

“NO TRESPASSING”: RAILROAD LAND GRANTS,  
THE RIGHT OF EXCLUSION, AND THE ORIGINS OF  
FEDERAL FOREST CONSERVATION

SEAN M. KAMMER\*

ABSTRACT

The Forest Management Act of 1897 established a management model for public lands that, for the most part, remains intact. It embodies a balancing of control and conservation of forest resources such as timber, minerals, and forage with provisions for the exploitation of those resources for private gain. This article explores the historical context in which this landmark legislation arose. It examines the role of large railroad companies, particularly those that received extensive land subsidies, in first challenging the long-standing custom of timber as an open-access resource in the American West. By enforcing their right of exclusion against timber trespassers in the court system, these railroad companies—while simply acting in their own pecuniary interest—helped effect a shift in natural resources policy from one emphasizing privatization and rapid development to one incorporating government ownership and centralized management. This article, however, illustrates the extent to which the allocation of resources can operate as a one-way ratchet. It is all too easy to give nature away; it is not so easy to get it back.

---

\* Assistant Professor, University of South Dakota School of Law. The author wishes to thank Will Thomas and Sandi Zellmer for their mentorship and guidance, including but certainly not limited to the content of this article.

I.	INTRODUCTION.....	88
II.	THE TRAGEDY OF OPEN ACCESS TIMBER .....	92
	A. “TRAGEDY OF THE COMMONS” EXPLAINED.....	93
	B. CUSTOM OF FREE LAND, FREE TIMBER .....	94
	C. THE FEDERAL GOVERNMENT’S INADEQUATE EFFORT TO CONTROL DEPREDATIONS.....	96
III.	THE ROLE OF RAILROADS IN COMBATING TRAGEDY .....	99
	A. ESTABLISHING A RIGHT OF EXCLUSION .....	100
	B. LEGAL UNCERTAINTIES AS OBSTACLES TO EXCLUSION .....	102
	1. <i>The Problem of Too Many Trespassers</i> .....	104
	2. <i>The Problem of Unsurveyed Lands</i> .....	105
	3. <i>The Problem of Possession (for             Subsequent Purchasers)</i> .....	107
	4. <i>The “Problem” of the Duty to Exclude</i> .....	108
IV.	THE FEDERAL GOVERNMENT CHANGES COURSE.....	112
	A. ADMINISTRATIVE REFORMS .....	112
	B. STATUTORY REFORM OF PUBLIC LAND LAWS .....	115
V.	CONCLUSION.....	119

## I. INTRODUCTION

The extent to which formal law has impeded the ability of the government to implement new federal public lands policies has been a recent theme of much literature on natural resources law. Legal scholar Charles F. Wilkinson, for example, has blamed many of the contemporary problems in natural resources law on its origins in “the lords of yesterday,” a set of laws, policies, and ideas from another time.<sup>1</sup> These “lords of yesterday,” in his account, include the notions of “first in time, first in

---

1. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST xiii (1992).

right” for minerals, grazing land, and water, the construction of dams mainly for hydropower, and the establishment of logging as the dominant use of national forests. They continue to shape current policy and legal debates despite the fact that they no longer align with the socio-economic values of westerners or with current scientific understandings. Specifically, these pro-development policies are inconsistent with the broad consensus among westerners that, while resources should be developed, the pursuit of development should be, in Wilkinson’s words, “balanced and prudent, with precautions taken to ensure sustainability, to protect health, to recognize environmental values, to fulfill community values, and to provide a fair return to the public.”<sup>2</sup> Wilkinson attributed the persistence of these outmoded laws and ideas to a number of factors, including the inherent inertia of legal and political doctrines, the power of lobbying forces, and a lack of public awareness, all of which have conspired to wall off natural resources law and policy behind a “shield of perceived complexity.”<sup>3</sup>

Regarding the “lord of yesterday” governing the national forests, Wilkinson contended that this policy was achieved in a different manner than laws regarding mining, grazing, or water. Whereas westerners informally fashioned their mining and grazing laws before Congress sanctioned them, Wilkinson argued that eastern conservationists were the primary movers behind federal timber policy. In his account, the ideology and writings of Gifford Pinchot, the first head of the Forest Service beginning in 1905, are central to understanding how modern natural resources law came to be. Pinchot advocated the wise management of economic activities, including grazing and timber harvesting, within a system of national forests, all with the goal of ensuring both an equitable allocation of benefits in the present and a stable supply into the future.<sup>4</sup> These ideas indeed came to dominate public land management over the twentieth century.<sup>5</sup>

This narrative, however, implies that some degree of consensus formed around Pinchot’s ideas and that Congress then imposed such ideas wholesale on communities in the West. My research suggests a far more complicated narrative. The form of progressive conservation that Pinchot represented, as an intellectual movement, may have originated among professional elites in the East and in Europe. However, the implementation of conservationist principles also required a confrontation with certain

---

2. *Id.* at 17.

3. *Id.* at xiii.

4. *Id.* at 128-29; *see also* SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 27-39 (1999).

5. HAYS, *supra* note 4, at 251.

assumptions that had shaped American attitudes toward—as well as the laws governing—natural resources from the seventeenth century to the end of the nineteenth century. These assumptions included a belief in the abundance of un-owned land and natural resources, a belief that natural resources were limitless, and a corresponding belief that immediate use was best. James Willard Hurst, commonly regarded as the founder of “new legal history,” detailed how these cultural assumptions were reflected in core principles of American law. According to Hurst, the principle that society should promote the “release of creative human energy” by providing humans the greatest extent of freedom as possible permeated nineteenth century American law.<sup>6</sup> This principle was reflected in the central tenet of nineteenth century public land law: the preference for granting to individuals and companies the liberty and incentive to secure and develop natural resources as they saw fit and to bring the products of those resources to market. It also contributed to the prevailing view of Americans towards all public resources, namely that they were freely available to the first person to make use of them.<sup>7</sup>

Western railroads were among the most important of the economic actors with vested legal rights and economic interests established through application of the “release of creative energy” principle. By the end of the nineteenth century, railroads had come to be seen not only as manifestations of the growth of corporate power in the United States, but also as representative of the federal government’s nineteenth century approach to public lands, the failures and corrupt implementation of that approach, and the apparent threat of resource depletion that resulted.<sup>8</sup> Many saw railroads as the primary beneficiaries of the federal government’s nineteenth century public lands policy of converting the public domain into privately held property as rapidly and cheaply as feasible in order to stimulate economic development.<sup>9</sup> Indeed, railroads were granted a substantial portion of the federal government’s public domain in the West. Between 1850 and 1871, the federal government granted to railroads roughly 130 million acres, the

---

6. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 6 (1956).

7. See generally Sean Kammer, *Public Opinion is More than Law: Popular Sovereignty and Vigilantism in the Nebraska Territory*, 31 GREAT PLAINS Q. 309 (2011); George C. Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 4 (1982).

8. See WILKINSON, *supra* note 1, at 122.

9. Wilkinson characterized the “main thrust” of such policies as being the desire “to transfer public resources into private hands on a wholesale basis in order to conquer nature.” *Id.* at 18.

vast majority of which was west of the Mississippi River.<sup>10</sup> Partially due to these extensive land grants, railroad companies became some of the largest landowners in the country, as well as the largest owners of forests. Indeed, two of the three largest owners of timberlands in the country were the Southern Pacific and the Northern Pacific, both of which received millions of acres of timberlands from the government.<sup>11</sup>

It has become almost an axiom among legal scholars of natural resources law and policy that the various inconsistencies and inefficiencies embedded in current management regimes are the result of historical contingency rather than conscious design. This article explores a key facet of that historical contingency: the role of railroads as owners of large tracts of heavily timbered lands interspersed with public and other private lands in bringing about modern federal forest management policies and laws. The article begins in Section Two by outlining the extent to which a tradition of free resources permeated federal land policy and its often-lax administration, using Garret Hardin's "tragedy of the commons" model as its framework. Then, Section Three explores the ironic role of railroad companies in confronting the tradition of free resources, even though they were prime beneficiaries of it. Focusing primarily on the two largest railroad owners of timber, the Southern Pacific (largely through its subsidiary Oregon & California) and the Northern Pacific, it shows how these powerful corporations contributed to the demise of "open access" resources by enforcing their "right of exclusion," a right attending ownership, even as they faced an uncertain legal terrain along the way. This was a necessary precondition for any effort at landscape-level land management and conservation—whether public or private. Finally, Section Four shows how policymakers—first within the Departments of Interior and Agriculture, then within Congress—recognized the need to follow the lead of railroads in restricting access to certain areas of the public domain. It was only after the government established its own "right of exclusion" through the establishment of forest reserves that management of such lands using conservationist principles became feasible, both practically and politically.

---

10. *Id.* at 18. This constituted almost one-tenth of the public domain as of 1850, when the extent of the public domain was at its peak and when the first railroad land grant was made. *Id.* at 21-22.

11. Roy E. Appleman, *Timber Empire from the Public Domain*, 26 *MISS. VALLEY HIST. REV.* 205, 207 (1939).

## II. THE TRAGEDY OF OPEN ACCESS TIMBER

Lumber entrepreneurs Andrew B. Hammond and his business partner Richard Eddy had already cut most of the merchantable timber along the Clark Fork River in the mountains between Missoula and Helena, Montana by the summer of 1885, when their company, the Montana Improvement Company, established a new sawmill on the river to process timber from the tributary Cramer Gulch.<sup>12</sup> Having arrived in Missoula just fifteen years earlier, Hammond had helped build Missoula into a “thriving city of five thousand” while also building himself into one of the state’s wealthiest, and hence, most powerful people.<sup>13</sup> Hammond and Eddy, along with E.L. Bonner, formed a merchandising firm in Missoula nine years earlier, and in 1881, that company entered into a contract to supply the Northern Pacific with lumber for ties and other materials, despite the company lacking construction experience. Just a year later, in 1882, Hammond, Eddy, and Bonner joined with Montana copper magnate Marcus Daly and Washington Dunn, the Northern Pacific’s superintendent of construction, to form the Montana Improvement Company.<sup>14</sup> Because Dunn and other Northern Pacific officials held a bare majority of the shares, people thought of the company as a Northern Pacific subsidiary, though nobody was acting in that company’s interests.<sup>15</sup> Upon its creation, the Montana Improvement Company received a twenty-year contract to supply the railroad’s lumber needs for construction and maintenance of the railway from Miles City, Montana to The Dalles, Oregon.<sup>16</sup>

When Hammond and Eddy arrived at their new Cramer Gulch mill in the fall of 1885, however, they were surprised to encounter some fifty loggers, all employees of rival Bill Thompson, on the site cutting down trees.<sup>17</sup> Fights ensued, but ownership of the timber remained unresolved. As the situation worsened, the parties even violated the custom of respecting at least the rights of others to trees properly branded.<sup>18</sup> They eventually reached a compromise to honor that custom, but with neither having the exclusive rights to any unbranded timber.<sup>19</sup> It thus became a

---

12. Gregory Gordon, *Money Does Grow on Trees 172-74* (2010) (unpublished Ph.D. dissertation, University of Montana).

13. *Id.* at 21.

14. *Id.* at 189.

15. *See id.*

16. *Id.*

17. *Id.* at 172.

18. As historian Gregory Gordon summarized the situation, “[w]ith no clear-cut demarcation of ownership, total mayhem broke out.” *Id.* at 173.

19. *Id.*

race as to who could log the fastest.<sup>20</sup> As a result, “there were few gulches in Montana,” historian Gregory Gordon has concluded, “which were stripped of their timber faster than was Cramer Gulch that winter [of 1886].”<sup>21</sup>

#### A. “TRAGEDY OF THE COMMONS” EXPLAINED

The above story exemplifies what economist Garrett Hardin labeled the “tragedy of the commons.”<sup>22</sup> Wherever there is lacking an ownership system that functions to limit access to and consumption of a given resource, Hardin wrote in his influential 1968 essay, each member of the community is “locked into a system that compels him to increase his [consumption of the resource] without limit—in a world that is limited. 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.”<sup>23</sup> Some have mistakenly explained the tragedy as the failure for individuals to see community interests over their own self-interests.<sup>24</sup> No, the story is a tragedy rather than merely an unfortunate occurrence because even when an individual recognizes the “ruin” towards which the community is headed, and even if that individual values community interests, that person will still over-exploit the resource absent some coercive mechanism to restrict the access of others. The reason is that if he were to forego exploitation based on concern for long-term sustainability, he knows that others will still

---

20. *Id.* at 173-74.

21. *Id.* at 174 (internal citation omitted). Gordon rightly pointed to this story, which repeated itself across the Northwest, as representing the battle among the federal government, private capital, and local residents over natural resources, but Gordon wrongfully pointed to it as an example of the right to access. Really, neither contested the other’s right to access because neither had the right to exclude—and it was that right which was crucial.

22. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

23. *Id.* at 1244. In economic terms, the “tragedy” is an example of a market failure. As Arthur McEvoy described the failure, “[i]n a competitive economy, no market mechanism ordinarily exists to reward individual forbearance in the use of shared resources.” ARTHUR F. MCEVOY, *THE FISHERMAN’S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850-1980* 10 (1990).

24. See, e.g., E. Donald Elliott, *Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law*, 29 *CAP. U. L. REV.* 245, 250 (2001) (arguing that Hardin’s tragedy results “because each individual is only concerned about the potential for selfish gain from the additional cow and pays no attention to the potential disaster looming for the community as a whole”); E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 *VA. ENVTL. L.J.* 17, 17 (2001) (criticizing Hardin’s apparent view of humans as “narrow-minded and selfish”); Lee Anne Fennell, *Common Interest Tragedies*, 98 *NW. U. L. REV.* 907, 915 (2004) (conceptualizing the tragedy as “the resource-appropriator . . . not taking all the costs of her appropriation into account”); Michael Ilg, *Environmental Harm and Dilemmas of Self-Interest: Does International Law Exhibit Collective Learning?*, 18 *TUL. ENVTL. L.J.* 59, 62 (2004) (using Hardin’s model as an explanation for how “individual perceptions of interest rarely result in decisions that are most beneficial to the whole . . .”).

over-exploit the resource, causing him to suffer along with everyone else but without the incremental benefit he would have derived from having fully exploited the resource. The only rational choice is to get what he can before the others do, even if it destroys the resource. Hardin proffered two solutions to the “tragedy”: to restrict access through the vigilance of the community as a whole—“mutual coercion mutually agreed upon”—or to privatize the resource so that each private owner has the capacity to exclude others.<sup>25</sup>

What Hardin labeled a “tragedy of the commons” was really a tragedy of open-access resources, of non-property, or of an unregulated commons. In the Anglo-American common law tradition, the terms “commons” or “common property,” on their own, normally imply some form of communal control over access and use.<sup>26</sup> In short, they embody precisely the “mutual coercion” that Hardin pointed to as the solution to the tragedy—not the tragedy itself. For example, beginning as early as the seventh century, settlements in what is now England employed a system of common fields, meadows, and pastures, all with limitations on use. After the Norman Conquest in 1066, communities increasingly regulated who had access to certain lands and the manner of their use, including the enactment of quotas on the amount of livestock allowed to graze on a given pasture.<sup>27</sup> Much later, English colonists exported such customs to communities from New Brunswick to Virginia.<sup>28</sup> By the nineteenth century, however, many Americans had come to view the “commons” differently, and in conflating “commons” with “open-access,” Hardin unwittingly aligned himself with nineteenth century American thinking.<sup>29</sup>

## B. CUSTOM OF FREE LAND, FREE TIMBER

Hammond, Eddy, Thompson and others all across the American West largely viewed timber as an open-access resource—at least prior to the government privatizing it. The notion of public timber being free for the taking was not just one of extra-legal, local custom; it had its defenders in

---

25. Hardin, *supra* note 22, at 1247.

26. See DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 11 (2002); Shi-Ling Hsu, *A Two-Dimensional Framework for Analyzing Property Rights Regimes*, 36 U.C. DAVIS L. REV. 813, 816-17 (2003); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 533 (2007).

27. Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance*, 23 WM. & MARY L. REV. 835, 853-54 (1982); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1388-90 (1993).

28. Butler, *supra* note 27, at 867-75.

29. See generally Hardin, *supra* note 22.

Congress as well. For some in Congress, open-access was even an important component of the American constitutional tradition: exclusion was for monarchies, open access for democracies. In 1826, for instance, Senator Thomas Hart Benton admonished his fellow senators that they were “an assembly of legislators” rather than “keeper[s] of the King’s forests.”<sup>30</sup> As representatives of the people, surely they all understood, Benton implored, that “the public lands belong to the People, and not to the Federal Government; who know that the lands are to be ‘disposed of’ for the common good of all, and not kept for the service of a few.”<sup>31</sup> Then, in 1852, when agents of the General Land Office (“GLO”), the agency charged with administering federal public lands, seized timber illegally cut from public lands in Wisconsin, a representative from that state, Ben Eastman, insisted that the agents were acting “without the least authority of law.”<sup>32</sup> He even complained that lumbermen had been “harassed almost beyond endurance with pretended seizures and suits, prosecutions and indictments until they have been driven almost to the desperation of an open revolt against their persecutors.”<sup>33</sup>

That same year, Representative Galusha Grow, from Pennsylvania, defended the rights of every person to share in the federal government’s supply of timber:

[W]hatever nature has provided . . . belongs alike to the whole race, and each may, of right, appropriate to his own use so much as is necessary to supply his rational wants. And as the means of sustaining life are derived almost entirely from the soil, every person has a right to so much of the earth’s surface as is necessary for his support . . . . As it is man’s labor, then, applied to the soil that gives him a right to his improvements . . . so he is entitled to a reasonable quantity of wood-land, it being necessary to the full enjoyment of his improvements; for wood is necessary for building purposes, fencing, and fire-wood. Therefore, he becomes entitled out of this common fund to a reasonable amount of wood-land.<sup>34</sup>

As these quotes demonstrate, Americans viewed more than just timber as an open-access resource. As Greeley once remarked, “free timber” was merely one part of the American “free land” tradition represented in the

---

30. 19 CONG. REC. 727 (1826) (statement of Sen. Thomas Benton).

31. *Id.*

32. Gordon, *supra* note 12, at 183.

33. *See id.*

34. CONG. GLOBE APPENDIX, 32D CONG., 1ST SESS. 426 (1852).

preemption and homestead laws.<sup>35</sup> Preemption laws, the most significant of which Congress passed in 1841, provided for qualified persons to acquire legal title for up to 160 acres by inhabiting and improving the land and paying \$1.25 per acre.<sup>36</sup> The law applied retroactively to validate the claims of people who had previously settled land, even without legal right.<sup>37</sup> Passed in 1862, the Homestead Act expanded upon the preemption laws by providing settlers the option of securing lands for free simply by living on the land for five years and cultivating it.<sup>38</sup> Greeley might have added to that list of laws the nation's mining laws—which declared public lands to be “free and open” to mineral exploration and development—and its lack of restrictions on the use of public rangelands.<sup>39</sup> As late as 1884, a congressional committee charged with reviewing the nation's land laws found cattlemen to be illegally holding roughly fifteen million acres of the public domain, yet it also acknowledged the government lacked any legal mechanism for prosecuting the trespasses.<sup>40</sup> Indeed, the term “public lands” itself came to be understood not as those lands in governmental ownership, but only as those lands free and open for the American public to enter and to acquire.<sup>41</sup>

### C. THE FEDERAL GOVERNMENT'S INADEQUATE EFFORT TO CONTROL DEPREDATIONS

To a limited extent, the government did assert control of resources prior to privatization. It dictated who could have access to what resources and defined the conditions by which parcels could be privatized, even if such conditions were minimal. The Preemption Act of 1841, for example, allowed only heads of families, widows, or single men to settle lands and

---

35. See Robert Bunting, *Abundance and the Forests of the Douglas-Fir Bioregion, 1840-1920*, 18 ENVTL. HIST. REV. 41, 45 (1994). In 1807, Congress passed an act “[t]o prevent settlements being made on lands ceded to the United States, until authorized by law.” Act of March 3, 1807, 2 Stat. 445. However, the Preemption Law of 1841 recognized the rights of those who had settled (or squatted) on government land, even in violation of law. Preemption Act of 1841, 5 Stat. 453.

36. *Id.* at § 9.

37. *Id.* at § 10.

38. Homestead Act of 1862, Pub. L. No. 37-64, § 2, 12 Stat. 392.

39. Act of May 10, 1872, 17 Stat. 91.

40. See generally Joseph Arthur Miller, *Congress and the Origins of Conservation: Natural Resource Policies, 1865-1900* 203 (1973) (unpublished Ph.D. dissertation, University of Minnesota). The government could have brought civil actions under a common law trespass theory, but that would have required the government to describe the affected lands to a level of specificity that would have been nearly impossible.

41. For a discussion of the defense of free timber in Congress, at least for the purposes of settlement, see PAUL WALLACE GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 538-40 (1968).

ultimately secure legal title, and it limited the size of tracts to 160 acres.<sup>42</sup> It also required settlers to follow several steps. After inhabiting and improving particular parcels, qualified settlers had thirty days to file a declaration of intent to preempt, and they had a year to prove the settlement and improvement, to submit an affidavit testifying that they met all of the requirements of the act, and to pay \$1.25 per acre.<sup>43</sup> However, from the start, these restrictions were frequently violated, sometimes with the backing of extra-legal, vigilante organizations known informally as “claim clubs.”<sup>44</sup>

Such a development was foreseeable. In the debates over the preemption law in 1841, in fact, Senator Henry Clay predicted that the federal government would not be able to control the lawless rabble that he said would settle lands ahead of surveys. Clay’s warning, however, went unheeded, and at great expense. Thirty years later, Henry George lamented the extent to which speculators had exploited the land laws to benefit themselves at the expense of the public:

A generation hence our children will look with astonishment at the recklessness with which the public domain has been squandered. It will seem to them that we must have been mad . . . to every importunate beggar to whom we would have refused money we have given land—that is, we have given to him or to them the privilege of taxing the people who alone would put this land to any use.<sup>45</sup>

The Homestead law contained similar restrictions and requirements, but they too were often circumvented.<sup>46</sup> One prominent public lands historian has written that speculation and land monopolization—in part executed via fraudulent homestead entries—characterized the homesteading era, with “actual homesteading [being] generally confined to the less desirable lands distant from railroad lines.”<sup>47</sup> Commissioner of the GLO, William A. J. Sparks, complained in 1885 that the Homestead Act, “both in Washington and in the field, was frequently in the hands of persons unsympathetic to its principle” and that “Western interests, though lauding

---

42. The Preemption Act of 1841, 5 Stat. 453.

43. *Id.*

44. See generally Kammer, *supra* note 7, at 310.

45. HENRY GEORGE, OUR LAND AND LAND POLICY, NATIONAL AND STATE 10 (1871). His work was instrumental in ending the railroad land grant era. But much of the actual privatization of land under the land grants was still in the future, subject to legal interpretation, of course.

46. Act of May 20, 1862, Pub. L. No. 37-64, 12 Stat. 392.

47. Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652, 655 (1936).

the act, were ever ready to pervert it.”<sup>48</sup> In his memoir, Pinchot described one method for circumventing the Homestead Act’s requirements:

The law required a dwelling on a homestead claim. So the claimant would build a toy house, swear to the existence of a dwelling on his claim ‘14 by 16 in size,’ but omit to mention that the said dwelling was 14 by 16 inches instead of 14 by 16 feet.<sup>49</sup>

The federal government also passed laws prohibiting the unauthorized taking of timber from public lands. Congress enacted the first in 1817, when it allowed the Secretary of Navy to reserve timberlands for shipbuilding and enacted penalties for the unauthorized taking of timber from such forests.<sup>50</sup> Then, in 1831, Congress expanded the prohibition to all public lands.<sup>51</sup> These pieces of legislation, however, went largely unenforced. The GLO only began prosecuting timber trespass in 1852.<sup>52</sup> Even then, the government’s prosecutions were sporadic, and its policies focused not on preventing illegal timber harvests, but rather merely on ensuring the government received the value of the trees illegally cut. Commissioner of the GLO, Willis Drummond, reported to Congress in 1873, for instance, that when registers and receivers obtained reliable information that “spoliation of public timber is committed, their instructions require them to investigate the matter, to seize all timber found to have been cut without authority on the public land, to sell the same to the highest bidder at public auction, and deposit the proceeds in the Treasury.”<sup>53</sup> While Drummond increased prosecutions, he emphasized that their purpose was “not to indulge in vindictive prosecutions.”<sup>54</sup> Instead, he advised prosecutors “to compromise with the parties” to pay only a reasonable price for the stumpage plus the government’s costs in bringing suit.<sup>55</sup> By merely fining trespassers for the value of the timber taken, the federal government ignored the negative impact of the timber harvest on the land’s future productivity. This is why Hurst saw this approach as yet another example of the legal system’s preference for present over future yield, a preference that resulted from the perceived abundance of land and resources and

---

48. *Id.* at 655-56.

49. GIFFORD PINCHOT, *BREAKING NEW GROUND* 81 (rev. ed. 1987).

50. Gordon, *supra* note 12, at 181.

51. *Id.*

52. *See id.* at 182-185.

53. DEP’T OF THE INTERIOR, REPORT OF THE COMMISSIONER OF THE GEN. LAND OFFICE 13 (1873).

54. *Id.*

55. *Id.* *See also* GATES, *supra* note 41, at 545-57 (discussing federal policies towards protecting federal timber from 1873 to 1885, when the Cleveland Administration reformed the Land Department and more aggressively acted to protect the public domain from depredations).

perceived shortage of capital.<sup>56</sup> It also contributed to countless timber “tragedies,” at least on the local scale, as Hurst’s history of the Wisconsin lumber industry demonstrates.<sup>57</sup>

### III. THE ROLE OF RAILROADS IN COMBATING TRAGEDY

Railroads initially exacerbated such tragedies by creating demand for timber and by linking timber to distant markets. They stimulated timber demand both because they required timber for railroad construction and because they made industrial-scale mining—requiring large amounts of timber—feasible. In the Missoula Valley for instance, sawmills remained small-scale water-powered mills, intended only to supply lumber for immediate local consumption, until the arrival of the Northern Pacific, when railroad contracts allowed Hammond and others to build dozens of steam-powered mills to supply railroad construction and the burgeoning mining industry such railroads made possible.<sup>58</sup> Railroads also participated, typically through “improvement company” subsidiaries, in the trespasses themselves, as the Northern Pacific’s relationship with Hammond’s Montana Improvement Company exemplifies.<sup>59</sup>

However, railroads can also be seen as having helped save American forests from tragedy, at least on a national scale. Environmental historian Robert Bunting, for one, has argued that the acquisition of extensive timber holdings by powerful corporations like the Northern Pacific led to a decline in timber trespasses in the Pacific Northwest.<sup>60</sup> One reason is that railroads possessed the motivation to enforce rights as to which the government had long been indifferent: the right to exclude others. The Supreme Court has referred to this right as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>61</sup> The right to exclude

---

56. See James A. Lake, Sr., *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, 17 ME. L. REV. 298 (1964) (reviewing JAMES W. HURST, *LAW AND ECONOMIC GROWTH* (1964)) (explaining that railroad land grants were also a manifestation of this preference).

57. See *id.*

58. Gordon, *supra* note 12, at 181-82.

59. John B. Rae, *Commissioner Sparks and the Railroad Land Grants*, 25 MISS. VALLEY HIST. REV. 211, 217 (1938) (labeling the Northern Pacific as apparently “the worst offender”).

60. Bunting, *supra* note 35, at 41.

61. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). Writing for the majority in a 1979 case, Justice Rehnquist went even further in concluding that the right to exclude was not only the most important component of property, but “fundamental” to it. *Kaiser*, 444 U.S. at 179-80. Legal scholars have largely agreed, arguing that “the right to exclude others is a necessary and sufficient condition of identifying the existence of property,” such that the right to exclude is “fundamental to the concept of property” itself, and concluding that “property means the right to exclude others from valued resources, no more and no less.” Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730,

is indeed *the* reason that Hardin advocated privatization as one of the two solutions to the tragedy of the commons.<sup>62</sup> Whereas the federal government, at least until the latter part of the nineteenth century, lacked the combination of will and means to enforce its right of exclusion, railroads had both a pecuniary incentive to protect their resources and staffs of investigators and attorneys to do so.

#### A. ESTABLISHING A RIGHT OF EXCLUSION

That railroads were both willing and able to enforce their rights of exclusion is perhaps best demonstrated by the great number of land contests and ejectment actions—both legal mechanisms for enforcing an exclusionary right—railroads initiated. Railroads became embroiled in litigation over the nature and extent of their rights to particular tracts of land as against the rights of preemptors, homesteaders, mining claimants, Indians, federal and state governments, and other railroads. Indeed, no public lands legislation produced more litigation than railroad land grants. The Northern Pacific, on its own, was a party to over three-thousand formal legal disputes involving its land grant.<sup>63</sup>

The approach of another railroad, the Oregon & California, was typical. Upon having a selection list approved and receiving patents to sections of land, the company first made its possession of lands clear to all would-be settlers, both by recording its patents in the various counties in which the lands lay and by keeping on record its approved selection lists and patents issued by the government. The company also established its ownership by paying taxes on such lands.<sup>64</sup> When the company found a party occupying a parcel of its unsold lands, it sent agents to ascertain the

---

755 (1998). James E. Penner, in *THE IDEA OF PROPERTY IN LAW*, argued that “the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.” JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (1997). While the right is grounded in the owner’s use of the thing, “the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use.” *Id.* But see, Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 541 (2006) (questioning the essentialness of exclusion by pointing to property regimes outside of the English common law tradition that have implemented property regimes that incorporate public rights of access).

62. Of course, private property holders can also over-exploit a resource, especially in situations where their individual fortunes are not tied to the sustainability of either that resource or the local communities dependent upon it. For instance, lumbermen could over-exploit the forests of the upper Great Lake region because they knew more timber was available in the Pacific Northwest, such that their fortunes were not tied to Great Lakes timber or to the local communities built up to exploit it.

63. Docket, 1885-1899, Northern Pacific Railway Co. Records, Land Dep’t Records, Land Cases, Box 136.G.14.8F, Minnesota Historical Society, Saint Paul, MN.

64. Transcript of Record at 2202, *Or. & Cal. Ry. v. United States*, 238 U.S. 393 (1916) (No. 492).

situation and to determine the rights, if any, of the possible trespassers to the land. If the person was indeed without legal right to occupy the land, the company asserted its ownership and demanded that the party either take a lease on the land or vacate it. If the individual refused, the company then filed an ejectment suit to force them from the land.<sup>65</sup> The company also took efforts to prevent depredations, destruction, or waste of timber by persons not entitled to it by law.<sup>66</sup>

In the case of the Northern Pacific, wherever the company suspected timber trespasses, the company's land commissioner sent out an investigator to gather information as to any past transgressions and to prevent future transgressions. That person then reported to the land office, which then referred any prosecutable trespasses to the Western Land Attorney with a directive to settle for the amount cut. The Northern Pacific typically demanded a settlement amount far above market value.<sup>67</sup> In late 1896, for instance, a Northern Pacific investigator, Charles E. Woodworth, notified the sheriff of Missoula County, William H. McLaughlin, that he was responsible for taking timber from Northern Pacific lands. Frank M. Dudley, the Northern Pacific's Western Land Attorney in Spokane, Washington, later followed up with McLaughlin demanding settlement at \$1.50 per thousand board feet unlawfully cut.<sup>68</sup> The sheriff responded by requesting both an extension of time and for the amount to be lowered to one dollar. As to the need for an extension, he confessed that he was "unable to pay just now" and needed until May or June of the following year, the reason being that his lumber mill was seasonal—it had shut down on October 1 and would not reopen until spring. As for the price demanded, McLaughlin considered it "out of all reason the way lumber is selling and was selling when the timber was cut."<sup>69</sup> He stated that he would be "perfectly willing to pay the going price for timber," which he estimated at \$1.00 per thousand board feet, based primarily on the price for processed lumber at the railway car being less than \$6.00. He finished with a plea: "Hoping you will consider the price of timber very carefully."<sup>70</sup> What

---

65. *Id.* at 2203. The company made "a good many leases" of lands for grazing purposes, according to land official Brian A. McAllaster; in many of these cases, the company's purpose was to prevent the statute of limitations running against the company by virtue of the occupancy. *Id.* at 1980-81.

66. *Id.* at 2203.

67. See generally Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

68. Letter from McLaughlin to Dudley (December 21, 1896), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

69. *Id.*

70. *Id.*

McLaughlin sought, in short, was to pay the market value for the timber without paying anything for violating the Northern Pacific's right of exclusion.

In its reply, the railroad made clear it wanted redress not just for the value of the timber taken, but also for being deprived its right of exclusion. First, Dudley forwarded McLaughlin's letter to Land Commissioner William H. Phipps with a request for instructions on how to proceed. In reply, Phipps acknowledged the rate of \$1.50 per thousand board feet to be high, but he emphasized that such was intentional: he sought "to make it unprofitable for people to cut our timber without authority."<sup>71</sup> Unlike the federal government, the Northern Pacific recognized that its property rights entitled it not just to the market value of commodities on the land, but also to decide how and when they were to be extracted and to determine who would receive the benefits from such use. Moreover, it perhaps also recognized that the value of the property was not just in its present value, but also in its future productivity. Still, Phipps authorized Dudley to settle for \$1.25 per thousand board feet, an amount splitting the difference between the railroad's initial demand and McLaughlin's estimated market value. As to the extension of time, Phipps thought that was fine, so long as the railroad received sufficient security.<sup>72</sup>

#### B. LEGAL UNCERTAINTIES AS OBSTACLES TO EXCLUSION

Economists understand Hardin's "tragedy of the commons" as an example of a "market failure," meaning that the market has failed to maximize efficiency—an economic term of art essentially serving as a proxy for "satisfaction" or "enjoyment."<sup>73</sup> Types of market failure include externalities—i.e., costs or benefits not borne by parties to a transaction—transaction costs, imperfect competition, and a lack of clearly defined property rights.<sup>74</sup> While the federal government provided for the privatization of much of its public domain, it left much ambiguity in the definition of the resulting property rights. This was in part due to the sheer number of land laws, as Congress passed roughly 3,500 such laws between

---

71. Letter from Phipps to Dudley (January 2, 1897), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

72. *Id.*

73. For a good discussion of the tragedy as an example of a market failure, see JAN G. LAITOS, SANDI B. ZELLMER & MARY C. WOOD, *NATURAL RESOURCES LAW*, 18-21 (2d ed. 2012).

74. *Id.*

1785 and 1880.<sup>75</sup> It was not just the immense number of laws passed, however, but also their lack of precision and consistency as to the rights of grantees that led to confusion. The nation's land laws, in historian Paul Wallace Gates' summation, created an incongruous land system, one with sometimes dire consequences for those caught within it.<sup>76</sup> Indeed, in 1887, Secretary of the Interior Lucius Q. C. Lamar expressed pity for settlers who could "scarcely find a desirable location that was not claimed by some one, or perhaps two or three, of the many roads to which grants of land had been made by Congress."<sup>77</sup>

Railroad land grants, even on their own, were highly complex and difficult to administer. First, railroads typically received only alternating sections of land, creating a "checkerboard" of sorts across the American landscape. While this may seem simple, delays in cadastral surveys allowed for conflicting claims to arise and for property rights to remain unsettled.<sup>78</sup> Second, land grants typically excepted lands containing minerals other than coal or iron from grants. This too may seem simple but, in fact, led to uncertainties due to long delays in physical surveys.<sup>79</sup> Finally, Congress did not actually grant any land but rather provided the procedures by which railroads could acquire the designated lands. There were multiple steps involved. The first was for the grant recipients to file maps of the projected general routes of their roads with the Department of Interior, after which the president was directed to have the lands along such routes surveyed.<sup>80</sup> Most also contained provisions directing the GLO, upon general location, to withdraw granted lands from disposal under the public land laws.<sup>81</sup> Then, as each portion of the prescribed railway was built, recipient railway companies filed maps of definite location showing the precise line of the constructed railway.<sup>82</sup>

At that point, Congress expected that railroad companies would file selection lists, and the appropriate lands would be patented to the railroad companies to be sold to the general public to great benefit.<sup>83</sup> Congress also

---

75. Vernon Carstensen, *Introduction* to *THE PUBLIC LANDS: STUDIES IN THE HISTORY OF THE PUBLIC DOMAIN* xxii (Carstensen ed. 1963).

76. *See generally* GATES, *supra* note 41.

77. David M. Ellis, *The Forfeiture of Railroad Land Grants, 1867-1894*, 33 *MISS. VALLEY HIST. REV.* 27, 33 (1946).

78. *See infra* text accompanying note 94.

79. *See infra* text accompanying notes 94-101.

80. Act of July 2, 1864, 13 Stat. 369.

81. *Id.*; Act of July 25, 1866, 14 Stat. 239; Act of May 4, 1870, 16 Stat. 94.

82. Act of May 4, 1870, 16 Stat. 94.

83. *See* Ellis, *supra* note 77, at 30.

anticipated the railways to be completed within ten years.<sup>84</sup> In truth, neither occurred. Both the construction of railways and the subsequent patenting of lands were delayed for decades. The Northern Pacific, for instance, did not complete its line from Duluth, Minnesota to Tacoma, Washington until 1887, twenty-three years after it received its grant and a full thirteen years past its original deadline.<sup>85</sup> Further, despite its construction being gradual, it had patented less than a million acres of its estimated forty-seven million acre grant by that time.<sup>86</sup> While this was probably at least partly due to railroads delaying their applications for lands so as to avoid paying taxes,<sup>87</sup> it was also due to the GLO being overworked.<sup>88</sup>

Because so much of the land grants remained unpatented for so long, railroad companies were compelled to develop policies on how to protect their future interests to land not yet patented to them. All the while, their legal rights—including their rights of exclusion—remained in a sort of legal limbo. Indeed, the sheer number of legal disputes involving the Northern Pacific and other railroads and their claims to land evidences not just a dedication on their part to enforcing their exclusionary rights, but also a great deal of legal uncertainty. In short, parties do not expend the time and money in litigation unless either the facts or the law are uncertain; otherwise, they would settle.<sup>89</sup> Legal uncertainties remained even to the turn of the century, as indicated below.

### *1. The Problem of Too Many Trespassers*

Because railroad construction was a primary impetus for timber trespasses, the Northern Pacific sometimes caught people cutting timber for the purposes of selling it to another railroad, just as the Northern Pacific sometimes purchased timber stolen from another's land. In the spring of 1897, for example, a railroad investigator discovered piles of ties in multiple locations along the Montana-Idaho border. He soon concluded that the ties were taken from within the limits of the Northern Pacific's land grant and that such ties were earmarked for use on the competing Great Northern line. Upon the investigator reporting the matter to the Land Department, Land Commissioner Phipps sought the advice of Dudley, who

---

84. *Id.*

85. Leslie E. Decker, *The Railroads and the Land Office: Administrative Policy and the Land Patent Controversy, 1864-1896*, 46 MISS. VALLEY HIST. REV. 688, 695 (1960).

86. *Id.*

87. Transcript of Record, *supra* note 64, at 2213.

88. See Harold H. Dunham, *Some Crucial Years of the General Land Office, 1875-1890*, 11 AGRIC. HIST. 117, 118 (1937).

89. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

directed that the company wait for the Great Northern to inspect and accept the ties before calling its attention to the Northern Pacific's claims.<sup>90</sup> The reason was simple: if the Northern Pacific were to sue prior to the other railroad's acceptance, it would have to proceed against each of the individual trespassers, possibly entangling the company in twenty or more lawsuits.<sup>91</sup> Though not made explicit, that the Great Northern had deeper pockets than small-scale timber operators likely played a role as well.<sup>92</sup>

## 2. *The Problem of Unsurveyed Lands*

Another issue confronting the company in this case was that the ties had been taken from lands not yet surveyed. Because there were not yet specific parcels of land to which the Northern Pacific could point where its future interests had been violated, the Northern Pacific could not technically sue the Great Northern. Rather, that obligation fell to the United States Department of Justice. As in other cases, the Northern Pacific notified the U.S. district attorney and solicited his agreement to bring suit for the trespasses.<sup>93</sup> The agreement called for the Northern Pacific to draft the complaint and otherwise aid in the prosecution; in exchange, the district attorney agreed to give half of the suit's proceeds to the company.<sup>94</sup>

Lands remaining unsurveyed for so long was especially difficult given the exclusion of mineral lands from railroad grants.<sup>95</sup> The Supreme Court compounded the uncertainty in 1894 when it held the exclusion of mineral lands to include those lands unknown to contain minerals at the time of the route being fixed, so long as minerals were discovered prior to patent.<sup>96</sup> That case involved land in western Montana on the outskirts of Helena. The railroad fixed the definite route through that area in 1882, at which time nobody knew the land at issue contained minerals. Six years later, however, a group of four men entered the land without the consent of the

---

90. Letter from Dudley to Phipps (March 2, 1897), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

91. *Id.*

92. In another case, an alleged trespasser claimed not to have any money at all, insisting that he would have shut down if he could afford to buy off his five employees. Letter from Woodworth to Wilsey (March 4, 1897), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

93. Letter from Dudley to Phipps (April 16, 1897), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 22, Minnesota Historical Society, Saint Paul, MN.

94. *Id.*

95. From the perspective of the Northern Pacific, the exclusion of minerals can be seen as an exercise of the government's right of exclusion, but this was only to keep minerals free and open to entry by the general public.

96. *See Barden v. N. Pac. R. Co.*, 154 U.S. 288, 321 (1894).

railroad and located quartz lode mining claims on it. They subsequently discovered gold, silver, and other precious minerals on their claims. The Northern Pacific then asserted its right of exclusion by filing a complaint in federal court for the recovery of the possession of the land, for the value of minerals extracted, and for the costs associated with the litigation.<sup>97</sup> The railroad's attorneys insisted that the grant's exclusion of mineral lands applied only to those known to contain minerals as of the date of definite location or to those the railroad identified as mineral in its definite location.

Writing for the Supreme Court's majority, Justice Stephen Field rejected the railroad's argument. He first made a formalistic statutory construction argument. He reasoned that the company's position amounted to adding the word "known" into the statute, something he was unwilling to do. As he interpreted the plain meaning of the land grant, "the intention of [C]ongress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral."<sup>98</sup> Field then offered an additional rationalization for his opinion, this one relating to the policies behind the land grants. He first noted that when Congress passed the land grant, it was impossible to know what parts of the vast tract contained minerals; rather, the mineral character of lands "could only be ascertained after extensive and careful explorations."<sup>99</sup> He then surmised:

"it is not reasonable to suppose that Congress would have left that important fact [as to the mineral character of the lands] dependent upon the simple designation by the [Northern Pacific] of the line of its road, and the possible disclosure of minerals by the way, instead of leaving it to future and special explorations for their discovery."<sup>100</sup>

Such a reading of the statute, according to Field, would amount to an imputation to Congress that it intended its exclusion of minerals to be defeated, something that Field found "impossible to admit."<sup>101</sup> To Field, those "future and special explorations" were to take place as part of the GLO's investigation prior to issuing patents. Once the government issued patents to the railroad, they were final and determinative absent fraud.<sup>102</sup>

The Court's holding had the practical effect of calling into question the right of exclusion of railroad land grant recipients, including the Northern

---

97. *Id.* at 293

98. *Id.* at 316.

99. *Id.* at 319

100. *Id.* at 318.

101. *Id.*

102. *Id.*

Pacific, prior to patent, at least as to those entering lands to explore for minerals. That was especially the case given that private entry and exploration was still the primary legal mechanism for the government to identify which lands contained minerals, and hence which lands were excluded from railroad land grants. At the very least, railroads could no longer eject an alleged “trespasser” once a discovery of minerals had been made. Since many years, if not decades, typically passed between the definite location of the railway’s route and patenting, this was quite a troubling development for the Northern Pacific and other land grant railroads.

Another problem was that the GLO had neither the means nor the explicit legal authority to investigate lands as to their mineral character—as the Court seemingly assumed it did—prior to issuing patents. The Court’s opinion spurred Congress to action, however, as not even a year passed before Congress, in early 1895, directed the president to appoint three commissioners for each of four designated districts in western Montana and Idaho. Congress directed such commissioners, once appointed, to classify—based on personal examinations and the taking of affidavits—lands within the limits of the Northern Pacific grant as to their mineral character. Further, Congress showed real urgency in providing actual money to fund the enterprise and in directing the commissioners to begin immediately upon their appointment.<sup>103</sup> There would be no waiting for the Northern Pacific to file its selection lists.

### 3. *The Problem of Possession (for Subsequent Purchasers)*

Purchasers of land from the railroads also faced legal obstacles in an uncertain legal environment. Railroad companies typically sold land by contracts under which several years might pass before actual titles changed hands. Under American law at the time, this posed a problem; namely, that to maintain an ejectment suit, persons were required to show that they had “a valuable and subsisting interest and immediate right to the possession.”<sup>104</sup> Because persons under contract to purchase lands from the railroad did not receive title until fulfilling the terms of their contract, they arguably lacked the “immediate right to possession” necessary to exercise any exclusionary right in court.

---

103. Act of Feb. 26, 1895, 28 Stat. 683.

104. Letter from Gose & Kuykendall to Stephens (March 1902), Northern Pacific Railway Co. Records, Law Dep’t Records, Land Litigation Files, Box 1, Folder 15, Minnesota Historical Society, Saint Paul, MN.

John H. Jackson encountered this issue. On Christmas Eve 1898, Jackson contracted for the purchase of Northern Pacific land in southeast Washington near the town of Pomeroy.<sup>105</sup> Almost four years later, he sought to eject someone from the property who had been occupying it with a claim of ownership, but he could not do so because his contract with the Northern Pacific, like all others, was silent as to possession. Accordingly, his attorneys from Pomeroy wrote to the railroad's land department requesting that a company official sign a document confirming that the contract indeed entitled Jackson to possession of the land from the date of its execution.<sup>106</sup> Assistant Land Commissioner F. W. Wilsey refused, stating his understanding that the railroad did not in fact "place purchasers of its lands in possession thereof," but rather made possession contingent upon all of the conditions included in the contracts.<sup>107</sup> He thus advised the attorneys to take the matter up with the company's division counsel in Spokane, H. M. Stephens. They did just that.<sup>108</sup> Luckily for Jackson, Stephens disagreed with Wilsey's interpretation and did not object to signing the instrument attached. He forwarded the letter to Kerr to confirm, and Kerr agreed. Kerr then asked Land Commissioner Phipps to sign the instrument.<sup>109</sup> At least one problem was solved.

#### 4. *The "Problem" of the Duty to Exclude*

In some instances, railroad attorneys sought to maintain some level of legal uncertainty, lest issues be resolved against their client's interests. One example of this phenomenon dealt with the doctrine of adverse possession. This doctrine holds that where a deed holder allows another to possess its land in an actual, hostile, exclusive, and continuous fashion, under a claim of right, and for some requisite period, the deed holder loses the right to eject the trespasser.<sup>110</sup> It is, in essence, a duty of exclusion. Given that the

---

105. The tract was just north of the Tucannon River in section 5, township 11, range 40 E of Willamette Meridian.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. There has been some debate as to the historical origins of the modern, American form of adverse possession, one which arose during the nineteenth century. Traditionally, adverse possession law was seen as mere application of the statute of frauds to real property disputes, and this is indeed how attorneys at the turn of the twentieth century saw it. Recently, though, scholars have begun to emphasize the role of the pro-development ideology that has dominated American law, politics, and culture. As legal scholar John G. Sprankling argued, "adverse possession functions to facilitate the economic exploitation of land" and thus "mirrors the historic American view that forests, wetlands, grasslands, deserts and other lands in natural condition contribute nothing to the social welfare until they are converted to economic use." John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994).

Northern Pacific acquired its interest in lands over several steps, with arguably increased property rights at each step, questions were raised, even as late as the turn of the century, as to the time at which the Northern Pacific's duty to exclude adverse uses of its lands attached. This was of concern not just to the Northern Pacific, but also those who purchased or were considering purchasing lands from the company.

One such case involved Miles J. Cavanaugh, a miner and a member of the Mineral Land Classification Commission for the district encompassing Butte. In the summer of 1899, Cavanaugh purchased a section of land just to the west of Butte near the mining town of Anaconda, a section he and the commission had classified as non-mineral in a report approved by the Commissioner of the GLO the previous summer.<sup>111</sup> Prior to Cavanaugh's purchase of the property, however, a portion of it—the northeastern part—had reportedly been enclosed by a fence by someone with the last name Hays, and before that by someone with the last name McCleary, as part of what locals knew as the Saw Mill Ranch.<sup>112</sup>

Early in the spring following his purchase, Cavanaugh began to remove the fence before receiving a complaint from Hays claiming the tract as his own. Hays sought an ejectment of Cavanaugh and his employees, accusing them of having, “without right, unlawfully and without the consent of the plaintiff, entered upon said premises and trespassed thereon.”<sup>113</sup> “Unless restrained by the order of this Court,” the defendants would, according to Hays,

enter upon the same and tear down, take away and destroy plaintiff's fence enclosing said premises, and may themselves, their servants, agencies and employes [sic], continually enter and trespass upon said premises and destroy the said grass and hay, and will allow stock and cattle to enter and trespass upon the same, and that if they are permitted to remove or break or tear down or destroy said fence of any portion thereof, stock and cattle will continually enter upon the same and tread down said grass and render said premises worthless to the plaintiff for the purpose of raising grass or hay thereon.<sup>114</sup>

---

111. Letter from William Wallace to James B. Kerr (March 9, 1900), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

112. Letter from Edward W. Beattie & Miles J. Cavanaugh to Charles W. Bunn (March 13, 1900), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

113. *Id.*

114. *Id.*

Neither Hays nor McCleary had received patent from the United States, neither claimed to have purchased the land from the Northern Pacific, which had received a patent, and neither claimed to have rights under the land settlement laws of the United States. Rather, Hays based his claim on the doctrine of adverse possession.

A Butte law firm of Miles J. Cavanaugh Jr., the defendant's son, and Edward W. Beattie, Jr., the surveyor general's son, represented Cavanaugh.<sup>115</sup> In March 1900, after a judge had ordered a preliminary injunction against Cavanaugh entering the premises and had scheduled a court date for trial, the firm wrote to the Northern Pacific's division counsel, William Wallace, asking for information and for other assistance in the defense. The question was important enough for Wallace to forward it to Assistant General Counsel James B. Kerr. Wallace summarized the plaintiff's claim as relying upon "the proposition that the statutes of limitation begin to run on the definite location of the line and the fixing of the grant."<sup>116</sup> He also predicted what authority plaintiff's attorneys would use as support, all cases from California.<sup>117</sup>

Wallace initially thought that the Supreme Court had settled this question in an 1889 case.<sup>118</sup> In that case, the Court held that "[w]hile the title to public land is still in the United States, no adverse possession of it can, under a statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States against the legal title under a patent from the United States."<sup>119</sup> He was surprised to have found, however, that he was unable to locate another similar holding in his "hurried examination."<sup>120</sup> He hoped that Kerr might have access to some such decisions "where you can lay your hands on them," and asked Kerr to "furnish me with them by return mail."<sup>121</sup>

---

115. See Letter from Beattie & Cavanaugh to Henry Neill (March 5, 1901), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

116. Letter from Wallace to Kerr (March 9, 1900), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* Wallace then went on to discuss other case law which he felt inapplicable, including one case he found "not in point because the adverse claimant was the grantee of one who afterward became the patentee." *Id.*

Kerr had no definitive answer. As he characterized it, Wallace's question was "a very difficult one."<sup>122</sup> He cited to one case, from just a few years earlier, that he thought could potentially support a claim that the statute of limitations had not begun to run until mineral classification. In that case, *Michigan Lumber Co. v. Rust*, the Supreme Court held that legal title did not pass under the Swamp Land Grant Act until lands were determined to be swamp.<sup>123</sup> Since the Northern Pacific only received title to lands determined to be non-mineral under the Mineral Classification Act, he thought the case could be analogous, though he acknowledged "not [being] satisfied that the case falls within the doctrine of [that Supreme Court opinion]."<sup>124</sup>

As to whether the Northern Pacific should aid in Cavanaugh's defense, Kerr answered in the negative. He reasoned that the issue was "such a dangerous one that it seems to me it is better to have it undecided than decided adversely and the common understanding is likely to be that the statute did not begin to run until the issuance of patent."<sup>125</sup> In other words, the common understanding was better for the railroad than the great weight of precedent, and it was best not to risk alerting potential adverse claimants—as well as the attorneys representing them—to that fact.

Even as Kerr thought it best for the Northern Pacific not to be directly involved in the lawsuit, he urged Wallace to make it clear that "the company stands ready at any time to refund to Mr. Cavanaugh the whole or such portion of the purchase price as he is entitled to receive," especially since the portion of land involved is small.<sup>126</sup> Kerr also wrote to attorneys Beattie and Cavanaugh directly to offer them some legal advice. In particular, he recommended "a strong effort . . . be made to show that the nature of the possession of McCleary and Hays was not such a nature as to come within the statute." He also summarized his understanding of the law regarding when the statute of limitations began to run. After recounting that the Supreme Court's prior decisions had "uniformly been to the effect that on definite location the full legal and beneficial title to land in the place limits passed to the company," he surmised that the Mineral Classification Act may cast some doubt upon that issue, again citing to *Michigan Lumber*

---

122. Letter from Kerr to Wallace (March 17, 1900), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

123. See generally *Mich. Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897).

124. Letter from Kerr to Wallace (March 17, 1900), Northern Pacific Railway Co. Records, Law Dep't Records, Land Litigation Files, Box 1, Folder 12, Minnesota Historical Society, Saint Paul, MN.

125. *Id.*

126. *Id.*

*Co. v. Rust*. Kerr hoped such “authority may be of some assistance to [Beattie and Cavanaugh].”<sup>127</sup>

The Northern Pacific’s legal department encountered the same issue a few years later in 1903, and the issue’s resolution remained uncertain. One party, E.C. Pace, from Whitehall, Montana, wrote to Assistant Land Commissioner Wilsey asking two deceptively simple questions: (1) does the statute of limitations run against the Northern Pacific as it does against an individual, and (2) does it begin to run on the date of patent issuance, on the date of definite location, or on the date of filing of maps of definite location with the land office? Pace also desired any Supreme Court opinions on the issue.<sup>128</sup> Wilsey forwarded the letter to Land Attorney J. B. McNamee, who replied to Pace that his questions “cover so much ground that a complete answer to them would be equivalent to writing a brief on the subject.” Moreover, McNamee claimed that such a brief “would be unsatisfactory to [Pace] because of the impossibility of foreseeing just how the question will arise as to a given tract of land.” Like Kerr, he did not want “to pass on the general question, as the answer might prove misleading.”<sup>129</sup>

#### IV. THE FEDERAL GOVERNMENT CHANGES COURSE

Railroads also contributed to the avoidance of tragedy by making it so that policymakers could no longer ignore the problem. By accelerating the demand for timber and other resources, railroads sparked concerns about timber famine, thereby precipitating a paradigm shift in how the government approached both its forests and its public domain more broadly. First, in the 1880s, the GLO began to police the public domain much more aggressively, including against trespasses. Then, in the 1890s, Congress shifted policies from one of disposing of its lands as quickly as possible to retaining and centrally managing certain lands—including the best remaining forests—in perpetuity.

##### A. ADMINISTRATIVE REFORMS

A major shift in the GLO’s stance towards land and timber depredations occurred after the election of Grover Cleveland to the presidency in 1884. During his campaign, Cleveland had specifically

---

127. *Id.*

128. Letter from Pace to Wilsey (January 22, 1903), Northern Pacific Railway Co. Records, Law Dep’t Records, Land Litigation Files, Box 1, Folder 15, Minnesota Historical Society, Saint Paul, MN.

129. *Id.*

argued for reforms in the GLO to address its acquiescence to rampant frauds and timber poaching. Upon assuming office, he appointed Lamar as secretary of Interior and Sparks as commissioner of the GLO, both of whom already garnered reputations as land reformers. Their appointments spelled trouble for the lumber interests that had grown dependent upon “free timber” from the public domain. The administration’s stated policies even caused Hammond, a fervent Democrat, to switch party allegiances.<sup>130</sup>

As head of the GLO, Sparks confirmed Hammond’s worst fears. While he was not the first head of the GLO to seek to clean up the office’s administration of the public domain, Sparks was more aggressive—and, hence, more successful—than any of his predecessors. Most notably, he effected a major shift in the GLO’s approach to timber depredations. When he first arrived at his post, he found not just a gross indifference among land officials in the government to protecting the public domain, but actually a firm belief that the administration lacked the legal authority to prevent or punish depredations at all. Sparks lamented in his first annual report to Congress in 1885: “It seems that the prevailing idea running through this office . . . was that the government had no distinctive rights to be considered and no special interests to protect . . . .”<sup>131</sup> Notions of “free land” and “free timber” not only pervaded communities of “looters,”<sup>132</sup> but they also influenced those standing guard at the gates.

Sparks committed resources to investigating and prosecuting timber trespasses. Within his first year, he sent over twenty special agents to Washington to investigate over a thousand cases of timber trespass involving the alleged theft of timber worth more than nine million dollars. This was not just for show, as such investigations led to prosecutions by the following year.<sup>133</sup> Sparks did not just go after minor offenders. In July of 1885, he filed suit against the Northern Pacific and Hammond’s Montana Improvement Company for their illegal cutting of federal timber in western Montana.<sup>134</sup> Unfortunately, this prosecution would demarcate the limits of Sparks’ power. In defense, Hammond and other officials claimed that they

---

130. Gordon, *supra* note 12, at 195-96.

131. DEP’T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE 3 (1885). *See also* GATES, *supra* note 41, at 557-58. As Lawrence Rakestraw dryly noted in his 1955 dissertation, “[l]and office agents concerned with timber trespass were few and inactive; and often the Registers and Receivers of the local land offices were in sympathy with the depredators.” Lawrence Rakestraw, *A History of Forest Conservation in the Pacific Northwest, 1891-1913* 6 (1955) (unpublished Ph.D. dissertation, University of Washington).

132. This is a term referring to those who benefitted from the federal government’s lax administration of its public land laws, often through fraud. *See generally* S.A.D. PUTER & HORACE STEVENS, *LOOTERS OF THE PUBLIC DOMAIN* (1908).

133. GATES, *supra* note 41, at 557.

134. Gordon, *supra* note 12, at 201.

only took timber from railroad lands—i.e., odd sections—but this seems implausible given that much of the land remained unsurveyed. They also claimed that the previous administration, including Secretary of Interior Henry Teller, had authorized their activities.<sup>135</sup> That argument seems believable, given the laxity of the previous administration’s protection of the federal domain. Regardless of the merits of the government’s case and the companies’ defenses, Hammond won victories outside the courtroom. For example, he was able to rally local support by temporarily closing down mills and blaming the closures on the government’s suits.<sup>136</sup> By the fall of 1886, Sparks had found that it would be difficult to secure witnesses to testify against the companies, and by 1887, Sparks ran out of money and had to suspend the investigation.<sup>137</sup> This gave Hammond and the other officials in the Montana Improvement Company an opportunity to insulate themselves legally from further prosecution.<sup>138</sup>

From the start, Sparks also committed himself to cleaning up land office operations, including addressing the rampant frauds that had long been a feature of public lands administration. The Timber and Stone Act, which Congress passed in 1878, seemed to invite more fraudulent entries than any past legislation. That law provided for the sale of California, Oregon, Nevada, and Washington “timberlands”—defined as lands “valuable chiefly for timber, but unfit for cultivation”—in 160-acre tracts for \$2.50 per acre.<sup>139</sup> Each applicant had to submit an affidavit declaring, under oath, that the land was primarily valuable for timber, unimproved, and unfit for cultivation; that the applicant had not previously applied for land under the act; that the application was not for speculative purposes but rather “in good faith to appropriate it to his own exclusive use and benefit”; and that the applicant had not agreed to sell the title to another person or company.<sup>140</sup> In truth, timber companies routinely paid dummy locators to file applications under the act with the understanding, if not explicit written agreements, that they would convey the lands to the companies upon receiving title.<sup>141</sup> Indeed, Sparks investigated 2,591 entries made pursuant to the Act and found 2,223 of them—over eighty-five percent—to have been fraudulent.<sup>142</sup> In response, in 1886, Sparks suspended all entries under

---

135. *Id.*

136. *Id.* at 208.

137. *Id.* at 211-14.

138. *See id.* at 199-214.

139. Act of June 3, 1878, 20 Stat. 89.

140. *Id.*

141. *See generally* PUTER & STEVENS, *supra* note 133.

142. Gordon, *supra* note 12, at 198.

the Timber and Stone Act and most entries under other land laws in the western states and territories, where frauds were most prevalent. In defending his extreme actions, he bluntly pointed to the fact that the “public domain was being made the prey of unscrupulous speculation and the worst forms of land monopoly through systematic frauds.”<sup>143</sup>

Sparks was so aggressive that one Montana paper, in 1885, suggested that Sparks had preservationist motives. It wrote:

Sparks must be of the opinion that timber is one of the most sacred products of nature, not to be defiled by the rude hand of man but intended by God to grow and die and rot, safe from the profanation of the axeman’s stroke, and that it were sacrilegious to use it for fuel, building or mining purposes.<sup>144</sup>

In the West in the 1880s, there was perhaps no greater insult. Though there is no evidence that Sparks in fact cared about nature per se, his goals aligned with those of an emerging conservationist movement, the very movement to which the Montana newspaper sought to link the commissioner. Beginning in the 1860s, the acceleration in the exploitation of natural resources, including timber, contributed to a growing awareness in the United States and elsewhere of the scarcity of resources and of the need for some sort of rational management of their use. What came to be known as the conservation movement had many strands: some sought to ensure a broad segment of the population had access to resources, some sought to ensure a resource base for future generations, some sought to preserve the watershed-protection functions of certain forests, particularly those in the mountains, some sought to protect certain areas for their aesthetic or recreation value, and yes, some—albeit a far smaller number—sought to protect nature for nature’s sake. Each of these “conservationist” goals were impossible to achieve given the broken land law system and the rampant fraud and theft of public resources, the same problems Sparks aggressively confronted for his own reasons.

## B. STATUTORY REFORM OF PUBLIC LAND LAWS

Sparks’ term as head of the GLO set the stage for great conservationist victories in Congress in the 1890s. In response to the perceived waste and destruction of the nation’s forests, as well as the anticipated threat of a

---

143. *Id.* at 197-98 (internal citation omitted). *See also* GATES, *supra* note 41, at 557-58. Sparks’ first reporting found that land worth up to \$25 for its standing trees was being acquired under the Timber and Stone Act for \$2.50 per acre. It is easy to understand the lengths to which lumber interests went to avail themselves of the law. *Id.*

144. Gordon, *supra* note 12, at 200 (quoting the Butte Semi-Weekly Intermountain, September 16, 1885)).

timber famine, Congress, in 1891, passed what Gifford Pinchot later called “the most important legislation in the history of Forestry in America.”<sup>145</sup> In the legislation that came to be known as “the Forest Reserve Act,” Congress authorized the president to “[s]et apart and reserve . . . public land bearing forests . . . or in part covered by timber or undergrowth, whether of commercial value or not, as public reservations . . . .”<sup>146</sup> Pinchot was not alone in forestry circles in his praise of the Act, which many saw as the first step towards protecting public timberlands from waste and depredations.<sup>147</sup> Soon after it was passed, GLO Commissioner Thomas H. Carter predicted the Act would “do much in the way of caring for portions of the public lands bearing forest which it is needful to preserve from spoliation.”<sup>148</sup> In his report to Congress a few months later, Secretary of the Interior John Noble concurred. He noted that if the law were “prosecuted systematically and thoroughly, posterity will look upon the action as that to which the country owes much of its prosperity and safety.”<sup>149</sup> Notably, the legislation—one of the first calling for the conservation or protection of resources—did not call for any sort of management, but rather was one simply of excluding others from designated reserves.

Despite the enthusiasm for the Act in the Department of Interior, Secretary of Interior John W. Noble initially advised that the government withdraw only those forests “not absolutely required for the legitimate use and necessities of the residents,” the promotion of settlement, or the development of natural resources in the immediate vicinity.<sup>150</sup> Still, in the next two years, President Benjamin Harrison, a Republican, designated fifteen reserves encompassing over thirteen million acres.<sup>151</sup> In addition, while Noble took a conservative view of the qualification of lands for inclusion in the reserve system, he took a liberal view of what activities

---

145. PINCHOT, *supra* note 49, at 85.

146. Act of March 3, 1891, 26 Stat. 1095. Strikingly, Congress passed the Act “without question and without debate,” as Pinchot noted. PINCHOT, *supra* note 49, at 85. The Act was the twenty-fourth section of a public lands reform bill, inserted into the bill in committee, behind closed doors. One hundred years after the Act’s passage, prominent public land historian Harold K. Steen expressed the lament of all historians “that the record is not complete enough to state with certainty what happened in the conference committee when Section 24 was added.” HAROLD K. STEEN, *THE BEGINNING OF THE NATIONAL FOREST SYSTEM* 22 (1991).

147. See James Muhn, *Early Administration of the Forest Reserve Act: Interior Department and General Land Office Politics, 1891-1897*, FOREST HISTORY SOCIETY (May 14, 2014), [http://www.foresthistory.org/Publications/Books/Origins\\_National\\_Forests/](http://www.foresthistory.org/Publications/Books/Origins_National_Forests/).

148. *Id.* (quoting DEP’T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF GENERAL LAND OFFICE FOR THE FISCAL YEAR ENDED JUNE 30, 1890 89-96 (1890)).

149. *Id.* (quoting DEP’T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF GENERAL LAND OFFICE FOR THE FISCAL YEAR ENDED JUNE 30, 1891 I (1891)).

150. See *id.* (quoting DEP’T OF THE INTERIOR, COMPILATION OF PUBLIC TIMBER LAWS AND REGULATIONS AND DECISIONS THEREUNDER 131 (1897)).

151. HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 27-28 (2004).

were prohibited within the reserves, namely *all* commercial activities. This interpretation received great applause from those who had advocated for forest reserves for aesthetic, preservationist reasons.

Noble's commitment not to reserve lands desirable for settlement or development may have been a ploy to gain favor—or at least minimize dissent—amongst the public. However, it may also have had to do with the simple fact that neither the GLO, nor the Department of Interior of which it was a part, had the capacity to enforce the Act's provisions even to the lands that still qualified for reservation. While Congress passed legislation calling for the GLO to exclude others from forest reserves, it failed to provide any money for the GLO to implement Congress' directive. The GLO, already overworked, simply lacked the workforce to take on this new task. It not only had too few special agents to monitor the reserves, but these agents also had many other responsibilities, a combination that led to them only giving "cursory attention" to the reserves.<sup>152</sup> In 1893, after legislators ignored his request for the establishment of a new corps to supervise the reserves, Secretary of Interior Hoke Smith complained that the reserves were no better protected than unappropriated, unreserved lands.<sup>153</sup> Smith was right; at the time, the GLO employed only eighty-two part-time special agents to investigate frauds, timber depredations, illegal fencing, and other transgressions over the entire public domain consisting of not just the thirteen million acres of forest reserves, but the entire public domain exceeding over five-hundred million acres.<sup>154</sup> Accordingly, the secretary determined no new reservations should be created until Congress gave them the means—both financial and legal—to protect and manage such reservations.<sup>155</sup>

In 1894, Smith promulgated regulations calling for the prosecution of trespasses within the reserves.<sup>156</sup> However, Smith still encountered the same issues as his predecessors: a lack of enforcement power. The regulations made Smith unpopular in the West. Even the relatively few prosecutions that Smith instituted were enough to lead western stock and timber interests to push Congress to open reservations to resource use and extraction. They also led to legal challenges regarding the validity of the regulations. In one notable case, ranchers in Oregon insisted the regulation violated their fundamental rights of open access to the range resource, as

---

152. Muhn, *supra* note 147.

153. *Id.*

154. DEP'T OF THE INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 1893 77-79 (1893).

155. Muhn, *supra* note 147.

156. *Id.*

well as every other resource, on public lands. The circuit court disagreed, finding there was “no implication of a license to use the [forest reserves] to the destruction or injury of these forests,” and reiterated the judicial doctrine that the federal government had the right to protect its interests against the threat of trespass and injury.”<sup>157</sup> This opinion sparked outrage amongst cattlemen.

With the government’s right of exclusion legally vindicated, a grand compromise became feasible. Nobody wanted the reserved forests to go completely unused, while government officials in the GLO and Interior recognized a complete ban on entry would be impossible to enforce. In early 1896, Smith recognized the opportunity to enact a real management system for federal timberlands, and he asked the National Academy of Sciences to appoint a commission to study and to advise on the use and management of the reserves. In his letter to the academy, he exhibited a sense of urgency, in part due to the time already wasted:

My predecessors in office for the last twenty years have vainly called attention to the inadequacy and confusion of existing laws relating to the public timber lands and consequent absence of an intelligent policy in their administration, resulting in such conditions as may, if not speedily stopped, prevent a proper development of a large portion of our country; and because the evil grows more and more as the years go by, I am impelled to emphasize the importance of the question by calling upon you for the opinion and advice of that body of scientists which is officially empowered to act in such cases as this.<sup>158</sup>

Smith requested the academy issue the report during that session of Congress.<sup>159</sup> Nearly one year later, at the end of Cleveland’s term, the committee’s work remained incomplete. However, prior to Cleveland leaving office, the commission made oral recommendations to Smith’s successor, Secretary David R. Francis. The oral recommendations included the establishment of thirteen new reserves encompassing twenty-one million acres. Cleveland agreed with this recommendation and decided to issue the order creating the reserves on February 22, George Washington’s birthday. If the intent was to link forest reserves with the proud American tradition of representative democracy, it failed. Indeed, echoing Senator Benton’s statement from decades earlier linking restrictions on access to

---

157. *Id.* (alteration in original) (quoting *United States v. Tygh Valley Land and Livestock Co.*, 76 F. 693, 695 (1876)).

158. *See* S. Doc. No. 105, at 7 (1897).

159. STEEN, *supra* note 151, at 31.

public resources to monarchism, the Seattle Chamber of Commerce represented a large segment of Western opposition when it complained bitterly that even “King George had never attempted so high-handed an invasion upon [Americans’] rights.”<sup>160</sup> Laws can change, but customs die hard.

Even with strong resistance remaining, Cleveland’s action signaled that the era of free land and free timber was over, at least as applied to the remaining federal timberlands. Thus, when President William McKinley submitted the committee’s full report to Congress in May of 1897, there was ample support for a compromise measure that would recognize federal authority over its timberlands while still allowing for use to meet the existing resource needs of local communities. Within a month, Congress passed a bill providing for the management of federal timberlands to sustain the timber resource and to provide watershed protection, while allowing for timber cutting, mining, and livestock grazing—just the privilege westerners claimed to possess, though it would no longer be unrestrained or free.<sup>161</sup>

## V. CONCLUSION

Railroad companies were primary beneficiaries of the federal government’s nineteenth-century policy preference favoring the rapid disposal of its public domain, for the most part at prices far below market value, if not for free. Beyond its massive land giveaways, the federal government also exhibited an indifference to protecting its public domain for as long as lands remained public. Railroad companies—or, more accurately, their officials and employees—benefitted from that laxity as well.

However, railroad land grant recipients also played a key role in bringing this policy preference to an end. Because these companies had both a pecuniary interest in protecting their lands from trespasses and theft and the means to police their massive land holdings, as well as neighboring federal lands, they confronted and challenged a frontier custom treating all public resources as free for the taking in ways that the federal government failed to do. At the same time, because railroads accelerated the rate of resource exploitation, it also awakened the public to the perils of unfettered degradation of the nation’s resource base to such a degree that government officials could no longer ignore the need to reform its land policies. The

---

160. *Id.* at 33. See also GATES, *supra* note 41, at 569.

161. The bill contained two additional compromises to Westerners: it suspended, for one year, Cleveland’s wildly unpopular Washington’s Birthday Reserves, and it continued to allow some free use of timber for mining and domestic purposes. Act of June 4, 1897, 30 Stat. 35.

model of conservation embodied in the Forest Management Act, which still governs management of the national forests, required not only planning and restraint on the part of the government, but also the willingness and ability to exclude others from exploiting the land's resources. In this regard, railroads showed the way, even if most policymakers and government officials were slow to see it.

Still, by the late nineteenth century, the customs of free land, free minerals, and free timber had become too entrenched to be fully eradicated. And the divergence between federal policies as promulgated, federal policies as enforced, and local informal legal regimes—of which this article's story is a prime example—would continue to influence and constrain land management well into the next century.<sup>162</sup> Westerners continued to expect timber to be readily available to them, even if under a federal management regime. This helps to explain why logging came to dominate the management of our national forests. This may not be a tragedy, but it is unfortunate. Lessons abound for us as we confront new challenges today. Hopefully, we will not be too slow in seeing them. Merely avoiding tragedy is not always good enough.

---

162. Actually, it has even extended into the twenty-first century, as the recent episode in Nevada involving rancher (and serial public trespasser) Cliven Bundy makes clear. See John M. Glionna & Richard Simon, *At Scene of Nevada Ranch Standoff, 'Citizen Soldiers' are on Guard*, LOS ANGELES TIMES, April 24, 2014, <http://www.latimes.com/nation/la-na-nevada-range-war-20140425-story.html#page=1>.