undermine cardinal features of the American character. Although now under significant threat, the antimonopoly impulse has remained a consistent feature of American public land law throughout its long history.

II. FROM A “BLANK SLATE”: THE ORDINANCES OF 1785 AND 1787

After the United States proclaimed independence, the new nation had to decide how to treat the land west of the Appalachian Mountains. The states with fixed western boundaries quickly sought to pressure the states with western land claims—about half of the original states—to cede their claims to the federal government.¹⁴ Beginning in 1780 with New York and culminating with

¹¹ Advanced planning is a hallmark of antimonopoly because it designates protected and potential uses in a publicly available and enforceable document, usually before agencies must consider specific proposals to designate areas of public land for private or extractive uses. Land planning provides an opportunity for equal consideration of multiple public and private uses, extractive and non-extractive. Thirty years ago, Charles Wilkinson and Michael Anderson described the contrast between the pre-planning and the modern planning era: “Until the 1960s, resource allocation primarily involved the allocation of resources to private commercial interests. During that decade a broader public interest and a fuller recognition of non-commodity resources came to the fore and became firmly enshrined in statutes and case law during the 1970s and 1980s. A requirement of comprehensive land planning has become a central element of Congress’s determination to accord equal consideration to all resources and to open public land policy to broader public involvement.” Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 7, 10 (1986).

¹² See generally Bruce Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 992 (2014) (describing, for example, non-termination of oil and gas leases, administrative acquiescence in perpetuating grazing permits, and renewal of large private ski resort use and occupancy permits on federal lands).

¹³ See discussions of MUSYA, NFMA, and ANILCA, *infra* Parts V.A–C (describing the difficulties in enforcing subsistence rights and wildlife diversity requirements, and challenging expansive timber sales).

¹⁴ Six states were without western land claims, including Pennsylvania, and they pressured the states with western claims to cede them to the federal government. ANDREW C. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION* 109–10 (1905). The states without western claims argued that Congress had the authority, or should

Georgia in 1802, all of the so-called “landed” states ceded their western claims, giving the federal government full authority over the settlement and governance of the western lands.¹⁵ The land disposition policies that emerged in the 1780s were oriented towards relatively large sales and revenue production to retire the Revolutionary War debt, instead of offering free land or cheap sales of small plots to accommodate the needs of yeoman farmers.¹⁶ But states’ western land cessions also gave the nation its first opportunity to implement its republican ideals in land policy.

Republican government meant a government “bound by fixed laws, which people have a voice in making, and a right to defend.”¹⁷ How would the revolutionaries create such a government of the people? For the revolutionary generation, republicanism meant the promotion of civic virtue, and an aversion to monarchy, oligarchy, and aristocracy.¹⁸ In contrast to countries dominated by monarchy and aristocracy, the republican ideal emphasized equality of political power.¹⁹ Early republicanism relied upon equitable property distribution to do so: “an equality of property, with a necessity of alienation, constantly operating to destroy combinations of powerful families, is the very *soul* of the republic.”²⁰ At the base of this ideal is the Lockean notion that a man is naturally entitled to the fruits of his labor—whereas the aristocracy owned land without contributing physical labor.²¹ Moreover, widely distributing property among agrarians would create a virtuous

be given the authority, to take the land for the common good. *Id.* Maryland threatened to not accept the Articles of Confederation if the landed states continued to claim stretches of lands beyond the Appalachians. *Id.* In September 1780, Congress urged the landed states to cede their claims to it, and in turn urged Maryland to ratify the Articles. 17 JOURNALS OF CONG. 807 (Sept. 6, 1780) (“*Resolved . . . that it be earnestly recommended that those states, who have claims to the western country to . . . give their delegates in Congress such powers as may effectively remove the only obstacle to final ratification of the Articles of Confederation; and that the legislature of Maryland be urgently requested to . . . subscribe the said [A]rticles.*”).

¹⁵ The seven landed states (and the date each initiated cession) were: New York (1780), Virginia (1781), Massachusetts (1784), Connecticut (1786), South Carolina (1787), North Carolina (1789), and Georgia (1802). PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785-1820* 14 (1910). See *Atlas of the Historical Geography of the United States*, U. RICHMOND DIGITAL SCHOLARSHIP LAB, <http://dsl.richmond.edu/historicalatlas/47/b/> (use the “next” arrow to navigate through maps of the state cessions chronologically) (last visited Sept. 10, 2015). The federal government solidified its preeminence in Western land policy when Congress passed the Indian NonIntercourse Act in 1790, which gave the federal government exclusive authority to deal with Indian tribes, including approving all land transactions and licensing Indian traders. NonIntercourse Act of July 22, 1790, ch. 33, 1 Stat. 137 (1790). In *Johnson v. M’Intosh*, 21 U.S. 543 (1823), the Supreme Court essentially ratified the NonIntercourse Act’s federal primacy by upholding a federal land patentee’s claim against speculators who bought from Indian “chiefs” prior to the enactment of the 1790 statute, invoking a so-called “doctrine of discovery.” See generally Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713 (2004).

¹⁶ See Douglass North & Andrew Rutten, *The Northwest Ordinance in Historical Perspective*, in *ESSAYS ON THE ECONOMY OF THE OLD NORTHWEST* 19, 24–25 (David Klingaman & Richard Vedder eds. 1987).

¹⁷ JOHN ADAMS, *NOVANGLUS* NO. 7 (Mar. 6, 1775).

¹⁸ See generally 1 *THE FOUNDERS’ CONSTITUTION* ch. 4 (Philip Kurland & Ralph Lerner eds., 2001); James L. Huston, *The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765-1900*, 98 AM. HIST. REV. 1079, 1089 (1993).

¹⁹ See Huston, *supra* note 18, at 1080. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 70–75 (1998).

²⁰ See Stanley N. Katz, *Thomas Jefferson & the Right to Property in Revolutionary America*, 19 J. OF LAW & ECON. 467, 483-84 (1976) (citing Noah Webster, *An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention Held at Philadelphia*, in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 29, 59 (Paul Leicester Ford ed. 1888)).

²¹ See Huston, *supra* note 18, at 1083.

citizenry capable of self-government.²² In short, revolutionary-era republicans believed that those with a personal investment in society would be the most judicious decisionmakers for it.²³ Republicanism thus carried a redistributive ideal that inspired the abolition of primogeniture, the promotion of widespread land ownership and, later, free land grants to settlers.

Republican ideals were set into motion by the Land Ordinance of 1785 and the Northwest Ordinance of 1787, the progenitors of federal public land law.²⁴ The ordinances laid the roadmap for settling and governing the Northwest Territory²⁵ that the federal government obtained in the 1783 Treaty of Paris and the state land cessions.²⁶ Key among the provisions of the 1785 ordinance was the establishment of a grid system for surveying territorial land based on the New England model, which created square townships.²⁷ Surveyors laid out each township of thirty-six square miles without regard to landscape characteristics like ravines, streams, or swamps.²⁸ The 1785 ordinance created a system both of measurement and disposal—once the lands had been surveyed into squares, the federal government sold them off to the highest bidder, with a minimum price of a dollar per acre.²⁹

Selling public land at competitive auctions might appear to conflict with the Jeffersonian ideal of promoting democratic goals by distributing government lands widely to small farmers. In fact, Jefferson initially opposed the idea of selling the territorial lands based on his belief that the burden of the war should not be shouldered by those with the least ability to afford it.³⁰ But he was willing to compromise.³¹ The 1785 Ordinance included no provision for preemption either,³² meaning that

²² See Katz, *supra* note 20, at 475.

²³ See Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. L. REV. 409, 446 (2013).

²⁴ See GATES, *supra* note 6, at 65 (explaining that the rectangular survey system of 1785 has been retained in the national land system ever since). Vernon Carstensen, *Patterns on the American Land*, 18 PUBLIUS: THE J. OF FEDERALISM 31, 31 (1988) (stating that the federal government extended the rectangular system used in the 1785 ordinance to 1.3 billion acres in the continental U.S.).

²⁵ See Jonathan Hughes, *The Great Land Ordinances: Colonial America's Thumbprint on History*, in ESSAYS ON THE ECONOMY OF THE OLD NORTHWEST 1, 8 (David Klingaman & Richard Vedder eds., 1987); North & Rutten, *supra* note 16, at 22.

²⁶ Treaty of Paris art. 2, Sept. 3, 1783. The survey system of the 1785 Ordinance initially applied only to a forty-two-mile wide strip of land adjacent to the western boundary of Pennsylvania, extending north from the Ohio River. After 1796, Congress formally re-established the survey system, which it thereafter employed on the rest of the Northwest Territory, the Southwest Territory, the Louisiana Territory, Florida, land acquired from Mexico, the Oregon Territory, the Gadsden Purchase, and Alaska. See Carstensen, *supra* note 24, at 34.

²⁷ Ordinance of May 20, 1785, in 28 JOURNALS OF THE CONT'L CONG., 1774-1789, at 375-81 (John C. Fitzpatrick ed., 1933) ("An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory.").

²⁸ This grid system has been called a metaphorical "American thumbprint." See Hughes, *supra* note 25, at 8. The grid created a system of property delineation abstracted from environmental realities, and literally shaped the course of American farming in the West, predisposing farmers to straight-line tilling, no matter what the terrain. See Carstensen, *supra* note 24, at 35-38. In the dust-bowl era, the Soil Conservation Service retrained farmers to till in a landscape-contoured fashion instead. See *id.* at 37; Douglas Helms, *Conserving the Plains: The Soil Conservation Service in the Great Plains*, 64 AGRIC. HIST. 58, 61 (1990).

²⁹ See GATES, *supra* note 6, at 65.

³⁰ See *id.* at 62 ("By selling the lands to them, you will disgust them, and cause an avulsion to them from the common union. They will settle the lands in spite of everybody." (citing I THE PAPERS OF THOMAS JEFFERSON 492 (Julian P. Boyd ed. 1950))).

³¹ See North & Rutten, *supra* note 16, at 25.

³² See GATES, *supra* note 6, at 66. Note, however, that the states implemented their own land distribution policies. Several states issued retrospective preemption laws to give squatting settlers the option of purchase. See EDWARD T. PRICE, *DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC* 186 (1995). States

the survey-and-sale system would not recognize the right of a squatter³³ to gain title to the land he occupied without competing at auction to purchase it.³⁴ The Act included no anti-speculation provisions,³⁵ placed no limit on the amount of land individuals or companies could purchase, and imposed no requirement that the owner reside on or improve the land.³⁶

The 1785 Ordinance was a compromise between the needs of a post-revolutionary country that needed to pay its war debts and the republican ideals that carried it through the war. As Paul Gates explained, Congress wanted to end a tradition of granting large tracts of estates to aristocratic families and quell growing hostility between tenant-farmers and estate barons.³⁷ But the war debt apparently precluded granting free land to small farmers. The federal government therefore avoided the free-grant system once practiced in the southern colonies,³⁸ and opted instead for the survey-and-sale system.³⁹

In 1787, Congress established a system of governance for the territory north and west of the Ohio River.⁴⁰ In many important ways, the 1787 Northwest Ordinance reflected republican ideals in land policy. The ordinance's basic purpose was to provide for the governance of this new frontier, establishing the conditions for a new type of republicanism, on what was "essentially a blank political slate."⁴¹ Notable antimonopoly provisions of the 1787 Ordinance (1) rejected the British system of large landed estates, (2) made it easier for more individuals to participate in the

offered their own military bounties of free land grants for soldiers and sailors. *See id.* at 186–87. The federal government also offered millions of acres of land in the Northwest to Revolutionary War veterans as compensation for their service. *See* Jerry A. O'Callaghan, *The War Veteran and the Public Lands*, 28 ARGIC. HIST. 163, 164–65 (1954).

³³ "One that settles on land without a right or title." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2215 (2002) [hereinafter WEBSTER'S THIRD].

³⁴ *See* GATES, *supra* note 6, at 66.

³⁵ WEBSTER'S THIRD, *supra* note 33, at 2189 (" . . . an act of speculating (as by engaging in business out of the ordinary, by dealing with a view to making a profit from conjectural fluctuations in the price rather than from earnings of the ordinary profit of trade . . .)"). Speculation was a principal threat to the antimonopoly ideal. Through speculation, buyers acted as middlemen, purchasing large tracts of land they did not intend to personally use. Speculators purchased early, drove up prices, then made profits on resales. Alexander Hamilton supported sales to such speculative middle-men because they would produce quick sales of the public lands and revenue to retire the war debt. Settlers would be the eventual beneficiaries, but they would have to pay prices set by the speculators. *See* Paul W. Gates, *An Overview of American Land Policy*, 50 AGRIC. HIST. 213, 217 (1976).

³⁶ *See* GATES, *supra* note 6, at 66.

³⁷ *See* GATES, *supra* note 35, at 216 (explaining that many great estates of millions of acres had been granted by the colonies to influential families like the Penns, Calverts, Fairfaxes, and Granvilles prior to the Revolution).

³⁸ *See id.* The Southern system, called the headright system, reflected the British colonial system encouraging migration to the colonies. *See* PRICE, *supra* note 32, at 106–07. In Virginia, each settler could receive fifty acres, while a settler could get between 6 and 150 acres in other colonies. *Id.* Grant sizes were not socially egalitarian, as grants were often greater for free settlers than servants, for men than women, servants than free men, and for adults than children. Moreover, usually the person who paid the indentured servant's way received the servant's share of the land, although most colonies provided an equal share for a servant when he was freed. *See id.* at 107–09.

³⁹ Surveyors divided alternate townships into one-mile-square sections (or 640 acres). The federal government would sell half the townships whole, and half the townships by sections. Thus, an initial buyer had to have enough capital to purchase at least 640 acres. *See* Carstensen, *supra* note 24, at 34; BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 39 (1965).

⁴⁰ Northwest Ordinance, 1 Stat. 51 (1787), *reprinted in* 1 U.S.C., at LVII (2012) ("An Ordinance for the government of the Territory of the United States northwest of the River Ohio.") [hereinafter Northwest Ordinance. *See* North & Rutten, *supra* note 16, at 8. The territory was comprised of what is now considered the Midwest, north of Kentucky, between the Appalachian Mountains and the Mississippi River.

⁴¹ *See* Festa, *supra* note 23, at 435.

political process, and (3) reserved a public right-of-way to use navigable waters.

The Northwest Ordinance abolished primogeniture, the British system under which the first-born son would inherit the decedents' entire estate.⁴² The ordinance required that the property of an intestate decedent "shall descent to, and be distributed among their children, and the descendants of a deceased child, *in equal parts . . .*"⁴³ This equality of intestate succession contrasted with the British system, which held large property holdings intact when an intestate property-holder died, since only one heir could take by intestate succession. The ordinance also prohibited the use of the fee tail estate, under which land was passed down the chain of descendants, and consequently imposed practical restrictions on inter vivos land transfers.⁴⁴ The 1787 ordinance instead broke up land holdings, attacking the hereditary privilege that had inspired considerable ire in revolutionary America.

These reforms were important for promoting republican democracy. Since voting rights were linked to land ownership,⁴⁵ only a free land-owning male could participate in political life. The Northwest Ordinance continued the link between land ownership and political participation:

. . . no person [will] be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise *hold in his own right, in fee simple, two hundred acres of land* within the same; Provided, also, That *a freehold in fifty acres of land in the district*, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.⁴⁶

The Northwest Ordinance aimed to promote both settlement and political participation. To the drafters of the ordinance, land ownership protected the security of the common man and his stake in governance.⁴⁷ They believed that land ownership was "the essential ingredient to the success of the yeoman,"⁴⁸ because non-landed suffrage was unheard of before that era. Thus, the solution to greater political inclusiveness was to encourage widespread ownership of land and promote security in that ownership.⁴⁹

With political participation and civic virtue as functions of individual land ownership, the Confederation Congress intended to create the security necessary to encourage settlement of the territories.⁵⁰ The 1785 ordinance therefore authorized a recording system, and the 1787 Ordinance

⁴² Northwest Ordinance § 2; *see Festa, supra* note 23, at 437.

⁴³ Northwest Ordinance § 2 (emphasis added). Notably, the statute required an equal split among heirs whether male or female (with the exception that a widow would have a third of the real estate for life). *Id.*

⁴⁴ *See Festa, supra* note 23, at 438; Thomas Jefferson advocated abolishing fee tail, which he saw as part of a system of reform "by which every fibre would be eradicated of antient [sic] or future aristocracy and a foundation laid for a government truly republican." Thomas Jefferson, et al., AUTOBIOGRAPHY OF THOMAS JEFFERSON, 1743-1790, at 77 (Paul Leicester Ford ed., U. of Pa. Press, 2005) (1914). *See* John F. Hart, "A Less Proportion of Idle Proprietors": Madison, Property Rights, and the Abolition of Fee Tail, 58 WASH. & LEE L. REV. 167, 175-84 (2001) (discussing the legislative history of abolition of fee tail in Virginia).

⁴⁵ At the time of the drafting of the Northwest Ordinance and the U.S. Constitution, every state had some property or taxpaying prerequisite to voting. *See Festa, supra* note 23, at 446.

⁴⁶ Northwest Ordinance § 9 (emphasis added).

⁴⁷ Festa, *supra* note 23, at 465.

⁴⁸ *See id.* at 466.

⁴⁹ *See id.* at 446, 465.

⁵⁰ *Id.* at 442.

created a secretarial office to maintain public land records.⁵¹ Rampant squatting created uncertainties and risks for settlers in the territories, and a recording system secured individual property rights and encouraged both land alienation and development.⁵² Purchasers needed a recording system and a territorial government to keep and enforce that system in order to ensure security in their holdings. Richard Henry Lee, Congressman from Virginia and former President of the Continental Congress, explained the purpose of the 1787 Ordinance in these terms: “It seemed necessary, for the security of property among uninformed, and perhaps licentious people as the greater part of those who go there are, that a strong and toned government should exist, and the rights of property be clearly defined.”⁵³

The antimonopoly policy of the Northwest Ordinance was also evident in its reservation of free travel on navigable waterways in the region. Article 4 declared:

The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.⁵⁴

This provision was important to ensure that agricultural and other products could be freely transported on the major highways of the era, notably the Mississippi, Ohio, and St. Lawrence Rivers and their tributaries. Article 4’s promise of navigation access laid the foundation for the development of the antimonopolistic public trust doctrine,⁵⁵ whose American roots lie in the democratization of public access to waterways.⁵⁶

III. LAND DISPOSITION THROUGH THE HOMESTEAD ACT

Early public land disposition focused on generating revenue to pay Revolutionary War debts, rather than dispersing land among the broader public. Under this system, the federal government sold one-half of the townships whole and the other half of townships in 640-acre sections.⁵⁷ But the minimum sale size and the auction price were simply unattainable for the average settler.⁵⁸ Selling land in large tracts to investors and companies pursued the Hamiltonian vision of retiring

⁵¹ Ordinance of 1785, *supra* note 27, at 379; Northwest Ordinance § 4.

⁵² See Festa, *supra* note 23, at 442.

⁵³ See GATES, *supra* note 6, at 72–73 (citing Letter from Richard Henry Lee to George Washington (July 15, 1787)).

⁵⁴ Northwest Ordinance art. IV.

⁵⁵ See MICHAEL C. BLUMM & MARY C. WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 48–49 (2d ed. 2015).

⁵⁶ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484, 489 (1970) (finding conceptual support for the public trust doctrine in the Northwest Ordinance, and discussing the lodestar case *Illinois Central Railroad Company v. Illinois* as the most celebrated public trust case in American law. *Illinois Central* upheld a state’s repeal of a large grant of land underlying Lake Michigan because the grant would have been an abdication of the state’s trust duties to protect public access, navigation, and commerce on navigable waters).

⁵⁷ See Carstensen, *supra* note 24, at 34. The plan for selling tracts alternated between sales of entire townships and sales of 640 acres parcels of the next township. Alternating the method of sale was another compromise, as putting an entire township up for sale would necessarily mean selling to speculators. Reducing the minimum size of a purchase was an attempt to make purchases attainable for individual buyers, as opposed to large groups of speculators. See HIBBARD, *supra* note 39, at 39.

⁵⁸ See Roy M. Robbins, *Preëmption—A Frontier Triumph*, 18 MISS. VALLEY HIST. REV. 331, 333 (1931).

the war debt. The 640-acre policy was a compromise to provide opportunity to mid-sized investors.⁵⁹ Smaller investors and individuals had to purchase (at increased cost) from the initial private purchasers.⁶⁰

Over the course of the early Nineteenth century, through trial and error, Congress and the federal Land Office developed policies in response to the numerous petitions of bona fide settlers, who could not afford to buy land wholesale, or who were squatters.⁶¹ This proved to be a fairly slow process, as the antimonopoly goals of public land disposition were in tension with the motivation to repay the Revolutionary War debt and the worry that cheap land would prompt mass emigration from the East.⁶² As one scholar put it, “while by law we have insisted on a recognition of the democratic idea, in actual practice, wide departures from this ideal have not only been tolerated, but, it would seem encouraged”⁶³ This tension would remain a persistent theme throughout the history of federal land disposal. In the mid-1800s, Congress enacted legislation to address the complaints of small landowners and land seekers about the barriers imposed by purchase requirements, minimum price per acre, and minimum sale size policies. The Jeffersonian ideal finally triumphed in the 1862 Homestead Act, but early Nineteenth century public land policies contained several other disposition experiments.

A. CREDIT SALES

To facilitate settlement, Congress began to experiment with the price and parcel size issues around the turn of the Nineteenth century. In 1796, Congress increased land sale price to \$2.00 per acre as a deterrent to speculators.⁶⁴ Treasury Secretary Albert Gallatin claimed that the \$2.00 price was advantageous to the population and the prosperity of the people because it “effectually destroyed the monopoly of lands and thr[ew] the land exclusively in the hands of actual settlers. . . .”⁶⁵ In 1800, Congress reduced the minimum sale to a half-section, 320 acres, to reduce the amount of money a settler would have to accumulate.⁶⁶ But settlers began to petition for preemption rights—giving a squatting settler the opportunity to purchase the land on which he was residing and cultivating, for the minimum fixed price⁶⁷—thus avoiding competition at auction with “unfeeling” land-jobbers, who, according to one contemporary account, had been “preying on the

⁵⁹ See GATES, *supra* note 6, at 124.

⁶⁰ See *id.*

⁶¹ See Robbins, *supra* note 58, at 333–35.

⁶² See *id.* at 335; HIBBARD, *supra* note 39, at 77. Mass western settlement would also provoke Indian Wars. See Robbins, *supra* note 58, at 337.

⁶³ See Robert Tudor Hill, *The Public Domain and Democracy: A Study of Social, Economic and Political Problems in the United States in Relation to Western Development*, 36 *STUD. IN HIST., ECON. & PUB. L.* 3, 151 (1910).

⁶⁴ Act of May 18, 1796, ch. 29, § 4, 1 Stat. 464, 467. Purchasers could pay the sale price over the course of a year. *Id.* § 7, 1 Stat. at 467.

⁶⁵ 7 *ANNALS OF CONG.* 1332 (1803) (statement of Albert Gallatin, Secretary of the Treasury of the United States). Gallatin’s claim was actually out of step with the reality of land speculation. Hundreds of residents of Ohio complained that \$2 for each acre of a 320 acre-tract was beyond the reach of the average settler, whom speculators could outbid anyway. See GATES, *supra* note 6, at 131.

⁶⁶ Act of May 10, 1800, ch. 55, § 4, 2 Stat. 73, 74. The Act was sponsored by William Henry Harrison, the first delegate from the Northwest Territory. Robbins, *supra* note 58, at 336.

⁶⁷ See Robbins, *supra* note 58, at 337 (describing the petitions of settlers who settled upon and improved the public lands, seeking the right to purchase the lands they possessed at \$2 per acre).

Vitals of his Country. . . .⁶⁸

The 1800 Act also created an extended credit system, which Congress intended to help speed up the process of land disposition and make it easier for a bona fide settler to purchase land.⁶⁹ The Act required purchasers to pay only a quarter of the auction price within forty days, and thereafter make four annual installments. In 1804, Congress cut the minimum acreage in half again, down to a quarter-section tract of 160 acres,⁷⁰ retaining the credit system, and delaying interest charges until payment was due.⁷¹

Lawmakers placed no limits on the amount of surveyed land a person or company could purchase on credit, however, so there was no check on absentee purchasers and the purchase of land monopolies.⁷² Speculators used these low-entry costs to purchase vast tracts of land, anticipating that the increase in value would allow them to repay the credit extended by the government.⁷³ Many speculators were disappointed when the values did not rise as expected.⁷⁴ The credit system worked poorly for many small-holders as well. Settlers who would exhaust their resources to make the down payment would then find it difficult to make ensuing annual payments when the returns on their crops did not keep pace with the payment schedule.⁷⁵ Congress responded to an outcry from western settlers by enacting several relief bills from 1806 to 1832 that allowed delinquent purchasers extra time to pay their debts.⁷⁶

B. CASH SALES

In the wake of the Panic of 1819,⁷⁷ Congress cancelled the credit system in 1820 in favor of a cash-sale system.⁷⁸ No longer could purchasers gamble by taking the chance that their agricultural endeavors would pay the purchase price of land plus interest over a set period of time. In the cash-based system, the government required payment up front. Although settlers on the public domain lost the benefit of a credit-installment system, the 1820 Act lowered the minimum bid price of land to \$1.25 per acre from \$2 and again halved the minimum land sale from 160 acres to 80 acres,⁷⁹ in order to encourage small purchases.⁸⁰

⁶⁸ GATES, *supra* note 6, at 131 (quoting an 1801 Petition of John Boggs, an Ohio resident, to Congress).

⁶⁹ ROY M. ROBBINS, *OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1936*, at 18–19 (1962).

⁷⁰ Act of Mar. 26, 1804, ch. 35, § 10, 2 Stat. 277, 281.

⁷¹ *Id.* § 11, 2 Stat. at 281. See HIBBARD, *supra* note 39, at 74–75; ROBBINS, *supra* note 69, at 25.

⁷² See GATES, *supra* note 6, at 142.

⁷³ See ROBBINS, *supra* note 69, at 24.

⁷⁴ See Tudor Hill, *supra* note 63, at 40.

⁷⁵ See *id.*

⁷⁶ See HIBBARD, *supra* note 39, at 92–94; GATES, *supra* note 6, at 134–36 (detailing the terms of these acts from 1806 to 1816). At the time, Congress was still unwilling to provide free land grants and began to criminalize squatting in 1807. See Robbins, *supra* note 58, at 338. In that year, Congress passed the Intrusion Act, which allowed unlawful squatters to register with the local Land Office in order to become tenants-at-will, until they could pay for their tracts. Act of Mar. 3, 1807, ch. 46, § 2, 2 Stat. 445, 445–46. A squatter who failed to register would be fined and jailed by the frontier army. *Id.* § 4, 2 Stat. at 446.

⁷⁷ The Panic of 1819 was an economic depression that brought on major reductions in the price of agricultural products, bringing ruin to land debtors. See HIBBARD, *supra* note 39, at 97–98.

⁷⁸ Act of Apr. 24, 1820, ch. 51, § 2, 3 Stat. 566, 566.

⁷⁹ Compare Act of Mar. 26, 1804, ch. 35, § 10, 2 Stat. 277, 281 (quarter sections, or 160 acres), and § 5, 2 Stat. at 279 (\$2 per acre), with Act of Apr. 24, 1820, ch. 51, § 1, 3 Stat. 566, 566 (half-quarter sections, or 80 acres), and § 3, 3 Stat. at 566 (\$1.25 per acre).

⁸⁰ See Tudor Hill, *supra* note 63, at 41.

The cash system did not curb land speculation, however. Banks were willing to lend to speculators, and speculators paid the government for the land in paper bills of depreciating value. For example, the American Land Company⁸¹ borrowed from banks and influential investors, bought up hundreds of thousands of acres of land without improving them, and waited to resell at many times the price it had paid.⁸²

Sixteen years after the adoption of the cash system, President Andrew Jackson issued his famous “Specie Circular” to the Land Office in 1836, which directed officials to accept nothing but hard currency for land sales.⁸³ Jackson issued the policy in response to widespread complaints about fraud, speculation, and monopoly of the public lands accomplished by means of the credit banks offered after Congress had abolished the governmental credit system. The circular aimed “to repress alleged frauds, and to withhold any countenance of facilities in the power of the Government from the monopoly of the public lands in the hands of speculators and capitalists, to the injury of the actual settlers in the new States”⁸⁴ Although the circular did sharply reduce large-scale purchases, it was followed by (and perhaps induced) an economic recession that reduced westward investment.⁸⁵

Bona fide settlers were disadvantaged by the cash system. Since settlers no longer had the benefit of an installment plan option—allowing a settler to hold occupied land until his payment was complete—speculators could easily outbid the settler at an auction.⁸⁶ The preemption movement, seeking to give bona fide pioneers the first right of purchase, gained steam due to the inequities of the cash system.

C. PREEMPTION SALES AND GRADUATED PRICING

In 1830, Congress passed a preemption act, which retroactively gave settlers in possession of and cultivating land in 1829 the option of guaranteed purchase. The Act allowed settlers to purchase up to 160 acres for \$1.25 per acre within one year, without an auction.⁸⁷ In principle, preemption aimed to put occupants on the same playing field as absentees, giving small landholders an opportunity to purchase small parcels of land at the minimum price without being outbid. The Act pardoned illegal settlers who had already been working the land.⁸⁸ Congress also passed preemption statutes in 1838 and 1840, in order to extend the benefits and privileges of the 1830 Act to those who settled on the public lands after the 1830 Act went into effect.⁸⁹ To claim preemption, a settler had to be at least twenty-one years old, the head of a household, and an actual resident on the land,⁹⁰ conditions that aimed to prevent speculators and others from claiming more than their fair share without going through the auction process.⁹¹

⁸¹ Investors and officers of which included members of Congress. *See GATES, supra* note 6, at 171–74.

⁸² *See id.* at 171–73. Where the company had purchased land at \$1.25 an acre, in 1836 it advertised the same land from \$7 to \$15 per acre. *Id.* at 173.

⁸³ *See ROBBINS, supra* note 69, at 70.

⁸⁴ *GATES, supra* note 6, at 175.

⁸⁵ *See GATES, supra* note 6, at 175–76; *Robbins, supra* note 58, at 344.

⁸⁶ *See ROBBINS, supra* note 69, at 50.

⁸⁷ Act of May 29, 1830, ch. 208, § 1, 4 Stat. 420, 420–21; *GATES, supra* note 6, at 225.

⁸⁸ *See ROBBINS, supra* note 69, at 342.

⁸⁹ Act of June 22, 1838, ch. 119, 5 Stat. 251, 251; Act of June 1, 1840, ch. 32, § 5, 5 Stat. 382, 382.

⁹⁰ Act of June 22, 1838, 5 Stat. at 251; *see ROBBINS, supra* note 69, at 76.

⁹¹ Each claimant took an oath that he entered on the land “in his own right, and exclusively for his own use and benefit,” and that he had not “directly or indirectly, made any agreement or contract, in any way or any manner, with

Congress passed a major expansion of preemption in 1841.⁹² The General Preemption Act of 1841, for the first time, prospectively recognized the right of a settler to reside on land prior to purchase and to purchase that land without competition.⁹³ The statute embodied several ideas that Congress would incorporate into the Homestead Act two decades later, including: (1) the notion that promoting settlement was more important than generating revenue;⁹⁴ (2) the sentiment that the public domain should be split up into many small farms, rather than concentrated in the hands of large landowners;⁹⁵ and (3) the belief that bona fide settlers should be protected while in the process of earning enough money to fulfill the purchase price.⁹⁶ The 1841 statute marked the end of the conservative land-disposal policy that favored revenue production over egalitarian distribution.⁹⁷

Another step toward preventing land monopolies was the Graduation Act of 1854.⁹⁸ Since the government imposed a uniform minimum price of \$1.25 per acre, regardless of land quality, whole portions of townships—composed of less valuable land—went unsold for decades. As indicated previously, the survey-and-sale system was indiscriminate as to landforms, features, or arability.⁹⁹ The result was that some sections of land were leapfrogged and left unpurchased. Consequently, in 1854, Congress reduced the minimum price of these leftover tracts, not by individual appraisal, but by how long they remained unsold.¹⁰⁰ For a tract unsold for ten to fifteen years, a buyer would pay \$1 per acre, down from \$1.25. For a parcel unsold for fifteen to twenty years, the price was \$0.75 per acre. Lands unsold for thirty or more years were available for just twelve-and-a-half cents, so-called one-bit land.¹⁰¹ Graduated prices made land more accessible to settlers of lesser means.¹⁰² The law required an affidavit that the purchaser would occupy and cultivate the land (or use the land in support of an adjoining farm owned or occupied by him), would devote the land to personal use, and would acquire no more than 320-acres under the Act.¹⁰³

The 1854 Graduation Act was limited in terms of its democratizing effect on public land

any person or persons whatever, by which the title which he might acquire from the Government of the United States should inure to the use or benefit of anyone except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time” Act of June 22, 1838, 5 Stat. at 251.

⁹² General Preemption Act of 1841, ch. 16, 5 Stat. 453, *repealed by* General Revision Act of 1891, ch. 561, § 4, 26 Stat. 1095, 1097.

⁹³ *See* ROBBINS, *supra* note 69, at 89. Settlement prior to payment no longer constituted trespass. *See id.*

⁹⁴ *See id.* at 91.

⁹⁵ Importantly, in terms of antimonopoly policy, the Act required a purchaser to erect a dwelling on the land, required that a settler must not be a proprietor of 320 or more acres in any territory, and limited entry under the law to 160 acres. General Preemption Act of 1841, § 10, 5 Stat. at 455–56.

⁹⁶ *See* ROBBINS, *supra* note 69, at 91.

⁹⁷ *See id.*

⁹⁸ Graduation Act of 1854, ch. 244, 10 Stat. 574 (note the title to the Act: “[t]o Graduate and Reduce the Price of the Public Lands to actual Settlers and Cultivators.”)

⁹⁹ *See supra* note 28 and accompanying text.

¹⁰⁰ Graduation Act of 1854, § 1, 10 Stat. at 574.

¹⁰¹ *Id.* The 1854 statute excluded mineral lands, which the government sold for \$1.25 per acre. *Id.*

¹⁰² Senator Benton from Missouri had even advocated a graduation system that would provide some free land “to such poor persons as may be willing to take and cultivate them,” *quoted in* HIBBARD, *supra* note 39, at 290–91.

¹⁰³ Graduation Act of 1854, § 3, 10 Stat. at 574.

sales,¹⁰⁴ since it did not require proof of settlement, and it was not restricted to landless people.¹⁰⁵ Although the Land Office's policy required witness of the occupant's actual occupation of the land, this requirement was easily gamed.¹⁰⁶ Moreover, the leftover land was marginal and sometimes of poor quality for agriculture, the mainstay of the small settler.¹⁰⁷ On the other hand, the Act did provide a new opportunity for investors with little cash flow,¹⁰⁸ and the 320-acre limitation reiterated a growing sentiment that public lands should not be available in large tracts to monopolists for speculation.¹⁰⁹ Later, in the 1860s and 1870s, disposition acts would carry on the tradition of an acreage limitation—for example, in the Homestead, Timber and Stone, and Desert Land Acts.¹¹⁰

D. THE HOMESTEAD ACT

As early as 1828, the House Public Lands Committee recommended homesteading legislation to accommodate the growing numbers of settlers seeking small tracts at a fair price.¹¹¹ The committee asked the House to take notice of:

[T]he fact that there are many families who are neither void of industry nor of good moral habits, who have met with the usual share of the difficulties always accompanying the settlement of a new country, and who, living very remote from the market, never expect to see the day arrive when they will be enabled to save enough, with all their efforts, from their means of support, to purchase a farm and pay for it in cash.¹¹²

Some states like Missouri and Illinois prodded Congress for land cessions, so they could donate land to indigent settlers.¹¹³ Missouri's petition to Congress claimed that "the passage of such a law would . . . not only promote the strength and prosperity of this frontier state, but the happiness of thousands who, from the want of pecuniary means, are compelled to remain in an anti-republican state of dependence on rich landlords."¹¹⁴ But it would not be until three decades later, during the

¹⁰⁴ The main purpose of graduation was not to get cheap lands into the hands of poor farmers, but to earn revenue on lands that had been overlooked. *See GATES, supra* note 6, at 185 (suggesting that without a means of enforcing the 320-acre limitation, the 1854 statute represented mere window dressing, not a serious attempt at egalitarian distribution and antimonopoly).

¹⁰⁵ *See GATES, supra* note 6, at 187.

¹⁰⁶ *See id.* at 190.

¹⁰⁷ *See id.* at 182 (describing leftover Graduation Act acreage as "sometimes fractional quarters, hilly, broken, cut by ravines or streams, swampy or low land unpromising for crops. . . . If the broken land was suitable for pasture or had good grass for hay, nearby owners saw little reason to buy it and pay taxes on it as long as they could graze their livestock on it Everywhere in the West the process of land selection had left behind these neglected tracts, stripped of their timber, overgrazed . . .").

¹⁰⁸ Paul Gates maintained that the proponents' real purpose was not to help the "small man" but to reduce the sale price and encourage cession of these lands to the states (citing the fact that large amounts of unsold tracts of usable land remained in the southern states). *See id.* at 184.

¹⁰⁹ *See id.* at 187. The homestead advocate, Horace Greeley, supported the acreage limitation, but lamented that it was unenforced, so that "any shrewd monopolist can drive a coach and six through it." *Id.*

¹¹⁰ Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392; Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377, 377; Timber and Stone Act of 1878, ch. 151, § 1, 20 Stat. 89, 89.

¹¹¹ *See HIBBARD, supra* note 39, at 351.

¹¹² *See id.*

¹¹³ *See id.* at 350–51.

¹¹⁴ *See id.*

Civil War (with the South out of the Union and out of the Senate),¹¹⁵ that Congress would provide free land for settlement. Southern politicians opposed granting free land to small holders because they worried that homestead legislation would fill the West with Yankee settlers opposed to slavery.¹¹⁶

As enacted in 1862, the Homestead Act entitled any person twenty-one years or older to claim up to 160 acres of public land without fee.¹¹⁷ At long last, the Lockean vision of free land for labor was government policy.¹¹⁸ The Act required the homesteader to ‘prove up’ his site after five years and pay only a registration fee and small commission to the register or receiver of the Land Office to obtain a land patent.¹¹⁹ The Act included limitations designed to ensure that only bona fide settlers obtained free land, requiring the settler to swear that he (1) would use the land for actual settlement and cultivation, (2) was not acquiring the land on behalf of someone else, and (3) was the head of the household or twenty-one years of age.¹²⁰ In the Homestead Act, Congress sought to rectify many of the elements which had worked against bona fide settlement in the past—land price, purchase medium, minimum acreage, and time allowed for payment of debt. The land was now essentially free; the purchase medium became five years of sweat equity, rather than cash or credit; the acreage was limited to 160 acres¹²¹ in order to give all a fair chance. These changes reflected the overriding purpose of providing homes and a means of livelihood to the average farmer, achieving the vision of the 1828 Public Lands Committee, which advocated homesteading:

. . . [Y]our committee believes that such small earnings [of the poor] applied to the improvement and cultivation of small tracts, scattered through the public domain, would be as advantageous to the public as though they should be paid directly to the treasury. No axiom in political economy is sounder than the one which declares that the wealth and strength of the country, and more especially, of the republic, consists not so much in the number of its citizens as in their employments, their capability of bearing arms, and of sustaining the burdens of taxation whenever the public exigencies shall require it.”¹²²

The Homestead Act represented the triumph of Jeffersonian land disposition, favoring free land for bona fide settlers over the Hamiltonian method of disposition to speculators and middle-men that had dominated the early era.¹²³

Although the Homestead Act made land acquisition accessible to the small farmer, it was actually no panacea for the yeoman. Importantly, the cash sale statute of 1820 was still on the

¹¹⁵ See *id.* at 366–67, 383–85; ROBBINS, *supra* note 69, at 206.

¹¹⁶ See JAMES M. MCPHERSON, *THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 193 (1988).

¹¹⁷ Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392. A homesteader could claim, for free, 160 acres that the government had offered at \$1.25 an acre, or up to eighty acres of land the government offered for sale at \$2.50 an acre. *Id.*

¹¹⁸ *Id.* The concept of a homestead evokes a Lockean view of property, in that a person can lawfully privatize that amount of resources (or acorns, in the Lockean allegory) that he can put to use by his labors. LOCKE, *supra* note 1, § 31.

¹¹⁹ That is, the settler had to show, before receiving title from the government, that he lived on or cultivated the homestead for five years. *Id.* § 2, 12 Stat. at 392; see GATES, *supra* note 6, at 394–95.

¹²⁰ Homestead Act § 2, 12 Stat. at 392.

¹²¹ *Id.* § 1, 12 Stat. at 392.

¹²² See HIBBARD, *supra* note 39, at 351.

¹²³ See *supra* notes 30–36 and accompanying text.

books, and no acreage limitation attached to such sales. A land speculator could still anticipate settlement by buying land in unlimited amounts.¹²⁴ Homesteading was not permitted on unsurveyed lands (although squatting surely did occur) until 1880.¹²⁵ With cash sales still available, buyers were able to pay the speculator's price for lands closer to existing towns.¹²⁶ Additionally, millions of acres of land were off-limits to homesteading by virtue of the fact that 175 million acres were Indian land,¹²⁷ 140 million acres were conveyed by the federal government to new states as part of statehood, and 125 million acres were the subject of federal railroad grants.¹²⁸

E. RAILROAD GRANTS AND RISING ANTIMONOPOLY SENTIMENT

The second half of the Nineteenth century saw the rise of antimonopoly as a political movement pressing for land reforms, particularly in instituting resale conditions in railroad grants.¹²⁹ Settlers in the West developed great antipathy towards railroad companies, to which Congress granted millions of acres of land in exchange for the service of building major transit infrastructure across the nation. Congress intended the companies to sell the land to pay for construction, but the companies retained vast acreages of formerly public lands for decades, engaging in their own form of land speculation.¹³⁰ According to one account, the railroads influenced the settlement of one-third of the country.¹³¹

¹²⁴ See GATES, *supra* note 6, at 435.

¹²⁵ Act of May 14, 1880, ch. 89, 21 Stat. 140, 140–41.

¹²⁶ See GATES, *supra* note 6, at 397. Also, the practice of commuting homesteaded land undermined the effort to ensure that the lands stayed in the hands of small owners, as the statute allowed individuals to buy the lands after six months instead of occupying and working the land for five years. These “commuted homesteads” often fell into the hands of timber companies. See Gary D. Libecap & Ronald N. Johnson, *Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement*, 39 J. ECON. HIST. 129, 131 (1979).

¹²⁷ The model of the homestead—which represented a triumph of distributive justice for settlers—proved disastrous when applied a quarter-century later to Native Americans. In 1887, Congress imposed the 160-acre settlement system on Indian tribes in the West. Dawes Act, ch. 119, § 1, 24 Stat. 388, 388. The Dawes Act initiated the transformation of communally-held tribal land into 160-acre allotments for individual Indians, leading to the dissolution of many tribal communal cultures. See ROBBINS, *supra* note 69, at 283. The statute offered citizenship to tribal members who chose a “civilized life” by settling onto homestead allotments. § 6, 24 Stat. at 390. After carving up the communal Indian reservations into individual homestead tracts and allocating those tracts to the individual tribal members, the Dawes Act authorized the federal government to sell the remaining “surplus” reservation lands to white homesteaders in 160-acre parcels. § 5, 24 Stat. at 389–90. By 1906, three-fifths of Indian lands had been appropriated by white settlement. See ROBBINS, *supra* note 69, at 284.

¹²⁸ See GATES, *supra* note 6, at 397.

¹²⁹ See *id.* at 454; GEORGE DRAFFAN, *TAKING BACK OUR LAND, A HISTORY OF RAILROAD LAND GRANT REFORM 10* (1998); see also Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489, 492 (the “Union Pacific Act” required the railroad to relinquish its hold on land grants it had not used in a timely manner, so that the public could make use of the land at an affordable price: “[L]ands so granted by this section which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding \$1.25 per acre to be paid to said company.”).

¹³⁰ See Tudor Hill, *supra* note 63, at 199.

¹³¹ See DRAFFAN, *supra* note 129, at 6 (citing Fred Shannon, *The Railroad Land Grant Legend in American History Texts*, 32 MISS. VALLEY HIST. REV. 572–74 (1946)). Although railroad grants covered fully ten percent of the country, these grants were composed of opposite sections of land in a checkerboard pattern, increasing the influence of the railroads over miles of land. The monopoly railroads created was not limited to land; on the frontier the companies monopolized grain terminals, set transportation rates at “whatever the traffic could bear,” controlled

From the 1850s to 1871, Congress (along with individual states) pursued a policy of granting millions of acres of public lands to the railroads. Once it became apparent that the railroad companies were selling the lands in large tracts to other companies or holding onto the better part of their grants, a land reform bloc in Congress began to advocate for inclusion of homestead provisions in the grants, to prevent monopoly and ensure distribution to actual settlers and farmers.¹³²

Congress began to include such conditions in railroad grants after 1866.¹³³ For example, the 1869 grant to the Oregon and California (“O&C”) Railroad included a proviso that the granted land “shall be sold to actual settlers only, in quantities not greater than one-quarter section [160 acres] to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.”¹³⁴ Not only did the legislation seek to break the monopoly by forcing sale to the public, it required sales to small landowners at specified prices. However, what was intended to be a redistributive policy ultimately failed, because the General Land Office, which suffered from a lack of funding and purportedly operated under the influence of the railroads, rarely enforced it.¹³⁵ By 1870, the House of Representatives resolved to issue no more railroad grants,¹³⁶ deciding that the public lands should instead “be held for the exclusive purpose of securing homesteads to the actual settlers under the homestead and preemption laws”¹³⁷

In the 1870s, Congress began to institute a series of forfeiture laws to re-vest hundreds of thousands of acres of railway grants into the public domain and reopen the land to settlement.¹³⁸ The forfeiture movement that provoked this change in policy was fueled by the fact that many railroad grantees had not finished their lines. Because they had not yet fulfilled the conditions of

mortgages and other loans, and often inspected farmers’ books to monitor their profits. *See* DRAFFAN, *supra* note 121, at 6–7.

¹³² Under the preexisting policy, “the railroad corporations have been able to withdraw vast tracts of land from the market and hold them for an unlimited time out of the reach of persons desiring to purchase for actual settlement, thereby retarding the settlement of the country, and doing manifest injustice to those seeking homes for cultivation by creating vast monopolies.” CONG. GLOBE, 40th Cong., 2d Sess. 4428 (1866) (statement of Rep. Benjamin Hopkins of Wisconsin).

¹³³ *See* DRAFFAN, *supra* note 129, at 10.

¹³⁴ Act of April 10, 1869, ch. 27, 16 Stat. 47, amending Act of July 25, 1866, ch. 242, 24 Stat. 239. However, instead of selling its land grants only to settlers in limited parcels, the O&C Railroad sold large amounts of timbered acreage at market prices. In the 1890s, when the timber industry began to grow in the Northwest, O&C patented 2,450,000 acres of its grant, and sold the parcels greater than 160 acres and for prices between \$5 and \$40 per acre, in violation of the settler provision of its grant. *See* *United States v. Or. & Cal. R.R.*, 186 F. 861, 873 (D. Or. 1911). *See* DRAFFAN, *supra* note 129, at 22. Faced with antimonopoly protest from Oregonians, Congress called on the U.S. Attorney General to enforce O&C grant limitations. S.J. Res. 18, 60th Cong., 35 Stat. 571 (1908). *See generally* Michael C. Blumm & Tim Wigington, *The Oregon & California Railroad Grant Lands’ Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict*, 40 B.C. ENVTL. AFFAIRS L. REV. 1 (2013) (providing a history of the controversy surrounding the so-called O&C Lands).

¹³⁵ *See* DRAFFAN, *supra* note 129, at 10; David Maldwin Ellis, *The Forfeiture of Railroad Land Grants, 1867-1894*, 33 MISS. VALLEY HIST. REV. 27, 31 n.9, 33 (1946).

¹³⁶ Although in the next term the House approved further grants, the railroad land grant policy came to an end in 1871. *See* ROBBINS, *supra* note 69, at 277.

¹³⁷ CONG. GLOBE, 41st Cong. 2 Sess. 2095 (1870). Farm groups, labor organizations, land reformers, and politicians pressured Congress to make this change. Ellis, *supra* note 135, at 38.

¹³⁸ *See, e.g.*, Act of July 11, 1870, ch. 241, 16 Stat. 227 (New Orleans, Opelousas & Great Western); Act of Apr. 15, 1874, ch. 97, 18 Stat. 29 (Placerville & Sacramento Valley); Act of June 16, 1874, ch. 285, 18 Stat. 72 (Stockton and Copperopolis Railroad); Act of July 24, 1876, ch. 227, 19 Stat. 101 (Leavenworth, Lawrence, & Galveston); Act of Mar. 3, 1877, ch. 125, 19 Stat. 404 (Kansas & Neosho Valley Railroad).

the grants, these railroad grantees were withholding millions of acres from settlement.¹³⁹ The 1880s brought further forfeiture legislation as antimonopoly sentiment grew, supported by agrarian parties that would later form the Populist Party.¹⁴⁰ From 1884 to 1887 Congress passed bills to re-vest more than twenty-eight million acres,¹⁴¹ then a general forfeiture law in 1890,¹⁴² which declared the forfeiture of all grants that were unearned at the time of the Act's passage.¹⁴³ The statute effectuated the forfeiture of only 5.6 million acres¹⁴⁴—several times less than the demands of Democrats. Ultimately, this era of reform energized agrarians and other antimonopolists, whose fervor would spark a new era of resource management in the Twentieth century, as discussed below in Part IV.

IV. NATURAL RESOURCES DEVELOPMENT IN THE NINETEENTH CENTURY

For most of the Nineteenth century, federal natural resource management policies in the West were virtually non-existent. The government's chief policy was to dispose of the vast expanse of the continent to American settlers. Not until 1831 did Congress legislate to manage publicly owned timber.¹⁴⁵ Over the course of the Nineteenth century, Congress began to enact resource-related laws with acreage limits and imposed diligent pursuit requirements¹⁴⁶ and public access provisions—all classic antimonopoly safeguards against speculation and resource concentration. However, loopholes and weak enforcement thwarted much of these limitations' antimonopoly potential. On the other hand, Congress experimented with resource leasing—which allowed the public to share in the rent and royalties from the sale of public resources—¹⁴⁷ and would later authorize federal land planning based on resource suitability. Congress also protected access to the resources on public lands through the 1885 Unlawful Inclosures Act.¹⁴⁸ Safeguarding public access was another core element of antimonopoly policy.¹⁴⁹

A. ANTIMONOPOLY IN EARLY TIMBER MANAGEMENT

Public timber resources went largely unmanaged throughout most of the Nineteenth century.

¹³⁹ See DRAFFAN, *supra* note 129, at 10.

¹⁴⁰ See Ellis, *supra* note 135, at 40.

¹⁴¹ Act of June 28, 1884, ch. 131, 23 Stat. 61; Act of Jan. 31, 1885, ch. 46, 23 Stat. 296; Act of Feb. 28, 1885, ch. 265, 23 Stat. 337; Act of July 6, 1886, ch. 637, 24 Stat. 123. See Ellis, *supra* note 135, at 42 (calculating that these four statutes re-vested 601,000, 810,880, 15,692,800, and 10,795,40 acres, respectively).

¹⁴² Act of Sep. 29, 1890, ch. 1040, 26 Stat. 496.

¹⁴³ *Id.*

¹⁴⁴ See Ellis, *supra* note 135, at 55.

¹⁴⁵ Act of Mar. 2, 1831, ch. 66, 4 Stat. 472. (outlining punishments for offenses related to destroying or removing timber reserved for naval purposes).

¹⁴⁶ See *infra* notes 150, 159–171, 184–191, 217–24 and accompanying text (describing the antimonopoly elements of the Timber Cutting Act, Timber and Stone Act, the General Mining Law, and Unlawful Inclosures Act).

¹⁴⁷ See *infra* notes 166–71 and accompanying text.

¹⁴⁸ Act of Feb. 25, 1885, ch. 149, 23 Stat. 321 (codified at 43 U.S.C. § 1061). See *infra* notes 209–10.

¹⁴⁹ See, e.g., Sax, *supra* note 56, at 484–85 (explaining that the conceptual foundations of the antimonopolistic public trust doctrine arose from ideas expressed in the free public navigation provision of the Northwest Ordinance, early New England laws preserving for free public use the “great ponds,” and the setting-aside of national parks for public use).

For example, although an 1831 statute made it illegal to cut timber from the public lands,¹⁵⁰ the public largely ignored the law. Settlers, railroad companies, and mill owners alike stole timber from government land, and the law essentially went unenforced.¹⁵¹ The reality on the frontier was that settlers considered unfenced forests to be common resources.¹⁵² Commercial enterprises cleared government-owned acreage to feed growing cities and power steamboats.¹⁵³

During the second half of the Nineteenth century, Congress and the Department of the Interior began instituting policies to prevent monopolistic use of forest land, while recognizing the claims of small landowners. At mid-century, the agency¹⁵⁴ began to enforce rules against timber trespass, using timber agents to gather evidence and prosecute offenders. Some state representatives decried the action as unfair to small homesteaders and frontiersmen, claiming that otherwise “law abiding” citizens had no choice but to steal.¹⁵⁵ In the early 1850s, Interior clarified its antimonopoly policy by disclaiming any intent to interfere with bona fide settlers taking a reasonable amount of wood for building homes, bridges, and fences. Instead, the main government target was “speculators whose sole object and pursuit are the manufacture and exportation of lumber, for their own profit, without compensation to the government or benefit to the country whence it is taken.”¹⁵⁶ Over the subsequent decades, railroads and sawmill operators tried to convince Congress that government timber agents were wresting firewood and building materials from the hands of average settlers and should be stopped.¹⁵⁷ In reality, the agents were preoccupied with large-scale timber removals by corporations such as the Atchison, Topeka & Santa Fe Railroad, the Colorado Central Railroad, and the Boston & Colorado Smelting Company, which the United States sued for tens of thousands of dollars in stolen timber.¹⁵⁸

A large part of the timberlands had never been offered for sale, and there was still no good way for the average settler to legally obtain timber from those lands until the late 1870s. In 1878, Congress enacted both the Timber and Stone Act and the Timber Cutting Act to make timber

¹⁵⁰ Act of Mar. 2, 1831, ch. 66, § 1, 4 Stat. 472, 472 (if a person should remove any “timber, from any other lands [other than those set aside to provide timber for the Navy] of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of use, or employ the same in any manner whatsoever, other than for the navy of the United States” shall be fined and imprisoned).

¹⁵¹ See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN* 121 (1993).

¹⁵² Most frontiersmen took the timber they found on unenclosed lands regardless of land ownership. See GATES, *supra* note 6, at 534. To the pioneers, the standing forest on the frontier served little value; it was an impediment to agriculture and improvements, provided useful building material for settlement, but was valuable only insofar as it could be cut and converted to shelter. See *id.* For a typical Nineteenth century judicial view of the unenclosed forest land as a commons, see *McConico v. Singleton*, 9 S.C.L. 244, 351 (S.C. Const. App. 1818) (upholding the public’s right to hunt on privately owned, unenclosed rural forestland).

¹⁵³ See GATES, *supra* note 6, at 534–35 (describing the small commercial lumbering that served steamboat and railroads construction and urban development).

¹⁵⁴ Congress founded the Department of the Interior in 1849. Act of Mar. 3, 1849, ch. 108 § 1, 9 Stat. 395, 395.

¹⁵⁵ For example, the Minnesota territorial legislature issued a statement reflecting its frustration with the fact that the federal government had yet to offer pine land at public sale, or open these lands to preemption sales. Nevertheless, hundreds of Minnesotans engaged in lumbering as an occupation. The territorial legislature argued against prosecuting those individuals for trespass, claiming the prosecutions would “fill[] the pockets of a few government officials at the expense of the law abiding community[.]” See GATES, *supra* note 6, at 538 (quoting a Memorial signed by Alexander Ramsey, Territorial Governor (Feb. 14, 1852)).

¹⁵⁶ See GATES, *supra* note 6, at 539 (quoting Sec’y Interior McClelland’s Letter of May 14, 1852).

¹⁵⁷ See GATES, *supra* note 6, at 549, 554.

¹⁵⁸ See 7 CONG. REC. H1533 (Mar. 6, 1878) (statement of Rep. Charles Foster of Ohio, defending the legitimacy of these suits and asking for \$20,000 in appropriations so that the Secretary of the Interior could continue to investigate and prosecute them).

available to settlers and miners.¹⁵⁹ Both statutes reflected antimonopoly sentiments.¹⁶⁰

The Timber Cutting Act allowed citizens of specified states and territories to cut timber without charge from “mineral lands” for building, agricultural, mining, or other domestic purposes.¹⁶¹ Although Congress limited timber cutting to domestic, agricultural, or mining purposes in order to support the individual miner and settler, expressly excluding railroad companies,¹⁶² the government failed to enforce the Act to prevent large companies from benefitting from it.¹⁶³ Indeed, the General Land Office expressed concern in an 1882 report that, “[d]epredations upon the public timber by powerful corporations, wealthy mill owners, lumber companies and unscrupulous monopolists . . . are still being committed to an alarming extent and great public detriment.”¹⁶⁴ The law was largely unenforced against unauthorized commercial extraction.¹⁶⁵

The Timber and Stone Act, which Congress enacted on the same day in 1878, complemented the Timber Cutting Act and reflected the same antimonopoly sentiment. The statute authorized the government to offer public land unfit for cultivation but chiefly valuable for timber or stone for sale at a \$2.50 per acre minimum.¹⁶⁶ The Act restricted each sale to 160 acres and required the purchaser to file an affidavit that the timber and stone was for personal use, not for speculation or on behalf of any other person.¹⁶⁷ Congress intended this statute to operate similarly to homesteading legislation, in which small resource users could privatize only enough forested land for personal benefit.¹⁶⁸ Nevertheless, large companies often purchased timber and stone acreage by fraud or secondary purchase, amassing large land holdings.¹⁶⁹ The Act also declared that timber removal from public lands was illegal, but the law made clear that miners and farmers would not be prosecuted if they cut timber in the course of clearing their farm for tillage or for taking the amount of timber necessary to support improvements on the land.¹⁷⁰ Decades later, in 1909, the

¹⁵⁹ Act of June 3, 1878, ch. 150, 20 Stat. 88 (Timber Cutting Act); Act of June 3, 1878, ch. 151, 20 Stat. 89 (Timber and Stone Act).

¹⁶⁰ Paul Gates claimed that the Timber and Stone Act aimed less to benefit the settler, and more to open up unoffered timberlands to western timber companies. GATES, *supra* note 6, at 550–51. However, the Senate voted against offering the land at auction in unlimited amounts. *See id.* at 551.

¹⁶¹ Act of June 3, 1878, ch. 150, § 1, 20 Stat. 88, (codified as amended at 16 U.S.C. § 604 (1921)) (granting residents of Colorado, Nevada, and the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana “and all other mineral districts of the United States” the right to cut timber for mining, domestic, and agricultural purposes). *But see* HIBBARD, *supra* note 39, at 463–64 (noting that because many mineral lands were unknown, or vastly interspersed, unpermitted timber cutting on non-mineral lands continued).

¹⁶² Act of June 3, 1878, ch. 150, § 1, 20 Stat. at 88.

¹⁶³ *See* HIBBARD, *supra* note 39, at 464.

¹⁶⁴ GENERAL LAND OFFICE REPORT OF 1882, *quoted in* HIBBARD, *supra* note 39, at 464.

¹⁶⁵ *See* GATES, *supra* note 6, at 552 n.60 (“the registers had shown a marked tendency to tolerate or perhaps one should say wink at infractions of the law by the larger economic interests . . .”).

¹⁶⁶ Act of June 3, 1878, ch. 151, § 1, 20 Stat. 89, 89 (applying to surveyed lands within California, Oregon, Nevada, and the Washington Territory).

¹⁶⁷ *Id.* § 2.

¹⁶⁸ *See* Gary Libecap & Ronald Johnson, *Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement*, 39 J. ECON. HIST. 129, 129–32 (1979) (comparing the Homestead Act’s acreage limits and bona-fide settlement requirement to the requirements of the Timber and Stone Act, arguing that timber companies lacked sufficient lawful opportunities to acquire profitable amounts of timber acreage, so they ignored the law).

¹⁶⁹ HIBBARD, *supra* note 39, at 466 (noting that one company acquired over 100,000 acres of the most valuable redwood lands in California).

¹⁷⁰ Act of June 3, 1878, ch. 151, § 4, 20 Stat. 90 (“ . . . it shall be illegal to cut . . . any timber growing on any lands of the United States, in said States and Territory [California, Oregon, Nevada, and in the Washington Territory] . . . with intent to export or dispose of the same . . . and any person violating the provisions of this section shall be guilty

National Conservation Commission would urge repeal of the Act, partly because its antimonopolistic policies were ignored in practice, and partly because of the vast disparity between the value of the land and the meager compensation the government obtained from sales.¹⁷¹

B. ANTIMONOPOLY IN EARLY MINING LAW

The federal government experimented with different approaches to mineral disposition throughout the Nineteenth century until 1872. Several early federal mining policies contained antimonopoly elements, such as authorizing disposition by lease (rather than sale), acreage limitations, investment requirements, and location prerequisites.

Before the Civil War, the federal government's mineral policy was minimal. The land disposition statutes reserved mineral lands to the federal government. Since mineral lands were hard to identify, however, homesteaders or purchasers patented a considerable amount of land containing minerals.¹⁷² In 1807, the government experimented with a leasing policy for lead mines in the Indiana Territory.¹⁷³ Although Congress terminated the leasing program in 1846 as an economic failure,¹⁷⁴ the leasing system enabled the government to encourage resource development while retaining public title to the land and obtaining a fair economic return for the public.

The Supreme Court upheld the 1807 leasing policy some three decades later in *United States v. Gratiot*,¹⁷⁵ a case in which the federal government sought to recover unpaid royalties from a lessee. The miner claimed that the government could not retain ownership of the leased land under the Property Clause,¹⁷⁶ but the Supreme Court ruled that Congress had wide discretion as to how to dispose of the public lands because "this power is vested in Congress without limitation."¹⁷⁷ *Gratiot* was the first of a long line of decisions in which the Court upheld broad federal power to establish the conditions under which private parties may obtain private interests in public resources.¹⁷⁸

But Congress abandoned the leasing idea in 1846, liberalizing disposition by offering mineral lands for sale in unlimited amounts.¹⁷⁹ In the West, the gold rush frenzy brought on by the

of a misdemeanor . . . [p]rovided, [t]hat nothing herein contained shall prevent any miner or agriculturalist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States)

¹⁷¹ See HIBBARD, *supra* note 39, at 467-69 (citing REPORT OF THE NATIONAL CONSERVATION COMMISSION, S. DOC. NO. 60-676, at 71 (1909)) (explaining that the federal government was losing \$25 million annually of the actual value of timber that purchasers acquired under the Act).

¹⁷² See ROBBINS, *supra* note 69, at 151.

¹⁷³ Act of March 3, 1807, ch. 49, § 5, 2 Stat. 448, 449 (enacting a leasing system limited to terms of five years).

¹⁷⁴ See ROBBINS, *supra* note 69, at 151 (explaining that many ignored the leasing requirement, and that the administrative costs of the leasing program exceeded the royalties it produced).

¹⁷⁵ *United States v. Gratiot*, 39 U.S. 526, 538 (1840).

¹⁷⁶ U.S. CONST. art IV, § 3, cl. 2: "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property, belonging to the United States."

¹⁷⁷ 39 U.S. at 537.

¹⁷⁸ See, e.g., *Light v. United States*, 220 U.S. 523, 536 (1911) ("The United States can prohibit absolutely or fix the terms on which its property may be used."); *United States v. Grimaud*, 220 U.S. 506, 523 (1911) (requirement of a permit to graze a forest reservation constitutional).

¹⁷⁹ See Act of July 11, 1846, ch. 36, 9 Stat. 37 (Illinois and Wisconsin); Act of March 1, 1847, ch. 32, 9 Stat. 146 (northern Michigan); Act of March 3, 1847, ch. 54, 9 Stat. 179 (northern Wisconsin); see ROBBINS, *supra* note 69, at 151.

discoveries in northern California prevented the federal government from establishing a workable sales system.¹⁸⁰ Congress did not address public lands mining again until after the Civil War, declaring in the 1866 Mining Act that both surveyed and unsurveyed mineral lands would be free and open to exploration for lode mining¹⁸¹ and occupation.¹⁸² In 1870, Congress offered placer mine lands for sale at \$2.50 an acre.¹⁸³ In 1872, it incorporated both placer and lode mining into the 1872 General Mining Law, which offered mineral deposits for free and lode claim patents at \$5 per acre.¹⁸⁴ The 1872 law established a capture system for hard rock minerals that persists to this day.¹⁸⁵

Three major factors of the 1872 law's mining paradigm reflected antimonopoly characteristics. First, Congress imposed limits on the size of claims¹⁸⁶ Second, the 1872 law required an annual monetary investment,¹⁸⁷ aimed at deterring individuals and companies from excluding others by claiming many alleged "discoveries."¹⁸⁸ Third, the text of the statute forbade a miner from locating a claim until discovery of a valuable mineral.¹⁸⁹ The latter provision was designed to prevent a speculator from staking many parcels and excluding other prospectors. All of these limits reflected an intent to democratize access to the resource and promote diligent pursuit of small claims by individual prospectors.¹⁹⁰ However, as Gordon Bakken has noted, today the Act mainly benefits large corporations.¹⁹¹

C. THE ANTIMONOPOLY BATTLE OVER RANGELANDS

¹⁸⁰ See ROBBINS, *supra* note 69, at 220 (explaining that the miners established associations and self-regulated their claims, making their own laws for mining districts).

¹⁸¹ Act of July 26, 1866, ch. 262, § 3, 14 Stat. 251, 252 (limiting plats and surveys to one vein or lode each).

¹⁸² *Id.* § 1, 14 Stat. at 251.

¹⁸³ Act of July 9, 1870, ch. 235, § 12, 16 Stat. 217, 217. Placer mining takes advantage of minerals that have been deposited by the action of rivers and streams. See GEORGE COGGINS & ROBERT GLICKSMAN, 4 PUBLIC NATURAL RESOURCES LAW § 42:12 (West 2015).

¹⁸⁴ General Mining Act of 1872, ch. 152, § 6, 17 Stat. 91, 93 (codified at 30 U.S.C. § 29).

¹⁸⁵ GORDON M. BAKKEN, THE MINING LAW OF 1872: PAST, POLITICS, AND PROSPECTS 7 (2008).

¹⁸⁶ Lode claims may be no longer than 1,500 feet. General Mining Act of 1872, § 2, 17 Stat. at 91 (codified at 30 U.S.C. § 23). By using a tunnel, a miner could claim minerals within 3,000 feet of the face of the tunnel. General Mining Act of 1872, ch. 152, § 4, 17 Stat. 91, 92 (codified at 30 U.S.C. § 27). Placer claims are limited to twenty acres per individual, General Mining Act of 1872, ch. 152, § 10, 17 Stat. 91, 94 (codified at 30 U.S.C. § 35), or up to 160 acres by an association. Act of July 9, 1870, § 12, 16 Stat. at 217 (codified at 30 U.S.C. § 36); see WILKINSON, *supra* note 151, at 20, 45.

¹⁸⁷ General Mining Act of 1872, § 5, 17 Stat. at 92 (codified at 30 U.S.C. § 28). Notably, the provision required "assessment work" of "not less than \$100 of labor" per claim, or the miner would forfeit the claim. *Id.*

¹⁸⁸ See BAKKEN, *supra* note 185, at 34.

¹⁸⁹ General Mining Act of 1872, § 2, 17 Stat. at 91 (codified at 30 U.S.C. § 23). But the Supreme Court discounted the requirement of discovery before location in *Union Oil v. Smith*, 249 U.S. 337 (1918). Until discovery, the local doctrine of *pedis possessio* protected miners so long as the miner diligently pursued discovery and maintained a presence on the land, a common law protection against claim-jumping. See COGGINS & GLICKSMAN, *supra* note 183, § 42:9.

¹⁹⁰ See BAKKEN, *supra* note 185, at 6 (stating that "The Mining Law of 1872 was written to deal primarily with local issues such as claims, but the statute had wide-ranging implications for the nation. Its authors saw lone prospectors much like yeoman farmers moving westward to scratch out a living and individually create the wealth of the nation.").

¹⁹¹ *Id.* at 7.

Although Congress created a number of enforceable rights for miners,¹⁹² it never created similar property rights for ranchers. Throughout the Nineteenth century, the federal government instead instituted a policy maintaining open access to grasslands for everyone, culminating in an anti-fencing measure enacted in 1885.¹⁹³ While monopolistic ventures were attempting to privatize the open range, the Supreme Court upheld Congress's authority to decide that the public range not fall into de facto possession by the few.¹⁹⁴

The federal government did not establish an allocation system for the range resource until well into the Twentieth century. The 1862 Homestead Act opened rangelands to settlement,¹⁹⁵ but ranchers often needed more forage than a 160-acre homestead could provide.¹⁹⁶ To secure a workable amount of land for barns, corrals, and pastures, ranchers acquired adjacent homesteads from family members¹⁹⁷ and required their cowboys to make entries under Timber Culture, Homestead, and Desert Land Acts,¹⁹⁸ thereby undermining the antimonopolistic goals of those statutes. Many entries under the Desert Land Act were not actually desert lands. According to Roy Robbins, the statute did more to encourage western ranching than to facilitate reclamation of the arid lands.¹⁹⁹ Outside their base holdings, ranchers made use of the great biomass growing on the unreserved public domain for their livestock.²⁰⁰ The federal government simply allowed the cattlemen to graze their herds freely, thus frustrating federal land allocation strategy.²⁰¹

On the public domain, a first-come, first-served attitude prevailed among cattlemen. With no secure way of maintaining their customary cattle range, ranchers would post notices in local papers warning others not to graze on the acreage they claimed.²⁰² The ranchers' competition for the range resource came both from homesteaders and nomadic sheepherders. The yeoman farmer, who could obtain legal title to the land, threatened the free rein of the rancher, who could not.²⁰³ Sheepherders roamed the public lands in search of forage. And since the public range was interspersed with private lands, this "checkerboard" ownership pattern created access issues for both cattle and sheep graziers. Access across private holdings produced numerous conflicts in the Nineteenth and early Twentieth Centuries.

¹⁹² Charles Wilkinson referred to the General Mining Law of 1872 as a "miner's Magna Carta." WILKINSON, *supra* note 151, at 44.

¹⁹³ Act of Feb. 25, 1885, ch. 149, 23 Stat. 321 (codified at 43 U.S.C. § 1061).

¹⁹⁴ *Camfield v. United States*, 167 U.S. 518 (1897) (upholding congressional authority to restrict the fencing of private lands that had the effect of enclosing public lands).

¹⁹⁵ Some portions of public grasslands were unfit for cultivation. Nevertheless, the Homestead Act allowed settlers to perfect their claims by showing proof of residence *or* cultivation after five years. Section 2 of the Act required a settler to "prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years." Homestead Act, ch. 75, § 2, 12 Stat. at 392.

¹⁹⁶ See WILKINSON, *supra* note 151, at 83.

¹⁹⁷ See *id.*

¹⁹⁸ ROBBINS, *supra* note 69, at 250. The Desert Land Act allowed an individual to enter 640 acres of land if he could irrigate the land—a requirement considerably more burdensome than the Homestead Act's conditions of residing upon or cultivating the acreage. Act of March 3, 1877, ch. 107, § 1, 19 Stat. 377, 377.

¹⁹⁹ See ROBBINS, *supra* note 69, at 250.

²⁰⁰ See WILKINSON, *supra* note 151, at 83. Violence between ranchers and homesteaders was not uncommon. In one notable case, the two factions engaged in an all-out war in Johnson County, Wyoming, following the lynching of a homesteading couple. *Id.* at 86.

²⁰¹ *Buford v. Houtz*, 133 U.S. 320, 326 (1890); see Valerie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 MONT. L. REV. 155, 160 (1967).

²⁰² See Weeks Scott, *supra* note 201, at 163-64.

²⁰³ See WILKINSON, *supra* note 151, at 85.

A celebrated 1890 case exemplified many of the issues posed by the checkerboard pattern of public and private lands.²⁰⁴ Buford, a cattle rancher²⁰⁵ running a stock-raising company in Utah, sued several shepherds for alleged trespass on his land—the result of driving a herd of sheep across a roughly 1,500-acre checkerboard area that included both public and private lands.²⁰⁶ By seeking an injunction²⁰⁷ against the shepherds, Buford attempted to achieve in effect exclusive use of the publicly owned parcels—and thus uninterrupted use of the entire checkerboard.²⁰⁸

The Utah territorial court declined to enjoin the shepherds, however, ruling that the usual rules of trespass did not apply to unfenced public rangelands that were used almost exclusively for livestock grazing.²⁰⁹ The court recognized the great hardship that an injunction would work on nomadic shepherds, virtually preventing their use of public lands.²¹⁰ The Supreme Court affirmed, declaring that the shepherds possessed an implied license to access the public parcels, and therefore could let their animals roam at large.²¹¹ The Court rejected Buford's trespass claim, suggesting that the rancher's motive was to monopolize public lands.²¹²

Of this 921,000 acres of land, the plaintiffs only assert title to 350,000 acres; that is to say, being the owners of one-third of this entire body of land, which ownership attaches to different sections and quarter sections scattered through the whole body of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States²¹³

Thus, the Supreme Court upheld the public's right of access to the public parcels, recognizing that Buford's right to exclude trespassers from his private lands could not be used to evict the public from checkerboard lands, because the public had acquired an implied easement to access the adjacent public property consistent with the western custom of allowing livestock to roam at large.²¹⁴

To protect their ability to continue to pasture, ranchers turned to fencing the public lands and arming riders to defend them.²¹⁵ In the 1880s, the government began taking action against fencing public lands²¹⁶ and, in 1885, Congress enacted the Unlawful Inclosures of Public Lands Act, which

²⁰⁴ Buford v. Houtz, 133 U.S. 320 (1890).

²⁰⁵ The company was a large concern, pasturing 20,000 head of cattle valued at \$100,000 (in 1890 dollars). *Id.* at 322.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 325.

²⁰⁸ *Id.* at 325–26 (The stock-raisers “mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use.”).

²⁰⁹ Buford v. Houtz, 18 P. 633, 634 (Utah 1888).

²¹⁰ *Id.*

²¹¹ 133 U.S. at 326.

²¹² *Id.* at 332.

²¹³ *Id.* at 325–26.

²¹⁴ *Id.* at 327–28, 332.

²¹⁵ See ROBBINS, *supra* note 69, at 250; Leo Sheep Co. v. United States, 440 U.S. 668, 683–84 (1979) (explaining that Congress's motivation in enacting the Unlawful Inclosures Act was to respond to the range wars, in which cattlemen sought “monopoly control” over the range by privatizing water sources and enclosing thousands of acres of mixed public and private land with barbed wire).

²¹⁶ The first anti-enclosure policies arrived through executive action—the Federal Lands Commissioner announced that fencing would not be tolerated where it obstructed a settler's entry. See Weeks Scott, *supra* note 201, at 169 (citing U.S. General Land Office, ANNUAL REPORT OF THE COMMISSIONER 30 (1883)).

criminalized such fencing to prevent ranchers from monopolizing the rangeland.²¹⁷

Nonetheless, ranchers and others continued to fence, obstructing public access to federal lands.²¹⁸ One creative method of fencing reached the Supreme Court in 1897. In 1894, the federal government filed suit against Daniel Camfield and William Drury for enclosing some 20,000 acres of public land in Colorado. Camfield and Drury purposefully refrained from building their fences on the public checkerboard parcels, erecting them only on the private sections that they had purchased from the Union Pacific Railway Company.²¹⁹ The government sought removal of the fences, and the district court decided that the plain language of the Unlawful Inclosures Act prohibited their activities.²²⁰ The Eighth Circuit affirmed.²²¹

The Supreme Court agreed that Camfield and Drury had violated the Unlawful Inclosures Act, finding that the law extended to fencing activities on private parcels within the checkerboard.²²² The Court upheld the reach of the law as constitutional, reasoning that the federal government had the power to abate nuisances affecting the public lands due to its ownership of and trusteeship over publicly owned lands.²²³ Describing the federal trust duty as ensuring that the public retained fair access to land resources, the Court explained that: “. . . it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market.”²²⁴ Although Camfield and Drury claimed to be enclosing the land for the purpose of irrigating (rather than ranching),²²⁵ the case set precedent for cattle fences as well.²²⁶

Despite judicial, congressional, and executive recognition of the public’s right of access, by the end of the Nineteenth century, range-users had no ownership interest in the public range, or even an explicit right to graze upon it. Instead, they possessed only an implied license, as the *Buford* Court described it.²²⁷ Other resource users—miners in particular—had the right to obtain an exclusive ownership interest in public lands, but ranchers could not.²²⁸ Charles Wilkinson

²¹⁷ Act of Feb. 25, 1885, ch. 149, 23 Stat. 321 (codified at 43 U.S.C. § 1061); see Weeks Scott, *supra* note 201, at 169. The government did not file suits against enclosures under 160 acres unless the local United States Attorney consulted the Secretary of the Interior. See *id.* According to one court, the intent of the statute was “to prevent the inclosure and appropriation of vast tracts of public lands, said to be millions of acres in extent, by associations of wealthy cattle owners, known as ‘cattle kings,’ without a shadow or pretense of title. These tracts were surrounded by barbed wire fences, and all persons desirous of settling upon the lands under the laws of the United States were vigorously excluded; in some cases by violence or threats.” *United States v. Brandestein*, 32 F. 738, 741 (N.D. Cal. 1887). Even companies headquartered on the East Coast and in England fenced in land in the West, claiming that a man had a right to “as much range as he could fence.” See HIBBARD, *supra* note 39, at 477 (citing S. DOC. NO. 48-127 (1884)).

²¹⁸ See, e.g., *Caldwell v. Bush*, 6 Wyo. 342 (Wyo. 1896); *United States v. Bisel*, 8 Mont. 20 (1888); *Anthony Wilkinson Livestock Co. v. McIlquam*, 14 Wyo. 209 (Wyo. 1905).

²¹⁹ *United States v. Camfield*, 59 F. 562, 562 (C.C.D. Colo. 1894).

²²⁰ *Id.* at 563.

²²¹ *Camfield v. United States*, 66 F. 101, 104 (8th Cir. 1895).

²²² *Camfield*, 167 U.S. at 528.

²²³ *Id.* at 525–26.

²²⁴ *Id.* at 524.

²²⁵ *Id.* at 524–26 (explaining that the federal government’s power under the Unlawful Inclosures Act to remove fences sited on private lands inheres in the federal proprietary power and the related trustee duty to protect public lands from injurious nuisance structures).

²²⁶ See Weeks Scott, *supra* note 201, at 170.

²²⁷ See 133 U.S. at 326; WILKINSON, *supra* note 151, at 88.

²²⁸ As one official wrote, “The laws of the United States in regard to the disposition of the public lands constitute a barrier to the purchase of such lands in quantities sufficiently large for the conduct of the range and ranch cattle

suggested that this dichotomy arose because of the rise of populism in the late Nineteenth century and increased public opposition to privatization of large tracts of public land, especially in the wake of controversy over large railroad holdings.²²⁹ Not until 1934 would graziers on unreserved public lands obtain express permission for livestock use, and then only through a federal permit system.²³⁰

V. ANTIMONOPOLY AND CONSERVATION

The antimonopoly strain in public land law reached its zenith around the turn of the Twentieth century. The populist movement that dominated politics in rural America, especially in the Midwest and South,²³¹ sought regulatory reform of railroad monopolies and support for farmers in debt.²³² Roughly contemporaneously, a progressive movement evolved in urban America, also calling for regulation of industry, rights of labor to organize, food safety regulation, and trust-busting.²³³ The federal government, chiefly under the Theodore Roosevelt Administration, responded to the apparent end of the American frontier by beginning to conserve the nation's public resources through establishing reserves, instituting permit systems, and retaining land in public ownership while leasing certain resources. Antimonopoly principles were evident as the government began actively managing public natural resources rather than simply privatizing them.²³⁴

Turn-of-the-century Progressive conservationists envisioned public land management as a prominent part of antimonopoly policy that provided opportunities to foster egalitarianism.²³⁵ The Progressive antimonopoly impulse was a reaction to the failures of the previous policies. Progressives emphasized (1) government withdrawal and reservation of lands from disposition, (2) the introduction of resource leasing systems, (3) funding of large water projects designed to

business. This has resulted from the fact that the public sentiment of this country is and has always been strongly opposed to the disposition of the public lands in large quantities, either to one person or to corporations." H.R. EX. DOC. NO. 267 (1884–85), quoted in Weeks Scott, *supra* note 201, at 159.

²²⁹ See WILKINSON, *supra* note 151, at 88.

²³⁰ Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269 (1934); See *infra* notes 316–21.

²³¹ *Populist Movement*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/470477/Populist-Movement> (accessed March 17, 2015). An antecedent may have been the movement of state legislatures to curtail "market hunting" of wildlife in the 1870s and 1880s, inspired in part by the nature writings of George Perkins Marsh. See Erik Podhora, *Lessons for Climate Change Reform from Environmental History: 19th Century Wildlife Protection and the 20th Century Environmental Movement*, 30 J. ENVTL. L. & LIT. 7–22 (2015).

²³² See *id.*; see also RICHARD HOFSTADTER, *THE AGE OF REFORM* 58 (1955).

²³³ See *id.* at 196–212, 225–54. See also the Sherman Antitrust Act of 1890 15 U.S.C. §§ 1–7 (requiring the government to investigate trusts and combinations, and prohibiting the artificial raising of prices through anti-competitive monopoly agreements).

²³⁴ The advent of active public resource management was a sharp contrast from the management-by-disposition style that existed in the mid-1800s. As Jedidiah Purdy described it, "Public lands were envisioned as being held in trust for use by, and prompt disbursement to, the citizens who had the only ultimate and just claim to them. In this view, if the federal government retained public lands, it set itself up as that *bête noire* of the era, a monopolist—the worst kind, because it was both creator and beneficiary of the monopoly." Jedidiah Purdy, *The Politics of Nature, Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1142 (2010).

²³⁵ See Leonard Bates, *Fulfilling American Democracy: The Conservation Movement, 1907-1921*, 44 MISS. VALLEY HIST. REV. 29, 31 (1957) ("There were several ways to handle the monopolization of public resources . . . [including] to hold on to the remaining public lands, at least temporarily, preventing further monopolization; [and] to attempt to give the people a fuller share of opportunities and profits.").

produce widespread public benefits, and (4) preservation of resources like parks for the enjoyment of future generations. In effect, the Progressive era of land reservation and conservation was a consequence of widespread public dissatisfaction with the abuses of Nineteenth century public land policies. These reforms eventually led to the end of the era of federal land disposition.

A. RESERVATION AND WITHDRAWAL

1. Timberland Reservations

Around the turn of the century, the government policy of unfettered privatization of public resources led to overexploitation, particularly of timber and rangelands. Public concern over the resource monopolization of forests led the federal government to withdraw lands from the disposition laws otherwise applicable to the public domain.²³⁶ In 1891, Congress authorized the President to reserve “public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations . . .”²³⁷ Presidents Harrison and Cleveland used this statutory authority to reserve tens of millions of acres as forest reserves.²³⁸

Since Congress established no management policies for these forest reserves, Gifford Pinchot remarked that the regime the reserves created was “clearly impossible. . . . [N]o timber could be cut, no forage could be grazed, no minerals could be mined, nor any road built, in any Forest Reserve.”²³⁹ Consequently, in 1897, Congress established policies for the forest reserves in the National Forest Organic Administration Act, which called for improving and protecting forested lands within reservations, securing favorable conditions of water flows, and furnishing a continuous supply of timber.²⁴⁰ Congress passed the Act to maintain a priority for conservation of the reserves, while allowing controlled commercial extractive uses of the forests.²⁴¹ The Act gave the government authority to allow the use of “such timber as can be spared without injury to the forest when its use is a public necessity.”²⁴² Although the Organic Act rejected calls from some to

²³⁶ See James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 258 (1977-78). The impetus for the act was the vast misappropriation of public forest lands under the land disposition laws. See *id.* at 259.

²³⁷ Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1095, 1103.

²³⁸ See Huffman, *supra* note 236, at 260.

²³⁹ GIFFORD PINCHOT, *BREAKING NEW GROUND* 85–86 (1947, 1998).

²⁴⁰ Act of June 4, 1897, ch. 2, 30 Stat. 11, 34–35. On the Organic Act’s purposes, see *United States v. New Mexico*, 438 U.S. 696, 707 n.14 (1979) (construing the statute’s purposes narrowly in the case of reserved water rights). The 1897 Organic Act was responsive to the concerns of Western states, which wanted working forests, not *de facto* wilderness areas. See Huffman, *supra* note 236, at 262–64. The compromise came in the form of Senator Richard Pettigrew’s amendment to the pending Civil Appropriations bill. His amendment ensured that the forest reserves would be managed for sustained yield, contributing to the economy of the nation. *Id.*

²⁴¹ See ch. 2, 30 Stat. at 35 (“For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior . . . may cause to be designated and appraised so much of the dead, matured, or large growth of trees . . . as may be compatible with the utilization of the forests thereon, and may sell the same . . . to be used in the State or Territory in which such timber reservation is situated [] but not for export therefrom.”). The Act also provided that the Secretary could permit bona fide settlers, miners, and residents to cut timber for firewood, building, mining, and other domestic purposes. *Id.*

²⁴² *W. Va. Div. of Izaak Walton League of Am., Inc. v. Butz*, 522 F.2d 945, 951 (1975) (quoting 25 CONG. REC. H2374 (1893) (statement of Congressman McRae, Chairman of the House Committee on Public Lands, upon introducing an 1893 version of the bill)).

forbid all timber harvesting in reserves, it limited the authority of the Secretary to the sale of dead and physiologically mature trees.²⁴³ The Act did not authorize clearcuts of merchantable timber in forest reserves;²⁴⁴ however, clearcuts became commonplace in the post-World War II era to meet the demand for new housing.²⁴⁵

Gifford Pinchot,²⁴⁶ the father of the conservation movement and the first Forest Service Chief, established an antimonopoly ethic for administering the reservations. His philosophy contained a large dose of utilitarian sentiment, maintaining that the management of the forests should provide the greatest good for the greatest number over the long-run: “In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies.”²⁴⁷ Pinchot viewed the Forest Service as the first agency to assert that the “small man” should be the priority user of natural resources of the West: “Better to help a poor man make a living for his family than help a rich man get richer still. That was our battle cry.”²⁴⁸ The Pinchot ethic reflected Progressive opposition to the monopolistic excesses of the Nineteenth century.²⁴⁹

2. Coal, Oil, and Gas Withdrawals

Until the end of the Nineteenth century, federal policy allowed oil, gas, and shale on public land to be located and privatized like other minerals under the Mining Act of 1872. In 1897, Congress passed the Oil Placer Act, confirming that fuel minerals were subject to open discovery and development, free of charge, with the vesting of a right to mine upon discovery of a valuable mineral.²⁵⁰ But coal lands had their own legislation, enacted in 1873, limiting the extent of claims to 160 acres for individuals and 320 acres for associations,²⁵¹ although companies were claiming

²⁴³ *Id.* at 952 (“that the living trees shall be preserved that is, under the direction of the Secretary of the Interior so that the large trees, the dying trees, the trees that will grow no better in time, may be sold and removed by the purchaser” quoting 30 CONG. REC. 909 (1897) (statement of Sen. Pettigrew)). In fact, to allow the Forest Service to continue to engage in clearcutting, Congress amended the Forest Rangelands Renewable Resources Planning Act in 1976. National Forest Management Act, Pub. L. No. 94-588, § 6, 90 Stat. 2949, 2952-56 (1976). For further discussion, see *infra* § V.

²⁴⁴ 522 F.2d. at 952.

²⁴⁵ See *infra* notes 374–80 and accompanying text, discussing the advent of the National Forests Management Act, which accommodated and regulated the clearcutting practices of the Forest Service.

²⁴⁶ Pinchot became the first Chief of the Forest Service after Congress transferred jurisdiction over the forest reserves from the Interior to the Agriculture Department in 1905. See WILKINSON, *supra* note 151, at 90–92.

²⁴⁷ Letter from the Secretary of Agriculture (Feb. 1, 1905) (quoted in PINCHOT, *supra* note 239, at 261). Pinchot wrote the letter himself, but styled it as a directive from the Secretary and had it signed by him. *Id.* at 260. See also WILKINSON, *supra* note 151, at 128; *USFS History: Gifford Pinchot*, FOREST HIST. SOC’Y, <http://www.foresthistory.org/ASPNET/People/Pinchot/Pinchot.aspx> (last updated May 1, 2015).

²⁴⁸ PINCHOT, *supra* note 239, at 259.

²⁴⁹ See WILKINSON, *supra* note 151, at 128; PINCHOT, *supra* note 239, at 507 (“Monopoly on the loose is a source of many of the economic, political, and social evils which afflict the sons of men. Its abolition or regulation is an inseparable part of the conservation policy.”)

²⁵⁰ Oil Placer Act of 1897, ch. 216, 29 Stat. 526 (“any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.”)

²⁵¹ Act of March 3, 1873, ch. 279, § 1, 17 Stat. 607, 607.

much more, flouting antimonopoly policy through fraudulent entries.²⁵²

Progressives believed that the fuel minerals, like public forests and navigable waterways, were the equivalent of public utilities, not private commodities.²⁵³ Yet coal and railway companies ignored the acreage limitations of the 1873 coal statute by making fraudulent entries under it and other public land laws.²⁵⁴ Thus, in 1906, Theodore Roosevelt began to use his executive authority to withdraw mineral lands from the operation of the General Mining Law.²⁵⁵ That year, he withdrew sixty-six million acres of known coal deposits.²⁵⁶ Three years later, in 1909, President Taft withdrew over three million acres of oil lands in California and Wyoming in the wake of a U.S. Geological Survey report showing that the oil lands were being privatized at such an alarming rate that the government would soon have no option but to buy oil back from private claimants.²⁵⁷ Privatization of public oil reserves threatened national security, since the Navy needed oil as it shifted from coal to oil-powered ships in the years before World War I.²⁵⁸

Earlier, in tandem with his policy of withdrawals, President Roosevelt advocated a leasing system as the best way to maintain federal title in the minerals, avoid resource monopoly, and provide benefits to the public.²⁵⁹ However, not until 1920 did Congress enact a leasing system for coal, gas, oil, and other “minerals,” as discussed below in subsection C.

B. ECONOMIES OF SCALE AND EFFICIENT DEVELOPMENT FOR THE PUBLIC GOOD

By the end of the Nineteenth century, it became apparent that federal disposition policies failed to spur productive use of all cultivable lands. The Desert Land Act did not yield the results its drafters intended. Although the statute granted settlers more land—640 acres instead of 160 acres—the large amount made it difficult for settlers to fulfill the Act’s irrigation requirement.²⁶⁰ Irrigation was no easy undertaking; construction of dams and canals was not practicable for most individuals, and difficult even for collectives.²⁶¹ Consequently, in 1894, Congress passed the

²⁵² See *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 169 (1890) (each person is “permitted to enter not exceeding 160 acres, while ‘associations of persons,’ severally qualified, as above, may enter not exceeding 320 acres. The object of these restrictions as to quantity was, manifestly, to prevent monopolies in these coal lands.”).

²⁵³ See Statement of Theodore Roosevelt, Feb. 13, 1907, in GATES, *supra* note 6, at 728 (citing 41st CONG. REC. H2806–08 (1907)).

²⁵⁴ See GATES, *supra* note 6, at 726.

²⁵⁵ See *id.* at 726–27 (describing Roosevelt’s first withdrawals of coal lands in Colorado, North Dakota, Montana, Oregon, Washington, Utah, Wyoming, and the Territories of New Mexico and Alaska).

²⁵⁶ See WILKINSON, *supra* note 151, at 50 (explaining that a withdrawal is like a zoning requirement that prohibits a specific use. Roosevelt used the withdrawals to prohibit further fraudulent entries of coal lands).

²⁵⁷ See GATES, *supra* note 6, at 732. This executive withdrawal came before Congress recognized a presidential power to withdraw federal land from settlement, location, sale, or entry in 1910. Pickett Act of 1910, ch. 421, 36 Stat. 847. However, the Supreme Court upheld the 1909 withdrawal, under the theory that Congress had impliedly consented to Roosevelt’s exercise of power; over the years, the executive had issued orders setting aside public lands for military and Indian reservations, and Congress declined to exercise its power to override them. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474–75 (1915).

²⁵⁸ See COGGINS & GLICKSMAN, *supra* note 183, § 39:2. The United States was following Britain’s lead; Winston Churchill had the foresight to shift to oil-powered ships, which gave the Allies a considerable advantage in World War I.

²⁵⁹ See GATES, *supra* note 6, at 728.

²⁶⁰ Desert Land Act, ch. 107, § 1, 19 Stat. 377, 377 (1877) (requiring a claimant to declare that he intends to reclaim a tract of desert land not exceeding one section (640 acres), and to irrigate that section within three years).

²⁶¹ See WILKINSON, *supra* note 151, at 243.

Carey Act²⁶² to encourage private capital investment into irrigation projects. To provide an incentive to states to encourage irrigation facilities, the Act authorized the Secretary of the Interior to grant thousands of federal acres, sell irrigable public lands to “actual settlers” in tracts no larger than 160 acres, and provide incentives to states to supervise and encourage irrigation works.²⁶³ The Carey Act’s reliance on the states to finance irrigation works was a reaction to the undercapitalized or fraudulent claims commonplace under the Desert Land Act, but it failed to produce efficient or workable infrastructure.²⁶⁴

In 1902, the federal government began actively encouraging arid lands reclamation by providing irrigation to small homesteaders.²⁶⁵ The Reclamation Act authorized the Secretary of the Interior to locate and construct irrigation works for the storage, diversion, and development of streams and rivers.²⁶⁶ The statute had two primary purposes: (1) to promote national development in the West and (2) to distribute its benefits widely, rather than allow them to be monopolized by the few.²⁶⁷ The Act’s antimonopoly policy²⁶⁸ limited ownership of lands irrigated with reclamation water to 160 acres and required the owner to be a bona fide resident of the irrigated land.²⁶⁹ The acreage limitation echoed the Homestead Act, reaffirming the basic public domain disposition principle that public lands and resources should inhere to the benefit of many, but it was ignored in practice and later liberalized by Congress.²⁷⁰

Progressives also promoted the antimonopoly policy that streamflows are publicly owned.²⁷¹

²⁶² Carey Act, ch. 301 § 4, 28 Stat. 372, 422 (1894).

²⁶³ *Id.* § 4, 28 Stat. at 422. Senator William Stewart estimated that the West offered 75 to 100 million acres of irrigable arid land. By 1899, irrigation reached only 7.2 million of these acres. See GATES, *supra* note 6, at 651. The Carey Act had an especially large effect on Idaho, whose population increased with the increase in irrigated acreage. Between 1900 and 1920, irrigated acreage in the state increased from 40,000 to 620,000 acres. At the same time, population increased from over 5,000 people to nearly 70,000. See Hugh T. Lovin, *The Carey Act in Idaho, 1895-1925: An Experiment in Free Enterprise Reclamation*, 78 PAC. NW. Q. 122, 126 (1987).

²⁶⁴ See HIBBARD, *supra* note 39, at 429 (“In Wyoming a great deal of so-called ditching was done by plowing a few furrows or by cutting a ditch one foot deep where eight feet were needed. Moreover, these ditches failed to follow the contour of the land with reference to the habits of water, and often they began where there was no water to be conducted and ended where there was no field to receive it . . .”).

²⁶⁵ See Paul S. Taylor, *Excess Land Law: Calculated Circumvention*, 52 CAL. L. REV. 978, 980 (1964) (citing REPORT BY THE COMM. OF SPECIAL ADVISERS ON RECLAMATION, S. DOC. NO. 92, at 111 (1924)).

²⁶⁶ Newlands Act of June 17, 1902, Pub L. No. 57–161 § 2, 32 Stat. 388, 388 (codified as amended at 43 U.S.C. § 391 (2012)).

²⁶⁷ See Taylor, *supra* note 265, at 979 (citing HOUSE COMMITTEE ON ARID LANDS, REPORT ON RECLAMATION AND ARID LANDS, H.R. REP. NO. 1468, at 3 (1902)). Taylor explained that the Reclamation Act required the Secretary of the Interior to prevent ineligible lands—those in excess of the 160 acre limitation—from receiving project water. His analysis centered on the underground deliveries of water to high-concentration ownership lands in the San Joaquin Valley in the 1960s, which were ineligible for project water because they were owned in parcels of greater than 160 acres. *Id.* at 982.

²⁶⁸ See Taylor, *supra* note 265, at 979 (describing § 5 of the Act as “the legal instrument for effectuating the antimonopoly policy of the law.”).

²⁶⁹ Newlands Act, *supra* note 266, at 389 (“No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land . . .”).

²⁷⁰ See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 97 (7th ed. 2014).

²⁷¹ Concerning the use of streamflows for irrigation, President Roosevelt said, “The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent home-makers, to

This principle supported both the Progressive irrigation agenda and became a means to forestall growing monopolization of the emerging electric power industry. President Roosevelt promoted antimonopoly policies in his Inland Waterways Commission in 1908. The Commission declared that water was a public resource and recommended comprehensive basin-wide federal planning to serve the multiple purposes of navigation, flood control, irrigation, and hydropower.²⁷²

The Roosevelt Administration pursued antimonopoly policy in hydroelectric power project development, and the president vetoed grants of power sites to private companies.²⁷³ Congress proposed such grants on unlimited terms, which the president considered to be monopolistic.²⁷⁴ In his veto of a site grant for a dam on the James River, he declared:

[T]he great corporations are acting with foresight, singleness of purpose, and vigor to control the water powers of the country. They pay no attention to state boundaries, and are not interested in the Constitutional law affecting navigable streams . . . I esteem it my duty to use every endeavor to prevent the growing monopoly, the most threatening which has ever appeared, from being fastened upon the people of this nation.²⁷⁵

Both Roosevelt and Taft vetoed statutes granting power sites of unrestrained duration to private parties.²⁷⁶

In 1920, Congress included antimonopoly policies in the Federal Power Act's regulation of private hydropower development on navigable waterways.²⁷⁷ The Act contained multiple antimonopoly elements. First, it imposed a limit of a fifty-year license term, reserving ownership

use and develop it for themselves and for their children and children's children." Theodore Roosevelt, State of the Union Address (Dec. 3, 1907).

²⁷² See Michael C. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 185 (1983). The Army Corps of Engineers, the nation's principal navigation agency, succeeded in blocking efforts to give the Inland Waterways Commission authority over river basin planning. See Robert M. Utley & Barry Mackintosh, *The Department of Everything Else: Highlights of Interior History*, 13 PUB. HISTORIAN 89, text between nn.37–38 (1989), http://www.nps.gov/parkhistory/online_books/utley-mackintosh/index.htm [hereinafter *Interior History*].

²⁷³ The Forest Service under Pinchot produced the first policy of limiting rights-of-way for water power production to fifty years and charging a fee to developers who sited projects in forest reserves. See Gifford Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 GEO. WASH. L. REV. 9, 12-15 (1946).

²⁷⁴ 43rd CONG. REC. H978 (1909) ("The [James River] bill gives to the grantee a valuable privilege which by its very nature is monopolistic and does not contain the conditions to protect the public interest.") (statement of the Speaker of the House, delivering a message of the President).

²⁷⁵ Pinchot, *supra* note 273, at 17 (citing 43 CONG. REC. 979–80 (1909)).

²⁷⁶ *Id.* at 17–18 (citing 48th CONG. REC. 11796 (1912)).

²⁷⁷ Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920). Congress later applied similar antimonopoly principles to a public project in the 1937 enactment of the Bonneville Power Administration. The Bonneville Act called for widespread use of the electricity produced by the dams on the Columbia River: "In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives." Bonneville Project Act, ch. 720, § 4, 50 Stat. 731, 733 (codified as amended at 16 U.S.C. § 832c(a) (2012)). Prices charged for the power were to be established with a view to encouraging the "widest possible, diversified use of electric energy" at uniform rates throughout prescribed transmission areas in order to "encourage the equitable distribution of electric energy. . . ." *Id.* § 6, 50 Stat. 731, 735 (codified as amended at 16 U.S.C. § 832e (2012)). See MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 92–93 (2002).

of streamflows to the public.²⁷⁸ Second, the statute included a preference for publicly-owned developments.²⁷⁹ Third, it contained a requirement that a licensed facility had to be best adapted to a comprehensive scheme of improvement and use for navigation, water-power development, and other beneficial public uses.²⁸⁰ Fourth, it prohibited combinations for the purpose of limiting electrical distribution or price fixing.²⁸¹ Fifth, the Act required that the rates charged for the power generated from licensed facilities be “reasonable and just” to the customer.²⁸² In short, the 1920 law required private water developments to satisfy a variety of antimonopolistic purposes.

C. THE MINERAL LEASING ACT

Congress finally created a leasing system for coal, oil and gas, and other fuel and fertilizer minerals in the 1920 Mineral Leasing Act (“MLA”),²⁸³ ending the federal policy of granting or selling fossil fuels and fertilizers.²⁸⁴ The statute was the culmination of the Progressive effort to end disposition by capture for fuel minerals, making coal, phosphates, oil, gas, and oil shale subject to a leasing program. Congress adopted the leasing system for these minerals to stop their outright disposition under the mining and other laws and “to promote conservation, to secure proper methods of development and operation, to prevent speculation and encourage bona fide exploration and development and to prevent monopoly of mineral fuels and fertilizers, which were regarded as public utility in character.”²⁸⁵ No longer would there be a “right to mine” for fuel and fertilizer minerals; the right of self-initiation under the 1872 Act was replaced with a requirement to obtain permission from the federal government to prospect. The MLA gave the federal government broad discretion to decide whether to lease, to whom to lease, and the terms with which the lessee had to comply.²⁸⁶ Also, unlike the 1872 Mining Law, the MLA authorized the federal government to obtain an economic return in the form of rents and royalties.²⁸⁷

The major antimonopoly contributions of the MLA as enacted were the limits it placed on the number of leases and acreage allowed under each lease. No person, association, or corporation could hold more than one coal lease during the life of that lease in any one state.²⁸⁸ Nor could a person, association, or corporation hold more than three oil or gas leases granted under the Act in

²⁷⁸ *Id.* § 6, 41 Stat. at 1067 (codified at 16 U.S.C. § 799 (maximum fifty-year license terms)).

²⁷⁹ *Id.* § 7, 41 Stat. at 1067 (codified at 16 U.S.C. § 800(a) (public preference)).

²⁸⁰ *Id.* § 10(a), 41 Stat. at 1068 (codified at 16 U.S.C. § 803(a) (best adapted to a comprehensive plan)).

²⁸¹ *Id.* § 10(h), 41 Stat. at 1070 (codified at 16 U.S.C. § 803(h) (monopolistic combinations)).

²⁸² *Id.* § 20, 41 Stat. at 1073 (codified at 16 U.S.C. § 813 (requiring interstate power to be reasonably priced)).

²⁸³ Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (codified at 30 U.S.C. § 181 *et seq.*).

²⁸⁴ See COGGINS & GLICKSMAN, *supra* note 183, at § 39:2.

²⁸⁵ Harry Edelstein, *Federal Oil and Gas Leasing of Public and Acquired Lands*, 24 ROCKY MTN. L. REV. 301, 302 (1952). Edelstein was the Assistant Solicitor for Public Lands at the time of his publication.

²⁸⁶ See *United States ex rel McLennan v. Wilbur*, 283 U.S. 414, 419 (1931) (upholding the Secretary’s reading of the MLA as authorizing the discretionary rejection of oil and gas exploration applications and invoking *United States v. Grimaud* to uphold the federal government’s rejection of the applications in the interest of the public welfare and the protection of federally-owned natural resources). Unlike the General Mining Law, the MLA allowed the government to choose who could extract the resource and where through competitive auction. The Act also included several provisions denying its benefits to any claimant who had been previously found guilty of fraud. See, e.g., ch. 85 § 19, 41 Stat. at 449.

²⁸⁷ See, e.g., ch. 85 § 14, 41 Stat. at 442.

²⁸⁸ § 27, 41 Stat. at 448. The modern statute has converted this to statewide and nationwide aggregation limits of not more than “75,000 acres in any one State and in no case greater than an aggregate of 150,000 acres in the United States.” 30 U.S.C. § 184(a) (2012).

any one state, or more than one lease within the geologic structure of the same oil or gas field.²⁸⁹ Moreover, no person or corporation could hold an interest as a member of an association or as a stockholder which would, aggregated with other interests that person or member had, exceed the maximum number of acres of the respective kinds of minerals allowed to any one lessee under the Act.²⁹⁰ The MLA also limited the amount of acreage a person, association, or corporation could lease in one unit, restricting coal leases to 2,560 acres each,²⁹¹ oil and gas leases to 640 acres,²⁹² and oil shale leases to 5,120 acres.²⁹³ Notably, the law provided for royalty-free local and domestic use by small users,²⁹⁴ and restricted any railroad company's ability to hold coal leases to the extent needed for its own purposes.²⁹⁵

On the other hand, the Act allowed indefinite lease terms for coal²⁹⁶ and oil shale,²⁹⁷ and created a preferential right of renewal for oil and gas leases of twenty-year primary lease terms.²⁹⁸ Implementation of fossil fuel leasing fell short of antimonopoly goals, however, as leases were readily extended, a practice which continues to this day.²⁹⁹ However, the MLA's core limits on

²⁸⁹ MLA § 27, 41 Stat. at 448. The modern provision limits aggregation in any one state (other than Alaska) to 246,080 acres. 30 U.S.C. § 184(d). In Alaska, the limit is 300,000 in the northern leasing district, and the same in the southern leasing district. *Id.*

²⁹⁰ MLA § 27, 41 Stat. at 448. Under the law today, persons may still not aggregate beyond the statutory limits, but no person is charged with his pro rata share of any acreage holdings of a corporation unless he owns more than ten percent of the corporation's stock. 30 U.S.C. § 184(e).

²⁹¹ MLA § 2–5, 41 Stat. at 438–39; 30 U.S.C. § 205. Today, individual coal leases can be consolidated into a “logical mining unit,” not to exceed 25,000 acres. *Id.* § 202a(7). A “logical mining unit” can consist of multiple federal leaseholds, and may include intervening or contiguous lands in which the federal government does not own the coal resources, but are under the control of one operator. *Id.* § 202a(1).

²⁹² MLA § 14, 41 Stat. at 442 (upon discovery, allowing the permittee to lease one-fourth of the prospecting permit, which may have been as large as 2,560 acres); *id.* § 17, 41 Stat. at 443 (allowing unappropriated deposits of oil or gas to be leased to the highest bidder in areas not exceeding 640 acres). Now, lease units on known producing fields are limited to 5,760 acres in Alaska and 2,560 acres elsewhere. 30 U.S.C.A. § 226(b) (West 2014).

²⁹³ MLA § 21, 41 Stat. at 446. The modern statute permits oil shale leases up to 5,760 acres. 30 U.S.C. § 241(a)(2).

²⁹⁴ MLA § 8, 41 Stat. at 440 (allowing individuals and municipalities to hold permits for household use, not for sale, and excluding corporations from the benefits of the provision); 30 U.S.C. § 208.

²⁹⁵ MLA § 2, 41 Stat. at 438 (also restricting railroad coal leases to one permit per 200 miles of its line); 30 U.S.C. § 202.

²⁹⁶ MLA § 7, 41 Stat. at 439. Congress subjected the indeterminate period of the lease to a condition of diligent development, to prevent companies from sitting on the leases for purposes of speculation. Congress strengthened this anti-speculation provision of the MLA in Section 3 of the Federal Coal Leasing Amendments Act (“FCLAA”) of 1975 by banning the issuance of new leases to lessees holding nonproductive leases for more than ten years after FCLAA's enactment. *See* Sam Kalen, *Where Do We Go From Here?: The Federal Coal Leasing Amendments Act—Past, Present, and Future*, 98 W. VA. L. REV. 1023, 1036 (1996). Under the FCLAA, the primary lease term is twenty years, “and for so long thereafter as coal is produced annually in commercial quantities from that lease.” 30 U.S.C. § 207(a) (2012). Logical Mining Units must be mined within a period of no greater than forty years, unless the Secretary makes findings that a longer period would be conducive to maximum economic recovery. *Id.* § 202a(2). *See* Kalen, *supra*, at 1042–43.

²⁹⁷ MLA, ch. 85 § 21, 41 Stat. at 446. The indeterminate nature of the lease is subject to “such conditions as may be imposed by the Secretary of the Interior, including covenants relative to . . . productive development,” indicating Congress's desire to prevent speculative holdings.

²⁹⁸ *Id.* § 17, 41 Stat. at 443. The Act provided a preferential right of renewal for periods of ten years at the expiration of the twenty-year term. *Id.* The primary lease term for onshore leasing is now ten years. 30 U.S.C. § 226(e) (2012). Leases producing “paying quantities” of minerals may be extended indefinitely through secondary leases. *Id.*; *see* COGGINS & GLICKSMAN, *supra* note 183, at § 39:18.

²⁹⁹ *See* Huber, *supra* note 12, at 1009 (noting that “unlike private lessors, the United States sometimes tries harder to keep leases in force than to terminate them,” and the federal government goes to “seemingly absurd lengths . . . of

acreage and aggregation reflected the Progressive era's antimonopolistic values of spreading the benefits of publicly owned resources widely while minimizing control of minerals in the hands of the few.

D. CONSERVATION FOR FUTURE GENERATIONS

The Progressive era introduced another antimonopoly sentiment in the National Park Service Organic Act of 1916—that of intergenerational sharing.³⁰⁰ The objective of the Act is to “conserve the scenery and the national and historic objects and the wild life therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.”³⁰¹ These policies were significant antimonopoly statements because the non-impairment standard limited the use of park resources by the current generation to ensure that future generations may enjoy the reserves in a relatively preserved state, making clear that the current generation has no monopoly on use. Interior Secretary Franklin Lane, who interpreted the Act to require the National Park Service to manage the parks for “the use observation, health and pleasure of the people,” stated that “the national interest must dictate all decisions affecting public or private enterprise in the parks,”³⁰² reflecting the antimonopoly sentiment of limiting privatization.³⁰³

The statute did not create off-limits wilderness parks, but rather perpetuated the antimonopoly

leniency” in comparison to private lessors. For example, federal law allows leases to be extended much more readily than in typical private transactions). One notorious example of a monopolistic giveaway was the Powder River coal lease sale during the early 1980s. Although a court decided that environmentalists had failed to prove that the sale was below-market value, *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849 (9th Cir. 1989), a government study disagreed with the court, finding that the Interior Department offered excessive amounts of coal leases in a declining market. *See generally* COMM'N ON FAIR MARKET VALUE POL'Y FOR FED. COAL LEASING, REP. OF THE COMMISSION: FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING (1984) (also suggesting that courts lack the expertise or will to police fair market valuation issues).

³⁰⁰ Act of Aug. 25, 1916, ch. 408 § 1, 39 Stat. 535 (codified at 16 U.S.C. §§ 1–18f (2012) (repealed Pub. L. 113–287, § 3, 128 Stat. 3094 (2014) (moving National Parks legislation to Title 54)). The National Parks Service Organic Act of 1916 sought to establish a new type of reserve, a non-extractive landscape. Congress had declared a handful of so-called “National Parks” already under its Property Clause power. U.S. CONST. art. IV, § 3, cl. 2. These were Yellowstone, Yosemite, Sequoia, Mount Rainier, Crater Lake, Glacier, and Rocky Mountain National Parks. *See* ROBERT B. KEITER, *TO CONSERVE UNIMPAIRED* 232 (2013). Note that the seeds of intergenerational preservation of Yosemite began in 1864, when the United States granted Yosemite to California on the condition that “the premises shall be held for public use, resort, and recreation” and shall be “inalienable for all time.” Act of June 30, 1864, ch. 184 § 1, 13 Stat. 325, 325. The federal government reacquired the Yosemite Valley in 1906. *See Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 523–26 (1938) (detailing the history of Yosemite National Park). In the modern era, Congress has continued to frame management directives in terms of intergenerational sharing. For example, the enacting language of the Steens Mountain Cooperative Management and Protection Area Act of 2000 required the Secretary of the Interior to “conserve, protect, and manage the long-term ecological integrity of Steens Mountain for future and present generations.” Pub. L. No. 106–399, §102, 114 Stat. 1655, 1658–59 (2000) (codified at 16 U.S.C. § 460nnn-12 (2012)).

³⁰¹ 16 U.S.C. § 1 (2012) (repealed 2014); 54 U.S.C.A. § 100101 (West 2015).

³⁰² *See* KEITER, *supra* note 300, at 9 (citing letter of Interior Secretary Franklin Lane (May 13, 1918)).

³⁰³ Secretary Lane believed that protecting the parks required the agency to guard against entrenched privatization, stating that the Parks Service must “faithfully preserve the parks for posterity in essentially their natural state. The commercial use of these reservations, except as specially authorized by law, or such as may be incidental to the accommodation and entertainment of visitors, will not be permitted under any circumstances.” Letter of Interior Secretary Franklin Lane (May 13, 1918).

theme of public access.³⁰⁴ For example, the Act’s statement of purpose directs the National Park Service to “conserve” the land, rather than merely “preserve” it as the enacting statutes of the original parks had called for.³⁰⁵ The National Park Service statutes therefore allowed some consumptive uses in the parks, such as leasing for tourism accommodations for periods of no longer than twenty years.³⁰⁶ Grazing was also a permissible park use, cabined by the requirement that grazing not be detrimental to the primary purposes of the park.³⁰⁷ Although the Organic Act authorizes commercial park concessionaires,³⁰⁸ the statute clearly forbids the Park Service from encumbering the public’s access to natural curiosities, wonders, or objects of interest by leasing or granting those areas to private concerns.³⁰⁹

E. MANAGING GRAZING LANDS

Public access to federal lands reflects the antimonopoly impulse when access is shared among the many, rather than privatized by a few or committed to a single use. In the Nineteenth century, free and unrestricted use of public lands for grazing was a boon to private cattle and sheep graziers. But in 1906, the Forest Service revoked the implied license to graze that the Supreme Court recognized in its 1890 *Buford v. Houtz* decision.³¹⁰ Realizing that overgrazing was degrading the range, Pinchot invoked Organic Act authority³¹¹ to promulgate regulations imposing a permit requirement and charge fees for grazing on national forest lands.³¹² The regulation reflected antimonopoly sentiment by ending free and unrestricted grazing, thereby removing a major subsidy for large rangeland users. Pinchot intended the permit requirement and fees, which were tied to the amount of forage grazers consumed, to prevent excessive grazing by individual ranchers

³⁰⁴ Multiple-Use surfaces as a major antimonopoly doctrine in the 1960s, as discussed *infra* Part V.

³⁰⁵ See RICHARD W. SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS 43 (1997) (explaining that the conservation movement comprised a wide array of concerns, “of which the wise use of scenic lands in the national parks to foster tourism and public enjoyment was very much a part.”).

³⁰⁶ Act of Aug. 25, 1916, ch. 408 § 3, 39 Stat. 535, 535. Today, the Secretary can award concession contracts for up to twenty years (54 U.S.C.A. § 101914 (West 2015)), but may provide a preferential right to renew contracts to outfitters, guide services, and smaller contracts. 54 U.S.C.A. § 101913 (West 2015).

³⁰⁷ SELLARS, *supra* note 305, at 44; ch. 408 § 3, 39 Stat. 535, 535; 16 U.S.C. § 3 (2012) (repealed 2014); 54 U.S.C.A. § 102101 (West 2015).

³⁰⁸ 16 U.S.C. § 5952 (2012) (repealed 2014); 54 U.S.C.A. § 101913 (West 2015).

³⁰⁹ 16 U.S.C. § 3 (2012) (repealed 2014); 54 U.S.C.A. § 102101 (West 2015). Today, National Parks concessions are governed also by the Concessions Management Improvement Act, Pub. L. No. 105–391, Title IV § 402, 112 Stat. 3503 (1998). The statute requires that contracts for visitor facilities and services be limited to those that are “necessary and appropriate for public use and enjoyment” of the park and that they “are consistent to the highest practicable degree with the preservation and conservation” of the park. 54 U.S.C.A. § 101912 (West 2015).

³¹⁰ *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

³¹¹ See PINCHOT, *supra* note 239, at 271–72 (describing Pinchot’s elicitation of a letter from the Attorney General confirming his authority under the Organic Act of 1897 to impose a fee-permit scheme within the forest reserves).

³¹² Forest Service Reg. 45 (June 12, 1906). The permit system required grazers to pay a fee of five cents per animal unit month (“AUM”). WILKINSON, *supra* note 151, at 91. An AUM is the amount of forage ingested by one cow, or about five sheep, grazing about 700 to 800 pounds of plant matter for a month. *See id.*; COGGINS & GLICKSMAN, *supra* note 183, § 33:7.

on the forest reserves.³¹³ The regulation also created a safe harbor for subsistence grazers,³¹⁴ exempting small users from the permitting fees imposed on large commercial operations.

The fee program did not go unchallenged. In 1911, the Supreme Court upheld the Secretary of Agriculture's power under the Organic Act to impose a grazing fee with criminal penalties for non-compliance.³¹⁵ In a decision issued on the same day, the Court invoked a trust theory of ownership to support the power of the federal government to restrict grazing.³¹⁶ "All the public lands of the nation are held in trust for the people of the whole country," wrote Justice Lamar, who declared that the federal government could even ban pasturage on its lands altogether if necessary to fulfill its custodial duty.³¹⁷ The opinion proclaimed that "these are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it."³¹⁸ Thus, the agency could choose to permit, curtail, or eliminate grazing, in order to prevent the degradation that comes with monopoly of use. This 1911 decision clearly recognized the federal role as both trustee and proprietor of the public lands, each role justifying restricting consumptive uses, reserving some lands for various purposes, and conditioning the use of resources. These measures all reflect antimonopoly sentiments.

F. BEYOND THE PROGRESSIVE ERA: ANTIMONOPOLY AND GRAZING ON LANDS OUTSIDE NATIONAL FORESTS

On public lands outside the national forests, the imposition of a permit-and-fee system for grazing remained a contentious proposition. Competition for the forage resource was intense in the late 1800s, and established stockmen used various means to claim exclusive use of the range.³¹⁹

³¹³ *United States v. Grimaud*, 220 U.S. 506, 522 (1911) ("These fees were fixed to prevent excessive grazing, and thereby protect the young growth and native grasses from destruction, and to make a slight income with which to meet the expenses of management.").

³¹⁴ The Forest Service exempted "the few head [of cattle] in actual use by prospectors, campers, and travelers, and milch or work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve . . ." Forest Service Reg. 45 (June 12, 1906).

³¹⁵ *Grimaud*, 220 U.S. at 522–23 (deciding that the Organic Act authorized the agency to promulgate regulations providing for the penalty, citing the statutory duty to protect the forest reserves from depredations). Although the statute did not declare it unlawful to graze sheep without a permit, it did require that users of the forest reserves comply "with the rules and regulations covering said forest reservation." *Id.* at 521. The Court ruled that statute did not unconstitutionally delegate a legislative power, because the statute required the Secretary to protect the forests from harmful uses. *Id.* at 522.

³¹⁶ *Light v. United States*, 220 U.S. 523, 537–38 (1911) (rejecting a rancher's claim of an implied license to graze upon the forest lands and upholding Pinchot's regulations requiring a permit). In effect, the regulation revoked the grazers' implied right to graze on federal public lands the Court recognized in *Buford v. Houtz*; see *supra* note 207. Pinchot's allies in the Department of the Interior attempted to bring grazing permits and fees to Interior-managed lands, but "[c]ontroversy among cattle men, sheepmen, farmers, and watershed protectionists doomed the grazing program." Utley & Mackintosh, *supra* note 272, at text between notes 37–38.

³¹⁷ *Light*, 220 U.S. at 537 ("in the exercise of the same trust [Congress] may disestablish a reserve, and devote the property to some other national and public purpose.").

³¹⁸ *Id.*

³¹⁹ See George Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 23–27 (1982) (describing how established ranchers acquired title to land through homestead fraud, acquiring riparian areas to monopolize water supplies, claiming "rights" to the range through private agreements with other local ranchers, taking possession by effectively excluding others with fences); see also *Interior History*, *supra* note 272, at text between notes 37–38 ("controversy over cattlemen, sheep men,

By the 1930s, that competition had caused severe deterioration and erosion of the resource.³²⁰ Although President Theodore Roosevelt had urged Congress to regulate grazing on the public domain, opposition prevented enactment of a Progressive era statute.³²¹ To counteract monopolization, the rangeland commons required regulation through mutually agreed upon coercion.³²²

Congress ultimately enacted the Taylor Grazing Act in 1934 in response to the rangeland deterioration that contributed to the Dust Bowl.³²³ The Taylor Act authorized the Secretary of Interior to divide the unreserved public domain into grazing districts and issue permits for predetermined levels of livestock grazing in each district. The antimonopoly aspects of the law included: (1) revoking the implied license to graze the public domain, requiring permits and imposing a user fee;³²⁴ (2) authorizing the Secretary to adjust or cancel permits when necessary to protect public rangelands;³²⁵ (3) limiting permit terms to ten years;³²⁶ (4) expressly declaring that no private property inhered in the permit to graze;³²⁷ and (5) calling for (via a 1939 amendment) district advisory boards (comprised largely of local ranchers)—establishing a sort of “range democracy.”³²⁸

farmers, and watershed protectionists doomed the grazing program” that would have established a leasing program aimed at range carrying capacity).

³²⁰ See Coggins & Lindeberg-Johnson, *supra* note 319, at 47 (citing E. LOUISE PEFFER, THE CLOSING OF THE PUBLIC DOMAIN 221 (1951)) (“Overgrazed, wind-eroded expanses, interspersed with rocky peaks and barren slopes, were all that remained of the public domain in 1934.”).

³²¹ Opposition came from “those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real home maker,” along with “the men who have already obtained control of great areas of the public land . . . who object . . . because it will break the control that these few big men now have over the lands which they do not actually own.” PUBLIC LAND SITUATION IN THE UNITED STATES, MESSAGE FROM THE PRESIDENT, S. DOC. NO. 310, 59th Cong., 2d Sess. 5 (1907).

³²² “Surely it is in accordance with the spirit of our government to pass a law in the interest of the actual settler, instead of to leave undisturbed the present system in the interest of those who monopolize an improper proportion of the public domain, or of others who are indifferent to whether in the long run they destroy the worth of the public domain.” *Id.* at 5–6. See also Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (“The rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.” *Id.* at 1244. Hardin explained succinctly the idea that regulatory limits allow the commons to be enjoyed by many, rather than robbed by few. *Id.* at 1247).

³²³ Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269. The purposes of the Act were “to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, to stabilize the livestock industry dependent upon the public range, and for other purposes.” *Id.* The dire erosion and ecological deterioration wrought on the Dust Bowl plains motivated policymakers to conserve what remained of the soils in the public domain. See Coggins & Lindeberg-Johnson, *supra* note 319, at 46–47.

³²⁴ *Id.* § 3.

³²⁵ *Id.*; 43 C.F.R. §§ 160.26(a) – (f) (1938), 43 C.F.R. § 160.30 (1938).

³²⁶ Taylor Grazing Act of 1934, 48 Stat. at 1271.

³²⁷ *Id.* See also *United States v. Fuller*, 409 U.S. 488, 494 (1973) (determining that neither the permit nor the value it adds to the base ranch are compensable property rights). Congress intended that “no compensable property might be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands.” *Id.*

³²⁸ Act of July 14, 1939, ch. 270, 53 Stat. 1002 (each range district also had a wildlife representative). See Coggins & Lindeberg-Johnson, *supra* note 319, at 48. Notably, however, advisory boards were composed generally of

On the one hand, the Taylor Act brought the first form of statutory governance to the overburdened commons of the plains, disrupting the informal monopoly of claimed private rights that had evolved there.³²⁹ However, the statutorily authorized advisory boards created conditions ripe for governmental capture.³³⁰ The Act and its regulations also created preference grazing rights for landowners adjacent to public lands, which limited the antimonopoly effect of the law.³³¹ The statute established a preference for issuing permits to landowners within or near the district who were engaged in the livestock business, bona fide settlers, or owners of water rights.³³² This preference system effectively perpetuated the rangeland status quo.³³³ In fact, George Coggins claimed that the immediate effect of the Taylor Act was “exclusionary and monopolistic,” especially because nomadic sheepherders, who had no land base, were effectively excluded from the preference, and the preference for existing users forced the poorest cattlemen into bankruptcy.³³⁴ The antimonopoly potential of the Act was also thwarted by the fact that—although not conveying a property right—grazing permits are preferentially renewed at the end of each term.³³⁵ That potential was further curtailed when the Tenth Circuit decided that conservation-use permits were antithetical to its language.³³⁶ Despite its mixed antimonopolistic effects, the Taylor Act and its implementation ended the disposition era of public land policy, preserving the remaining public domain for public allocation through regulation, not private appropriation.

VI. ANTIMONOPOLY IN MODERN PUBLIC LAND STATUTES

In the modern era, the antimonopoly theme persists in public land law, enshrined in federal policies promoting widespread use by diverse users, limiting dominant uses, requiring advanced public planning, and upholding user access to reserved lands. Laws promulgating these policies include the Multiple Use Sustained Yield Act (“MUSYA”),³³⁷ Federal Land Policy and

cattlemen, to the exclusion of other users, such as nomadic sheepherders, which limited the antimonopoly effect. *See id.* at 48–49.

³²⁹ This monopoly had been defended fiercely in so-called range wars between established ranching interests and competing users such as homesteaders and sheepherders. WILKINSON, *supra* note 151, at 85–86.

³³⁰ Grazing Service personnel “went out and practically turned the lands over to the big cowmen and the big sheepmen of the West.” Coggins & Lindeberg-Johnson, *supra* note 319, at 64 (referencing the remarks of Chairman Johnson in the *Hearings on the Interior Department Appropriations Bill for 1947 before the House Subcomm. on Appropriations*, 9th Cong., 2d Sess. 147 (1946)).

³³¹ *See* Coggins & Lindeberg-Johnson, *supra* note 319, at 49 (discussing the contradictory nature of the Taylor Grazing Act, in that “Congress carefully emphasized that a permit to graze was in no sense a vested right, yet at the same time it ensured that adjacent landowners would be able to develop a monopoly on the grazing benefits bestowed.”).

³³² Ch. 865 § 3, 48 Stat. at 1271.

³³³ The regulations created the following preference system: first, to owners of stock who owned “base property” (in land or water) and who grazed their herds during the five years prior to the enactment of the Taylor Grazing Act; second, to other owners of base property who lacked prior use; and third, to those who did not own base property. *See* Public Lands Council v. Babbitt, 529 U.S. 728, 734–35 (2000) (citing Rules for Administration of Grazing Districts (June 14, 1937)).

³³⁴ Coggins & Lindeberg-Johnson, *supra* note 319, at 56.

³³⁵ *See* Huber, *supra* note 12, at 1005.

³³⁶ Public Lands Council v. Babbitt, 167 F.3d 1287, 1307 (10th Cir. 1999), *aff’d on other grounds*, 529 U.S. 728 (2000). The government did not appeal to the Supreme Court the Tenth Circuit’s rejection of the conservation permit issue, which was the only issue on which the challengers to Secretary Babbitt’s rangeland reforms prevailed.

³³⁷ 16 U.S.C. §§ 528–31.

Management Act (“FLPMA”),³³⁸ National Forest Management Act (“NFMA”),³³⁹ and the Alaska National Interest Lands Conservation Act (“ANILCA”).³⁴⁰

A. MULTIPLE USE

In 1960 the MUSYA codified multiple use on national forests, although foresters had practiced multiple use for decades since Pinchot’s day.³⁴¹ The statute was a response to growing public concern over clearcutting, overharvesting, and increasing recreational use, as well as countervailing pressures from the industry to ratchet up the harvest.³⁴² Clear-cutting,³⁴³ “high-grading,”³⁴⁴ and failure to re-seed harvested areas were common logging practices. These practices not only were environmentally detrimental, they were highly visible to a public that had begun to value recreation on public lands.³⁴⁵ In the World War II and post-war eras, commercial uses on national forests began to increasingly conflict with non-consumptive and recreational uses.³⁴⁶

The Forest Service requested legislation expressly authorizing the balancing of these competing uses, which it was, in fact, already doing and had done so since the days of Pinchot.³⁴⁷ Congress responded by enacting MUSYA in 1960, establishing five major national forest uses: outdoor recreation, range, timber, watershed, and wildlife.³⁴⁸ The Bureau of Land Management (“BLM”) lands acquired this directive temporarily in 1964³⁴⁹ and permanently in 1976 with the enactment of FLPMA, BLM’s organic statute.³⁵⁰ FLPMA included a comparatively broader range

³³⁸ 43 U.S.C. §§ 1701–82.

³³⁹ 16 U.S.C. §§ 1600–14.

³⁴⁰ Codified in part at 16 U.S.C. §§ 3101–3233.

³⁴¹ See *infra* note 340 and accompanying text.

³⁴² See Wilkinson & Anderson, *supra* note 11, at 29. During World War II, the annual harvest of timber from the national forests more than tripled, rising from an average of 1 billion board feet to 3.3 billion board feet in 1944. See WILKINSON, *supra* note 143, at 135. The booming post-war economy and population growth required timber for homebuilding and manufacturing, raising annual extraction to 4.4 billion board feet in 1952. *Id.* at 136.

³⁴³ See *W. Va. Div. of Izaak Walton League of Am. v. Butz*, 522 F.2d 945, 954–55 (4th Cir. 1975) (describing the effect that World War II and the postwar building boom had on the management practices of the Forest Service, changing it “from a custodian to a production agency. It was in this new role that the Service initiated the policy of even-aged management in the national forests . . .”). Even-aged management is a euphemism for clear-cutting.

³⁴⁴ That is, a method of removing timber which removed only the most valuable trees, without re-seeding a renewal crop. See WILKINSON, *supra* note 151, at 136.

³⁴⁵ See *id.* at 137.

³⁴⁶ See Wilkinson & Anderson, *supra* note 11, at 9 (describing by region the challenges for national forest management: coal leasing in Montana, Wyoming, and Utah; oil and gas development competing with recreation from Montana to Wyoming and from Colorado to Arizona; commercial timber harvest conflicting with salmon and steelhead in the Pacific Northwest; and issues of large predator habitat protection in the Northern Rockies).

³⁴⁷ See *id.* at 28–29 (“Forest Service planners responded to the increasing demands [from loggers and recreationists] by attempting to coordinate resource planning. After preparing an inventory of resources, local managers developed composite plans that identified recreation and special management areas, watercourses, transportation routes, and other characteristics.”).

³⁴⁸ Pub. L. 86-517, § 1, June 12, 1960, codified at 16 U.S.C. § 528; the uses are listed in alphabetical order, but notice that “recreation” was listed as “outdoor recreation” so that it could be mentioned before “range,” emphasizing that the commodity uses are not to dominate management. See George Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of “Multiple Use Sustained Yield” for Public Land Management*, 53 U. COLO. L. REV. 229, 252 (1982).

³⁴⁹ Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–18 (a temporary statute that expired in 1970).

³⁵⁰ 43 U.S.C. § 1701 *et seq.*

of uses for the agency to co-manage, including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values.³⁵¹

The idea of “multiple use” was an outgrowth of Pinchot’s utilitarian approach to public lands management, expressed as resource allocation for the greatest good for the greatest number over the long run.³⁵² MUSYA required the Forest Service to give “due consideration” to the relative values of the various resources.³⁵³ The statute defines “multiple use” as:

The management of all the various renewable surface resources of the national forest so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services . . . ; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.³⁵⁴

The statute’s antimonopoly principle is clear: no single use should dominate the management scheme. Land managers must consider several uses and provide for them in an integrated fashion and in a manner that avoids “impairment to the productivity of the land.” Congress also stressed that commodification and extraction to produce the highest economic output would no longer be guiding principles in land management.

However, MUSYA amounted to little more than a statement of policy.³⁵⁵ Its antimonopoly tenets contained no measurable standards or enforceable provisions. For example, the Forest Service arguably ignored the directive of MUSYA in selling 8.7 billion board feet of old growth in the Tongass National Forest in 1968.³⁵⁶ The sale included ninety-five percent of the commercial forestlands available in the Tongass, the nation’s largest national forest.³⁵⁷ In *Sierra Club v. Hardin*, environmentalists unsuccessfully challenged the sale, arguing that the Tongass was being administered predominantly for the purpose of timber production in violation of MUSYA.³⁵⁸ The district court was unable to find any useful law to apply, stating that, “Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.”³⁵⁹ The court interpreted the statutory phrase “due consideration” of multiple uses to require only “some consideration,” with judicial deference to the agency’s decision.³⁶⁰

³⁵¹ *Id.* § 1702(c). See Coggins, *supra* note 348, at 269–70. Compared to MUSYA, the BLM’s directive in FLPMA includes more “preservation” uses but also mineral production as well. See *id.*

³⁵² See COGGINS & GLICKSMAN, *supra* note 183, at § 30:1.

³⁵³ 16 U.S.C. § 529.

³⁵⁴ *Id.* § 531.

³⁵⁵ See ARNOLD BOLLE, A UNIVERSITY VIEW OF THE FOREST SERVICE, S. DOC. NO. 115 (1970) (criticizing the Forest Service for failing to promote true multiple use management and continuing a “dominant use” focus on timber production).

³⁵⁶ *Sierra Club v. Hardin*, 325 F. Supp. 99, 104 (D. Alaska 1971), *rev’d*, *Sierra Club v. Butz*, 3 E.L.R. 20292 (9th Cir. 1973).

³⁵⁷ See Wilkinson & Anderson, *supra* note 11, at 72. The Act did not address whether the Forest Service could use all of the commercially harvestable area for harvesting, and leave other parts of the forest for the other uses to fulfill its multiple use mandate.

³⁵⁸ 325 F. Supp. at 106.

³⁵⁹ *Id.* at 123.

³⁶⁰ *Id.* at 123 n.48.

The Ninth Circuit reversed this decision, ruling that the district court should have considered a suppressed analytical report on the sale to determine whether the agency's decision was an informed one.³⁶¹ However, the appellate court did accept the district court's "some consideration" standard interpreting MUSYA,³⁶² deciding the Act merely requires the Forest Service to *consider* all the various uses, not administer them equally.³⁶³ Thus, the environmentalists could not truly rely on MUSYA to challenge the timber-use monopoly in the Tongass.

The timber dominance of the Forest Service was instead overcome by removing lands from the agency's apparently standardless multiple-use balancing.³⁶⁴ During the 1960s, Congress reacted to the recommendations of the Outdoor Recreation Resources Review Commission, which urged legislative designation of federal lands for non-commodity use, by separating these areas from the timber harvest-focused view of the Forest Service.³⁶⁵ Congress responded by enacting a wilderness system,³⁶⁶ a national trails system,³⁶⁷ and a wild and scenic rivers system,³⁶⁸ all designed to preserve natural landscapes, accommodate recreation, and protect the free-flowing and unpolluted character of designated rivers. These systems protect non-commodity uses by geographically confining the broad discretion that the land agencies previously enjoyed.

For the lands that Congress did not remove from the Forest Service's MUSYA balancing, the

³⁶¹ 3 E.L.R. 20292 (9th Cir. 1973).

³⁶² *Id.* However, the court did state that "due consideration" required the agency to take "the values in question . . . informedly and rationally. . . into balance. The requirement can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them." *Id.*

³⁶³ *See, e.g., Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979), in which the court described MUSYA's standards as "contain[ing] the most general clauses and phrases . . . [which] can hardly be considered concrete limits upon agency discretion. Rather it is language with 'breathe[s] discretion at every pore.'"

³⁶⁴ *See* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple-Use Failed*, 18 HARV. ENVTL. L. REV. 405, 422-23 (1994) (explaining that Congress has "acted to curtail the excesses of multiple use"—produced by agency capture by commodity users—by reducing the land base subject to multiple use principles). The land base reduction was accomplished by establishing a dominant non-commodity use for those areas). Wilderness designation represents an "enclave" approach, in that it protects non-commodity uses by separating them from disposal and exploitation policies. *See* John D. Leshy, *Legal Wilderness: Its Past and Some Speculations on Its Future*, 44 ENVTL. L. 549, 569 (2014).

³⁶⁵ *See* OUTDOOR RECREATION RESOURCES REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1962), http://www.nps.gov/parkhistory/online_books/anps/anps_5d.htm. Congress established the Outdoor Recreation Resources Review Commission in 1958 in order to determine the present and future recreational wants and needs of the public, and to make recommendations to Congress as to the policies and programs it should implement to meet those needs. *Id.*

³⁶⁶ Wilderness Act of 1964, Pub. L. 88-577, Sept. 3, 1964, codified at 16 U.S.C. §§ 1131–1136. Congressional designation of wilderness areas was thought necessary because the Forest Service had the power (and exercised the power) to remove wild land protections from administratively designated wilderness. *See* WILKINSON, *supra* note 151, at 139. The impetus for the creation of a wilderness bill came from public opposition to conventional development, damming, and road building in wild places. Leshy, *supra* note 364, at 561–66. The Wilderness Society, initiated in 1935 by Aldo Leopold (who had invented and pushed for "primitive" designations as a Forest Service employee) and Bob Marshall (who thereafter became the head of recreation management for the Forest Service), called for the designation of wild acreage for the purpose of protecting it from growing development. *Id.* at 556. Decades later, in 1956, conservationists succeeded in convincing Congress to reject the construction of Echo Park Dam in Dinosaur National Monument. *Id.* at 562. According to John Leshy, this rejection sparked a national debate about the creation of a wilderness preservation system. *Id.* at 561–63.

³⁶⁷ National Trails System Act, Pub. L. 90-543, Oct. 2, 1968, codified at 16 U.S.C. §§ 1241–1249.

³⁶⁸ Wild and Scenic Rivers Act, Pub. L. 90-542, Oct. 2, 1968, codified at 16 U.S.C. §§ 1271–1287.

national forest system continued to be plagued by poorly planned and even-aged management.³⁶⁹ In effect, clearcutting is a use-monopoly, in that it deprives an area of almost all the other contemplated uses (habitat for tree-dwelling species, recreation, watershed protection, and so forth). In many cases, clearcutting can adversely affect the diversity of uses, species, and habitat in surrounding areas.³⁷⁰ In the early 1970s, environmentalists challenged clearcutting as a violation of the 1897 Organic Act, which permitted the Forest Service to sell only individually marked or designated dead, matured, or large growth trees.³⁷¹ In *W. Va. Div. of Izaak Walton League of Am. v. Butz*, the district court agreed that the Forest Service's proposed clearcut timber sales in the Monongahela National Forest violated the statute.³⁷² The Fourth Circuit affirmed, determining that the language of the statute was clear and supported by a legislative history showing Congress's intent that young and growing trees be left standing for the purpose of preserving the forests.³⁷³ This judicial ban on clearcutting was short-lived, however: following the 1975 *Monongahela* decision, Congress enacted the National Forest Management Act ("NFMA") of 1976, which expressly authorized clearcutting under certain conditions.³⁷⁴

B. LAND AND RESOURCE PLANNING UNDER NFMA AND FLPMA

Despite NFMA's authorization of monopolistic clearcutting, two provisions of the statute reflect prominent antimonopoly principles: (1) the Act's limitations on clearcutting and (2) its overarching resource planning requirement. NFMA and its harvesting provisions expressly incorporate the multiple-use policy of MUSYA, allowing clearcutting only in circumscribed situations.³⁷⁵

Under the statute, the Forest Service may not choose a harvesting method based upon the greatest dollar return.³⁷⁶ If the agency chooses the clearcutting option, it must be the optimum harvest method,³⁷⁷ after interdisciplinary review to assess the potential environmental, biological, aesthetic, engineering, and economic effects of each sale, as well as the sale's consistency with the applicable land plan.³⁷⁸ Clearcuts must also be carried out in "a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource."³⁷⁹ The upshot of these conditions is that the Forest Service

³⁶⁹ See Coggins, *supra* note 348, at 276. Indeed, the Wilderness Act hardly had any immediate effect on the scale of timber cutting on the national forests because much of the initially designated wilderness was above the timber line. WILKINSON, *supra* note 151, at 139. The Act initially only protected about nine million acres of national forest lands. Leshy, *supra* note 364, at 566.

³⁷⁰ For example, clearcutting mixed Eastern hardwood forests resulted in conversion to pine stands. See GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 692 (6th ed. 2007).

³⁷¹ 16 U.S.C. § 476, repealed Pub. L. 94-588 § 13, Oct. 22, 1976.

³⁷² 367 F. Supp. 422 (N.D.W. Va. 1973).

³⁷³ 522 F.2d 945, 952 (4th Cir. 1975).

³⁷⁴ 16 U.S.C. § 1604(g)(3)(F).

³⁷⁵ NFMA aimed in part to end the paradigm of timber as a use-monopoly. According to Senator Hubert Humphrey, a principal sponsor of NFMA, "The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions." 122 CONG. REC. 5619 (daily ed. Mar. 5, 1976) (statement of Sen. Hubert Humphrey).

³⁷⁶ 16 U.S.C. § 1604(g)(3)(E)(iv).

³⁷⁷ *Id.* § 1604(g)(3)(F)(i).

³⁷⁸ *Id.* § 1604(g)(3)(F)(ii).

³⁷⁹ *Id.* § 1604(g)(3)(F)(v).

must justify its decisions with findings according to these factors in a record subject to public review and comment.³⁸⁰

Forest planning for multiple uses³⁸¹ reflects three major tenets of antimonopoly: (1) accommodation of diverse uses; (2) development of a framework for balancing those uses before the agency must evaluate specific resource proposals; and (3) accountability for resource allocation. Both NFMA³⁸² and FLPMA³⁸³ require land managers to prepare land plans reflecting the multiple use and sustained yield standards.³⁸⁴

National forest planning requirements include some unique elements that embody an ethic of antimonopoly, particularly requirements concerning plant and wildlife diversity and sustainability, with the latter including an ecosystem integrity requirement. NFMA requires Forest Service land plans to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives.³⁸⁵ Under regulations promulgated in 2012, Forest Service plans must contribute to the recovery of federally listed threatened and endangered species under the Endangered Species Act (“ESA”), must conserve proposed and candidate ESA species, and must maintain a viable population of each species of conservation concern³⁸⁶ within the plan area.³⁸⁷ In theory,³⁸⁸ this provision requires the Forest Service to ensure that non-commodity uses are represented, protected, measured, and monitored.³⁸⁹

The 2012 regulations also require Forest Service plans to provide for social, economic, and

³⁸⁰ See 36 C.F.R. § 219.15(d) (2012) (“A project or activity approval document must describe how the project or activity is consistent with applicable plan components”); *id.* § 219.11(d)(5) (2013) (requiring that plans limit harvest such that “[t]imber will be harvested from NFS lands only where such harvest would comply with the resource protections set out in sections 6(g)(3)(E) and (F) of the NFMA (16 U.S.C. 1604(g)(3)(E) and (F).”).

³⁸¹ Multiple-use planning has not lived up to its promise. See Blumm, *supra* note 364, at 421 (explaining that multiple use failed to produce balanced results because commodity-based interest groups pressure land managers to maintain historic levels of grazing and timber harvesting in low-visibility administrative decisions). Consider also that the Forest and Rangelands Renewable Planning Act of 1974, 16 U.S.C. §§ 1601–1610, requires the federal government to set a timber production goal for the national forests. *Id.* § 1602. After Congress passed the 1974 Act, board-feet goals became a driving force shaping the content of NFMA-mandated forest plans. See Blumm, *supra* note 364, at 427.

³⁸² 16 U.S.C. § 1604(a).

³⁸³ 43 U.S.C. § 1712(a).

³⁸⁴ 16 U.S.C. § 1604(e); 43 U.S.C. § 1712(c)(1). FLPMA’s planning requirement encompasses nine general criteria, all of which are aimed at ensuring administrative consideration of diverse values to produce a balanced plan, including (1) designation and protection of areas of “critical environmental concern,” (2) evaluation of present and potential uses of public lands, (3) consideration of the relative scarcity of values involved and the alternative means and siting for those uses, and (4) weighing long-term and short-term benefits to the public.

³⁸⁵ 16 U.S.C. § 1604(g)(3)(B); 36 C.F.R. § 219.9 (2012).

³⁸⁶ A species of conservation concern “is a species, other than federally recognized threatened, endangered, proposed, or candidate species, that is known to occur in the plan area and for which the regional forester has determined that the best available scientific information indicates substantial concern about the species’ capability to persist over the long-term in the plan area.” 36 C.F.R. § 219.9(c).

³⁸⁷ 36 C.F.R. § 219.9(b).

³⁸⁸ The effect of the diversity rule was weakened by giving the regional forester discretion to select species of conservation concern, *id.* (c); she also has the option of determining that maintaining a species is beyond the agency’s authority. *Id.* (b)(2). The regulations dropped a requirement of the 1982 regulations requiring the Forest Service to maintain “viable populations of existing native and desired non-native vertebrate species in the planning area.” 36 C.F.R. § 219.19 (1982). See Courtney Schultz et al., *Wildlife Conservation Planning Under the United States Forest Service’s 2012 Planning Rule*, 77 J. WILDLIFE MGMT. 428, 432 (2012).

³⁸⁹ 36 C.F.R. § 219.12(a)(5)(iii)–(iv). Focal species and ecological conditions are proxies for actual monitoring of species of conservation concern.

ecological sustainability.³⁹⁰ Although “sustainability” is not a use, the concept acknowledges that forest resources must be shared inter-generationally to protect future use.³⁹¹ Within the sustainability directive is a requirement to plan for ecosystem integrity.³⁹² The regulations direct the Forest Service to look beyond the borders of the plan area to account for existing conditions in the adjacent landscape and the changing climate.³⁹³ Thus, the regulations recognize that patchwork harvests and developments affect wildlife’s ability to access and use the landscape as a whole. Although a court once upheld the Forest Service’s rejection of a conservation-biology approach to management,³⁹⁴ the planning rules now recognize the agency’s duty to “restore structure, function, composition, and connectivity” for purposes of ecological sustainability.³⁹⁵ Thus, the regulations suggest a form of antimonopoly of human use, infusing forest planning with requirements based on the needs of the greater biological community.³⁹⁶ However, given the history of deferential case law favoring the Forest Service,³⁹⁷ whether the public may enforce the interspecies antimonopoly aspect of the forest planning rules is not yet clear.³⁹⁸

C. PRIORITIZING SUBSISTENCE USES IN ALASKA

³⁹⁰ 36 C.F.R. § 219.8.

³⁹¹ The regulations’ definition of “sustainability” includes “the capability to meet the needs of the present generation without compromising the ability of future generations to meet their needs.” 36 C.F.R. § 219.19.

³⁹² *Id.* § 219.19(a)(1).

³⁹³ 36 C.F.R. § 219.8(a)(1).

³⁹⁴ *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995) (upholding the Forest Service’s refusal to incorporate principles of conservation biology—e.g., consideration of edge effects, island biogeography, and connectivity—in its plan for the Nicolet and Chiquamegon National Forests).

³⁹⁵ 36 C.F.R. § 219.8(a).

³⁹⁶ Opponents of the rule claimed that the 2012 sustainability planning rule: (1) “establishes achievement of ‘ecological sustainability’ [as] the primary purpose of every national forest,” while “relegating ‘social and economic sustainability’ to an inferior and insignificant position,” in violation of the Organic Act, NFMA, MUSYA; (2) unlawfully elevates species viability, conservation, and recovery over the Forest Service’s statutory multiple use objectives; and (3) improperly imposes the requirement of “best available scientific information” in the development of forest plans. Complaint ¶¶ 25, 27, 29, 32, 48, 52, *Federal Forest Resource Coalition v. Vilsack*, No. 1:12-cv-1333 (D.D.C. filed Aug. 13, 2012). The D.C. District Court dismissed the Federal Forest Resource Coalition’s case for lack of standing in March 2015. No. 1:12-cv-1333 (D.D.C. Mar. 31, 2015); No. 1:12-cv-1333 (D.D.C. Apr. 28, 2015) (memorandum opinion explaining that the plaintiffs lacked standing). Plaintiffs have since filed a motion for reconsideration, which was denied in May. No. 1:12-cv-1333 (D.D.C. May 27, 2015).

³⁹⁷ *See, e.g., Lands Council v. Martin*, 529 F.3d 1219, 1226 (9th Cir. 2008) (deferring to a Forest Service plan amendment interpreting the term “live trees” to exclude certain trees that are still scientifically alive, and finding “no legal requirement that a methodology be ‘peer-reviewed or published in a credible source.’”); *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) (en banc) (taking a hands-off approach in determining that the Forest Service’s scientific methodology need not be confirmed through on-the-ground analysis). *But see Karuk Tribe v. U.S. Forest Serv.*, 681 F.3d 1006 (9th Cir. 2012) (en banc) (holding that, based on the record, mining proposals under the Forest Service’s jurisdiction “may affect” the local listed salmon, and therefore the Forest Service violated the Endangered Species Act by failing to consult).

³⁹⁸ For example, under the prior planning rule, many plans lacked enforceable standards and clear conservation commitments for sensitive species, to the point that the plans’ inadequacies influenced Fish & Wildlife Service (“FWS”) decisions to list some species under the Endangered Species Act. *See Schultz et al., supra* note 388, at 440 (explaining that, for example, the FWS based its decision to list the Canada lynx in part on the fact that most national forests with lynx had no population viability objectives or management standards for the lynx).

Antimonopoly sentiment is also evident in ANILCA's subsistence provisions.³⁹⁹ These provisions were included in a statute that created vast expanses of conservation reserves,⁴⁰⁰ recognized wildlife protection; preserved scenic areas and protected subsistence harvest for rural residents.⁴⁰¹ The most explicit antimonopoly principle embedded in the statute is the recognition and protection of subsistence uses of public resources. The statute defined "subsistence" as:

[T]he customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.⁴⁰²

Section 804 created a preference for these subsistence uses of the fish and wildlife resource.⁴⁰³ The effect is that when the government limits hunting and fishing to protect the resource, ANILCA gives subsistence harvesters priority over commercial and recreational harvesters.⁴⁰⁴

Section 810 requires any federal agency planning a project on public land to assess the effects of the project on subsistence and study how adverse effects may be avoided.⁴⁰⁵ Section 810 reflects antimonopoly sentiment by giving subsistence uses some procedural protection against other public land uses that threaten to reduce subsistence harvests.⁴⁰⁶ However, case law interpreting Section 810 has not imposed meaningful restrictions on uses harming subsistence harvests, such as timber sales.⁴⁰⁷

D. ENSURING PUBLIC ACCESS

³⁹⁹ ANILCA represented the greatest conservation achievement in terms of acreage in the Twentieth century. It doubled the size of the National Park System, tripled the acreage of the National Wildlife Refuge System, and quadrupled the size of the Wilderness Preservation System. COGGINS ET AL., *supra* note 370, at 29.

⁴⁰⁰ ANILCA added 103 million acres of BLM land to federal conservation systems. See COGGINS & GLICKSMAN, *supra* note 183, § 14:23. Included were millions of acres of new national parks, wildlife refuges, wilderness areas, and wild and scenic rivers. See *id.* § 2.17.

⁴⁰¹ 16 U.S.C. § 3101 (2012).

⁴⁰² 16 U.S.C. § 3113.

⁴⁰³ *Id.* § 3114.

⁴⁰⁴ *Id.*

⁴⁰⁵ 16 U.S.C. § 3120. Section 810 requires federal agencies to undertake a two-tiered analysis of the effects of federal projects on subsistence activities. First, the agency must evaluate the effect of a project on subsistence use and investigate whether there might be project alternatives or alternative sites that would protect subsistence uses. *Id.* § 3120(a). Second, if the proposed project would "significantly restrict" subsistence uses, *id.*, the agency must undertake further study to determine (1) whether such significant restriction is necessary, (2) whether the project uses the smallest amount of land necessary to accomplish the task, and (3) how the agency will take reasonable steps to minimize the adverse impacts on subsistence uses. *Id.* An activity which would significantly restrict subsistence uses may not proceed unless those determinations are made. *Id.*

⁴⁰⁶ Although the word "subsistence" may suggest an ascetic way of living, the statutory protection includes commodity uses, a wide range of products, and foodstuffs that support Alaska Native cultures. See Dan Cheyette, *Breaking the Trail of Broken Promises: "Necessary" in Section 810 of ANILCA Carries Substantive Obligations*, 27 ENVTL. L. 611, 619 (1999).

⁴⁰⁷ See Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers' Subsistence*, 7 FORDHAM ENVTL. L.J. 211, 285-87 (1996) (discussing the case law, especially Hoonan Indian Ass'n v. Morrison, 170 F.3d 1223, 1230 (9th Cir. 1990), which interpreted the statutory language of "minimum amount of public lands necessary" to mean the amount of land necessary to conduct a timber sale, not a substantive limit on the size of the sale).

This article's earlier discussion of the Unlawful Inclosures Act shows that access to federal public lands and resources has been a major antimonopoly theme for well over a century.⁴⁰⁸ In the modern era, although federal land managers have restricted and prohibited the manner and means of access,⁴⁰⁹ multiple policies continue to safeguard public access to and across public lands. This part considers two modern aspects of antimonopoly through access: the public's recreational license to use national forest lands and FLPMA's recognition of existing public highways as access routes.

1. The Public's Recreational License

The public has an implied license to use public lands for purposes of recreation. The leading case is *United States v. Curtis-Nevada Mines, Inc.*, in which the Ninth Circuit upheld federal recognition of a public recreational license under the Surface Resources Act of 1955 to unpatented mining claims on public lands.⁴¹⁰ The court enjoined an alleged miner from excluding recreationalists on 203 mining claims covering approximately thirteen square miles on BLM and Forest Service land.⁴¹¹ The Ninth Circuit emphasized that the 1955 Surface Resources Act specifically preserved the right of the federal government and its permittees and licensees to use the surface resources of unpatented mining claims and to cross mining claims to access other lands.⁴¹² Congress enacted the 1955 statute for the antimonopoly purpose of preventing fraudulently located mining claims from gaining exclusive possession of the surface for endeavors like private fishing and hunting activities.⁴¹³

Upholding a broadly implied public license to access and use the public lands,⁴¹⁴ the court

⁴⁰⁸ See *supra* notes 217–30 and accompanying text.

⁴⁰⁹ For example, in the last century, the implied access license to graze on the public domain has been revoked by the Taylor Grazing Act and replaced with a permit system. See *supra* notes 316–21 and accompanying text. A statute granting rights-of-way for the construction of highways over public lands, known as Revised Statute 2477, was repealed by FLPMA in 1976. See *infra* notes 412–13 and accompanying text; COGGINS & GLICKSMAN, *supra* note 183, § 15:19. Access through national forest lands has a long history of regulatory oversight and restriction. The Organic Act expressly made public access subservient to the rules and regulations covering such national forests. 16 U.S.C. § 448. See also *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1197 (9th Cir. 2012) (describing the Forest Service's authority to restrict motor vehicle access in the El Dorado National Forest, even where such restriction would burden access to mining claims in the forest). Additionally, the Wilderness Act prohibits road-building and motorized access in wilderness areas, although the Act does contain access provisions (including exceptions for area administration and special provisions grandfathering in some existing access such as aircraft or motorboats as well as valid mining claims existing before 1984). 16 U.S.C. § 1133(c)–(d). Access is and has long been subject to considerable time, place, purpose, and manner regulations.

⁴¹⁰ 611 F.2d 1277 (9th Cir. 1980); See COGGINS & GLICKSMAN, *supra* note 183, § 31:2.

⁴¹¹ *Curtiss-Nevada*, 611 F.2d at 1279.

⁴¹² 30 U.S.C. § 612(b).

⁴¹³ *Curtiss-Nevada*, 611 F.2d at 1281–82 (citing H.R. REP. NO. 84–730, at 6 (1955): “Mining locations made under existing law may, and do, whether by accident or design, frequently block access: to water needed in grazing use of the national forests or other public lands; to valuable recreational areas; to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.”).

⁴¹⁴ *Curtiss-Nevada*, 611 F.2d at 1286. The district court had ruled that use and access is available only to those members of the public who hold individual recreation licenses or permits from a state or federal agency. *United States v. Curtis-Nevada Mines, Inc.*, 415 F. Supp. 1373 (E.D. Cal. 1976).

recognized that the federal government, as “trustee” of the lands,⁴¹⁵ had long allowed the use of public lands for recreational purposes or to afford access adjoining lands, so long as the government did not revoke its tacit consent.⁴¹⁶ The court decided that the 1955 Act aimed to promote public use of public lands by recognizing an implied public license absent a conflict with mining operations.⁴¹⁷ The alleged miner therefore could not use its alleged mining claim to impose a monopoly use on the public lands.⁴¹⁸

2. R.S. 2477 Highway Rights-of-Way

In 1976, FLPMA declared that a claimant wishing to establish a new right-of-way across BLM land or national forests for commercial or non-casual purposes needed to obtain agency approval to create the right-of-way.⁴¹⁹ However, the statute grandfathered valid existing rights-of-way that predated its enactment.⁴²⁰ A provision of the 1866 Mining Act, known as Revised Statute 2477 (“R.S. 2477”), granted rights-of-way for the “construction” of “highways” over public lands.⁴²¹ To claim an R.S. 2477 right-of-way, one must show that the public used the route as a highway before the 1976 enactment of FLPMA, that the right-of-way vested before the government reserved the land for a public purpose, and that the right-of-way was not abandoned.⁴²²

R.S. 2477 fosters a form of antimonopoly by allowing the public to enforce historic public-

⁴¹⁵ *Curtiss-Nevada*, 611 F.2d at 1283.

⁴¹⁶ *Id.* at 1283–84 (citing *Buford v. Houtz*, 133 U.S. 320 (1890); *Light v. United States*, 220 U.S. 523 (1911); and *McKee v. Gratz*, 260 U.S. 127 (1922)).

⁴¹⁷ *Id.* at 1282, 1285.

⁴¹⁸ The 1872 Mining Law contained several antimonopoly provisions that, for example, limit the size of claims and require labor to maintain a mine claim. 30 U.S.C. §§ 23 (size limits), 28 (required labor). Implementation of the Mining Law proved problematic due to frequent fraudulent claims seeking title to lands where there was no mineral value. In response, the Interior Department interpreted the law to require that “valuable mineral” (required to support a “discovery” necessary for a valid mine claim) satisfy a “marketability test” (meaning that the mineral could be “extracted, removed, and marketed at a profit.”) The Supreme Court upheld the use of this test as a reasonable means of reducing fraudulent claims in *United States v. Coleman*, 390 U.S. 599 (1968). A district court upheld Interior’s authority to reject mine plans that cause “undue” environmental degradation as a reasonable interpretation of section 302(b) of FLPMA. 43 U.S.C. § 1732(b), in *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30 (D.D.C. 2003). Both judicial interpretations foster antimonopoly by giving the agency the ability to reject and regulate federal mining operations where they are inconsistent with multiple use goals.

⁴¹⁹ 43 U.S.C. § 1761.

⁴²⁰ 43 U.S.C. § 1769(a) (2012) (“Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted”). See *COGGINS & GLICKSMAN*, *supra* note 183, § 15:18.

⁴²¹ Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253; see *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 740 (10th Cir. 2005).

⁴²² *COGGINS & GLICKSMAN*, *supra* note 183, § 15:18. Who has the burden of showing whether R.S. 2477 rights exist may depend on who brings the suit, and in what circuit the case is brought. The Tenth Circuit’s decision in *The Wilderness Society v. Kane County* seems to have placed a burden on environmental plaintiffs to show that counties claiming R.S. 2477 rights do not actually have valid claims, rather than presuming federal ownership and placing the burden on the counties to first quiet title in court. *Wilderness Soc’y v. Kane Cty.*, 632 F.3d 1162, 1171 (10th Cir. 2011) (denying standing to environmental plaintiffs because their claims required validation of the federal government’s property rights, thus the environmental plaintiffs were inappropriately seeking to vindicate the rights of a third party—the federal government). See Hillary M. Hoffman, *Signs, Signs, Everywhere Signs: The Wilderness Society v. Kane County Leaves Everyone Confused About Navigating A Right-of-Way Claim Under Revised Statute 2477*, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 3, 30 (2012).

access rights against the federal government.⁴²³ In *Southern Utah Wilderness Alliance v. BLM*, the Tenth Circuit, in a majority opinion by Judge McConnell, decided that establishing an R.S. 2477 highway requires proof of a continuous history of public use before 1976, but does not require a showing of mechanical construction.⁴²⁴ In rejecting a mechanical construction requirement favored by the federal government and environmentalists, the court suggested that the probable intent of Congress was “to ensure that widely used routes would remain open to the public even after homesteaders or other land claimants obtained title to the land over which the public traveled,” not to encourage individuals to invest in road infrastructure.⁴²⁵ Therefore, what is important for a valid existing right under R.S. 2477 is a history of consistent public use before 1976 by which the public effectively accepted the federal offer of a right-of-way.⁴²⁶ The claimant must also show that the claimed road still exists in that location.⁴²⁷

The court’s interpretation of R.S. 2477 to include de facto public travel routes thus recognized a broader range of historic access routes than had the BLM.⁴²⁸ R.S. 2477 highways, as preserved by FLPMA, serve an antimonopoly purpose by protecting established and continuously used public access ways, defined in terms of their historic and ongoing utility to the public without being closed to access by the BLM or other agencies such as the National Park Service.⁴²⁹ In fact, R.S. 2477 highways may burden private lands as well.⁴³⁰ In 2011, the state of Utah filed claims to

⁴²³ Environmental groups assert that local governments filing R.S. 2477 claims are motivated by the desire to regain local control and thwart wilderness designations by the federal government. See Robert L. Glicksman, *Wilderness Management by the Multiple Use Agencies: What Makes the Forest Service and the Bureau of Land Management Different?*, 44 ENVTL. L. 447, 473 (2014).

⁴²⁴ 425 F.3d 735, 769, 782–83 (10th Cir. 2005). The district court had decided in favor of BLM, which rejected several R.S. 2477 claims of Utah counties’ because BLM’s administrative decision was based on substantial evidence on the record, agreeing with BLM’s interpretation that valid R.S. 2477 claims required visible and purposeful physical construction. 147 F. Supp. 2d 1130, 1137, 1143 (D. Utah 2001).

⁴²⁵ *SUWA*, 425 F.3d at 780. Instead, according to the court, “construction” meant something more like clearing boulders and brush so that wagons could travel through the area. *Id.* There is little indication in the legislative record as to the intent of Congress in enacting R.S. 2477, so intent is left largely to the judicial imagination.

⁴²⁶ *Id.* at 769. The federal offer was made in ch. 262, § 8, 14 Stat. at 253 (1866) (“[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”) *repealed by* Pub. L. No. 94–579, § 706(a), 90 Stat. 2743, 2793 (1976). What constitutes acceptance varies according to the law of each state, which the federal government “borrows” due to a lack of federal highway law. Most western states do not require an overt government act to accept the federal right-of-way offer, as continuous public use will suffice. 425 F.3d at 770–71. The period of proof of continuous use varies state-by-state, since the federal rule was “borrowed” from state law. *Id.* at 771. In Utah, a public right-of-way requires use “by many and different persons for a variety of purposes” and is “open to all who desired to use it. . . .” *Id.* at 772 (quoting *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929)). The Tenth Circuit noted that this state interpretation was consistent with the traditional definition of “highway” as “a way over which the public at large have a right of passage.” *Id.* at 782 (quoting ISAAC GRANT THOMPSON, A PRACTICAL TREATISE ON THE LAW OF HIGHWAYS 1 (1868)).

⁴²⁷ COGGINS & GLICKSMAN, *supra* note 183, § 15:18; *Adams v. United States*, 3 F.3d 1254, 1258 (9th Cir. 1993).

⁴²⁸ *SUWA*, 425 F.3d at 781 (“If a particular route sustained substantial use by the general public over the necessary period of time, one of two things must be true: either no mechanical construction was necessary, or any necessary construction must have taken place.”).

⁴²⁹ Occasional or desultory use is not sufficient. *Id.* at 771. The absence of an existing right of way does not prevent individuals from gaining access to the public lands for private or commercial uses, but that would require a right-of-way permit under Title V of FLPMA. 43 U.S.C. § 1761.

⁴³⁰ See *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 648–49 (Utah 1929) (deciding that an R.S. 2477 public highway existed across grazing lands before they came into the private ownership of the plaintiff and, therefore, defendants could continue to use it as a public highway).

over 18,000 such alleged highways,⁴³¹ as part of an effort to disqualify lands with wilderness qualities from wilderness designation, since the Wilderness Act has been interpreted to forbid permanent roads in wilderness areas.⁴³² The vast majority of these claims remain unresolved as of this writing.

3. Sacred Sites

One of the more surprising results of antimonopoly sentiment in modern public land law concerns Native American sacred sites on federal lands. Indian tribes ceded many of these sites in treaties and treaty substitutes, but they maintain that federal land managers should manage the sites to maintain tribes' access to them for religious and cultural activities. The leading case was *Lyng v. Northwest Indian Cemetery Protective Ass'n*,⁴³³ in which the Forest Service decided to build a timber road in a sacred area despite an agency-commissioned study that concluded that the road would produce "serious and irreparable damage" to Indian religious practices.⁴³⁴ The Supreme Court reversed lower court decisions enjoining the project⁴³⁵ and ruled that the Forest Service could proceed to build a timber road in a sacred area despite objections by Native Americans that the road violated their constitutional rights under the Free Exercise Clause of the First Amendment. The Court rejected their claims on the pathbreaking ground that non-discriminatory public land decisions do not require a compelling justification if they only have an "incidental effect" on native religious practices without prohibiting those practices.⁴³⁶

The Court's underlying reasoning reflected antimonopoly sentiment. Justice O'Connor's majority opinion emphasized that requiring the Forest Service to protect Indian religious practices would be tantamount to imposing a religious servitude on public lands, effectively giving them a veto over public land management.⁴³⁷ The decision suggested that upholding the lower courts'

⁴³¹ See Sierra Club, *RS 2477 Claims and Lawsuit*, UTAH SIERRAN, <https://utah.sierraclub.org/content/rs-2477-claims-and-lawsuit> (last visited Sept. 10, 2015).

⁴³² 16 U.S.C. § 1131(c)(3) ("Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act."). Note that R.S. 2477 rights-of-way could be considered "existing private rights" that wilderness areas must accommodate. And while wilderness study areas ("WSAs") and designated wilderness areas may not have permanent "roads," they may still be designated as such, even where they have R.S. 2477 rights-of-way. A "road" for purposes of the Wilderness Act is different from a public road for R.S. 2477 purposes. An R.S. 2477 right-of-way may exist within a WSA. See *Kane Cty. v. United States*, 772 F.3d 1205, 1217 (10th Cir. 2014). In those situations, the WSA/wilderness designation "is subject to the terms and conditions of the pre-existing [right of way] grant." *Id.* (citing BLM Instructional Memorandum No. 90-589 (Aug. 15, 1990)). Also, the Wilderness Act is sometimes thought to require at least 5,000 contiguous roadless acres, but the statute requires the area to be 5,000 acres *or* be "of sufficient size as to make practicable its preservation and use in an unimpaired condition." 16 U.S.C. § 1131(c).

⁴³³ 485 U.S. 439 (1988).

⁴³⁴ See *id.* at 442. See also *id.* at 451 ("The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices.").

⁴³⁵ See *id.* at 458.

⁴³⁶ *Id.* at 450-51 ("This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for otherwise lawful actions.").

⁴³⁷ *Id.* at 452 ("The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.").

injunction would be tantamount to recognizing “de facto beneficial ownership of some rather spacious tracts of public property,” providing what amounted to a “concomitant subsidy of the Indian religion.”⁴³⁸ In short, the antimonopoly paradigm of multiple use of public lands trumped the protection of Native American religious practices,⁴³⁹ an outcome that would not surprise tribal advocates.⁴⁴⁰

VII. CONCLUSION

Antimonopoly principles have thoroughly infused federal public land law. They have been present since the founding of the United States. Somewhat surprisingly, antimonopoly principles have recently come under sustained attack in Congress,⁴⁴¹ despite the fact that congressional antimonopoly policy may be the most persistent theme in the long history of federal public land law. Reversal of such longstanding sentiment would be shocking, however, conflicting with a deeply held view that public lands should be managed for the many, not for the monopolistic few.

Historically, antimonopoly sentiment concerning public lands reflected a philosophy of (1) providing widespread distribution of the public domain; (2) preserving public access to public resources; and (3) preventing concentration of public resources in the hands of the few. Over the years, the diversity of authorized public land uses grew from promoting commodity production in the nineteenth century to emphasizing non-commodity uses in the twentieth century. Today, antimonopoly policy not only includes distributional equity in the allocation of resources but also

⁴³⁸ *Id.* at 453.

⁴³⁹ However, the proposed forest road and the associated timbering harvest never actually occurred. The Supreme Court’s opinion did not reach two statutory grounds for the lower court’s injunction concerning violations of the National Environmental Policy and Clean Water Acts. Before the agency could remedy those defects, Congress included the area in the Smith River National Recreation Act and designated the area as wilderness, 16 U.S.C. §§ 460bbb-3(b)(2)(H). *See* JUDITH V. ROYSTER ET AL., NATIVE AMERICAN NATURAL RESOURCES LAW 19 (3d ed. 2013).

Tribes have not fared well under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2012), which Congress enacted in the wake of *Lyng* and *Smith v. Employment Division*, 494 U.S. 872 (1990) (rejecting a religious free exercise claim involving peyote use in the context of an employment discharge). *See, e.g.,* *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1113–14 (9th Cir. 2008) (en banc decision rejecting a claim of religious interference due to use of reclaimed wastewater for snowmaking on a sacred site).

Even when land managers seek to protect native religious practices, they may run into constitutional limits imposed by the First Amendment’s Establishment Clause. *See, e.g.,* *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998), *aff’d*, 175 F.3d 814, 816, 822 (10th Cir. 1999) (upholding a voluntary rock climbing ban at a sacred site after striking down a mandatory ban). However, managers may be able to justify protecting such practices by classifying them as cultural, rather than religious in nature. *See* *Nat. Arch & Bridge Ass’n v. Alston*, 209 F. Supp. 2d 1207, 1222–23 1214 (D. Utah 2002), *aff’d*, 98 Fed. Appx. 711 (10th Cir. 2004) (upholding Park Service signage requesting that the public not walk underneath Rainbow Bridge, noting that the agency’s effort to discourage the public did not violate the Establishment Clause because tribal beliefs are both religious and social and cultural in nature); *Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036, 1046 (9th Cir. 2007) (ruling that the establishment clause “does not bar the government from protecting an historically and culturally important site simply because the site’s importance derives at least in part from its sacredness to certain groups” and upholding a rock climbing ban near Lake Tahoe); *see also* ROYSTER ET AL., *supra* note 439, at 41–45 (reprinting the Forest Service’s decision banning the climbing).

⁴⁴⁰ *See, e.g.,* Peter Zwick, *A Redeemable Loss: Lyng, Lower Courts and American Indian Free Exercise on Public Lands*, 60 CASE W. RES. L. REV. 241, 252–55 (2009) (describing tribal plaintiffs’ unsuccessful record of attempting to employ First Amendment free exercise claims to challenge federal land use policies).

⁴⁴¹ *See infra* note 461.

provides for diverse uses of federal lands. For example, the modern definition of multiple-use now includes recreation, range, timber, minerals, watershed, and fish and wildlife, as well as natural, scenic, scientific and historical values.⁴⁴²

Antimonopoly gained ground during the Disposition Era⁴⁴³ to become a predominant national public ethic. From the Confederation Congress statutes of the 1780s,⁴⁴⁴ which laid the groundwork for widespread ownership,⁴⁴⁵ through the Homestead Act Era of the late nineteenth century,⁴⁴⁶ to the Progressive Conservation Era of the early twentieth century,⁴⁴⁷ antimonopoly was a persistent theme in public land statutes. Antimonopoly was also evident in judicial interpretations of those statutes, as the Supreme Court repeatedly directed courts to resolve doubts in favor of public ownership when considering proposals to privatize public land.⁴⁴⁸

Even when Congress pursued arguably monopolistic railroad land grants beginning with the departure of the South from Congress during the Civil War, antimonopoly policies eventually tempered the railroad grants through the imposition of conditions aimed at limiting land sales to

⁴⁴² See 43 U.S.C. § 1702(c); see *supra* notes 349–51 and accompanying text. See also 16 U.S.C. § 1604(g)(3)(A) – (B); *supra* notes 381–89 and accompanying text.

⁴⁴³ The Disposition Era lasted until 1916 and beyond, when the Stock-Raising Homestead Act authorized settlers to enter 640 acres of land for grazing purposes. 43 U.S.C. §§ 291–301 (repealed 1976). After the passage of the Taylor Grazing Act of 1934, executive withdrawals closed much of the remaining public domain to disposition. See *Andrus v. Utah*, 446 U.S. 500, 529–33 (1980) (recounting the restrictions placed on homestead entry after the enactment of the Taylor Grazing Act in 1934); *COGGINS ET AL.*, *supra* note 370, at 106.

⁴⁴⁴ One of the first public land laws, the Northwest Ordinance, rejected hereditary land concentration and large familial holdings that characterized the British system of inheritance and recognized public ownership of navigable waters as essential for public use of a critical means of transport in an era of bad roads. See *supra* notes 33–48 and accompanying text.

⁴⁴⁵ See, e.g., *Festa*, *supra* note 23, at 443 (describing the Northwest Ordinance as part of a republican effort to guarantee individual property rights through rule of law in the Northwest Territories, where the Confederation Congress hoped to encourage settlement by the yeoman, rather than to allow a regime of land speculation take hold).

⁴⁴⁶ During the Disposition era, Congress experimented for decades with various policies for selling or granting public land and resources. Major competing considerations were revenue generation, encouraging diligent development and bona fide settlement, and discouraging speculation. See *supra* notes 57–76 and accompanying text. Advocates for the common settler achieved price reduction and preemption sales, and eventually in the Homestead Act the right to free land, epitomizing egalitarian distribution. See *supra* notes 111–18 and accompanying text.

The late 1800s saw a proliferation of resource legislation reflecting antimonopoly principles. The Timber Cutting Act authorized the free cutting of timber for mining and domestic uses (as opposed to commercial use). See *supra* notes 159–61 and accompanying text. The Timber and Stone Act authorized the sale of timberlands of 160 acres, limited to personal use. See *supra* note 167 and accompanying text. The General Mining Law, while establishing a capture system for minerals, employed antimonopoly principles like size limits for claims and diligent pursuit requirements. See *supra* notes 184–90 and accompanying text. The Unlawful Inclosures Act sought to safeguard the ability of the general public to access the range resource on public land. See *supra* note 217 and accompanying text.

⁴⁴⁷ Progressive era resource policy embraced the utilitarian ethic of the greatest good for the greatest number, an antimonopoly principle, reflected in the Forest Service Organic Act’s directive to conserve forestlands while furnishing a continuous supply of timber, and limiting timber cutting to dead and mature trees. See *supra* notes 240–43, 246–47 and accompanying text. The language of the Act thus rejected clearcuts, a use-monopoly. See *supra* notes 244–45 and accompanying text. Progressives thought development of fuel minerals on public lands and hydropower on navigable waters should be regulated as public utilities. See *supra* note 253 and accompanying text. This era also saw the institution of permit-fee regulation for livestock grazing on the public lands. See *supra* notes 311–14 and accompanying text.

⁴⁴⁸ *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 617 (1978); *Watt v. W. Nuclear, Inc.* 462 U.S. 36, 59 (1983).

settlers.⁴⁴⁹ The first several decades of the Disposition Era gave birth to an Antimonopoly Era, as public support for selling public lands to finance government became linked to ensuring that the public's resources be spread as broadly as possible.

The Progressive Era transformed antimonopoly by extending its focus to include a much greater array of uses, including preservation and intergenerational concerns.⁴⁵⁰ Those sentiments built on traditional American antimonopoly sentiment of maintaining public access to public resources, preventing concentration of public resources in the hands of the few, and encouraging dispersed uses of federal land. Over the years, the diversity of officially recognized uses has expanded to include non-commodity uses such as recreation, range, timber, minerals, watershed, and fish and wildlife, as well as natural, scenic, scientific and historical values.⁴⁵¹ American public land antimonopoly policy included several measures to pursue its goals of widespread distribution and public control, including leasing, term limits, acreage limitations, diligent pursuit requirements, land and resource planning, protection of non-commercial uses, and land use regulation for sustainability, intergenerational equity, and interspecies equity.⁴⁵²

In the modern era, the variety of recognized uses of the public lands has swelled. The institution of universal resource planning required public land agencies to acknowledge and prepare for diverse users, prepare a framework for protecting those uses before being confronted with resource proposals, and created accountability for resource allocation.⁴⁵³ The Forest Service, for example, must provide for diversity of plant and animal communities in order to meet multiple use objectives.⁴⁵⁴ Recent Forest Service regulations require national forest plans to provide for social, economic, and ecological sustainability.⁴⁵⁵ Public access law has been a major antimonopoly theme throughout, tempered by time, place, and manner restrictions.⁴⁵⁶

Although antimonopoly remains clear national policy, monopoly in public land management has in fact been tolerated more in the last several decades than ever. For example, leasing of offshore oil and gas has virtually ignored antimonopoly principles,⁴⁵⁷ grazing permits are almost invariably renewed,⁴⁵⁸ and policies aimed at promoting competition in the award of park

⁴⁴⁹ After western settlers agitated for railroad grant reform in the second half of the Nineteenth century, Congress included homestead provisions in railroad grants that aimed to force the companies to sell land to bona fide settlers. Failure to adhere to these antimonopoly provisions led to the forfeiture of millions of acres. *See supra* notes 133–144 and accompanying text.

⁴⁵⁰ *See supra* notes 300–01 and accompanying text.

⁴⁵¹ *See* 43 U.S.C. § 1702(c); *see supra* notes 349–51 and accompanying text; 16 U.S.C. § 1604(g)(3)(B) (diversity); *see supra* notes 381–89, and accompanying text.

⁴⁵² *See supra* notes 286 (leasing), 326, 278, 306 (term limits), 121, 167, 290–93 (acreage limits), 190–91 (diligent pursuit requirements), 381–89 (planning), 300–01, 365–68 (protection of non-commercial uses), 385–98 (land use regulation for sustainability and interspecies equity).

⁴⁵³ *See supra* § V.B.

⁴⁵⁴ 16 U.S.C. § 1604(g)(3)(B).

⁴⁵⁵ 36 C.F.R. § 219.8 (2012). ANILCA's protection of subsistence harvests, *see supra* notes 392–400 and accompanying text, is another example of antimonopoly. Others include MUSYA, *see supra* note 341 and accompanying text, NFMA's diversity requirement, *see supra* notes 378–82 and accompanying text, or ANILCA's public land limitations, *see supra* note 399 and accompanying text, although courts have not interpreted these provisions vigorously.

⁴⁵⁶ *See supra* § V.D.

⁴⁵⁷ *See, e.g.,* Huber, *supra* note 12, at 1011–12 (describing the federal government's routine extension of offshore leases, and leaseholders' invocation of lease suspensions as a tool to extend lease terms, even during moratoria).

⁴⁵⁸ *See* Huber, *supra* note 12, at 1004–05 (discussing renewal of federal grazing permits).

concessions have not borne much fruit.⁴⁵⁹ To the extent that antimonopoly includes interspecies and intergenerational concerns, there is also considerable blowback from states such as Utah, which has marshaled sufficient anti-federal sentiment to enact a legally questionable challenge to most federal land holdings in the state.⁴⁶⁰ Congressional riders considered by the 114th Congress included numerous rollbacks of species, land, and resource protections that would reestablish monopoly control, especially by public land graziers and oil and gas lessees.⁴⁶¹

This effort to reestablish monopoly control by certain public land users through congressional riders is not a new development,⁴⁶² but the number and scope of the proposed riders suggested that a new era may have been launched in which monopolistic forces now enjoy widespread currency in Congress. This would represent a marked reversal of more than two hundred years of congressional antimonopoly intent.

Antimonopoly policy may in fact be a prime example of widely proclaimed high ideals, coupled with compromised implementation in relatively low visibility administrative decisionmaking. Antimonopoly principles are sometimes frustrated through below-cost mineral and timber sales,⁴⁶³ grazing permit decisions,⁴⁶⁴ and renewal of park concessions.⁴⁶⁵ Commodity users of public lands can dominate administrative decisions like permit renewals due to the intensity of their interest and their economic ability to participate in complex processes, coupled with a relative lack of participation by the general public.⁴⁶⁶ Although imperfectly implemented,

⁴⁵⁹ See Kurt Repanshek, *National Park Service Sitting On Half-A-Billion Dollars Of Concessions Obligations*, NATIONAL PARKS TRAVELER (Mar. 15, 2015), <http://www.nationalparkstraveler.com/2015/03/national-park-service-sitting-half-billion-dollars-concessions-obligations26283> (explaining that four primary companies manage the Parks Service's concessions. The possessory interests that these companies have in parks infrastructure reaches into the tens and hundreds of millions of dollars. Thus, competition is stifled by the high price a new concessionaire would need to pay to buy out its predecessor).

⁴⁶⁰ See Robert B. Keiter & John Ruple, *The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands* (Stegner Center White Paper 2015-01), http://papers.ssrn.com/sol13/papers.cfm?abstract_id=2555922; Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding A Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1 (2014).

⁴⁶¹ See, e.g., *2015 Anti-Environmental Budget Riders*, NAT. RES. DEF. COUNCIL (June 26, 2015), <http://www.nrdc.org/legislation/2015-riders.asp#sec-lands> (discussing ten public lands riders, which would: cripple the government's ability to acquire lands under the Land and Water Conservation Fund Act; eliminate citizens' ability to challenge BLM land use decisions in court; block implementation of Interior's "wild lands initiative"; authorize the Forest Service to rely on outdated forest plans; forbid the use of eminent domain in support of federal lands management (except in the case of Florida Everglades restoration); exempt livestock grazing permit renewals from environmental review; forbid federal land plans from limiting fishing or shooting activities if they were allowed on January 1, 2013; permanently exempt from environmental review livestock grazing on lands replacing those made unusable by wildfire or drought; permanently prevent BLM or the Forest Service from acquiring water rights to protect fish and wildlife habitat and limit federal land managers' ability to restrict activities like hydraulic fracturing to protect waters; and block implementation or enforcement of BLM's new fracking rule concerning oil and gas wells to protect groundwater).

⁴⁶² As examples, both the Forest Service Organic Act of 1897, ch. 2, 30 Stat. 11, long the governing statute for national forests, and the McCarran Amendment, 43 U.S.C. § 666, by which the federal government consents to state court jurisdiction over its water right in comprehensive water adjudications, were contained in appropriations statutes.

⁴⁶³ See Claire E. Sollars, Comment, *Natural Resources: Federal Coal Leasing in the Powder River Basin – A Call for Reform*, 28 LAND & WATER L. REV. 115, 141 (1993).

⁴⁶⁴ See Huber, *supra* note 12, at 1004–05.

⁴⁶⁵ See Huber, *supra* note 12, at 1005–07 (renewal of ski-resort licenses).

⁴⁶⁶ For a classic anticipation of agency capture in the Gilded Age, see Letter of Richard S. Olney (a prominent railroad lawyer) to Charles S. Perkins (a railroad president) (Dec. 2, 1892), reprinted in KERMIT L. HALL, ET AL., *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 365–66 (1st ed. 1991), which aimed to assuage industry fears

antimonopoly policies have persisted from the United States' founding into the modern age. They are a reflection of the nation's republican ideals, its agrarian egalitarianism, and values of individualism, equal opportunity, and shared access to common resources.⁴⁶⁷ For future Congresses to retreat from the more than two-centuries-old national commitment to antimonopoly principles would amount to a revolutionary change in public land management policy.

concerning the establishment of the Interstate Commerce Commission, suggesting that the Commission would eventually become an industry ally—"the older such a commission gets to be, the more inclined it will be . . . to take the business and railroad view of things. It thus becomes a barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests." For a modern example of the workings of agency capture, see the effort of the BLM to amend its grazing regulations to reduce public participation in grazing permit renewals, an effort which met with judicial disapproval in *W. Watersheds Project v. Kraayenbrink*, 620 F.3d 1187 (9th Cir. 2010) (affirming a lower court injunction).

⁴⁶⁷ Thomas Jefferson would have inserted a human right to freedom from monopoly into the Bill of Rights. Critiquing a draft of the Constitution, he complained that it omitted "a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, [and] restriction against monopolies . . ." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787).