Antimonopoly in Public Land Law

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Public land law is often thought to be divided into historical eras like the Disposition Era, the Reservation Era, and the Modern Era. We think an overarching theme throughout all eras is antimonopoly. Since the Founding, and continuing for over two-and-a-quarter centuries into the 21st century, antimonopoly policy has permeated public land law. In this article we show the persistence of antimonopoly sentiment throughout the public land history, from the Confederation Congress to Jacksonian America to the Progressive Conservation Era and into the modern era.

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

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

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Introduction

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

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¹ John Locke, Second Treatise of Government § 31 (1690).
² Id. § 27.
³ See generally Richard J. Ellis, Radical Lockeanism in American Political Culture, 45 W. Political Quarterly 825 (1992) (describing the egalitarian interpretation of Lockeanism espoused by Thomas Paine, Jacksonian democrats, populists, and others).
⁴ See Carl Becker, The Declaration of Independence, A Study in the History of Political Ideas 27 (1922) (explaining that “So far as the ‘Fathers’ were, before 1776, directly influenced by particular writers, the writers were English, and notably Locke. . . . [T]he
Jefferson grounded his agrarian ethic in a Lockean interpretation of the laws of nature: “Whenever there is in any country uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The small land holders are the most precious part of a state.” Thus he, other Founders, and their successors sought to implement policies that would avoid monopolization of public land and associated natural resources and put them instead into the hands of numerous users, thereby fostering both egalitarianism and democracy.

Antimonopoly principles pervade the history of federal natural resources management, which is rife with examples of limits on the terms, amounts, types of interest, and conditions imposed on the privatization of public resources. Limiting private property rights in public

5 See KAREN IVerson VAUGHN, JOHN LOCKE: ECONOMIST AND SOCIAL SCIENTIST 59 (1980) (describing Locke’s distrust of monopolistic privilege); LOCKE, supra note 1, § 36 (“Nature did well in setting limits to private property through limits to how much men can work and limits to how much they need. No man’s labour could tame or appropriate all the land; no man’s enjoyment could consume more than a small part; so that it was impossible for any man in this way to infringe on the right of another, or acquire a property to the disadvantage of his neighbor . . .”).
7 David Schorr has argued that the historical private/commons formula does not adequately explain the American democratic ideal of distributive justice in natural resources. DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER 7, 31 (2012) (discussing the origins of Western water rights in Colorado and arguing that “[t]he Lockean and Jeffersonian view of acquisition from the public domain, requiring work as a condition of appropriation and limiting the scope of rights to the amount a person could directly use, led directly to the requirement for water claims, both in its direct form and indirectly through the miners’ laws’ limits on appropriations calibrated to the amount one person could reasonably use; and the abrogation of riparian ownership [the Eastern system of water rights] . . . was a manifestation of anti-monopolism and anti-speculation ideology, directed against the potential concentration of water wealth in the hands of those who could afford to buy up the riparian lands of the arid-country streams.”). This paper discusses how that Lockean impulse influenced American public land disposition and use over time.
resources allowed for their widespread distribution,\(^8\) the mixing of private and public use, and possible reversion to the public for failure to perform specified conditions. In numerous ways the federal government retained property interests for the public when disposing public lands and resources in order to promote broad-based sharing of resources and to avoid monopolization.\(^9\)

This paper illustrates how public land law has consistently reflected a philosophy of distributional equity in allocating public resources, a philosophy that is an important reflection of American democratic thought. Long before and well after Congress passed the Sherman Antitrust Act,\(^10\) public land policy attempted to limit private acquisition of public resources to prevent monopoly and avoid speculation. If this policy was sometimes overcome in practice by monopolistic forces, the fact is that antimonopoly was a persistent force throughout American public land law history.

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

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

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

from large sales to free grants of a limited acreage to yeoman farmers and bona-fide settlers. Section III describes the roots of American policies pertaining to extractive resources—a progression toward leasing, term limits, acreage limitations, diligent pursuit requirements, and protection of public access to the public domain. Section IV considers the evolution of antimonopoly policies during the Progressive Era, including the rise of resource conservation and the first concern for intergenerational equity. Finally, Section V briefly assesses some modern public land laws, explaining the ways in which they promote widespread use by diverse users, limit commercially extractive uses on certain lands, require land planning,11 and uphold public access to the public lands. We conclude that, over the years, two major dimensions of antimonopoly have developed: policies promoting 1) widespread resource ownership and use, as opposed to resource concentration in the hands of the few; and 2) multiple uses of public lands, instead of dominant use. Today, while antimonopoly sentiment continues to emphasize intergenerational equity, modern public land law is now also marked by multi-species concerns. However, protecting widespread allocation and diverse uses remains a challenge, as private claims to public property are commonly renewed, expanded, extended, and protected by bureaucratic

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11 Advanced planning is a hallmark of antimonopoly, because it designates protected and potential uses in a publicly available and enforceable document, usually before agencies must consider specific proposals to designate areas of public land for private or extractive uses. Land planning provides an opportunity for equal consideration of multiple public and private uses, extractive and non-extractive. Thirty years ago Charles Wilkinson and Michael Anderson described the contrast between the pre-planning and the modern planning era: “Until the 1960s, resource allocation primarily involved the allocation of resources to private commercial interests. During that decade a broader public interest and a fuller recognition of non-commodity resources came to the fore and became firmly enshrined in statutes and case law during the 1970s and 1980s. A requirement of comprehensive land planning has become a central element of Congress’s determination to accord equal consideration to all resources and to open public land policy to broader public involvement.” Charles F. Wilkinson & H. Michael Anderson, Land and Resource Planning in the National Forests, 64 OR. L. REV. 6, 10 (1986).
inertia, and also because multiple use affords land managers with virtually unreviewable administrative discretion. The modern era also has recently seen monopolistic proposals seriously entertained by Congress, a development which would roll back centuries of antimonopoly policy and undermine cardinal features of the American character. Although now under some significant threat, the antimonopoly impulse remains the most consistent feature of public land law throughout its long history.

I. From a “Blank Slate:” the Ordinances of 1785 and 1787

After it proclaimed independence, the new nation had to decide how to treat the land west of the Appalachian Mountains. The states with fixed boundaries quickly sought to pressure the states with western land claims—about half of the original states—to cede their claims to the federal government. Beginning in 1780 with New York and culminating with Georgia in 1802, all of the so-called “landed” states ceded their western claims, giving the federal government full

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

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

14 Six states were without western land claims, including Pennsylvania, and they pressured the states with western claims to cede them to the federal government. 10 ANDREW C. MCLAUGHLIN, THE AMERICAN NATION, A HISTORY, THE CONFEDERATION AND THE CONSTITUTION 109-10 (1905). The states without western claims argued that Congress had the authority, or should be given the authority, to take the land for the common good. Id. Maryland threatened not to accept the Articles of Confederation if the landed states continued to claim stretches of lands beyond the Appalachians. Id. In September 1780, Congress urged the landed states to cede their claims to it, and in turn urged Maryland to ratify the Articles. 17 JOURNALS OF CONG. 807 (Sept. 6, 1780) (“Resolved . . . that it be earnestly recommended that those states, who have claims to the western country to . . . give their delegates in Congress such powers as may effectively remove e only obstacle to final ratification of the Articles of Confederation; and that the legislature of Maryland be urgently requested to . . . subscribe the said [A]rticles.”).
authority over the settlement and governance of the western lands. And parenthetically it gave the nation its first opportunity to implement its founding republican ideals in land policy. Yet the land disposition policies that emerged in the 1780s were oriented towards relatively large sales and revenue production to retire the Revolutionary War debt, instead of offering free land or cheap sales of small plots to accommodate the needs of yeoman farmers. Nevertheless, the Ordinance of 1787 did reflect antimonopoly sentiment: abolishing a centuries-old British system of land inheritance, creating greater alienability of title, and effectively providing the opportunity for widespread distribution of land.

The Land Ordinance of 1785 and the Northwest Ordinance of 1787 were the progenitors of federal public land law. The ordinances laid the roadmap for settling and governing the

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15 The seven landed states (and the date each initiated cession) were: New York (1780), Virginia (1781), Massachusetts (1784), Connecticut (1786), South Carolina (1787), North Carolina (1789), and Georgia (1802). Payton Jackson Treat, The National Land System, 1785-1820, 14 (1910). See University of Richmond, Atlas of the Historical Geography of the United States, Digital Scholarship Lab, http://dsl.richmond.edu/historicalatlas/47/b/ (use the next arrow to navigate through maps of the state cessions chronologically) (accessed Sept. 10, 2015).

The federal government solidified its preeminence in Western land policy when Congress passed the Indian NonIntercourse Act in 1790, which gave the federal government exclusive authority in dealing with Indian tribes, including approving all land transactions and licensing Indian traders. NonIntercourse Act of July 22, 1790, Ch. 33, 1 Stat. 137 (1790). In Johnson v. M’Intosh, 21 U.S. 543 (1823), the Supreme Court essentially ratified the NonIntercourse Act’s federal primacy by upholding a federal land patentee’s claim against speculators who bought from Indian “chiefs” prior to the enactment of the 1790 statute, invoking a so-called “doctrine of discovery.” See generally Michael C. Blumm, Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country, 28 VT. L. REV. 713 (2004).


17 See Gates, supra note 6, at 65 (explaining that the rectangular survey system of 1785 has been retained in the national land system ever since). Vernon Carstensen, Patterns on the American Land, 18 PUBLIUS 31, 31 (1988) (stating that the federal government extended the rectangular system used in the 1785 ordinance to 1.3 billion acres in the continental U.S.).
Northwest Territory\textsuperscript{18} that the federal government obtained from the 1783 Treaty of Paris and the state land cessions.\textsuperscript{19} Key among the provisions of the 1785 ordinance was the establishment of a grid system for surveying territorial land based on the New England model, which created square townships.\textsuperscript{20} Surveyors laid out each township of thirty-six square miles without regard to landscape characteristics like ravines, streams, or swamps.\textsuperscript{21} The 1785 ordinance created a system both of measurement and disposal—once the lands had been surveyed into squares, the federal government sold them off to the highest bidder, with a minimum price of a dollar per acre.\textsuperscript{22}

Selling public land at competitive auctions might appear to conflict with the Jeffersonian ideal of promoting democratic goals by disposing government lands widely to small farmers. Jefferson in fact initially opposed the idea of selling the territorial lands due to his belief that the burden of the war should not be shouldered by those with the least ability to afford it.\textsuperscript{23} But he

\textsuperscript{18} See Jonathan Hughes, The Great Land Ordinances: Colonial America’s Thumbprint on History, \textit{in Essays on the Economy of the Old Northwest} 1, 8 (David Klingaman & Richard Vedder eds., 1987); North & Rutten, \textit{supra} note 16, at 22.

\textsuperscript{19} Treaty of Paris art. 2, Sept. 3, 1783. The survey system of the 1785 Ordinance initially applied only to a 42-mile wide strip of land adjacent to the western boundary of Pennsylvania, extending north from the Ohio River. After 1796, Congress formally re-established the survey system, which it thereafter employed on the rest of the Northwest Territory, the Southwest Territory, the Louisiana Territory, Florida, land acquired from Mexico, the Oregon Territory, the Gadsden Purchase, and Alaska. See Carstensen, \textit{supra} note 17, at 34.

\textsuperscript{20} Ordinance of May 20, 1785, 28 J\textit{OURLS OF THE CONTINENTAL CONG.} 375-381 (an Ordinance for ascertaining the mode of disposing of Lands in the Western Territory).

\textsuperscript{21} This grid system has been called a metaphorical “American thumbprint.” See Hughes, \textit{supra} note 18, at 8. The grid created a system of property delineation abstracted from environmental realities, and literally shaped the course of American farming in the West, predisposing farmers to straight-line tilling, no matter what the terrain. See Carstensen, \textit{supra} note 17, at 35-38. In the dust-bowl era, the Soil Conservation Service retrained farmers to till in a landscape-contoured fashion instead. See \textit{id.} at 37; Douglas Helms, \textit{Conserving the Plains: The Soil Conservation Service in the Great Plains}, 64 AGRIC. HISTORY 58, 61 (1990).

\textsuperscript{22} See Gates, \textit{supra} note 6, at 65.

\textsuperscript{23} See \textit{id.} at 62: “By selling the lands to them, you will disgust them, and cause an avulsion to them from the common union. They will settle the lands in spite of everybody.” (citing I \textit{THE PAPERS OF THOMAS JEFFERSON} 492 (Julian P. Boyd ed.1950)).
was willing to compromise. The 1785 ordinance included no provision for pre-emption either, meaning that the survey-and-sale system would not recognize the right of a squatter to gain title to the land he occupied without competing at auction to purchase it. The Act included no anti-speculation provisions, placed no limit on the amount of land individuals or companies could purchase and imposed no requirement that the owner reside on or improve the land.

The 1785 ordinance was a compromise between the needs of the post-revolution country that needed to pay its war debts and the republican ideals that carried it through the war. As Paul Gates explained, Congress wanted to end a tradition of granting large tracts of estates to aristocratic families and quell growing hostility between tenant-farmers and estate barons. But the war debt apparently precluded granting free land to small farmers. The federal government therefore

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25 See Gates, supra note 6, at 66.
26 “One that settles on land without a right or title.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2215 (2002).
27 Gates, supra note 6, at 66.
28 WEBSTER’S THIRD, supra note 26, at 2189 (“ . . . an act of speculating (as by engaging in business out of the ordinary, by dealing with a view to making a profit from conjectural fluctuations in the price rather than from earnings of the ordinary profit or trade . . . . )”). Speculation was a principal threat to the antimonopoly ideal. Through speculation, buyers acted as middlemen, purchasing large tracts of land they did not intend to personally use. Speculators purchased early, drove up prices, then made profits on resales. Alexander Hamilton supported sales to such speculative middle-men because they would produce quick sales of the public lands and revenue to retire the war debt. Settlers would be the eventual beneficiary, but they would have to pay prices set by the speculators. See Paul W. Gates, An Overview of American Land Policy, 50 AGRIC. HISTORY 213, 217 (1976).
29 Gates, supra note 6, at 66.
30 Gates, supra note 28, at 216 (explaining that many great estates of millions of acres had been granted by the colonies to influential families like the Penns, Calverts, Fairfaxes, and Granvilles prior to the Revolution).
avoided the free-grant system once practiced in the southern colonies,\textsuperscript{31} and opted instead for the survey-and-sale system.\textsuperscript{32}

In 1787, Congress established a system of governance for the territory north and west of the Ohio River.\textsuperscript{33} In many important ways, the 1787 Northwest Ordinance reflected republican ideals in land policy. The ordinance’s basic purpose was to provide for the governance of this new frontier, establishing the conditions for a new type of republicanism, on what was “essentially a blank political slate.”\textsuperscript{34} Notable antimonopoly provisions of the 1787 ordinance 1) rejected the British system of large landed estates, 2) made it easier for more individuals to participate in the political process, and 3) reserved a public right-of-way to use navigable waters.

The Northwest Ordinance abolished primogeniture, the British system under which the first-born son would inherit the decedents’ entire estate.\textsuperscript{35} The ordinance required that the property of an intestate decedent “shall descent to, and be distributed among their children, and the

\textsuperscript{31} \textit{Id.} The Southern system, called the headright system, reflected the British colonial system encouraging migration to the colonies. \textit{See} \textit{EDWARD T. PRICE, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC} 106-07 (1995). In Virginia, each settler could receive 50 acres, while a settler could get between 6 and 150 acres in other colonies. \textit{Id.} Grant sizes were not socially egalitarian, as rents were often greater for free settlers than servants, for men than women, servants than free men, and for adults than children. Moreover, usually the person who paid the indentured servant’s way received the servant’s share of the land, although most colonies provided an equal share for a servant when he was freed. \textit{See id.} at 107-09.

\textsuperscript{32} Surveyors divided alternate townships into one-mile-square sections (or 640 acres). The federal government would sell half the townships whole, and half the townships by sections. Thus, an initial buyer had to have enough capital to purchase at least 640 acres. \textit{See} Carstensen, \textit{supra} note 17, at 34; \textit{BENJAMIN HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES} 39 (1965).

\textsuperscript{33} Northwest Ordinance of 1787 (Confederation Cong. July 15, 1787) (an Ordinance for the government of the territory of the United States Northwest of the river Ohio), 1 Stat. 51, \textit{reprinted in} 1 U.S.C. at LVII (2012) (hereinafter Northwest Ordinance). \textit{See} North & Rutten, \textit{supra} note 16, at 8. The territory was comprised of what is now considered the Mid-west, north of Kentucky, between the Appalachians and the Mississippi.


\textsuperscript{35} Northwest Ordinance § 2; \textit{see} Festa, \textit{supra} note 34, at 437.
descendants of a deceased child, in equal parts . . .”36 This equality of intestate succession contrasted with the British system, which held large property holdings intact when an intestate property-holder died since only one heir could take by intestate succession. The ordinance also prohibited the use of the fee tail estate, under which land was passed down the chain of descendants, and consequently imposed practical restrictions on inter vivos land transfers.37 The 1787 ordinance instead broke up land holdings, attacking the hereditary privilege which had inspired considerable ire in revolutionary America.

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

...no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee simple, two hundred acres of land within the same; Provided, also, That a freehold in fifty acres of land in the district, having been a citizen of one of the states, and being resident in the district, or the like freehold and two years residence in the district, shall be necessary to qualify a man as an elector of a representative.38

The Northwest Ordinance aimed to both promote settlement and political participation. To the drafters of the ordinance, land ownership protected the security of the common man, and his

36 Northwest Ordinance § 2 (emphasis added). Notably, the statute required an equal split among heirs whether male or female (with the exception that a widow would have a third of the real estate for life).
38 Northwest Ordinance § 9 (emphasis added).
stake in governance.\textsuperscript{39} They believed that land ownership was “the essential ingredient to the success of the yeoman,”\textsuperscript{40} because non-landed suffrage was unheard during that era. Thus, the solution to greater political inclusiveness was to encourage widespread ownership of land and promote security in that ownership.\textsuperscript{41}

With political participation tied to individual land ownership, the Confederation Congress intended to create the security necessary to encourage settlement of the territories.\textsuperscript{42} The 1785 ordinance therefore authorized a recording system, and the 1787 Ordinance created a secretarial office, to maintain public land records.\textsuperscript{43} Rampant squatting created uncertainties and risks for settlers in the territories. A recording system provided security that protected individual property rights and encouraged both land alienation and development.\textsuperscript{44} Purchasers needed a recording system and a territorial government to keep and enforce it in order to ensure security in their holdings. Richard Henry Lee, Congressman from Virginia and former President of the Continental Congress, explained the purpose of the 1787 Ordinance in these terms: “It seemed necessary, for the security of property among uninformed, and perhaps licentious people as the greater part of those who go there are, that a strong and toned government should exist, and the rights of property be clearly defined.”\textsuperscript{45}

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

\textsuperscript{39} Festa, \textit{supra} note 34, at 465.
\textsuperscript{40} \textit{Id.} at 466.
\textsuperscript{41} \textit{Id.} at 446, 465.
\textsuperscript{42} \textit{Id.} at 442.
\textsuperscript{43} Ordinance of 1785, 28 JOURNALS OF THE CONTINENTAL CONG. at 379; Northwest Ordinance § 4.
\textsuperscript{44} Festa, \textit{supra} note 34, at 442.
\textsuperscript{45} \textit{See} Gates, \textit{supra} note 6, at 72-73 (citing Letter from Richard Henry Lee to George Washington (July 15, 1787)).
The navigable waters leading into the Mississippi and St. Lawrence, and the
carrying places between the same, shall be common highways and forever free, as
well to the inhabitants of the said territory as to the citizens of the United States,
and those of any other States that may be admitted into the confederacy, without
any tax, impost, or duty therefor.46

This provision was important to ensure that farm and other products could be freely transported
on the major highways of the era, notably the Mississippi, Ohio, and St. Lawrence Rivers and their
tributaries. Article 4’s promise of navigation-access laid the foundation for the development of
the antimonopolistic public trust doctrine,47 whose American roots lie in the democratization of
public access to waterways.48

II. Land Disposition through the Homestead Act

Early public land disposition focused on generating revenue to pay Revolutionary War
depts, rather than dispersing land among the broader public. Under this system, the federal
government sold one-half of the townships whole, and the other half of townships in 640-acre
sections.49 The minimum sale size and the auction price were simply unattainable for the average

46 Northwest Ordinance Art. IV.
47 See Michael C. Blumm & Mary C. Wood, The Public Trust Doctrine in
Environmental and Natural Resources Law (2d ed. 2015).
Intervention, 68 Mich. L. Rev. 471, 484, 489 (1969) (finding conceptual support for the public
trust doctrine in the Northwest Ordinance, and discussing the lodestar case Illinois Central
Railroad Company v. Illinois, as the most celebrated public trust case in American law. Illinois
Central upheld a state’s repeal of a large grant of land underlying Lake Michigan, as such a grant
would have been an abdication of the state’s trust duties for its people in order to protect their
access, navigation, and commerce on navigable waters).
49 See Carstensen, supra note 17, at 34. The plan for selling tracts alternated between sales of
entire townships and sales of 640 acres parcels of the next township. Alternating the method of
sale was another compromise. To put an entire township up for sale would necessarily mean
selling to speculators. Reducing the minimum size of purchase was an attempt to make purchase
attainable for individual buyers, as opposed to large groups of speculators. See Hibbard, supra
note 32, at 39.
settler. The federal government sold land in large tracts under the Hamiltonian vision of retiring the war debt by selling quickly to investors and companies. The 640-acre policy was a compromise to provide opportunity to mid-sized investors. Smaller investors and individuals could purchase (at increased cost) from the initial private purchasers.

Over the course of the early 19th century, through trial-and-error, Congress and the federal Land Office developed policies in response to the numerous petitions of bona-fide settlers, who could not afford to buy land wholesale, or who were squatters. This proved to be a fairly slow process, as the antimonopoly goals of public land disposition were in tension with the motivation to repay the Revolutionary War debt and worry that cheap land would prompt mass emigration from the East. As one scholar put it, “while by law we have insisted on a recognition of the democratic idea, in actual practice, wide departures from this ideal have not only been tolerated, but, it would seem encouraged . . . .” This tension would remain a persistent theme throughout the history of federal land disposal. In the mid-1800s, Congress enacted legislation to address the complaints of small landowners and land seekers about the barriers imposed by purchase credit, minimum price per acre, and minimum-sale size policies. The Jeffersonian ideal finally triumphed

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50 See Roy M. Robbins, Preemption—A Frontier Triumph, 18 MISS. VALLEY HIST. REV. 331, 333 (1931).
51 See Gates, supra note 6, at 124.
52 See id. The federal government also offered millions of acres of land in the northwest to Revolutionary War Veterans as compensation for their service. Jerry A. Callaghan, The War Veteran and the Public Lands, 28 ARGIC. HIST. 163, 164-65 (1954).
53 See Robbins, supra note 50, at 333-34.
54 See id. at 335; Hibbard, supra note 32, at 77. Mass western settlement would also provoke Indian Wars. See Robbins, supra note 50, at 337.
in the 1862 Homestead Act, but early 19th century disposition policies contained several other land disposition experiments.

A. Credit Sales

To facilitate settlement, Congress began to experiment with the price and parcel size issues around the turn of the 19th century. In 1796, Congress increased land sale price to $2.00 per acre as a deterrent to speculators. Treasury Secretary Albert Gallatin claimed that the $2.00 price was advantageous to the population and the prosperity of the people because it “effectually destroyed the monopoly of lands and thr[ew] the land exclusively in the hands of actual settlers.” In 1800, Congress reduced the minimum sale to a half-section, 320 acres, to reduce the amount of money a settler would have to accumulate. But settlers began to petition for preemption rights—giving a squatting settler the opportunity to purchase the land on which he was residing and cultivating, for the minimum fixed price—thus avoiding competition at auction with “unfeeling” land-jobbers, who, according to one contemporary account, had been “preying on the vitals of his country . . .”

The 1800 Act also created an extended credit system, which Congress intended to speed the process of land disposition and make it easier for a bona fide settler to purchase land. The Act of 1800 required purchasers to pay only a quarter of the auction price within forty days, and

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56 Act of May 18, 1796, ch. 29, § 4, 1 Stat. 464, 467. Purchasers could pay the sale price over the course of a year. Id. § 7, 1 Stat. at 467.
57 7 ANNALS OF CONG. 1332 (1803) (statement of Albert Gallatin, Secretary of the Treasury). Gallatin’s claim was actually out of step with the reality of land speculation. Hundreds of residents of Ohio complained that $2 for each acre of a 320 acre-tract was beyond reach of the average settler, whom speculators could outbid anyway. See Gates, supra note 6, at 131.
58 Act of May 10, 1800, ch. 55 § 4, 2 Stat. 73, 74 (sponsored by William Henry Harrison, the first delegate from the Northwest Territory. Robbins, supra note 50, at 336).
59 See Robbins, supra note 50, at 337 (describing the petitions of settlers who settled upon and improved the public lands, seeking the right to purchase the lands they possessed at $2 per acre).
60 See id. (quoting an 1801 Petition of John Boggs, an Ohio resident, to Congress).
thereafter make four annual installments. In 1804, Congress cut the minimum acreage in half again, down to a quarter-section tract of 160 acres, retaining the credit system, and delaying interest charges until payment was due.

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

B. Cash Sales

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63 Id. § 11, 2 Stat. at 281. See Hibbard, supra note 32, at 75, Robbins, supra note 61, at 25.
64 See Gates, supra note 6, at 142.
65 See Robbins, supra note 61, at 24.
66 See Tudor Hill, supra note 55, at 40.
67 See id.
68 See Hibbard, supra note 32, at 92-94; Gates, supra note 6, at 134-136, detailing the terms of these acts from 1806 to 1816. At the time, Congress was still unwilling to provide free land grants and began to criminalize squatting in 1807. See Robbins, supra note 50, at 338. In that year, Congress passed the Intrusion Act, which allowed unlawful squatters to register with the local land office in order could become tenants-at-will, until they could pay for their tracts. Act of Mar. 3, 1807, ch. 46 § 2, 2 Stat. 445, 445. A squatter who failed to register would be fined and jailed by the frontier army. Id. § 4, 2 Stat. at 446.
In the wake of the Panic of 1819, Congress cancelled the credit system in 1820 in favor of a cash sale system. No longer could purchasers gamble by taking the chance that their agricultural endeavors would pay the purchase price of land plus interest over a set period of time. In the cash-based system, the government required payment up-front. Although settlers on the public domain lost the benefit of a credit installment system, the 1820 Act lowered the minimum bid price of land to $1.25 per acre from $2 and again halved the minimum land sale to 80 acres from 160 acres, in order to encourage small purchases.

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

Sixteen years after the adoption of the cash system, President Andrew Jackson issued his famous “Specie Circular” to the Land Office in 1836, which directed officials to accept nothing but hard currency for land sales. Jackson issued the policy in response to widespread complaints about fraud, speculation, and monopoly of the public lands accomplished by means of the credit system.
banks offered after Congress had abolished the governmental credit system. The circular aimed “to repress alleged frauds, and to withhold any countenance of facilities in the power of the government from the monopoly of the public lands in the hands of speculators and capitalists, to the injury of the actual settlers in the new States . . . .”  

Although the circular did sharply reduce large-scale purchases, it was followed by (and perhaps induced) an economic recession that reduced westward investment.  

Bona fide settlers were disadvantaged by the cash system. Since settlers no longer had the benefit of an installment plan option—allowing a settler to hold occupied land until his payment was complete—speculators could easily outbid the settler at an auction.  

The preemption movement, seeking to give for bona fide pioneers the first right of purchase, gained steam due to the inequities of the cash system.  

C. Preemption Sales and Graduated Pricing  

In 1830, Congress passed a preemption act, which retrospectively gave settlers in possession and cultivating land in 1829 the option of guaranteed purchase, without auction, up to 160 acres for $1.25 per acre, within the year.  

In principle, preemption aimed to put occupants on the same playing field as absentees, giving small landholders an opportunity to purchase small parcels of land at the minimum price without being outbid. The Act pardoned illegal settlers who had already been working the land.  

Congress also passed preemption statutes in 1838 and 1840, in order to extend the benefits and privileges of the 1830 Act to those who settled on the public
lands after the 1830 Act went into effect. To claim preemption, a settler had to be at least 21, the head of a household, and in actual residence upon the land, conditions that aimed to prevent speculators and others from claiming more than their fair share without going through the auction process.

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

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82 Act of 1838, ch. 119, 5 Stat. at 251; See ROBBINS, supra note 61, at 76.
83 Each claimant took an oath that he entered on the land “in his own right, and exclusively for his own use and benefit,” and that he had not “directly or indirectly made any agreement or contract in any way or any manner with any person whatever by which the title which he might acquire from the government should inure to the use or benefit of anyone but himself, or to convey or transfer the said land or title to any other person whatever at any subsequent time.” Act of 1838, ch. 119 5 Stat. at 251.
85 Settlement prior to payment no longer constituted trespass. See ROBBINS, supra note 61, at 89.
86 See ROBBINS, supra note 61, at 91.
87 Importantly, in terms of antimonopoly policy, the Act required a purchaser to erect a dwelling on the land, required that a settler must not be a proprietor of 320 or more acres in any territory, and limited entry under the law to 160 acres. General Preemption Act § 10, 5 Stat. at 455-56.
88 See ROBBINS, supra note 61, at 91.
89 See id.
Another step toward preventing land monopolies was the Graduation Act of 1854.\textsuperscript{90} Since the government imposed a uniform minimum price of $1.25 per acre, regardless of land quality, whole portions of townships--composed of less valuable land--went unsold for decades. As mentioned previously, the survey-and-sale system was indiscriminate as to land-forms, features, or arability.\textsuperscript{91} The result was that some sections of land were leap-frogged, unpurchased. Consequently, in 1854, Congress reduced the minimum price of these leftover tracts, not by individual appraisal, but by how long they remained unsold.\textsuperscript{92} For a tract unsold for 10-15 years, a buyer would pay $1 per acre, down from $1.25. For a parcel 15-20 years unsold, the price was $0.75 per acre. Lands unsold for 30 or more years were available for just 12-and-a-half cents, so-called one-bit land.\textsuperscript{93} Graduated prices made land more accessible to settlers of lesser means.\textsuperscript{94} The law required an affidavit that the purchaser would occupy and cultivate the land (or use the land in support of an adjoining farm owned or occupied by him), would devote the land to personal use, and would acquire no more than 320-acres under the Act.\textsuperscript{95} The 1854 Graduation Act was limited in terms of its democratizing effect on public lands sales,\textsuperscript{96} since it did not require proof of settlement, and it was not restricted to landless people.\textsuperscript{97}

\textsuperscript{90} Graduation Act of Aug. 4, 1854, ch. 244, 10 Stat. 574 (note the title to the Act: “To Graduate and Reduce the Price of the Public Lands to Actual Settlers and Cultivators”).
\textsuperscript{91} See supra note 21 and accompanying text.
\textsuperscript{92} Act of 1854 § 1, 10 Stat. at 574.
\textsuperscript{93}Id. The 1854 statute excluded mineral lands, which the government sold for $1.25 per acre. Id.
\textsuperscript{94} Senator Benton from Missouri had even advocated a graduation system that would provide some free land to “to such poor persons as may be willing to take and cultivate them[.]” As quoted in Hibbard, supra note 32, at 291.
\textsuperscript{95} Act of 1854 § 3, 10 Stat. at 574.
\textsuperscript{96} The main purpose of graduation was not to get cheap lands into the hands of poor farmers, but to earn revenue on lands that had been overlooked. See Gates, supra note 6, at 185 (suggesting that without a means of enforcing the 320-acre limitation, the 1854 statute represented mere window dressing, not a serious attempt at egalitarian distribution and antimonopoly).
\textsuperscript{97} See Gates, supra note 6, at 187.
Although the Land Office’s policy required witness of the occupant’s actual occupation of the land, this requirement was easily gamed.\textsuperscript{98} Moreover, the leftover land was marginal, sometimes of poor quality for agriculture—the mainstay of the small settler.\textsuperscript{99} On the other hand, the Act did provide a new opportunity for investors with little cash flow,\textsuperscript{100} and the 320-acre limitation reiterated a growing sentiment that public lands should not be available in large tracts to monopolists for speculation.\textsuperscript{101} Later, in the 1860s and 1870s, disposition acts would carry on the tradition of an acreage limitation—in, for example, in the Homestead, Timber and Stone, and the Desert Land Acts.\textsuperscript{102}

\textbf{D. The Homestead Act}

As early as 1828, the House Public Lands Committee recommended homesteading legislation to accommodate the growing numbers of settlers seeking small tracts at a fair price.\textsuperscript{103} The committee asked the House to take notice of:

\begin{quote}
. . . the fact that there are a good many families who are neither void of industry nor of good moral habits, who have met with the usual share of the difficulties always accompanying the settlement of a new country, and who, living very remote from the market, never expect to see the day arrive when they will be enabled to
\end{quote}

\textsuperscript{98} See id. at 190.
\textsuperscript{99} See id. at 182 (describing leftover Graduation Act acreage as “sometimes fractional quarters, hilly, broken, cut by ravines or streams, swampy or low land unpromising for crops. . . . If the broken land was suitable for pasture or had good grass or hay, nearby owners saw no reason to buy it an pay taxes on it as long as they could graze their livestock on it . . . . Everywhere in the West the process of land selection had left behind these neglected tracts, stripped of their timber, overgrazed . . . .”).
\textsuperscript{100} Paul Gates maintained that the proponents’ real purpose was not to help the “small man” but to reduce the sale price and encourage cession of these lands to the states (citing the fact that large amounts of unsold tracts of usable land remained in the southern states). \textit{See id.} at 184.
\textsuperscript{101} See id. at 187. The homestead advocate, Horace Greeley, supported the acreage limitation, but lamented that it was unenforced, so that “any shrewd monopolist can drive a coach and six through it.” \textit{Id.}
\textsuperscript{102} Homestead Act of 1862, ch. 75 § 1, 12 Stat. 392, 392; Desert Land Act of 1877, ch. 107 § 1, 19 Stat. 377, 377; Timber and Stone Act of 1878, ch. 151 § 1, 20 Stat. 89, 89.
\textsuperscript{103} \textit{See} HIBBARD, \textit{supra} note 32, at 351.
save enough with all their efforts, from their means of support, to purchase a farm and pay for it in cash.\textsuperscript{104}

Some states like Missouri and Illinois prodded Congress for land cessions, so they could donate land to indigent settlers.\textsuperscript{105} Missouri’s petition to Congress claimed that “the passage of such law would not only promote the strength and prosperity of this frontier state, but the happiness of thousands who, from the want of pecuniary means, are compelled to remain in an anti-republican state of dependence on rich landlords.”\textsuperscript{106} But it would not be until three decades later, during the Civil War (with the South out of the Union and out of the Senate),\textsuperscript{107} that Congress would provide free land for settlement. Southern politicians opposed to granting free land to small holders because they worried that homestead legislation would fill the West with Yankee settlers opposed to slavery.\textsuperscript{108}

As enacted in 1862, the Homestead Act entitled any person, 21 years or older to claim without fee up to 160 acres of public land.\textsuperscript{109} At long last the Lockean vision of free land for labor was government policy.\textsuperscript{110} The Act required the homesteader to ‘prove up’ his site after five years and pay only a registration fee and small commissions to the register or receiver of the Land Office to obtain a land patent.\textsuperscript{111} The Act included limitations designed to ensure that only bona fide

\textsuperscript{104} See id.
\textsuperscript{105} See id. at 350.
\textsuperscript{106} See id.
\textsuperscript{107} See id. at 366-67, 382; ROBBINS, supra note 61, at 206.
\textsuperscript{109} Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392. A homesteader could claim, for free, 160 acres that the government had offered at $1.25 an acre, or up to 80 acres of land the government offered for sale at $2.50 an acre. \textit{Id.}
\textsuperscript{110} \textit{Id.} The concept of a homestead evokes a Lockean view of property, that a person can rightfully privatize that amount of resources (or acorns in the Lockean allegory), as he can put to use by his labors. LOCKE, supra note 1, at § 31.
\textsuperscript{111} That is, the settler must show, before he is able to receive title from the government, that he has lived upon or cultivated the homestead for five years. \textit{Id.} § 2, 12 Stat. at 392; see GATES, supra note 6, at 394-95.
settlers obtained free land: The government required the homesteader to swear that he 1) would use the land for actual settlement and cultivation, 2) was not acquiring the land on behalf of someone else, and 3) was the head of the household or 21 years of age.\textsuperscript{112} In the Homestead Act, Congress sought to rectify many of the elements which had worked against bona fide settlement in the past—land price, purchase medium, minimum acreage, time allowed for payment of debt. The land was now essentially free; the purchase medium became five years of sweat equity, rather than cash or credit; the acreage was limited to 160 acres\textsuperscript{113} in order to give all a fair chance. These changes reflected the overriding purpose of providing homes and a means of livelihood to the average farmer, achieving the vision of the 1828 Public Lands Committee, which advocated homesteading:

\[
\ldots [Y]our \text{ committee believe that such small earnings [of the poor] applied to the improvement and cultivation of small tracts, scattered through the public domain, would be as advantageous to the public as though they should be paid directly to the treasury. No axiom in political economy is sounder than the one which declares that the wealth and strength of the country, and more especially, or the republic, consists not so much in the number of its citizens as in their employments, their capability of bearing arms, and of sustaining the burdens of taxation whenever the public exigencies shall require it.}\]\textsuperscript{114}

The Homestead Act represented the triumph of Jeffersonian land disposition, favoring free land for bona fide settlers, over the Hamiltonian method of disposition to speculators and middle-men, which had dominated the early era.\textsuperscript{115}

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

\textsuperscript{112} Homestead Act § 2, 12 Stat. at 392.
\textsuperscript{113} Id. § 1, 12 Stat. at 392.
\textsuperscript{114} See HIBBARD, supra note 32, at 351.
\textsuperscript{115} See supra notes 23-32 and accompanying text.
books, and no acreage limitation attached to such sales. So a land speculator could still anticipate settlement by buying land in unlimited amounts. Homesteading was not permitted on unsurveyed lands (although squatting surely did occur), until 1880. With cash sales still available, buyers were able to pay the speculator’s price for lands closer to existing towns. Additionally, millions of acres of land were off-limits to homesteading by virtue of the fact that 175 million acres were Indian land, 140 million acres were conveyed by the federal governments to new states as part of statehood, and 125 million acres were the subject of federal railroad grants.

E. Railroad Grants and Rising Antimonopoly Sentiment

The second half of the 19th century saw the rise of antimonopoly as a political movement, pressing for land reforms, particularly in instituting resale conditions in railroad grants. Settlers

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116 See GATES supra note 6, at 435.
117 Act of May 14, 1880, ch. 89, 21 Stat. 140.
118 See GATES, supra note 6, at 397. Also, the practice of commuting homesteaded land undermined the effort to ensure that the lands stayed in the hands of small owners, as the statute allowed individuals to buy the lands after six months instead of occupying and working the land for five years. These “commuted homesteads” often fell into the hands of timber companies. See Gary D. Libecap & Ronald N. Johnson, Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement, 39 J. Ec. Hist. 129, 131 (1979).
119 The model of the homestead, which represented a triumph of distributive justice for settlers, proved disastrous when applied to Native Americans. In 1887, Congress imposed the 160-acre settlement system on Indian tribes in the West. Act of Feb 8, 1887, ch 119 § 1, 24 Stat. 388, 388 (Dawes Act). The Dawes Act called for the transformation of communally held tribal land into 160-acre allotments for individual Indians, leading to the dissolution of many tribal communal cultures. See ROBBINS, supra note 61, at 283. The statute offered citizenship to tribal members who chose a “civilized life” by settling onto homestead allotments. § 6, 24 Stat. at 390. After carving up the communal Indian reservations into individual homestead tracts and allocating those tracts to the individual tribal members, the Dawes Act authorized the federal government to sell the remaining “surplus” reservation lands to white homesteaders in 160-acre parcels. § 5, 24 Stat. at 389–90. By 1906, three-fifths of Indian lands had been appropriated by white settlement. See ROBBINS, supra note 61, at 284.
120 See GATES, supra note 6, at 397.
121 See id. at 454; GEORGE DRAFFAN, TAKING BACK OUR LAND, A HISTORY OF RAILROAD LAND GRANT REFORM 10 (1998).
in the West developed great antipathy towards railroad companies, to which Congress granted millions of acres of land, in exchange for the service of building major transit infrastructure across the nation. Congress intended the companies to sell the land to pay for construction, but the companies retained vast acreages of formerly public lands for decades, engaging in their own form of land speculation. According to one account, the railroads influenced the settlement of fully one-third of the country.

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

Congress began to include such conditions in railroad grants after 1866. For example, the 1869 grant to the Oregon and California (O&C) Railroad included a proviso that the granted land “shall be sold to actual settlers only, in quantities not greater than one-quarter section [160

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122 See Tudor Hill, supra note 55, at 199.
123 See DRAFFAN, supra note 121, at 6 (citing Fred Shannon, The Railroad Land Grant Legend in American History Texts, 32 MISS. VALLEY HIST. REV. 572-74 (1946)). Although railroad grants covered fully 10 percent of the country, these grants were composed of opposite sections of land in a checkerboard pattern, increasing the influence of the railroads over miles of land. The monopoly railroads created was not limited to land; on the frontier the companies monopolized grain terminals, set transportation rates at “whatever the traffic could bear,” controlled mortgages and other loans, and often inspected farmers’ books to monitor their profits. See DRAFFAN, supra note 121, at 6-7.
124 Under the preexisting policy, “the railroad corporations have been able to withdraw vast tracts of land from the market and hold them for an unlimited time out of the reach of persons desiring to purchase for actual settlement, thereby retarding the settlement of the country, and doing manifest injustice to those seeking homes for cultivation by creating vase monopolies.” CONG. GLOBE, 40th Cong., 2d Sess. 4428 (1866) (statement of Rep. Benjamin Hopkins of Wisconsin).
125 See DRAFFAN, supra note 121, at 10.
acres] to one purchaser, and for a price not exceeding two dollars and fifty cents per acre.”

Not only did the legislation seek to break the monopoly by forcing sale to the public, it required sales to small landowners at specified prices. However, what was intended to be a redistributive policy ultimately failed, in many cases as it was often not enforced by the General Land Office, which suffered lack of funding and purportedly operated under the influence of the railroads.

By 1870, the House of Representatives resolved to issue no more railroad grants, deciding that the public lands should instead “be held for the exclusive purpose of securing homesteads to the actual settlers under the homestead and preemption laws . . .”

In the 1870s, Congress began to institute a series of forfeiture laws to re-vest hundreds of thousands of acres of railway grants into the public domain and reopen the land to settlement.

The forfeiture movement that provoked this change in policy was fueled by the fact that many

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127 See Draffan, supra note 121, at 10; David Malodwin Ellis, The Forfeiture of Railroad Land Grants, 1867-1894, 33 MISSISSIPPI VALLEY HIST. REV. 27, 31 n. 9, 33 (1946).

128 Although in the next term the house approved further grants, the railroad land grant policy came to an end in 1871. See Robbins, supra note 61, at 277.

129 Cong. Globe, 41 Cong. 2 Sess. 2095 (1870). Farm groups, labor organizations, land reformers, and politicians pressured Congress to make this change. Ellis, supra note 127, at 38.

railroad grantees had not finished their lines, and therefore had not yet fulfilled the conditions of the grants and were consequently withholding millions of acres from settlement.\textsuperscript{131} The 1880s brought further forfeiture legislation as antimonopoly sentiment grew, supported by agrarian parties that would later form the Populist Party.\textsuperscript{132} From 1884 to 1887 Congress passed bills to re-vest more than 28 million acres,\textsuperscript{133} then a general forfeiture law in 1890,\textsuperscript{134} which declared the forfeiture of all grants that were unearned at the time of the Act’s passage.\textsuperscript{135} The statute effectuated the forfeiture of only 5.6 million acres,\textsuperscript{136} however, several times less than the demands of Democrats. Ultimately, this era of reform energized agrarians and other antimonopolists, whose fervor would spark a new era of resource management in the 20th century, as discussed below in Section IV.

III. Natural Resources Development in the 19th Century

For most of the 19th century, federal natural resource management policies in the West were virtually non-existent. The government’s chief policy was to dispose of the vast expanse of the continent to American settlers. Not until 1831 did Congress legislate to manage publicly owned timber.\textsuperscript{137} Over the course of the 19th century, Congress began to enact resource-related laws with acreage limitations to encourage small resource users and imposed diligent pursuit

\textsuperscript{131} See DRAFFAN, supra note 121, at 10.
\textsuperscript{132} See Ellis, supra note 127, at 40.
\textsuperscript{134} Act of Sep. 29, 1890, ch. 1040, 26 Stat. 496.
\textsuperscript{135} ch. 1040, § 1, 26 Stat. at 496.
\textsuperscript{136} See Ellis, supra note 127, at 55.
\textsuperscript{137} Act of March 2, 1831, ch. 66, 4 Stat. 472. (outlining punishments for offenses related to destroying or removing timber reserved for naval purposes).
requirements and public access provisions, all classic antimonopoly safeguards against speculation and resource concentration. Loopholes and weak enforcement thwarted much of the antimonopoly potential of these limitations, however. On the other hand, Congress experimented with resource leasing—which allowed the public to share in the rent and royalties from the sale of the public resources—and later would authorize federal land planning based on resource suitability. Congress also protected access to the resources on public lands through the 1885 Unlawful Inclosures Act. Safeguarding public access was another core element of antimonopoly policy.

A. Antimonopoly in Early Timber Management

Public timber resources went largely unmanaged throughout most of the 19th century. For example, although an 1831 statute made it illegal to cut timber from the public lands, the public largely ignored the law. Settlers, railroad companies, and mill owners alike stole timber from government land, and the law went essentially unenforced. The reality on the frontier was that

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138 See infra notes 154-55, 159-63, 179-183, 209-10 and accompanying text (describing the antimonopoly elements of the Timber Cutting Act, Timber and Stone Act, the General Mining Law, and Unlawful Inclosures Act).

139 See infra notes 166-71 and accompanying text.


141 See, e.g. Sax, supra note 48, at 489-90 (explaining that the conceptual foundations of the antimonopolistic public trust doctrine arose from ideas expressed in the free public navigation provision of the Northwest Ordinance, early New England laws preserving for free public use the “great ponds,” and the setting-aside of national parks for public use).

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

settlers considered unfenced forests to be common resources. Commercial enterprises cleared government-owned acreage to feed growing cities and to power steamboats. During the second half of the century, Congress and the Department of the Interior began to acknowledge the needs of small timber users and outlaw commercial trespassers, enacting and implementing legislation to allow some users to privatize limited parcels of forest or cut timber from mining lands for domestic and mining purposes. Although these laws reflected antimonopoly principles in the sense that they restricted acreage and usage, lax government enforcement failed to avoid fraudulent privatization.

During the second half of the 19th century, Congress and the Interior Department began instituting policies to prevent monopolistic use of forest land, while recognizing the claims of small landowners. At mid-century, the agency began to enforce rules against timber trespass, using timber agents to gather evidence and prosecute offenders. Some state representatives decried the action as unfair to small homesteaders and frontiersmen, claiming that otherwise “law abiding” citizens had no choice but to steal. In the early 1850s, Interior clarified its antimonopoly policy

144 Most frontiersmen took the timber they found on unenclosed lands regardless of land ownership. See Gates, supra note 6, at 534. To the pioneers, the standing forest on the frontier served little value; it was an impediment to agriculture and improvements, provided useful building material for settlement, but was valuable only insofar as it could be cut and converted to shelter. See id. For a typical 19th century judicial view of the unenclosed forest land as a commons, see McConico v. Singleton, 1818 WL 787 (S.C. Const. App. 1818) (upholding the public’s right to hunt on privately owned, unenclosed rural forestland).

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


147 The Department of the Interior was founded in 1849. Act of March 3, 1849, ch. 108 § 1, 9 Stat. 395, 395.

148 For example, the Minnesota territorial legislature issued a statement reflecting its frustration with the fact that the federal government had yet to offer pine land at public sale, or open these lands to preemption sales. Nevertheless, hundreds of Minnesotans engaged in lumbering as an occupation. The territorial legislature argued against prosecuting those individuals for trespass,
by disclaiming any intent to interfere with bona-fide settlers taking a reasonable amount of wood for building homes, bridges, and fences. Instead, the main government target was “speculators whose sole object and pursuit are the manufacture and exportation of lumber, for their own profit, without compensation to the government or benefit to the country whence it is taken.” Over the next decades, railroads and sawmill operators tried to convince Congress that government timber agents were wresting firewood and building materials from the hands of average settlers and should be stopped. In reality, the agents were preoccupied with large-scale timber removals by corporations like the Atchison, Topeka, & Santa Fe Railroad, the Colorado Central Railroad, and the Boston & Colorado Smelting Company, which the U.S. sued for tens of thousands of dollars in stolen timber.

A large part of the timberlands had never been offered for sale, and there was still no good way for the average settler in the mid-century to legally obtain timber from those lands. Finally, in 1878, Congress enacted both the Timber and Stone Act and the Timber Cutting Act to make timber available to settlers and miners. Both statutes reflected antimonopoly sentiments.

claiming the prosecutions would “fill[] the pockets of a few government officials at the expense of the law abiding community[]” See GATES, supra note 6, at 538 (quoting a Memorial signed by Alexander Ramsey, Territorial Governor (Feb. 14, 1852)).
149 See GATES, supra note 6, at 539 (quoting Sec’y Interior McClelland’s Letter of May 14, 1852).
150 See GATES, supra note 6, at 549, 554.
151 See 7 CONG. REC. 1533 (Mar. 6, 1878) (Statement of Rep. Charles Foster of Ohio, defending the legitimacy of these suits and asking for $20,000 in appropriations so that the Secretary of the Interior might continue to investigate and prosecute them).
153 Paul Gates claimed that the Timber and Stone Act aimed less to benefit the settler, and more to open up unoffered timberlands to western timber companies. GATES, supra note 6, at 550-51. However, the Senate voted against offering the land at auction in unlimited amounts. See id. at 551.
The Timber Cutting Act allowed citizens of specified states and territories to cut timber without charge from “mineral lands” for building, agricultural, mining, or other domestic purposes. 154 Although Congress limited timber cutting to domestic, agricultural, or mining purposes in order to support the individual miner and settler, expressly excluding railroad companies,155 the government failed to enforce the Act to prevent large companies from benefitting from it. 156 Indeed, the General Land Office expressed concern in an 1882 report that “Depredations upon the public timber by powerful corporations, wealthy mill owners, lumber companies and unscrupulous monopolists . . . are still being committed to an alarming extent and great public detriment.” 157 The law was largely unenforced against unauthorized commercial extraction.158

The Timber and Stone Act, which Congress enacted the same day in 1878, was a complement to the Timber Cutting Act, reflecting the same antimonopoly sentiment. The statute authorized the government to offer for sale, at $2.50-per-acre minimum, public land chiefly valuable for timber or stone, on lands unfit for cultivation.159 The Act restricted the sale acreage to 160 acres and required the purchaser to file an affidavit that the timber and stone was for

156 See Hibbard, supra note 32, at 464.
158 See Gates, supra note 6, at 552 n. 60 (“the registers had shown a marked tendency to tolerate or perhaps one should say wink at infractions of the law by the larger economic interests . . . .”).
159 Act of June 3, 1878, ch. 151 § 1, 20 Stat. 89, 89 (applying to surveyed lands within California, Oregon, Nevada, and the Washington Territory).
personal use, not for speculation or on behalf of any other person.\textsuperscript{160} Congress intended this statute as homestead-like legislation, in which small resource users could privatize only enough forested land for personal benefit.\textsuperscript{161} Nevertheless, large companies often purchased Timber-and-Stone acreage by fraud or secondary purchase, amassing large land holdings.\textsuperscript{162} The Act also declared that timber removal from public lands was illegal, but the law made clear that miners and farmers would not be prosecuted if they cut timber in the course of clearing their farm for tillage or for taking the amount of timber necessary to support improvements on the land.\textsuperscript{163} Decades later, in 1909, the National Conservation Commission would urge repeal of the Act, partly because its antimonopolistic policies were ignored in practice, and partly because of the vast disparity between the value of the land and the meager compensation the government obtained from sales.\textsuperscript{164}

B. Antimonopoly in Early Mining Law

The federal government experimented with different approaches to mineral disposition throughout the 19\textsuperscript{th} century until 1872. Several early federal mining policies contained

\textsuperscript{160} Id. § 2, 20 Stat at 89.
\textsuperscript{161} See Gary Libecap & Ronald Johnson, Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement, 39 J. ECON. Hist. 129, 129-32 (1979) (comparing the Homestead Act’s acreage limits and bona-fide settlement requirement to the requirements of the Timber and Stone Act, arguing that timber companies lacked sufficient lawful opportunities to acquire profitable amounts of timber acreage, so they ignored the law).
\textsuperscript{162} Hibbard, supra note 32, at 466 (noting that one company acquired over 100,000 acres of the most valuable redwood lands in California).
\textsuperscript{163} ch. 151 § 4, 20 Stat. 90 (“. . . it shall be illegal to cut . . . any timber growing on any lands of the United States, in said States and Territory [California, Oregon, Nevada, and in the Washington Territory] . . . with intent to export or dispose of the same . . . and any person violating the provisions of this section shall be guilty of a misdemeanor . . . provided, that nothing herein contained shall prevent any miner or agriculturalist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States . . . .”).
\textsuperscript{164} See Hibbard, supra note 32, at 468 (citing REPORT OF NATIONAL CONS COMM’N, S. DOC. NO. 676, at 71 (1909)) (explaining that the federal government was losing $25 million annually of the actual value of timber that purchasers acquired under the Act).
antimonopoly elements, such as authorizing disposition by lease (rather than sale), acreage limitations, investment requirements, and location prerequisites.

Before the Civil War, the federal government’s mineral policy was minimal. The land disposition statutes reserved mineral lands to the federal government, although since mineral lands were hard to identify, homesteaders or purchasers patented a considerable amount of land containing minerals.\textsuperscript{165} In 1807, the government experimented with a leasing policy for lead mines in the Indiana Territory.\textsuperscript{166} Although Congress terminated the leasing program in 1846 as an economic failure,\textsuperscript{167} the leasing system was a way for the government to encourage resource development while retaining public title to the land and also obtaining fair economic return for the public.

The Supreme Court upheld the 1807 leasing policy some three decades later in \textit{United States} v. \textit{Gratiot},\textsuperscript{168} a case in which the federal government sought to recover unpaid royalties from a lessee. The miner claimed that the government could not retain ownership of the leased land under the Property Clause,\textsuperscript{169} but the Supreme Court ruled that Congress had wide discretion as to how to dispose of the public lands because “this power is vested in Congress without limitation.”\textsuperscript{170} \textit{Gratiot} was the first of a long line of decisions in which the Court upheld broad

\begin{footnotes}
\item[165] \textit{See ROBBINS, supra} note 61, at 151.
\item[166] Act of March 3, 1807, ch. 49 § 5, 2 Stat. 448, 449 (enacting a leasing system limited to terms of five years).
\item[167] \textit{See ROBBINS, supra} note 61, at 151 (explaining that many ignored the leasing requirement, and that the administrative costs of the leasing program exceeded the royalties it produced).
\item[168] 39 U.S. 526, 538 (1840).
\item[169] U.S. \textsc{const.} art IV, § 3, cl. 2: “Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property, belonging to the United States.”
\item[170] 39 U.S. at 537.
\end{footnotes}
federal power to establish the conditions under which private parties may obtain private interests in public resources.\textsuperscript{171}

But Congress abandoned the leasing idea in 1846, liberalizing disposition by offering mineral lands for sale in unlimited amounts.\textsuperscript{172} In the West, the gold rush frenzy brought on by the discoveries in northern California prevented the federal government from establishing a workable sales system.\textsuperscript{173} Not until after the Civil War did Congress address public lands mining again, declaring in the 1866 Mining Act that both surveyed and unsurveyed mineral lands would be free and open to exploration for lode mining\textsuperscript{174} and occupation.\textsuperscript{175} In 1870, Congress offered placer mine lands for sale at $2.50 an acre.\textsuperscript{176} In 1872, it incorporated both placer and lode mining into the 1872 General Mining Law, which offered mineral deposits for free and lode claim patents at $5 per acre.\textsuperscript{177} The 1872 law established a capture system for hard rock minerals that persists to this day.\textsuperscript{178}

Three major factors of the 1872 law’s mining paradigm reflected antimonopoly characteristics: 1) size limits, 2) diligent pursuit requirements, and 3) location restrictions. First,

\begin{itemize}
  \item \textsuperscript{171} See, e.g., Light v. United States, 220 U.S. 523, 536 (1911) (“The United States can prohibit absolutely or fix the terms on which its property may be used.”); U.S. v. Grimaud, 220 U.S. 506, 523 (1911) (requirement of a permit to graze a forest reservation constitutional).
  \item \textsuperscript{172} See Act of July 11, 1846, ch. 36, 9 Stat. 37 (Illinois and Wisconsin); Act of March 1, 1847, ch. 32, 9 Stat. 146 (northern Michigan); Act of March 3, 1847, ch. 54, 9 Stat. 179 (northern Wisconsin); See ROBBINS, supra note 61, at 151.
  \item \textsuperscript{173} See ROBBINS, supra note 61, at 220 (explaining that the miners established associations and self-regulated their claims, making their own laws for mining districts).
  \item \textsuperscript{174} Act of July 26, 1866, ch. 262 § 3, 14 Stat. 251, 252 (limiting plats and surveys to one vein or lode each).
  \item \textsuperscript{175} Id. § 1, 14 Stat. at 251.
  \item \textsuperscript{176} Act of July 9, 1870, ch. 235 § 12, 16 Stat. 217, 217. Placer mining takes advantage of minerals that have been deposited by the action of rivers and streams. See GEORGE COGGINS & ROBERT GLICKSMAN, 4 PUB. NAT. RESOURCES L. § 42:12 (West 2015).
  \item \textsuperscript{177} General Mining Act of 1872, ch. 152 § 6, 17 Stat. 91, 93 codified at 30 U.S.C. § 29.
  \item \textsuperscript{178} GORDON M. BAKKEN, THE MINING LAW OF 1872: PAST, POLITICS, AND PROSPECTS 7 (2008).
\end{itemize}
Congress imposed limits on the size of claims.\textsuperscript{179} Second, the 1872 law required an annual monetary investment,\textsuperscript{180} aimed at deterring individuals and companies from excluding others by claiming many alleged “discoveries.”\textsuperscript{181} Third, the text of the statute forbade a miner from locating a claim until discovery of a valuable mineral.\textsuperscript{182} The latter provision was an attempt to prevent a speculator from staking many parcels and excluding other prospectors. All these limits reflected an intent to democratize access to the resource and promote diligent pursuit of small claims by individual prospectors.\textsuperscript{183} However, as Gordon Bakken has noted, without reform, in the modern day the Act now works to the benefit of large corporations.\textsuperscript{184}

C. The Antimonopoly Battle over Rangelands

Although Congress created a number of enforceable rights for miners,\textsuperscript{185} it never created similar property rights for ranchers. Throughout the 19\textsuperscript{th} century, Congress instead instituted a policy of maintaining free and open access to grasslands for everyone, culminating in an anti-
fencing measure enacted in 1885.\textsuperscript{186} While monopolistic ventures were attempting to privatize the open range, the Supreme Court upheld Congress’s decision that the public range not fall into possession of the few.\textsuperscript{187}

Not until well into the 20\textsuperscript{th} century did the federal government establish an allocation system for the range resource. The 1862 Homestead Act opened rangelands to settlement,\textsuperscript{188} but ranchers often needed more forage than a 160-acre homestead could provide.\textsuperscript{189} To secure a workable amount of land for barns, corrals, and pastures, ranchers acquired adjacent homesteads from family members\textsuperscript{190} and required their cowboys to make entries under Timber Culture, Homestead, and Desert Land Acts,\textsuperscript{191} thereby undermining the antimonopolistic goals of those statutes. In fact, many entries under the Desert Land Act were not actually desert lands. According to Roy Robbins, the statute did more to encourage western ranching than to facilitate reclamation of the arid lands.\textsuperscript{192} Outside their base-holdings, ranchers made use of the great biomass growing

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\textsuperscript{187} Camfield v. U.S., 167 U.S. 518 (1897) (upholding congressional authority to restrict the fencing of private lands that had the effect of enclosing public lands).
\textsuperscript{188} Some portions of public grasslands were unfit for cultivation. Nevertheless, the Homestead Act allowed settlers to perfect their claims by showing proof of residence or cultivation after five years. Section 2 of the Act required a settler to “prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years.” Homesteading Act, ch. 75 § 2, 12 Stat. at 392.
\textsuperscript{189} See WILKINSON, supra note 143, at 83.
\textsuperscript{190} See id.
\textsuperscript{191} ROBBINS, supra note 61, at 250; The Desert Land Act allowed an individual to enter 640 acres of land if he could irrigate the land—a requirement considerably more burdensome than the Homestead Act’s conditions of residing upon or cultivating the acreage. Act of March 3, 1877, ch. 107 § 1, 19 Stat. 377, 377.
\textsuperscript{192} See ROBBINS, supra note 61, at 250.
\end{flushleft}
on the unreserved public domain for their livestock. The grazing took place at the sufferance of the federal government.

On the public domain, a first-come, first-served attitude prevailed among cattlemen. With no secure way of maintaining their customary cattle range, ranchers would post notices in local papers, warning others not to graze on the acreage they claimed. The ranchers’ competition for the range resource came both from homesteaders and nomadic shepherders. The yeoman farmer, who could obtain legal title to the land, threatened the free rein of the rancher, who could not. Shepherders roamed the public lands in search of forage. And since the public range was interspersed with private lands, the checkerboard ownership pattern created access issues for both cattle and sheep graziers. Access across private holdings produced numerous conflicts in the 19th and early 20th centuries.

A celebrated 1890 case exemplified many of the issues posed by the checkerboard pattern of public and private lands. Buford, a cattle rancher running a stock-raising company in Utah, sued several shepherds for alleged trespass on his land—the result of driving a herd of sheep across checkerboarded lands over a roughly 1500-acre area that included both public lands as well as private lands. Buford intended to achieve exclusive use of the publicly owned parcels

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193 See Wilkinson, supra note 143, at 83. Violence between ranchers and homesteaders was not uncommon. In one notable case, the two factions engaged in an all-out war in Johnson County, Wyoming, following the lynching of a homesteading couple. Id. at 86.
195 See Weeks Scott, supra note 194, at 163.
196 See Wilkinson, supra note 143, at 85.
197 Buford v. Houtz, 133 U.S. 320 (1890).
198 The company was a large concern, pasturing 20,000 head of cattle valued at $100,000 (in 1890 dollars). Id. at 322.
199 Id.
interspersed between his privately owned parcels by seeking an injunction against trespass by
the sheep over his private parcels.\textsuperscript{201}

The Utah territorial court declined to enjoin the shepherds, ruling that the usual rules of
trespass did not apply to unfenced public rangelands that were used almost exclusively for
livestock grazing.\textsuperscript{202} The court recognized the great hardship that an injunction would work on
nomadic shepherds, virtually preventing their use of public lands.\textsuperscript{203} The Supreme Court affirmed,
declaring that the shepherds possessed an implied license to access the public parcels, and therefore
could let their animals run at large.\textsuperscript{204} The Court therefore rejected Buford’s trespass claim,
suggesting that the rancher’s motive was to monopolize public lands:\textsuperscript{205}

Of this 921,000 acres of land, the plaintiffs only assert title to 350,000 acres; that
is to say, being the owners of one-third of this entire body of land, which ownership
attaches to different sections and quarter sections scattered through the whole body
of it, they propose by excluding the defendants to obtain a monopoly of the whole tract, while two-thirds of it is public land belonging to the United States . . .\textsuperscript{206}

Thus, the Supreme Court protected the public’s right of access to the public parcels, recognizing
that Buford’s right to exclude trespassers from his private lands could not be used to evict the
public from checkerboarded lands, as the public had acquired an implied easement to access the
adjacent public property consistent with western custom of allowing livestock to roam at large.\textsuperscript{207}

\begin{itemize}
\item \textsuperscript{200} Id. at 325.
\item \textsuperscript{201} Id. at 325-26 (The stock-raisers “mainly, seek by the purchase and ownership of parts of these lands, detached through a large body of the public domain, to exclude the defendants from the use of this public domain as a grazing ground, while they themselves appropriate all of it to their own exclusive use.”).
\item \textsuperscript{202} Buford v. Houtz, 18 P. 633, 634 (Utah 1888).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} 133 U.S. at 326.
\item \textsuperscript{205} Id. at 332.
\item \textsuperscript{206} Id. at 325-26.
\item \textsuperscript{207} Id. at 327-28, 332.
\end{itemize}
To protect their ability to continue to pasture, ranchers turned to fencing the public lands and arming riders to defend them.208 In the 1880s, the government began taking action against fencing public lands,209 and in 1885, Congress enacted the Unlawful Inclosures Act, which criminalized such fencing to prevent ranchers from monopolizing rangeland, thereby restricting homestead settlement, access and other uses.210

Nonetheless, ranchers and others continued to fence, obstructing public access to federal lands.211 One creative method of fencing reached the U.S. Supreme Court in 1897. In 1894, the federal government filed suit against Daniel Camfield and William Drury for enclosing some 20,000 acres of public land in Colorado, although they purposefully refrained from building their fences on the public checkerboard lands and constructed them only on the odd sections they had purchased from the Union Pacific Railway Company.212 The government sought removal of the

208 See ROBBINS, supra note 61, at 250.
209 The first anti-enclosure policies arrived through executive action—the Federal Lands Commissioner announced that fencing would not be tolerated where it obstructed a settler’s entry. See Weeks Scott, supra note 194, at 169 (citing U.S. General Land Office, ANNUAL REPORT OF THE COMMISSIONER 30 (1883)).
210 Act of Feb. 25, 1885, ch. 149, 23 Stat. 321, codified at 43 U.S.C. § 1061; see Weeks Scott, supra note 194, at 169. The government did not file suits against enclosures under 160 acres unless the local U.S. Attorney consulted the Secretary of the Interior. See id. According to one court, the intent of the statute was “to prevent the inclosure and appropriation of vast tracts of public lands, said to be millions of acres in extent, by associations of wealthy cattle owners, known as ‘cattle kings,’ without a shadow or pretense of title. These tracts were surrounded by barbed wire fences, and all persons desirous of settling upon the lands under the laws of the United States were vigorously excluded; in some cases by violence or threats.” U.S. v. Brandestein, 32 F. 738, 741 (N.D. Cal 1887). Even companies headquartered in the East Coast and England fenced in land in the West, claiming that a man had a right to “as much range as he could fence.” See HIBBARD, supra note 32, at 477 (citing S. DOC. No. 127 (1884)).
211 See e.g. Caldwell v. Bush, 6 Wyo. 342 (1896); U.S. v. Bisel, 8 Mont. 20 (1888); Anthony Wilkinson Livestock Co. v. McIlquam, 14 Wyo. 209 (1905).
fence, and the district court decided that the plain language of the Unlawful Inclosures Act prohibited their activities.\textsuperscript{213} The Eighth Circuit affirmed.\textsuperscript{214}

The Supreme Court agreed that Camfield and Drury had violated the Unlawful Inclosures Act, which the Court decided reached private lands checkerboarded with public lands.\textsuperscript{215} The Court decided that applying the statute to fences on private lands was not unconstitutional because the federal government had the power to abate nuisances affecting the public lands, due to its ownership of and its trusteeship over publicly owned lands.\textsuperscript{216} Describing the federal trust duty as ensuring that the public retained fair access to land resources, the Court explained that: “. . . it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market.”\textsuperscript{217} Although Camfield and Drury claimed to be enclosing the land for the purpose of irrigating (rather than ranching),\textsuperscript{218} the case set precedent for cattle fences as well.\textsuperscript{219}

Despite judicial, congressional, and executive recognition of the public’s right of access, by the end of the 19th century, range-users had no ownership interest in the public range, or even an explicit right to graze upon it. Instead, they possessed only an implied license, as the \textit{Buford} Court described it.\textsuperscript{220} Other resource users—miners in particular—had the right to obtain an

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 563.
\item Camfield v. U.S., 66 F. 101, 104 (8th Cir. 1895).
\item \textit{Camfield}, 167 U.S. at 528.
\item \textit{Id.} at 525-26.
\item \textit{Id.} at 524.
\item \textit{Id.} at 524-26 (explaining that the federal government’s power under the Unlawful Inclosures Act to remove fences sited on private lands inheres in the federal proprietary power and the related trustee duty to protect public lands from injurious nuisance structures).
\item See Weeks Scott, \textit{supra} note 194, at 170.
\item See 133 U.S. at 326; WILKINSON, \textit{supra} note 143, at 88.
\end{enumerate}
\end{footnotesize}
exclusive ownership interest in public lands, but ranchers could not. Charles Wilkinson suggested this dichotomy arose because of the rise of populism in the late 19th century increased public opposition to privatization of large tracts of public land, especially in the wake of controversy over large railroad holdings. Not until 1934 would graziers on unreserved public lands obtain express permission for livestock use, and then only through a federal permit system.

IV. Antimonopoly and Conservation

The antimonopoly strain in public land law reached its height around the turn of the 20th century. The populist movement that dominated politics in rural America, especially in the Midwest and South, sought regulatory reform of railroad monopolies and support for farmers in debt. Roughly contemporaneously, a progressive movement evolved in urban America, also calling for regulation of industry, rights of labor to organize, food safety regulation, and trust-busting. The federal government, chiefly under the Theodore Roosevelt Administration,

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221 As one official wrote, “The laws of the United States in regard to the disposition of the public lands constitute a barrier to the purchase of such lands in quantities sufficiently large for the conduct of the range and ranch cattle business. This has resulted from the fact that the public sentiment of this country is and has always been strongly opposed to the disposition of the public lands in large quantities, either to one person or to corporations.” H.R. Ex. Doc. No. 267 (1884-85), quoted in Weeks Scott, supra note 194, at 159.
222 See Wilkinson, supra note 143, at 88.
226 See HOFSTADTER, supra note 225, at 196-212, 225-54. See also the Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, codified at 15 U.S.C. §§ 1–7 (requiring the government to investigate trusts and combinations, and prohibiting the artificial raising of prices through anti-competitive monopoly agreements).
responded to the apparent end of the American frontier by beginning to conserve the nation’s public resources through establishing reserves, instituting permit systems, and retaining land in public ownership while leasing certain resources. Antimonopoly principles were evident in the government’s assuming the role of actively managing public natural resources, rather than simply privatizing them.\textsuperscript{227}

Turn-of-the-century Progressive conservationists envisioned public land management as a prominent part of antimonopoly policy, providing opportunities to foster egalitarianism.\textsuperscript{228} The Progressive antimonopoly impulse, a reaction to the failures of the previous policies, emphasized government withdrawal and reservation of lands from disposition, 2) the introduction of resource leasing systems, especially for fuel minerals and private hydropower generation, 3) continued funding of large water projects, especially irrigation dams, designed to produce widespread public benefits, and 4) preservation of resources like parks for the enjoyment of future generations, the first express statutory recognition of intergeneration equity in American natural resources law. In effect, the abuses of 19\textsuperscript{th} century public land policies created widespread public dissatisfaction that led to the end of the federal land disposition era and fueled an era of reservation and conservation of public lands that extends to the present.

\textsuperscript{227} The advent of active public resource management was a sharp contrast from the management-by-disposition style that existed in the mid-1800s. As Jedidiah Purdy described it, “Public lands were envisioned as being held in trust for use by, and prompt disbursement to, the citizens who had the only ultimate and just claim to them. In this view, if the federal government retained public lands, it set itself up as that bete noire of the era, a monopolist—[the worst kind, because it was both creator and beneficiary of the monopoly].” Jedediah Purdy, \textit{The Politics of Nature, Climate Change, Environmental Law, and Democracy}, 119 YALE L. J. 1122, 1142 (2010).

\textsuperscript{228} See Leonard Bates, \textit{Fulfilling American Democracy: The Conservation Movement, 1907-1921}, 44 \textit{MISSISSIPPI HIST. REV.} 29, 31 (1957) (“There were several ways to handle the monopolization of public resources . . . [including] to hold on to the remaining public lands, at least temporarily, preventing further monopolization; [and] to attempt to give the people a fuller share of opportunities and profits.”).
A. Reservation and Withdrawal

1. Timberland Reservations

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

Since Congress established no management policies for these forest reserves, Gifford Pinchot remarked that the regime the reserves created was “clearly impossible. . . . [N]o timber could be cut, no forage could be grazed, no minerals could be mined, nor any road built, in any Forest Reserve.” Consequently, in 1897, Congress established policies for the forest reserves in the National Forest Organic Administration Act, which called for improving and protecting forested lands within reservations, securing favorable conditions of water flows, and furnishing a continuous supply of timber. Congress passed the Act to maintain a priority for conservation of

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229 See James L. Huffman, A History of Forest Policy in the United States, 8 Envt’l L. 239, 258 (1978). The impetus for the act was the vast misappropriation of public forest lands under the land disposition laws. See id. at 259.
231 See Huffman, supra note 229, at 260.
233 Act of June 4, 1897, ch. 2, 30 Stat. 11, 34-35. On the Organic Act’s purposes, see United States v. New Mexico, 438 U.S. 696, 707 n. 14 (1979) (construing the statute’s purposes narrowly in the case of reserved water rights). The 1897 Organic Act was responsive to the concerns of Western states, which wanted working forests, not de-facto wilderness areas. See Huffman, supra note 229, at 262-64. The compromise came in the form of Senator Richard
the reserves, while allowing controlled commercial extractive of uses of the forests.\textsuperscript{234} The Act gave the government authority to allow the use of “such timber as can be spared without injury to the forest when its use is a public necessity.”\textsuperscript{235} Although the Organic Act rejected calls from some to forbid all timber harvesting in reserves, it limited the authority of the Secretary to the sale of dead and physiologically mature trees.\textsuperscript{236} But while the Act did not authorize clearcuts of merchantable timber in forest reserves,\textsuperscript{237} they became commonplace in the post-World War II era to meet the demand for new housing.\textsuperscript{238}

Gifford Pinchot,\textsuperscript{239} the father of the forestry conservation movement and the first Forest Service Chief, established an antimonopoly ethic for administering the reservations. His Pettigrew’s amendment to the pending Civil Appropriations bill. His amendment ensured that the forest reserves would be managed for sustained yield, contributing to the economy of the nation. \textit{Id.}

\textsuperscript{234} See ch. 2, 30 Stat. at 35 (“For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior . . . may cause to be designated and appraised so much of the dead, matured, or large growth of trees . . . as may be compatible with the utilization of the forests thereon, and may sell the same . . . to be used in the State or Territory in which such timber reservation is situated [] but not for export therefrom.”). The Act also provided that the Secretary could permit bona fide settlers, miners, and residents to cut timber for firewood, building, mining, and other domestic purposes. \textit{Id.}

\textsuperscript{235} West Va. Div. of Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 951 (1975) (quoting 25 \textit{CONG. REC.} 2374 (1893) (statement of Congressman McRae, Chairman of the House Committee on Public Lands, upon introducing an 1893 version of the bill)).

\textsuperscript{236} \textit{Id.} at 952 (“that the living trees shall be preserved that is, under the direction of the Secretary of the Interior so that the large trees, the dying trees, the trees that will grow no better in time, may be sold and removed by the purchaser . . . .” quoting 30 \textit{CONG. REC.} 909 (1897) (statement of Senator Pettigrew)). In fact, to allow the Forest Service to continue to engage in clearcutting, Congress amended the Forest Rangelands Renewable Resources Planning Act in 1976. National Forest Management Act, Pub. L. No. 94-588, § 6, 90 Stat. 2949, 2952-56 (1976). For further discussion, see Section V.

\textsuperscript{237} 522 F.2d. at 952.

\textsuperscript{238} \textit{See infra} notes 362-67 and accompanying text, discussing the advent of the National Forests Management Act, which accommodated and regulated the clearcutting practices of the Forest Service.

\textsuperscript{239} Pinchot became the first Chief of the Forest Service after Congress transferred jurisdiction over the forest reserves from the Interior to the Agriculture Department in 1905. \textit{See} \textit{WILKINSON}, \textit{supra} note 143, at 90-92.
philosophy contained a large dose of utilitarian sentiment, maintaining that the management of the forests should provide the greatest good for the greatest number over the long-run: “In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies.”

Pinchot viewed the Forest Service as the first agency to assert that the “small man” should be the priority user of natural resources of the West: “Better to help a poor man make a living for his family than help a rich man get richer still. That was our battle cry.” The Pinchot ethic reflected Progressive opposition to the monopolistic excesses of the 19th century.

2. Coal, Oil, and Gas Withdrawals

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

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240 Letter from the Secretary of Agriculture (Feb. 1, 1905), quoted in PINCHOT, supra note 232, at 261. Pinchot wrote the letter himself, but styled it as a directive from the Secretary and had it signed by him. Id. at 260. See also WILKINSON, supra note 143, at 128.

241 PINCHOT, supra note 232, at 259.

242 See WILKINSON, supra note 143, at 128; PINCHOT, supra note 232, at 507 (“Monopoly on the loose is a source of many of the economic, political, and social evils which afflict the sons of men. Its abolition or regulation is an inseparable part of the conservation policy.”)

243 Oil Placer Act of 1897, ch. 216, 29 Stat. 526 (“any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.”)
to 160 acres for individuals and 320 acres for associations,244 although companies were claiming much more, flouting antimonopoly policy through fraudulent entries.245

Progressives believed that the fuel minerals, like public forests and navigable waterways, were the equivalent of public utilities, not private commodities.246 Yet coal and railway companies ignored the acreage limitations of the 1873 coal statute by making fraudulent entries under it and other public land laws.247 Thus, in 1906, Theodore Roosevelt began to use his executive authority to withdraw mineral lands from the operation of the General Mining Law.248 That year, he withdrew 66 million acres of known coal deposits.249 Three years later, in 1909, President Taft withdrew over three million acres of oil lands in California and Wyoming in the wake of a U.S. Geological Survey report showing that the oil lands were being privatized at such an alarming rate that the government would soon have no option but to buy oil back from private claimants.250

244 Act of March 3, 1873, ch. 279 § 1, 17 Stat. 607, 607.
245 See United States v. Trinidad Coal & Coking Co., 137 U.S. 160, 169, 11 S. Ct. 57, 60 (1890) (each person is “permitted to enter not exceeding 160 acres, while ‘associations of persons,’ severally qualified, as above, may enter not exceeding 320 acres. The object of these restrictions as to quantity was, manifestly, to prevent monopolies in these coal lands.”).
246 Statement of Theodore Roosevelt, Feb. 13, 1907, in GATES, supra note 6, at 728 (citing 41 CONG. REC. 2806-8 (1907)).
247 See GATES, supra note 6, at 726.
249 See WILKINSON, supra note 143, at 50 (explaining that a withdrawal is like a zoning requirement that prohibits a specific use. Roosevelt used the withdrawals to prohibit further fraudulent entries of coal lands).
250 See GATES, supra note 6, at 732. This executive withdrawal came before Congress recognized a presidential power to withdraw federal land from settlement, location, sale, or entry in 1910. Pickett Act of 1910, ch. 421, 36 Stat. 847. However, the Supreme Court upheld the 1909 withdrawal, under the theory that the Congress had impliedly consented to Roosevelt’s exercise of power; over the years, the executive had issued orders setting aside public lands for military and Indian reservations, and Congress declined to exercise its power to override them. United States v. Midwest Oil Co., 236 U.S. 459, 474-75 (1915).
Privatization of public oil reserves threatened national security, since the Navy needed oil as it shifted from coal to oil-powered ships in the years before World War I.251

Earlier, in tandem with his policy of withdrawals, President Roosevelt advocated a leasing system as the best way to maintain federal title in the minerals, avoid resource monopoly, and provide benefits to the public.252 However, not until 1920 did Congress enact a leasing system for coal, gas, oil, and other “minerals,” as discussed below in subsection C.

B. Economies of Scale and Efficient Development for the Public Good

By the end of the nineteenth century, it became apparent that federal disposition policies failed to spur productive use of all cultivable lands. The Desert Land Act did not yield the results its drafters intended. Although the statute granted settlers a large amount of land—640 acres instead of 160 acres—the condition that the entryman had to irrigate was a requirement not easily met.253 Irrigation was no easy undertaking; construction of dams and canals was not a practicable for most individuals, and difficult even for collectives.254 Consequently, in 1894, Congress passed the Carey Act,255 to encourage private capital investment into irrigation projects. To provide an incentive to states to encourage irrigation facilities, the Act authorized the Secretary of the Interior to grant thousands of federal acres to sell irrigable public lands to “actual settlers” in tracts no larger than 160 acres, to provide incentives to states to supervise and encourage irrigation works.256

251 See Coggins & Glicksman, supra note 176, at § 39:2. The U.S. was following Britain’s lead which was making the shift due to the foresight of Winston Churchill. The shift to oil-powered ships gave the Allies a considerable advantage in World War I.
252 See Gates, supra note 6, at 728.
253 Desert Land Act, ch. 107, § 1, 19 Stat. 377, 377 (1877) (requiring a claimant to declare that he intends to reclaim a tract of desert land not exceeding one section (640 acres), and to irrigate that section within three years).
254 See Wilkinson, supra note 143, at 243.
256 Id. § 4, 28 Stat. at 422. Senator William Stewart estimated that the West offered 75 to 100 million acres of irrigable arid land. By 1899, irrigation reached only 7.2 million of these acres.
The Carey Act’s reliance on the states to finance irrigation works was in reaction to the undercapitalized or fraudulent claims commonplace under the Desert Land Act and failed to produce efficient or workable infrastructure.257

In 1902, the federal government began actively encouraging arid lands reclamation by providing irrigation to small homesteaders.258 The Reclamation Act authorized the Secretary of the Interior to locate and construct irrigation works for the storage, diversion, and development of streams and rivers.259 The statute had two primary purposes: 1) to promote national development in the West, and 2) to distribute its benefits widely, rather than allow them to be monopolized by the few.260 The Act’s antimonopoly policy261 limited the size of ownership of lands irrigated with reclamation water entitled to 160 acres and required the owner to be a bona fide resident of the

See GATES, supra note 6, at 651. The Carey Act had an especially large effect on Idaho whose population increased with the increase in irrigated acreage. Between 1900 and 1920, irrigated acreage in the state increased from 40,000 to 620,000 acres. At the same time, population increased from over 5,000 people to nearly 70,000. See Hugh T. Lovin, The Carey Act in Idaho, 1895-1925: An Experiment in Free Enterprise Reclamation, 78 PAC. NW. QUARTERLY 122, 126 (1987).

257 See HIBBARD, supra note 32, at 429 (“In Wyoming a great deal of so-called ditching was done by plowing a furrow or by cutting a ditch one foot deep where eight feet were needed. Moreover, these ditches failed to follow the contour of the land with reference to the habits of water, and often they began where there was no water to be conducted and ended where there was no field to receive it . . . .”).

258 See Paul S. Taylor, Excess Land Law: Calculated Circumvention, 52 CAL. L. REV. 978, 980 (1964) (citing REPORT BY THE COMMITTEE OF SPECIAL ADVISERS ON RECLAMATION, S. DOC. NO. 92, at 111 (1924)). Taylor explained that the Reclamation Act required the Secretary of the Interior to prevent ineligible lands—those in excess of 160 acre limitation—from receiving project water. His analysis centered on the underground deliveries of water to high-concentration ownership lands in the San Joaquin Valley in the 1960s, which were ineligible for project water because they were owned in parcels of greater than 160 acres. Id. at 982.


260 See Taylor, supra note 258, at 979 (citing HOUSE COMMITTEE ON ARID LANDS, REPORT ON RECLAMATION AND ARID LANDS, H.R. REP. NO. 1468, at 3 (1902)). Taylor explained that the Reclamation Act required the Secretary of the Interior to prevent ineligible lands—those in excess of 160 acre limitation—from receiving project water. His analysis centered on the underground deliveries of water to high-concentration ownership lands in the San Joaquin Valley in the 1960s, which were ineligible for project water because they were owned in parcels of greater than 160 acres. Id. at 982.

261 Taylor, supra note 258, at 979 (describing section 5 of the act as “the legal instrument for effectuating the antimonopoly policy of the law.”).
irrigated land. The acreage limitation echoed the Homestead Act, reaffirming the basic public domain disposition principle that public lands and resources should inhere to the benefit of many, but it was ignored in practice and later liberalized by Congress.

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

262 “No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land . . . .” Pub. L. 57-161 § 5, 32 Stat. at 389.
264 Speaking of the use of streamflows for irrigation, President Roosevelt said, “The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent home-makers, to use and develop it for themselves and for their children and children's children.” Theodore Roosevelt, State of the Union Address (Dec. 3, 1907).
The Roosevelt Administration pursued antimonopoly policy in hydroelectric power project development, and the president vetoed grants of power sites to private companies, which Congress proposed on unlimited terms, and which the president considered to be monopolistic.

In his veto of a site grant for a dam on the James River, he declared,

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

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

In 1920, Congress included antimonopoly policies in the Federal Power Act’s regulation of private hydropower development on navigable waterways. The Act contained multiple antimonopoly elements. First, it imposed a limit of a fifty-year license term, reserving ownership of streamflows in the public. Second, the statute included a preference for publicly-owned developments. Third, it contained a requirement that a licensed facility had to be best adapted to a comprehensive scheme of improvement and use for navigation, water-power development, and other beneficial public uses. Fourth, it prohibited combinations for the purpose of limiting

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266 The Forest Service under Pinchot produced the first policy of limiting rights-of-way for water power production to 50 years and charging a fee to developers who sited projects in forest reserves. See Gifford Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 GEO. WASH. L. REV. 9, 12-15 (1946).
267 43 CONG. REC. 978 (1909) (“The [James River] bill gives to the grantee a valuable privilege which by its very nature is monopolistic and does not contain the conditions to protect the public interest.”) (statement of the Speaker of the House, delivering a message of the President).
268 Pinchot, supra note 266, at 17 (citing 43 CONG. REC. 979-80 (1909)).
269 Id. at 17-18 (citing 48 CONG. REC. 11796 (1912)).
271 Id. § 6, 41 Stat. at 1067 (codified at 16 U.S.C. § 799 (max 50-year license terms)).
272 Id. § 7, 41 Stat. at 1067, (codified at 16 U.S.C. § 800(a) (public preference))
273 Id. § 10(a), 41 Stat. at 1068 (codified at 16 U.S.C. § 803(a) (best adapted to a comprehensive plan)).
electrical distribution or price fixing.\textsuperscript{274} Fifth, the Act required that the rates charged for the power from licensed facilities to be “reasonable and just” to the customer.\textsuperscript{275} In short, the 1920 law required private water developments to meet a variety of antimonopolistic and public purposes.

C. The Mineral Leasing Act

Congress finally created a leasing system for coal, oil and gas, and other fuel and fertilizer minerals in the 1920 Mineral Leasing Act (MLA),\textsuperscript{276} ending the federal policy of granting or selling fossil fuels and fertilizers.\textsuperscript{277} The statute was the culmination of the Progressive effort to end disposition by capture for fuel minerals, making coal, phosphates, oil, gas, and oil shale subject to a leasing program. Congress adopted the leasing system for these minerals to stop their outright disposition under the mining and other laws in order “to promote conservation, to secure proper methods of development and operation, to prevent speculation and encourage bona fide exploration and development and to prevent monopoly of mineral fuels and fertilizers, which were regarded as public utility in character.”\textsuperscript{278} No longer would there be a “right to mine” for fuel and fertilizer minerals; the right of self-initiation under the 1872 Act was replaced with a requirement to obtain permission from the federal government to prospect. The MLA gave the federal government broad discretion to decide whether to lease, and to whom, and the terms with which

\textsuperscript{274} Id. § 10(h), 41 Stat. at 1070 (codified at 16 U.S.C. § 803(h) (monopolistic combinations)).
\textsuperscript{275} Id. § 20, 41 Stat. at 1073 (codified at 16 U.S.C. § 813 (power entering into interstate commerce for public service shall be reasonably priced)).
\textsuperscript{277} See Coggins & Glicksman, supra note 176, at § 39:2.
\textsuperscript{278} Harry Edelstein, Federal Oil and Gas Leasing of Public and Acquired Lands 24 ROCKY MTN. L. REV. 301, 302 (1952). Edelstein was the Assistant Solicitor for Public Lands at the time of his publication.
the lessee had to comply.\textsuperscript{279} Also, unlike the 1872 Mining Law, the MLA authorized the federal government to obtain an economic return in the form of rents and royalties.\textsuperscript{280}

The major antimonopoly contributions of the MLA as enacted were the limits it placed on the number of leases and acreage allowed each lease. No person, association, or corporation could hold more than one coal lease during the life of that lease in any one state.\textsuperscript{281} Nor could a person, association, or corporation hold more than three oil or gas leases granted under the Act in any one state, and not more than one lease within the geologic structure of the same oil or gas field.\textsuperscript{282} Moreover, no person or corporation could hold an interest as a member of an association or as a stockholder which would, aggregated with other interests that person or member had, exceed the maximum number of acres of the respective kinds of minerals allowed to any one lessee under the Act.\textsuperscript{283} The MLA also limited the amount of acreage a person, association, or corporation could

\footnotesize{\textsuperscript{279} See U.S. ex rel McLennan v. Wilbur, 283 U.S. 414, 419 (1931) (upholding the Secretary’s reading of the MLA in rejecting oil & gas exploration applications at his discretion, and invoking \textit{U.S. v. Grimaud} to uphold the federal government’s rejection of the applications in the interest of the public welfare and protection of federally-owned natural resources). Unlike the General Mining Law, the MLA allowed the government to choose who could extract the resource, through competitive auction. The Act also included several provisions denying the benefits of the Act to any claimant who had been previously found guilty of fraud. See e.g., ch. 85 § 19, 41 Stat. at 449.}

\footnotesize{\textsuperscript{280} See, e.g., ch. 85 § 14, 41 Stat. at 442.}

\footnotesize{\textsuperscript{281} § 27, 41 Stat. at 448. The modern statute has converted this to statewide and nationwide aggregation limits, of not more than “75,000 acres in any one State and in no case greater than an aggregate of 150,000 acres in the United States.” 30 U.S.C. § 184(a) (2012).}

\footnotesize{\textsuperscript{282} MLA § 27, 41 Stat. at 448. The modern provision limits aggregation in any one state (other than Alaska) to 246,080 acres. 30 U.S.C. § 184(d). In Alaska, the limit is 300,000 in the northern leasing district, and the same in the southern leasing district. Id.}

\footnotesize{\textsuperscript{283} MLA § 27, 41 Stat. at 448. Under the law today, persons may still not aggregate beyond the statutory limits, but no person is charged with his pro rata share of any acreage holdings of a corporation unless he owns more than 10 percent of the corporation’s stock. 30 U.S.C. § 184(e).}
lease in one unit, restricting coal leases to 2,560 acres each, and oil and gas leases to 640 acres, and oil shale leases to 5,120 acres. Notably, the law made provision for royalty-free local and domestic use by small users, and restricted any railroad company’s ability to hold coal leases to the extent needed for its own purposes.

On the other hand, the Act allowed indefinite lease terms for coal and oil shale, and created a preferential right of renewal for oil & gas leases which had twenty-year primary lease

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

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


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

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

289 MLA § 7, 41 Stat. at 439. Congress subjected the indeterminate period of the lease to a condition of diligent development, to prevent companies from sitting on the leases for purposes of speculation. Congress strengthened this anti-speculation provision of the MLA in section 3 of the Federal Coal Leasing Amendments Act of 1975 by banning the issuance of new leases to lessees holding nonproductive leases for more than ten years after FCLAA’s enactment. See Sam Kalen, Where do We Go From Here?: The Federal Coal Leasing Amendments Act—Past, Present, and Future, 98 W. Va. L. Rev. 1023, 1036 (1996). Under the FCLAA, the primary lease term is 20 years, “and for so long thereafter as coal is produced annually in commercial quantities from that lease.” 30 U.S.C. § 207(a) (2012). Logical Mining Units must be mined within a period of no greater than 40 years, unless the Secretary makes findings that a longer period would be conducive to maximum economic recovery. Id. § 202a(2). See Kalen, at 1042-43.

290 MLA, ch. 85 § 21, 41 Stat. at 446. The indeterminate nature of the lease is subject to “such conditions as may be imposed by the Secretary of the Interior, including covenants relative to . . . productive development,” indicating Congress’s desire to prevent speculative holdings.
Implementation of fossil fuel leasing falls short of antimonopoly goals, as leases were readily extended, and continue to be in modern times. However, the MLA’s core limits on acreage and aggregation reflected the Progressive Era’s antimonopolistic values of spreading the benefits of publicly owned resources widely, while minimizing control of minerals in the hands of the few.

D. Conservation For Future Generations

The Progressive Era introduced another antimonopoly sentiment in the National Park Service Organic Act of 1916—that of intergenerational sharing. The objective of the Act is to “conserve the scenery and the national and historic objects and the wild life therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired

291 Id. § 17, 41 Stat. at 443. The Act provided a preferential right of renewal for periods of 10 years at the expiration of the 20-year term. Id. The primary lease term for onshore leasing is now 10 years. 30 U.S.C. § 226(e) (2012)). Leases producing “paying quantities” of minerals may be extended indefinitely through secondary leases. Id.; See COGGINS & GLICKSMAN, supra note 176, at § 39:18.

292 See Huber, supra note 12, at 1009 (noting that “unlike private lessors, the United States sometimes tries harder to keep leases in force than to terminate them,” and the federal government goes to “seemingly absurd lengths . . . of leniency” in comparison to private lessors. For example, federal law allows leases to be extended much more readily than in typical private transactions).

One notorious example of a monopolistic giveaway was the Powder River coal lease sale during the early 1980s. Although a court decided that environmentalists had failed to prove that the sale was below-market value, Nat’l Wildlife Fed’n v. Burford, 871 F.2d 849 (9th Cir. 1989), a government study disagreed with the court, finding that the Interior Department offered excessive amounts of coal leases in a declining market. See Commission on Fair Market Value Policy for Federal Coal Leasing, REPORT OF THE COMMISSION: FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING (1984) (also suggesting that courts lack the expertise or will to police fair market valuation issues).

for the enjoyment of future generations.” These policies were significant antimonopoly statements because, the non-impairment standard limits the use of park resources by the current generation in order to ensure that future generations may enjoy the reserves in a relatively preserved state, making clear that the current generation has no monopoly on enjoyment. Interior Secretary Franklin Lane interpreted the Act to require the National Park Service to manage the parks for “the use observation, health and pleasure of the people;” stated that “the national interest must dictate all decisions affecting public or private enterprise in the parks,” reflecting the antimonopoly sentiment of limiting privatization.

The statute did not create an off-limits wilderness parks but instead perpetuated the antimonopoly theme of public access. For example, the purpose-statement calls on the National Park Service to “conserve” the land, rather than merely “preserve” it, as the enacting statutes of the original parks had called for. The National Park Service statutes therefore allowed some consumptive uses in the parks, such as leasing for tourism accommodations for periods of no longer than 20 years. Grazing was also a permissible park use, cabined by the requirement that

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295 See KETTER, supra note 293, at 9 (citing letter of Interior Secretary Franklin Lane (May 13, 1918)).
296 Secretary Lane believed protecting the parks required the agency to guard against entrenched privatization, stating that the Parks Service must “faithfully preserve the parks for posterity in essentially their natural state. The commercial use of these reservations, except as specially authorized by law, or such as may be incidental to the accommodation and entertainment of visitors, will not be permitted under any circumstances.” Letter of Interior Secretary Franklin Lane (May 13, 1918).
297 Multiple-Use surfaces as a major antimonopoly doctrine in the 1960s, as discussed in Section V, infra.
298 See RICHARD W. SELLS, PRESERVING NATURE IN THE NATIONAL PARKS 43 (1997) (explaining that the conservation movement comprised a wide array of concerns, “of which the wise use of scenic lands in the national parks to foster tourism and public enjoyment was very much a part.”).
299 Act of Aug. 25, 1916, ch. 408 § 3, 39 Stat. 535, 535. Today, the Secretary can award concession contracts for up to 20 years (54 U.S.C.A. § 101914 (West 2015)), but may provide a
grazing not be detrimental to the primary purposes of the park. And although the Organic Act authorizes commercial park concessionaires, the statute clearly forbids the Park Service from encumbering the public’s access to natural, curiosities, wonders, or objects of interest by leasing or granting those areas to private concerns.

E. Managing Grazing Lands

Free and unrestricted use of public lands for grazing in the nineteenth century was a boon to cattle and sheep graziers. But in 1906, the Forest Service revoked the implied license to graze that the Supreme Court recognized in its 1890 _Buford v. Houtz_ decision. Recognizing that overgrazing was degrading the range, Gifford Pinchot invoked Organic Act authority to promulgate regulations in 1906 imposing a permit requirement for grazing on national forest lands and charging fees. The regulation reflected antimonopoly sentiment by ending free and preferential right to renew contracts to outfitters, guide services, and smaller contracts. 54 U.S.C.A. § 101913 (West 2015).

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302 16 U.S.C. § 3 (2012) (repealed 2014); 54 U.S.C.A. § 102101 (West 2015). Today, National Parks concessions are governed also by the Concessions Management Improvement Act, Pub. L. No. 105-391, Title IV, § 402, 112 Stat. 3503 (1998). The statute requires that contracts for visitor facilities and services be limited to those that are “necessary and appropriate for public use and enjoyment” of the park and that they “are consistent to the highest practicable degree with the preservation and conservation” of the park. 54 U.S.C.A. § 101912 (West 2015).
304 See _PINCHOT, supra_ note 232, at 271-72 (describing Pinchot’s elicitation of a letter from the Attorney General confirming his authority under the Organic Act of 1897 to impose a fee-permit scheme within the forest reserves, but under the less controversial guise of seeking confirmation of Pinchot’s power to permit and charge fees for the construction of a fish saltery plant in the Alaska Archipelago Forest Reserve).
305 Forest Service Reg. 45 (June 12, 1906). The permit system required grazers to pay a fee of five cents per animal unit month (AUM). _WILKINSON, supra_ note 143, at 91. An AUM is the amount of forage ingested by one cow, or about five sheep, grazing for a month, about 700 to 800 pounds of plant matter. See id.; _COGGINS & GLICKSMAN, supra_ note 176, at § 33:7.
unrestricted grazing, thereby removing a major subsidy for large rangeland users. Pinchot intended
the permit requirement and fees that were tied to the amount of forage grazers consumed to prevent
excessive grazing by individual ranchers on the forest reserves.\footnote{United States v. Grimaud, 220 U.S. 506, 522 (1911) ("These fees were fixed to prevent excessive grazing, and thereby protect the young growth and native grasses from destruction, and to make a slight income with which to meet the expenses of management.").} The regulation also created a
safe harbor for subsistence graziers,\footnote{The Forest Service exempted “the few head [of cattle] in actual use by prospectors, campers, and travelers, and milch or work animals, not exceeding a total of six head, owned by bona fide settlers residing in or near a forest reserve . . . .” Forest Service Reg. 45 (June 12, 1906).} reflecting a preference for small users over large
commercial operations.

The fee program did not go unchallenged. In 1911, the Supreme Court upheld the Secretary
of Agriculture’s power under the Organic Act to impose a grazing fee with criminal penalties for
non-compliance.\footnote{Grimaud, 220 U.S. at 522-23 (deciding that the Organic Act authorized the agency to promulgate regulations providing for the penalty, citing the statutory duty to protect the forest reserves from depredations). Although the statute did not declare it unlawful to graze sheep without a permit, it did require that users of the forest reserves comply “with the rules and regulations covering said forest reservation.” Id. at 521. The Court ruled that statute did not unconstitutionally delegate a legislative power, because the statute required the Secretary to protect the forests from harmful uses. Id. at 522.} In a decision issued on the same day, the Court invoked a trust theory of
ownership to support the power of the federal government to restrict grazing.\footnote{Light v. United States, 220 U.S. 523, 537-38 (1911) (rejecting a rancher’s claim of an implied license to graze upon the forest lands and upholding Pinchot’s regulations requiring a permit). In effect, the regulation revoked the graziers’ implied right to graze on federal public lands the Court recognized in Buford v. Houtz; see supra note 207.} “All the public
lands of the nation are held in trust for the people of the whole country,” wrote Justice Lamar, who
declared that the federal government could even ban pasturage on its lands altogether if necessary
to fulfill its custodial duty.\footnote{Light, 220 U.S. at 537 (“in the exercise of the same trust [Congress] may disestablish a reserve, and devote the property to some other national and public purpose.”).} The opinion proclaimed that “these are rights incident to
proprietorship, to say nothing of the power of the United States as a sovereign over the property
belonging to it.” Thus, the agency could choose to permit, curtail, or eliminate grazing, in order to prevent the degradation that comes with monopoly of use. This 1911 decision clearly recognized the federal role as both trustee and proprietor of the public lands, each role justifying restricting consumptive uses, reserving some lands for various purposes, and conditioning the use of resources. These measures all reflect antimonopoly sentiments.

F. Beyond the Progressive Era: Antimonopoly and Grazing on Lands Outside National Forests

On public lands outside the national forests, the imposition of a permit-and-fee system for grazing remained a contentious proposition. Competition for the forage resource was intense in the late 1800s, and established stockmen used various means to claim exclusive use of the range. By the 1930s, that competition had caused severe deterioration and erosion of the resource. Although Theodore Roosevelt had urged Congress to regulate grazing on the public domain,

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311 Id.
312 See George Coggins & Margaret Lindeberg-Johnson, The Law of Public Rangeland Management II: The Commons and the Taylor Act, 13 ENVTL. L. 1, 23-27 (1982) (describing how established ranchers acquired title to land through homestead fraud, acquiring riparian areas to monopolize water supplies, claiming “rights” to the range through private agreements with other local ranchers, taking possession by effectively excluding others with fences); see also Interior History, supra note 265, at text between nn. 37-38 (“controversy over cattlemen, sheepmen, farmers, and watershed protectionists doomed the grazing program” that would have established a leasing program aimed at range carrying capacity).
313 See Coggins, supra note 312, at 47 (citing E. Peffer, THE CLOSING OF THE PUBLIC DOMAIN 221 (1951)) (“Overgrazed, wind-eroded expanses, interspersed with rocky peaks and barren slopes, were all that remained of the public domain in 1934.”).
Opposition prevented enactment of a Progressive era statute.\textsuperscript{314} To counteract monopolization, the rangeland commons required regulation through coercion mutually agreed upon.\textsuperscript{315}

Not until 1934 did Congress enact the Taylor Grazing Act in response to rangeland deterioration that contributed to conditions commonly known as the Dust Bowl,\textsuperscript{316} the Taylor Act authorized the Interior Secretary to divide the unreserved public domain into grazing districts, determine the amount of grazing in each district, and issue permits to graze livestock in those districts. The antimonopoly aspects of the law included (1) revoking the implied license to graze the public domain, requiring permits and imposing a user fee;\textsuperscript{317} (2) authorizing the Secretary to adjust or cancel permits when necessary to protect public rangelands;\textsuperscript{318} (3) limiting permit terms

\textsuperscript{314} Opposition came from “those who do not make their homes on the land, but who own wandering bands of sheep that are driven hither and thither to eat out the land and render it worthless for the real home maker;” along with “the men who have already obtained control of great areas of the public land . . . who object . . . because it will break the control that these few big men now have over the lands which they do not actually own.” \textit{PUBLIC LAND SITUATION IN THE UNITED STATES, MESSAGE FROM THE PRESIDENT, S. Doc. No. 310, 59th Cong., 2d Sess., 5 (1907).}

\textsuperscript{315} “Surely it is in accordance with the spirit of our government to pass a law in the interest of the actual settler, instead of to leave undisturbed the present system in the interest of those who monopolize an improper proportion of the public domain, or of others who are indifferent to whether in the long run they destroy the worth of the public domain.” \textit{Id.} at 5-6. \textit{See also} Garrett Hardin, \textit{The Tragedy of the Commons}, 162 Science 1243, 1244 (1968) (“The rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.” \textit{Id.} at 1244. Hardin explained succinctly the idea that regulatory limits allow the commons to be enjoyed by many, rather than robbed by few. \textit{Id.} at 1247).

\textsuperscript{316} Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269. The purposes of the Act were “to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, to stabilize the livestock industry dependent upon the public range, and for other purposes.” \textit{Id.} The dire erosion and ecological deterioration wrought on the Dust Bowl plains motivated policymakers to conserve what remained of the soils in the public domain. \textit{See} Coggins & Lindeberg-Johnson, \textit{supra} note 312, at 46-47.

\textsuperscript{317} \textit{Id.} § 3, 48 Stat. at 1270.

\textsuperscript{318} \textit{Id.}, 48 Stat. at 1271; 43 C.F.R. §§ 160.26(a)-(f) (1938), 43 C.F.R. § 160.30 (1938).
to ten years;\textsuperscript{319} (4) expressly declaring that no private property inhered in the permit to graze,\textsuperscript{320} and (5) calling for (via a 1939 amendment) district advisory boards (comprised largely of local ranchers)—establishing a sort of “range democracy.”\textsuperscript{321}

On one hand, the Taylor Act brought the first statutory governance to the overburdened commons of the plains, disrupting the informal monopoly of claimed private rights that had evolved there.\textsuperscript{322} On the other hand, the statutorily authorized advisory boards created conditions ripe for governmental capture.\textsuperscript{323} The Act and its regulations also created preference grazing rights for landowners adjacent to public lands, which limited the antimonopoly effect of the law.\textsuperscript{324} The statute established a preference for issuing permits to landowners within or near the district engaged in the livestock business, bona fide settlers, or owners of water rights.\textsuperscript{325} This preference

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\begin{itemize}
  \item \textsuperscript{319} Id. § 3, 48 Stat. at 1271.
  \item \textsuperscript{320} Id. See also United States v. Fuller, 409 U.S. 488, 494 (1973) (determining that neither the permit nor the value it adds to the base ranch are compensable property rights). Congress intended that “no compensable property might be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to fee lands by their potential use in connection with permit lands.” Id.
  \item \textsuperscript{321} Act of July 14, 1939, ch. 270, 53 Stat. 1002 (each range district also had a wildlife representative). See Coggins & Lindeberg-Johnson, supra note 312, at 48. Notably, however, advisory boards were composed generally of cattlemen, to the exclusion of other users, such as nomadic sheepherders, which limited the antimonopoly effect. See id. at 48-49.
  \item \textsuperscript{322} And which had been defended fiercely in so-called range wars between established ranching interests and competing users such as homesteaders and sheepherders. WILKINSON, supra note 143, at 85-86.
  \item \textsuperscript{323} Grazing Service personnel “went out and practically turned the lands over to the big cowmen and the big sheeprmers of the West.” Coggins & Lindeberg-Johnson, supra note 312, at 64 (referencing the remarks of Chairman Johnson in the Hearings on the Interior Department Appropriations Bill for 1947 before the House Subcomm. on Appropriations, 9th Cong., 2d Sess. 147 (1946)).
  \item \textsuperscript{324} See Coggins & Lindeberg-Johnson, supra note 312, at 49 (discussing the contradictory nature of the Taylor Grazing Act, in that “Congress carefully emphasized that a permit to graze was in no sense a vested right, yet at the same time it ensured that adjacent landowners would be able to develop a monopoly on the grazing benefits bestowed.”).
  \item \textsuperscript{325} ch. 865 § 3, 48 Stat. at 1271.
\end{itemize}
system effectively perpetuated the rangeland status quo.\textsuperscript{326} In fact, George Coggins claimed that the immediate effect of the Taylor Act was “exclusionary and monopolistic,” especially because nomadic shepherders, who had no land base, were effectively excluded from the preference, and the preference for existing users forced the poorest cattlemen into bankruptcy. \textsuperscript{327} The antimonopoly potential of the Act was also thwarted by the fact that—although not conveying a property right—grazing permits are preferentially renewed at the end of each term.\textsuperscript{328} The statute’s antimonopoly potential was further curtailed when the Tenth Circuit decided that conservation-use permits were antithetical to its language.\textsuperscript{329} Despite its mixed antimonopolistic effects, the Taylor Act and its implementation ended the disposition era of public land policy, preserving the remaining public domain for public allocation through regulation, not private appropriation.

V. \textbf{Antimonopoly in Modern Public Land Statutes}

In the modern era, the antimonopoly theme persists in public land law, represented in federal policies promoting widespread use by diverse users, limiting dominant uses, requiring advanced public planning, and upholding user access to reserved lands. Laws promulgating these policies include the Multiple Use Sustained Yield Act (MUSYA),\textsuperscript{330} Federal Land Policy and

\textsuperscript{326} The regulations created the following preference system: first, to owners of stock who owned “base property,” (in land or water) and who grazed their herds during the five years prior to the enactment of the Taylor Grazing Act; second, to other owners of base property who lacked prior use; and third, to those who did not own base property. \textit{See} Public Lands Council v. Babbitt, 529 U.S. 728, 734-35 (2000) (citing Rules for Administration of Grazing Districts (June 14, 1937)).

\textsuperscript{327} Coggins and Lindeberg-Johnson, \textit{supra} note 312, at 56.

\textsuperscript{328} \textit{See} Huber, \textit{supra} note 12, at 1005.

\textsuperscript{329} Public Lands Council v. Babbitt, 167 F.3d 1287, 1307 (10th Cir. 1999), \textit{aff’d on other grounds}, 529 U.S. 728 (2000). The government did not appeal the Tenth Circuit’s rejection of the conservation permit issue to the Supreme Court, which was the only issue on which the challengers to Secretary Babbitt’s rangeland reforms prevailed.

Management Act (FLPMA),331 National Forest Management Act (NFMA),332 and the Alaska National Interest Lands Conservation Act (ANILCA).333

A. Multiple Use

In 1960 the MUSYA codified multiple use on national forests, although Pinchot’s foresters had practiced multiple use for decades, since Pinchot’s day.334 The statute was a response to growing public concern over clearcutting, overharvesting, and increasing recreational use, as well as countervailing pressures from the industry to ratchet up the harvest.335 Clear-cutting,336 “high-grading,”337 and failure to re-seed harvested areas were common logging practices. These practices not only were environmentally detrimental, they were highly visible to a public which had begun to value recreation on public lands.338 In the World War II and post-war era, commercial uses on national forests began to increasingly conflict with non-consumptive and recreational uses.339

334 See infra note 340 and accompanying text.
335 See Wilkinson & Anderson, supra note 11, at 29. During World War II, the annual harvest of timber from the national forests more than tripled, rising from an average of 1 billion board feet to 3.3 billion board feet in 1944. See WILKINSON, supra note 143, at 135. Post-war, the booming economy and population required timber for homebuilding and manufacturing, raising annual extraction to 4.4 billion board feet in 1952. Id. at 136.
336 See West Virginia Div. of Izaak Walton League of America v. Butz, 522 F.2d 945, 954-55 (4th Cir. 1975) (describing the effect World War II and the postwar building boom had on the management practices of the Forest Service “from custodian to a production agency. It was in this new role that the Service initiated the policy of even-aged management in the national forests . . .”). Even-aged management is a euphemism for clear-cutting.
337 That is, a method of removing timber which removed only the most valuable trees, without re-seeding a renewal crop. See WILKINSON, supra note 143, at 136.
338 See id. at 137.
339 See Wilkinson & Anderson, supra note 11, at 9 (describing by region the challenges for national forest management: coal leasing in Montana, Wyoming, and Utah; oil and gas development competing with recreation from Montana to Wyoming and from Colorado to Arizona; commercial timber harvest conflicting with salmon and steelhead in the Pacific Northwest; and issues of large predator habitat protection in the Northern Rockies).
The Forest Service requested legislation expressly authorizing the balancing of these competing uses, which it was, in fact, already doing and had done so since the days of Pinchot.\textsuperscript{340} Congress responded by enacting MUSYA in 1960, establishing five major national forest uses: outdoor recreation, range, timber, watershed, and wildlife.\textsuperscript{341} The BLM lands acquired this directive temporarily in 1964,\textsuperscript{342} and permanently in 1976, with the enactment of the Federal Land Management and Policy Act (FLPMA), BLM’s organic statute.\textsuperscript{343} FLPMA included a comparatively broader range of uses for the agency to co-manage, including recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.\textsuperscript{344}

The idea of “multiple use” was an outgrowth of Pinchot’s utilitarian approach to public lands management, expressed as resource allocation for the greatest good for the greatest number over the long run.\textsuperscript{345} MUSYA required the Forest Service to give “due consideration” to the relative values of the various resources.\textsuperscript{346} The statute defines “multiple use” as:

\textsuperscript{340} See id. at 28-29 (“Forest Service planners responded to the increasing demands [from loggers and recreationists] by attempting to coordinate resource planning. After preparing an inventory of resources, local managers developed composite plans that identified recreation and special management areas, watercourses, transportation routes, and other characteristics.”).

\textsuperscript{341} Pub. L. 86-517, § 1, June 12, 1960, codified at 16 U.S.C. § 528; The uses are listed in alphabetical order, but notice that “recreation” was listed as “outdoor recreation” so that it could be mentioned before “range,” emphasizing that the commodity uses are not to dominate management. See George Coggins, Of Succotash Syndromes and Vacuous Platiitudes: The Meaning of “Multiple Use Sustained Yield” For Public Land Management, 53 U. Colo. L. Rev. 229, 252 (1982).

\textsuperscript{342} Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-18 (a temporary statute that expired 1970).

\textsuperscript{343} 43 U.S.C. § 1701 et seq.

\textsuperscript{344} Id. § 1702(c). See Coggins, supra note 341, at 269-70. Compared to MUSYA, the BLM’s directive in FLPMA includes more “preservation” uses but also mineral production as well See id.

\textsuperscript{345} See COGGINS & GLICKSMAN, supra note 176, at §30:1.

\textsuperscript{346} 16 U.S.C. § 529.
The management of all the various renewable surface resources of the national forest so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services . . ; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.347

The antimonopoly principle is clear here: one use should not dominate the management scheme. Land managers must consider several uses and provide for them in an integrated fashion and in a manner that avoids “impairment to the productivity of the land.” Congress also stressed that commodification and extraction to produce the highest economic output would no longer be the guiding principle.

However, MUSYA was basically a mere statement of policy.348 Its antimonopoly tenets contained no measurable standards or enforceable provisions. For example, the Forest Service arguably ignored the directive of MUSYA in selling 8.7 billion board feet of old growth in the Tongass National Forest in 1968.349 The sale included ninety-five percent of the commercial forestlands available in the Tongass, the nation’s largest national forest.350 In *Sierra Club v. Hardin*, environmentalists unsuccessfully challenged the sale, arguing that the Tongass was being administered predominantly for the purpose of timber production in violation of MUSYA.351 The district court was unable to find any useful law to apply, stating that, “Congress has given no

347 *Id.* § 531.
348 See ARNOLD BOLLE, A UNIVERSITY VIEW OF THE FOREST SERVICE, S. DOC. NO. 115 (1970) (criticizing the Forest Service for failing to promote true multiple use management and continuing a “dominant use” focus on timber production).
350 See Wilkinson & Anderson, *supra* note 11, at 72. The Act did not address whether the Forest Service could use all of the commercially harvestable area for harvesting, and leave other parts of the forest for the other uses to fulfill its multiple use mandate.
351 325 F. Supp. at 106.
indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.” The court interpreted the statutory phrase “due consideration” of multiple uses to require only “some consideration,” with judicial deference to the agency’s decision.

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

The timber dominance of the Forest Service was instead overcome by removing lands from the agency’s apparently standardless multiple-use balancing. During the 1960s, Congress

352 Id. at 123.
353 Id. at 123 n. 48.
354 3 E.L.R. 20292 (9th Cir. 1973).
355 Id. However, the court did state that “due consideration” required the agency to take “the values in question be informedly and rationally . . . into balance. The requirement can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them.” Id.
356 See, e.g., Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979), in which the court described MUSYA’s standards as “contain[ing] the most general clauses and phrases . . . [which] can hardly be considered concrete limits upon agency discretion. Rather it is language with ‘breathe[s] discretion at every pore.’”
357 See Michael C. Blumm, Public Choice Theory and the Public Lands: Why Multiple-Use Failed, 18 HARV. ENVT. L. REV. 405, 422-23 (1994) (explaining that Congress has “acted to curtail the excesses of multiple use”--produced by agency capture by commodity users--by reducing the land base subject to multiple use principles. The land base reduction was accomplished by establishing a dominant non-commodity use for those areas). Wilderness designation represents an “enclave” approach, in that it protects non-commodity uses by separating them from disposal and exploitation policies. John D. Leshy, Legal Wilderness: Its Past and some Speculations on its Future, 44 ENVTL. L. 549, 569 (2014).
reached to the recommendations of the Outdoor Recreation Resources Review Commission, which urged legislative designation of federal lands for non-commodity use, separating these areas from the timber harvest-focused view of the Forest Service.\footnote{358 See \textit{OUTDOOR RECREATION RESOURCES REVIEW COMM’N, OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS} (1962), available at http://www.nps.gov/parkhistory/online_books/anps/anps_5d.htm. Congress established the Outdoor Recreation Resources Review Commission in 1958 in order to determine the present and future recreational wants and needs of the public, and to make recommendations to Congress as to the policies and programs it should implement to meet those needs. \textit{Id.}} Congress responded by enacting a wilderness system,\footnote{359 Wilderness Act of 1964, Pub. L. 88-577, Sept. 3, 1964, codified at 16 U.S.C. §§ 1131-1136. Congressional designation of wilderness areas was thought necessary because the Forest Service had the power (and exercised the power) to remove wild land protections from administratively designated wilderness. \textit{See WILKINSON, supra} note 143, at 139. The impetus for the creation of a wilderness bill came from public opposition to conventional development, damming, and road building in wild places. Leshy, \textit{supra} note 357, at 561-66. The Wilderness Society, initiated in 1935 by Aldo Leopold (who had invented and pushed for “primitive” designations as a Forest Service Employee), Bob Marshall (who thereafter became the head of recreation management for the Forest Service), called for the designation of wild acreage for the purpose of protecting it from growing development. \textit{Id.} at 556. Decades later, in 1956, conservationists succeeded in convincing Congress to reject the construction of Echo Park Dam in Dinosaur National Monument. \textit{Id.} at 562. According to John Leshy, it was this rejection which sparked national debate about the creation of a wilderness preservation system. \textit{Id.} at 561-63.} a national trails system,\footnote{360 National Trails System Act, Pub. L. 90-543, Oct. 2, 1968, codified at 16 U.S.C. §§ 1241-1249.} and a wild and scenic rivers system,\footnote{361 Wild and Scenic Rivers Act, Pub. L. 90-542, Oct. 2, 1968, codified at 16 U.S.C. §§ 1271-1287.} all designed to preserve natural landscapes, accommodate recreation, and protect the free-flowing and unpolluted character of designated rivers. These systems protect non-commodity uses by geographically confining the broad discretion that the land agencies previously enjoyed.

For the lands that Congress did not remove from the Forest Service’s MUSYA balancing, the national forest system continued to be plagued by poorly planned and even-aged management.\footnote{362 See Coggins, \textit{supra} note 341, at 276. Indeed, the Wilderness Act hardly had any immediate effect on the scale of timber cutting on the national forests because much of the initially}
the other contemplated uses (habitat for tree-dwelling species, recreation, watershed protection, and so forth). In many cases, clearcutting can adversely affect the diversity of uses, species, and habitat in surrounding areas. In the early 1970s, environmentalists challenged clearcutting as a violation of the 1897 Organic Act, which required the Forest Service to sell only dead, matured, or large growth trees, which are individually marked or designated. In *West Virginia Div. of Izaak Walton League of America v. Butz*, the district court agreed that the Forest Service’s proposed clearcut timber sales in the Monongahela National Forest violated the statute. The Fourth Circuit affirmed, determining that the language of the statute was clear and supported by a legislative history showing Congress’s intent that young and growing trees be left standing for the purpose of preserving the forests. This judicial ban on clearcutting was short-lived, however: following the 1975 *Monongahela* decision, Congress enacted the National Forest Management Act (NFMA) of 1976, which expressly authorized clearcutting under certain conditions.

B. Land and Resource Planning under NFMA and FLPMA

Two provisions of NFMA reflect prominent antimonopoly principles: 1) the Act’s clearcutting limits, and 2) NFMA’s overarching resource planning requirement. NFMA and its

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363 For example, clearcutting mixed Eastern hardwood forests resulted in conversion to pine stands. See George C. Coggins et al., *Federal Public Lands and Resources Law* 692 (6th ed. 2007).
366 522 F. 2d 945, 952 (4th Cir. 1975).
harvesting provisions expressly incorporate the multiple-use policy of MUSYA, allowing clear-cutting only in circumscribed situations.\footnote{NFMA aimed in part to end the paradigm of timber as a use-monopoly. According to Senator Herbert Humphrey, a principal sponsor of NFMA, “The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers’ thinking and actions.” 122 CONG. REC. 5619 (1976).}

Under the statute, the Forest Service may not choose a harvesting method based upon the greatest dollar return.\footnote{16 U.S.C. § 1604(g)(3)(E)(iv).} If the agency chooses the clear-cutting option, it must be the optimum harvest method,\footnote{Id. § 1604(g)(3)(F)(i).} after interdisciplinary review to assess the potential environmental, biological, aesthetic, engineering, and economic effects on each sale, as well as the sale’s consistency with the applicable land plan.\footnote{Id. § 1604(g)(3)(F)(ii).} Clearcuts must also be carried out in “a manner consistent with the protection of soil, watershed, fish, wildlife, recreation, and aesthetic resources, and the regeneration of the timber resource.”\footnote{Id. § 1604(g)(3)(F)(v).} The upshot of these conditions is that the Forest Service must justify its decisions with findings according to these factors in a record subject to public review and comment.\footnote{See 36 C.F.R. § 219.15(d) (2012) (“A project or activity approval document must describe how the project or activity is consistent with applicable plan components . . .’’); id. § 219.11(d)(5) (2013) (requiring that plans limit harvest such that “[t]imber will be harvested from NFS lands only where such harvest would comply with the resource protections set out in sections 6(g)(3)(E) and (F) of the NFMA (16 U.S.C. 1604(g)(3)(E) and (F).’’).}

Forest planning for multiple-uses\footnote{Multiple-use planning has not lived up to its promise. See Blumm, supra note 357, at 421, (explaining that multiple use failed to produce balanced results because commodity-based interest groups pressure land managers to maintain historic levels of grazing and timber harvesting in low-visibility administrative decisions). Consider also that the Forest and Rangelands Renewable Planning Act of 1974, 16 U.S.C. §§ 1601-1610, requires the federal} reflects three major tenets of antimonopoly: 1) accommodation of diverse users, 2) development of a framework for balancing those uses before
the agency must evaluate specific resource proposals, and 3) accountability for resource allocation. Both NFMA\textsuperscript{375} and FLPMA\textsuperscript{376} require land managers to prepare land plans reflecting the multiple use and sustained yield standard.\textsuperscript{377}

National forest planning requirements include some unique elements that embody an ethic of antimonopoly, particularly requirements concerning plant and wildlife diversity and sustainability, the latter including an ecosystem integrity requirement. NFMA requires Forest Service land plans to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives.\textsuperscript{378} Under regulations promulgated in 2012, Forest Service plans must contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate ESA species, and maintain a viable population of each species of conservation
government to set a timber production goal for the national forests. \textit{Id.} § 1602. After Congress passed the 1974 Act, board-feet goals became a driving force shaping the content of NFMA-mandated forest plans. \textit{See} Blumm, \textit{supra} note 357, at 427.
\textsuperscript{375} 16 U.S.C. § 1604(a).
\textsuperscript{376} 43 U.S.C. § 1712(a).
\textsuperscript{377} 16 U.S.C. § 1604(e); 43 U.S.C. § 1712(c)(1). FLPMA’s planning requirement encompasses nine general criteria, all of which are aimed at ensuring administrative consideration of diverse values to produce a balanced plan, including 1) designation and protection of areas of “critical environmental concern,” 2) evaluation of present and potential uses of public lands, 3) consideration of the relative scarcity of values involved and the alternative means and siting for those uses, 4) weighing long-term and short-term benefits to the public.
concern within the plan area. In theory, this provision requires the Forest Service to ensure that non-commodity uses are represented, protected, measured, and monitored.

The 2012 regulations also require Forest Service plans to provide for social, economic, and ecological sustainability. Although “sustainability” is not a use, the concept represents the acknowledgment that forest resources must be shared inter-generationally to protect future use. Within the sustainability directive is a requirement to plan for ecosystem integrity. The regulations direct the Forest Service to look beyond the borders of the plan area, to account for existing conditions in the adjacent landscape as well as the changing climate, recognizing that patchwork harvests and developments affect wildlife’s ability to access and use of the landscape as a whole. Although a court once upheld the Forest Service’s rejection of a conservation-biology

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

380 36 C.F.R. § 219.9(b).

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

382 36 C.F.R. § 219.12(a)(5)(iii)-(iv). Focal species and ecological conditions are proxies for actual monitoring of species of conservation concern.


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

385 Id. § 219.19(a)(1).

386 36 C.F.R. § 219.8(a)(1).
approach to management.\textsuperscript{387} The planning rules now recognize the agency’s duty to “restore structure, function, composition, and connectivity” for purposes of ecological sustainability.\textsuperscript{388} Thus, the regulations suggest a form of antimonopoly of human use, infusing forest planning with requirements based on the needs of the greater biological community.\textsuperscript{389} However, given the history of deferential case law favoring the Forest Service,\textsuperscript{390} whether the public may enforce the interspecies antimonopoly aspect of the forest planning rules is not yet clear.\textsuperscript{391}

C. Prioritizing Subsistence Uses in Alaska

\textsuperscript{387} Sierra Club v. Marita, 46 F.3d 606 (7th Cir. 1995) (upholding the Forest Service’s refusal to incorporate principles of conservation biology—e.g., consideration of edge effects, island biogeography, and connectivity—in its plan for the Nicolet and Chiquamegon National Forests); 36 C.F.R. § 219.8(a).

\textsuperscript{388} Opponents of the rule claimed that the 2012 sustainability planning rule 1) “establishes achievement of ‘ecological sustainability’ [as] the primary purpose of every national forest,” while “relegating ‘social and economic sustainability’ to an inferior and insignificant position,” in violation of the Organic Act, NFMA, MUSYA; 2) unlawfully elevates species viability, conservation, and recovery over the Forest Service’s statutory multiple use objectives; and 3) improperly imposes the requirement of “best available scientific information” in the development of forest plans. Complaint ¶¶ 25, 27, 29, 32, 48, 52, Federal Forest Resource Coalition v. Vilsack, No. 1:12-cv-1333 (D.D.C. filed Aug. 13, 2012). The D.C. District Court dismissed the Federal Forest Resource Coalition’s case for lack of standing in March 2015. No. 1:12-cv-1333 (D.D.C. Mar. 31, 2015); No. 1:12-cv-1333 (D.D.C. April 28, 2015) (memorandum opinion explaining that the plaintiffs lacked standing). Plaintiffs have since filed a motion for reconsideration which was denied in May. No. 1:12-cv-1333 (D.D.C. May 27, 2015).

\textsuperscript{389} See, e.g. Lands Council v. Martin, 529 F.3d 1219, 1226 (9th Cir. 2008) (deferring to a Forest Service a forest plan amendment interpreting the term “live trees” to exclude certain trees that are still scientifically alive, and finding “no legal requirement that a methodology be ‘peer-reviewed or published in a credible source.’”); Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) (en banc) (taking a hands-off approach in determining that the Forest Service’s scientific methodology need not be confirmed through on-the-ground analysis); But see Karuk Tribe v. U.S. Forest Service, 681 F.3d 1006 (9th Cir. 2012) (en banc) (holding that, based on the record, mining proposals under the Forest Service’s jurisdiction “may affect” the local listed salmon, and therefore the Forest Service violated the Endangered Species Act by failing to consult).

\textsuperscript{390} For example, under the prior planning rule, many plans lacked enforceable standards and clear conservation commitments for sensitive species, to the point that the plans’ inadequacies influenced Fish & Wildlife Service (FWS) decisions to list some species under the Endangered Species Act. See Schultz et al., supra note 381, at 440 (explaining that, for example, the FWS based its decision to list the Canada lynx in part on the fact that most national forests with lynx had no population viability objectives or management standards for the lynx).
Antimonopoly sentiment is also evident in the Alaska National Interest Lands Conservation Act’s (ANICLA’s) subsistence provisions.\(^{392}\) These provisions were included in a statute that created vast expanses of conservation reserves;\(^ {393}\) recognized wildlife protection; preserved scenic, geological values; and protected subsistence harvest for rural residents.\(^ {394}\) ANILCA’s most evident antimonopoly was its recognition of and protection of subsistence uses of public resources. The statute defined “subsistence” as

the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.\(^ {395}\)

Section 804 created a preference for these subsistence uses of the fish and wildlife resource.\(^ {396}\) The effect is that when the government limits hunting and fishing to protect the resource, ANILCA gives subsistence harvesters priority over commercial and recreational harvesters.\(^ {397}\)

Section 810 requires any federal agency planning a project on public land to assess the effects of the project on subsistence and study how adverse effects may be avoided.\(^ {398}\) Section

\(^{392}\) ANILCA represented the greatest conservation achievement in terms of acreage in the 20\(^{th}\) century. It doubled the size of the national park system, tripled the acreage of the national wildlife refuge system and quadrupled the size of the wilderness preservation system. COGGINS ET AL., \textit{supra} note 363, at 29.

\(^{393}\) ANILCA added 103 million acres of BLM land into federal conservation systems. \textit{See} COGGINS & GLICKSMAN, \textit{supra} note 176, § 14:23. Included were millions of acres of new national parks, wildlife refuges, wilderness areas, and wild and scenic rivers. \textit{See id.} § 2.17.


\(^{396}\) \textit{Id.} § 3114.

\(^{397}\) \textit{Id.}

\(^{398}\) 16 U.S.C § 3120. Section 810 requires federal agencies to undertake a two-tiered analysis of the effects of federal projects on subsistence activities. First, the agency must evaluate the effect of a project on subsistence use and investigate whether there might be project alternatives or alternative sites that would protect subsistence uses. \textit{Id.} § 3120(a). Second, if the proposed project would “significantly restrict” (\textit{id.}) subsistence uses, the agency must undertake further
810 reflects antimonopoly sentiment by giving subsistence uses some process protection against other public land uses that threaten to reduce subsistence harvests. However, case law interpreting section 810 has not imposed meaningful restrictions on uses harming subsistence harvests, like timber sales.

D. Ensuring Public Access

This paper’s earlier discussion of the Unlawful Inclosures Act shows that access to federal public lands and resources has been a major antimonopoly theme for well over a century. In the modern era, although federal land managers have restricted and prohibited the manner and means of access, multiple policies continue to safeguard public access to and across public lands. This study to determine 1) that such significant restriction is necessary, 2) uses the smallest amount of land necessary to accomplish the task, and 3) the agency will take reasonable steps to minimize the adverse impacts on subsistence users. Id. An activity which would significantly restrict subsistence uses may not proceed unless those determinations are made. Id.

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

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

See supra notes 209-19 and accompanying text.

For example, in the last century, the implied access license to graze on the public domain has been revoked by the Taylor Grazing Act, and replaced with a permit system. See supra notes 316-21 and accompanying text. A statute granting rights-of-way for the construction of highways over public lands, known as Revised Statute 2477, was repealed by FLPMA in 1976. See infra notes 412-13 and accompanying text; COGGINs AND GLICKSMAN, supra note 176, at § 15:19. Access through national forest lands has a long history of regulatory oversight and restriction. The Organic Act expressly made public access subservient to the rules and regulations covering such national forests. 16 U.S.C. § 448. See also Pub. Lands for the People, Inc. v. U.S. Dep't of Agric., 697 F.3d 1192, 1197 (9th Cir. 2012) (describing the Forest Service’s authority to restrict motor vehicle access in the El Dorado National Forest, even where such restriction would burden access to mining claims in the forest). Additionally, the Wilderness Act prohibits roadbuilding and motorized access in wilderness areas, although the Act does contain
section considers two modern aspects of antimonopoly through access: the public’s recreational license to use national forest lands and FLPMA’s recognition of existing public highways as access-routes.

1. The Public’s Recreational License

The public has an implied license to use public lands for purposes of recreation. The leading case is *United States v. Curtis-Nevada Mines, Inc.*, in which the Ninth Circuit upheld federal recognition of a public recreational license under the Surface Resources Act of 1955 at unpatented mining claims on public lands.\(^{403}\) The court enjoined an alleged miner from excluding recreationalists on 203 mining claims on BLM and Forest Service land, covering approximately thirteen square miles.\(^{404}\) The Ninth Circuit emphasized that the 1955 Surface Resources Act specifically preserved the right of the federal government and its permittees and licensees to use the surface resources of unpatented mining claims or to cross mining claims to access other lands.\(^{405}\) Congress enacted the 1955 statute for the antimonopoly purpose of preventing the fraudulent location if mining claims from gaining exclusive possession of the surface for endeavors like private fishing and hunting preserves.\(^{406}\)

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\(^{403}\) 611 F.2d 1277 (9th Cir. 1980); *See COGGINS & GLICKSMAN, supra* note 176, at § 31:2.

\(^{404}\) *Curtiss-Nevada*, 611 F.2d at 1279.

\(^{405}\) 30 U.S.C. § 612(b).

\(^{406}\) *Curtiss-Nevada*, 611 F.2d at 1281-82 (citing H.R. REP. NO. 84-730, at 6 (1955): “Mining locations made under existing law may, and do, whether by accident or design, frequently block access: to water needed in grazing use of the national forests or other public lands; to valuable recreational areas; to agents of the Federal Government desiring to reach adjacent lands for purposes of managing wild-game habitat or improving fishing streams so as to thwart the public harvest and proper management of fish and game resources on the public lands generally, both on the located lands and on adjacent lands.”).
Upholding a broad implied public license to access and use the public lands,\textsuperscript{407} the court recognized that the federal government, as “trustee” of the lands,\textsuperscript{408} had long allowed use of public lands recreational uses or access to adjoining lands, so long as the government did not revoke its tacit consent.\textsuperscript{409} The court decided that the 1955 Act aimed to promote public use of public lands by recognizing a implied public license absent a conflict with mining operations.\textsuperscript{410} The alleged miner therefore could not use its alleged mining claim to impose a monopoly use of public lands.\textsuperscript{411}

2. **RS-2477 Highway Rights-of-Way**

In 1976, FLPMA declared that a claimant wishing to establish a new right-of-way across BLM land or national forests for commercial or non-casual purposes needed to obtain agency approval to create the right-of-way.\textsuperscript{412} However, the statute grandfathered valid existing rights-of-

\textsuperscript{407} 611 F.2d at 1286. The district court had ruled that use and access is available only to those members of the public who hold individual recreation licenses or permits from a state or federal agency. United States v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373 (E.D. Cal. 1976).

\textsuperscript{408} 611 F.2d at 1283.

\textsuperscript{409} Id. at 1283-84 (citing Buford v. Houtz, 133 U.S. 320 (1890); Light v. United States, 220 U.S. 523 (1911); and McKee v. Gratz, 260 U.S. 127 (1922)).

\textsuperscript{410} Id. 1282, 1285.

\textsuperscript{411} The 1872 Mining Law contained several antimonopoly provisions that, for example, limit the size of claims and require labor to maintain a mine claim. 30 U.S.C. §§ 23 (size limits), 28 (required labor). Implementation of the Mining Law proved problematic due frequent fraudulent claims, seeking title to lands where there was no mineral value. In response the Interior Department interpreted the law to require a that “valuable mineral” (required to support a “discovery” necessary for a valid mine claim) satisfy a “marketability test” (meaning that the mineral could be “extracted, removed, and marketed at a profit.”) The Supreme Court upheld the use of this test as a reasonable means of reducing fraudulent claims in United States v. Coleman, 390 U.S. 599 (1968). A district court upheld Interior’s authority to reject mine plans that cause “undue” environmental degradation as a reasonable interpretation of section 302(b) of FLPMA. 43 U.S.C. §1732(b), in Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003). Both judicial interpretations foster antimonopoly by giving the agency the ability to reject and regulate federal mining operations where they are inconsistent with multiple use goals.

\textsuperscript{412} FLPMA § 501, 43 U.S.C. § 1761.
way that pre-dated its enactment.\footnote{413}{43 U.S.C. § 1769(a) (2012) (“Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted”). \textit{See} COGGINS \& GLICKSMAN, \textit{supra} note 176, at § 15:18.} A provision of the 1866 Mining Act, known as Revised Statute 2477 (R.S. 2477), granted rights-of-way for the “construction” of “highways” over public lands.\footnote{414}{Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253; \textit{see} Southern Utah Wilderness Alliance \textit{v. BLM}, 425 F.3d 735, 740 (10th Cir. 2005).} To claim an R.S. 2477 right-of-way, one must show that the public used the route as a highway before the 1976 enactment of FLPMA, that the right-of-way vested before the government reserved the land for a public purpose, and that the right-of-way was not abandoned.\footnote{415}{COGGINS \& GLICKSMAN, \textit{supra} note 176, at § 15:18. Who has the burden of showing whether R.S. 2477 rights exist may depend on who brings the suit, and in what circuit the case is brought. The Tenth Circuit’s decision in \textit{The Wilderness Society v. Kane County} seems to have placed a burden on environmental plaintiffs to show that counties claiming R.S. 2477 rights do not actually have valid claims, rather than presuming federal ownership and placing the burden on the counties to first quiet title in court. The Wilderness Soc’y \textit{v. Kane Cnty.}, 632 F.3d 1162, 1171 (10th Cir. 2011) (denying standing to environmental plaintiffs, because their claims required validation of the federal government’s property rights, thus the environmental plaintiffs were inappropriately seeking to vindicate the rights of a third party—the federal government). \textit{See} Hillary M. Hoffman, \textit{Signs, Signs, Everywhere Signs: The Wilderness Society v. Kane County Leaves Everyone Confused About Navigating A Right-Of-Way Claim Under Revised Statute 2477}, 18 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 3, 30 (2012).} R.S. 2477 fosters a form of antimonopoly by allowing the public to enforce historic public-access rights against the federal government.\footnote{416}{Environmental groups assert that local governments filing R.S. 2477 claims are motivated by the desire to regain local control and thwart wilderness designations by the federal government. \textit{See} Robert L. Glicksman, \textit{Wilderness Management By The Multiple Use Agencies: What Makes The Forest Service And The Bureau Of Land Management Different?}, 44 Envtl. L. 447, 473 (2014).} In \textit{Southern Utah Wilderness Alliance \textit{v. BLM}}, Judge McConnell for the Tenth Circuit decided that establishing an R.S. 2477 highway requires proof of a continuous history of public use before 1976 but not mechanical construction.\footnote{417}{425 F.3d 735, 769, 782-83 (10th Cir. 2005). The district court had decided in favor of BLM, which rejected several R.S. 2477 claims of Utah counties’ because BLM’s administrative decision was based on substantial evidence on the record, agreeing with BLM’s interpretation that valid R.S. 2477 claims required visible and purposeful physical construction., 147 F. Supp.2d 1130, 1137, 1143 (D. Utah 2001).}
rejecting a mechanical construction requirement favored by the federal government and environmentalists, the court suggested that the probable intent of Congress was “to ensure that widely used routes would remain open to the public even after homesteaders or other land claimants obtained title to the land over which the public traveled,” not to encourage individuals to invest in road infrastructure.\footnote{SUWA, 425 F.3d at 780. Instead, according to the court, “construction” meant something more like clearing boulders and brush so that wagons could travel through the area. \textit{Id.} There is little indication in the legislative record as to the intent of Congress in enacting RS 2477, so intent is left largely to the judicial imagination.} Therefore, what is important for a valid existing right under R.S. 2477 is a history of consistent public use before 1976, by which the public effectively accepted the federal offer of a right-of-way.\footnote{\textit{Id.} at 769. The federal offer was made in ch. 262, § 8, 14 Stat. at 253 (1866) (“[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”) \textit{repealed by} Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). What constitutes acceptance varies according to the law of each state, which the federal government “borrows” due to a lack of federal highway law. Most western states do not require an overt government act to accept the federal right-of-way offer, as continuous public use will suffice. 425 F.3d at 770-71. The period of proof of continuous use varies state-by-state, since the federal rule was “borrowed” from state law. \textit{Id.} at 771. In Utah, a public right-of-way requires use “by many and different persons for a variety of purposes” and is “open to all who desired to use it.” \textit{Id.} at 772 (quoting Lindsay Land & Livestock Co. v. Churnos, 285 P. 646, 648 (Utah 1929)). The Tenth Circuit noted that this state interpretation was consistent with the traditional definition of “highway” as “a way over which the public at large have a right of passage.” \textit{Id.} at 782 (quoting ISAAC GRANT THOMPSON, A PRACTICAL TREATISE ON THE LAW OF HIGHWAYS 1 (1868)).} The claimant must also show that the claimed road still exists in that location.\footnote{COGGINS & GLICKSMAN, \textit{supra} note 176, at § 15:18; Adams v. United States, 3 F.3d 1254, 1258 (9th Cir. 1993).} The court’s interpretation of in R.S. 2477 to include de facto public travel routes thus recognized a broader range of historic access routes than had the BLM.\footnote{SUWA, 425 F.3d at 781 (“If a particular route sustained substantial use by the general public over the necessary period of time, one of two things must be true: either no mechanical construction was necessary, or any necessary construction must have taken place.”).} R.S. 2477 highways, as preserved by FLPMA, serve an antimonopoly purpose by protecting established and
continuously used public access-ways, defined in terms of their historic and ongoing utility to the public, from closure by the BLM or other federal agencies like the National Park Service.\textsuperscript{422} In fact, RS 2477 highways may burden private lands as well.\textsuperscript{423} In 2011, the state of Utah filed claims to over 18,000 such alleged highways,\textsuperscript{424} as part in an effort to disqualify lands with wilderness qualities from wilderness designation, since the Wilderness Act has been interpreted to forbid permanent roads in wilderness areas.\textsuperscript{425} The vast majority of these claims remain unresolved as of this writing.

3. Sacred Sites

One of the more surprising results of antimonopoly sentiment in modern public land law concerns Native American sacred sites on federal lands. Indian tribes ceded many of these sites in treaties and treaty substitutes, but they maintain that federal land managers should manage the

\textsuperscript{422} Occasional or desultory use is not sufficient. \textit{Id.} at 771. The absence of an existing right of way does not prevent individuals from gaining access to the public lands for private or commercial uses, but that would require a right-of-way permit under title V of FLPMA. 43 U.S.C. § 1761.

\textsuperscript{423} See Lindsay Land & Livestock Co. v. Churnos, 285 P. 646 (Utah 1929) (deciding that an R.S. 2477 public highway existed across grazing lands before they came into the private ownership of the plaintiff, and therefore defendants could continue to use it as a public highway).

\textsuperscript{424} See Sierra Club, RS 2477 Claims and Lawsuit, UTAH SIERRA,


\textsuperscript{425} 16 U.S.C. § 1131(c)(3) (“Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act”). Note that RS 2477 rights-of-way could be considered to be “existing private rights” to which wilderness areas must accommodate. And while wilderness study areas (WSAs) and designated wilderness areas may not have permanent “roads,” they may still be designated as such, even where they have R.S. 2477 rights-of-way. A “road” for purposes of the Wilderness Act is different from a public road for R.S. 2477 purposes. An R.S. 2477 right-of-way may exist within a WSA. See Kane County v. United States, 772 F.3d 1205, 1217 (10th Cir. 2014). In those situations, the WSA/wilderness designation “is subject to the terms and conditions of the pre-existing [right of way] grant.” \textit{Id.} (citing BLM Instructional Memorandum No. 90–589 (Aug. 15, 1990)). Also, the Wilderness Act is sometimes thought to require at least 5000 contiguous roadless acres, but the statute requires the area to be 5000 acres \textit{or} be “of sufficient size as to make practicable its preservation and use in an unimpaired condition.” 16 U.S.C. § 1131(c).
sites to maintain their access to areas for religious and cultural activities. The leading case was *Northwest Indian Cemetery Protective Ass’n v. Lyng*,\(^{426}\) in which the Forest Service decided to build a timber road in a sacred area despite an agency-commissioned study that concluded the road would produce “serious and irreparable damage” to Indian religious practices.\(^{427}\) The Supreme Court reversed lower court decisions enjoining the project\(^{428}\) and ruled that Forest Service could proceed to build a timber road in a sacred area despite native objections that the road they violated their constitutional rights under the free exercise clause of the First Amendment. The Court rejected their claims on the ground that non-discriminatory public land decisions having an “incidental effect” on native religious practices without prohibiting religious practices did not require a compelling justification.\(^{429}\)

The Court’s underlying reasoning reflected antimonopoly sentiment. Justice O’Connor’s majority opinion emphasized that requiring the Forest Service to protect Indian religious practices would be tantamount to imposing a religious servitude on public lands, effectively giving them a veto over public land management.\(^{430}\) The decision suggested that upholding the lower courts’ injunction would be tantamount to recognizing “de facto beneficial ownership of some rather spacious tracts of public property,” providing what amounted to a “concomitant subsidy of the

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\(^{427}\) See id. at 442. See also id. at 451 (‘‘The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices.’’).

\(^{428}\) See id. at 458.

\(^{429}\) Id. at 450 (‘‘This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for otherwise lawful actions.’’).

\(^{430}\) Id. at 452 (‘‘The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.’’).
Indian religion.’” In short, the antimonopoly paradigm of multiple use of public lands trumped the protection of Native American religious practices, an outcome that would not surprise tribal advocates.

**Conclusion**

Antimonopoly principles have thoroughly infused federal public land law. They have been there since the Founding. Somewhat surprisingly, they seem to be currently under some sustained attack in Congress, but congressional antimonopoly policy may be the most persistent theme in the long history of federal public land law. Reversal of such longstanding sentiment would be

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431 *Id.* at 453.
432 However, the proposed forest road and the associated timbering harvest never actually occurred. The Supreme Court’s opinion did not reach two statutory grounds for the lower courts’ injunction concerning violations of the National Environmental Policy and Clean Water Acts. Before the agency could remedy those defects, Congress included the area in the Smith River National Recreation Act, 16 U.S.C. §§ 460bbb-460bbb-11. See *Judith V. Royster*, et al., *Native American Natural Resources Law* 19 (3d ed. 2013).


Even when land managers seek to protect native religious practices, they may run into constitutional limits imposed by the First Amendment’s establishment clause. See, *e.g.*, Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F.Supp.2d 1448 (D. Wyo. 1998), *aff’d*, 175 F.2d 814 (10th Cir. 1999) (upholding a voluntary rock climbing ban a sacred site after striking down a mandatory ban). However, managers might be able to justify protecting such practices by classifying them as cultural, rather than religious in nature. See *Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036, 1046 (9th Cir. 2007) (ruling that the establishment clause “does not bar the government from protecting an historically and culturally important site simply because the site’s importance derives at least in part from its sacredness to certain groups” and upholding a rock climbing ban near Lake Tahoe, see *Royster*, *supra* note 433, at 41-45 (reprinting the Forest Service’s decision banning the climbing)).


434 See *infra* note 455.
shocking, however, as it would conflict with the deeply held view that public lands should be managed for the many, not for the monopolistic few.

Historically, antimonopoly sentiment concerning public lands reflected a philosophy of 1) providing widespread distribution of the public domain; 2) preserving public access to public resources, and 3) preventing concentration of public resources. Over the years, the diversity of authorized public land uses grew from promoting commodity production in the 19th century to emphasizing non-commodity uses in the last century. Antimonopoly policy now not only includes distributional equity in the allocation of resources but also provision for diverse uses on federal lands. For example, the modern definition of multiple-use now includes recreation, range, timber, minerals, watershed, fish and wildlife, as well as natural, scenic, scientific and historical values.435

Antimonopoly gained ground during the Disposition Era436 to become a predominant national public ethic. From the Confederation Congress statutes of the 1780s,437 which laid the groundwork for widespread ownership, 438 through the Homestead Act Era of the late 19th

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435 See 43 U.S.C. § 1702(c); see supra notes 342-44 and accompanying text. See also 16 U.S.C. § 1604(g)(3)(A)-(B); supra notes 378-82 and accompanying text.
437 One of the first public land laws, the Northwest Ordinance, rejected hereditary land concentration and large familial holdings that characterized British system of inheritance and recognized public ownership of navigable waters as essential for public use of a critical means of transport in an era of bad roads. See supra notes 33-48 and accompanying text.
438 See e.g. Festa, supra note 34, at 443 (describing the Northwest Ordinance as part of a republican effort to guarantee individual property rights through rule of law in the Northwest Territories, where the Confederation Congress hoped to encourage settlement by the yeoman, rather than to allow a regime of land speculation take hold).
century,\textsuperscript{439} to the Progressive Conservation Era of the early 20\textsuperscript{th} century,\textsuperscript{440} antimonopoly was a persistent theme in public land statutes.

Even when Congress pursued arguably monopolistic railroad land grants beginning with the departure of the South from Congress during the Civil War, antimonopoly policies eventually tempered the railroad grants through the imposition of conditions aimed at limiting land sales to settlers.\textsuperscript{441} The first several decades of the Disposition Era gave birth to an Antimonopoly Era, as public support for selling public lands to finance government became linked to ensuring that the public’s resources be spread as broadly as possible.

\textsuperscript{439} During the disposition era, Congress experimented for decades with various policies for selling or granting public land and resources. Major competing considerations were revenue generation, encouraging diligent development and bona fide settlement, and discouraging speculation. \textit{See supra} notes 53-68 and accompanying text. Advocates for the common settler achieved price reduction and preemption sales, and eventually in the Homestead Act the right to free land, epitomizing egalitarian distribution. \textit{See supra} notes 109-15 and accompanying text.

The late 1800s saw a proliferation of resource legislation reflecting antimonopoly principles. The Timber Cutting Act authorized the free cutting of timber for mining and domestic uses (as opposed to commercial use). \textit{See supra} notes 154-55 and accompanying text. The Timber and Stone Act authorized the sale of timberlands of 160 acres, limited to personal use. \textit{See supra} note 160 and accompanying text. The General Mining Law, while establishing a capture system for minerals, employed antimonopoly principles like size limits for claims and diligent pursuit requirements. \textit{See supra} notes 178-83 and accompanying text. The Unlawful Inclosures Act sought to safeguard the ability of the general public to access to the range resource on public land. \textit{See supra} note 210 and accompanying text.

\textsuperscript{440} Progressive Era resource policy embraced the utilitarian ethic of the greatest good for the greatest number, an antimonopoly principle, reflected in the Forest Service Organic Act’s directive to conserve forestlands while furnishing a continuous supply of timber, and limiting timber cutting to dead and mature trees. \textit{See supra} notes 233-36 and accompanying text. The language of the Act thus rejected clearcuts, a use-monopoly. \textit{See supra} note 236-37 and accompanying text. Progressives thought development of fuel minerals on public lands and hydropower on navigable waters should be regulated as public utilities. \textit{See supra} note 246 and accompanying text. This era also saw the institution of permit-fee regulation for livestock grazing on the public lands. \textit{See supra} notes 305-06 and accompanying text.

\textsuperscript{441} After western settlers agitated for railroad grant reform in the second half of the 19\textsuperscript{th} century, Congress included homestead provisions in railroad grants that aimed to force the companies to sell land to bona fide settlers. Failure to adhere to these antimonopoly provisions led to the forfeiture of millions of acres. \textit{See supra} notes 130-36 and accompanying text.
The Progressive Era transformed antimonopoly by extending its focus to include more uses, including preservation and intergenerational concerns. Those sentiments built on a traditional American antimonopoly sentiment of maintaining public access to public resources, preventing concentration of public resources in the hands of few, and encouraging dispersed uses of federal land. Over the years, the diversity of officially-recognized uses of the public lands grew from commodity production to include non-commodity uses, as reflected in the modern definition of multiple use, which includes recreation, range, timber, minerals, watershed, fish and wildlife, as well as natural, scenic, scientific and historical values. American public land antimonopoly policy has invoked several measures to pursue its goals of widespread distribution and public control, including leasing, term limits, acreage limitations, diligent pursuit requirements, land and resource planning, protection of non-commercial uses, and land use regulation for sustainability, intergenerational equity, and interspecies equity.

In the modern era, the variety of recognized uses of the public lands swelled. The institution of resource planning regimes required the public lands agencies to acknowledge and prepare for diverse users, prepare a framework for protecting those uses before being confronted

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442 See supra notes 293-94.
443 See 43 U.S.C. § 1702(c); see supra notes 343-44 and accompanying text; 16 U.S.C. § 1604(g)(3)(B) (diversity); see supra notes 378-82, and accompanying text.
444 See supra notes 280 (leasing), 319, 271, 299, (term limits), 109, 160, 283-86 (acreage limits), 180-81 (diligent pursuit requirements), 374-77 (planning), 293-94, 359-61 (protection of non-commercial uses), 379-89 (land use regulation for sustainability and interspecies equity). Preservation, public access, and intergenerational equity have become more predominant concerns since the advent of the environmental movement and the coining of the Public Trust Doctrine as a legal concept more than four decades ago. The powers and duties that inhere in the Public Trust Doctrine, to protect and maintain natural resources for the public and future generations, apply to federal government. See Petition for a Writ of Certiorari at 15-18, Alec L. v. McCarthy No. 14-1405 (Oct. 3, 2014). The D.C. Circuit disagrees that the public trust applies to the federal government, and the Supreme Court has as yet refused to clarify. Alec L. v. McCarthy, 561 F. Appx. 7 (D.C. Cir. 2014) (Mem.), cert. denied, 135 S. Ct. 774 (Dec. 8, 2014) (Mem.).
with resource proposals, and created accountability for resource allocation. The Forest Service, for example, must provide for diversity of plant and animal communities in order to meet overall multiple use objectives. Recent Forest Service regulations require national forest plans to provide for social, economic, and ecological sustainability. Public access law has been a major antimonopoly theme throughout, tempered by time, place, and manner restrictions.

While antimonopoly sentiment remains the overriding announced national policy, monopoly in public land management has in fact been tolerated more in the last several decades than it ever was before. For example, leasing of offshore oil and gas has virtually ignored antimonopoly principles; grazing permits are almost invariably renewed; policies aimed at promoting competition in the award of park concessions have not borne much fruit. To the extent that antimonopoly includes interspecies and intergenerational concerns, there is also considerable blowback from states like Utah, which has marshaled sufficient anti-federal

\(445\) See Section V. B.
\(447\) 36 C.F.R. § 219.8 (2012). ANILCA’s protection of subsistence harvests, see supra notes 392-400 and accompanying text, is another example of antimonopoly. Others include MUSYA, see supra note 341 and accompanying text, NFMA’s diversity requirement, see supra notes 378-82 and accompanying text, or ANILCA’s public land limitations, see supra note 399 and accompanying text, although courts have not interpreted these provisions vigorously.
\(448\) See Section V. D.
\(449\) 43 U.S.C. § 1337(a)(1) (2012) (requiring competitive bidding for oil and gas leases on the outer continental shelf, the highest qualified bidder to be awarded the lease); see Huber, supra note 12, at 1011-12 (describing the federal government’s routine extension of offshore leases, and leaseholders’ invocation of lease suspensions as a tool to extend lease terms, even during moratoria).
\(450\) See Huber, supra note 12, at 1004-05 (discussing renewal of federal grazing permits).
\(451\) See Kurt Repanshek, National Park Service Sitting On Half-A-Billion Dollars Of Concessions Obligations, NATIONAL PARKS TRAVELER (Mar. 15, 2015), http://www.nationalparkstraveler.com/2015/03/national-park-service-sitting-half-billion-dollars-concessions-obligations26283 (accessed Sept. 10, 2015) (explaining that four primary companies manage the Parks Service’s concessions. The possessory interests that these companies have in parks infrastructure reaches into the tens and hundreds of millions of dollars. Thus, competition is stifled by the high price a new concessionaire would need to pay to buy out its predecessor).
sentiment to enact a legally indefensible challenge to most federal land holdings in the state.\textsuperscript{452}

Congressional riders under consideration by the 114\textsuperscript{th} Congress include numerous rollbacks of species, land, and resource protections that would reestablish monopoly control, especially by public land graziers and oil and gas lessees.\textsuperscript{453}

This effort to reestablish monopoly control by certain public land users through congressional riders is not a new development,\textsuperscript{454} but the number and scope of the proposed riders suggests that a new era may have been launched in which monopolistic forces now enjoy widespread currency in Congress. If so, that would amount a marked reversal of over two hundred years of congressional antimonopoly expression (sometimes thwarted in on-the-ground implementation).


\textsuperscript{453} See, e.g., Nat’l Resources Defense Council, 2015 Anti-Environmental Budget Riders (June 26, 2015), http://www.nrdc.org/legislation/2015-riders.asp#sec-lands (discussing ten public lands riders, including crippling the government’s ability to acquire lands under the Land and Water Conservation Fund Act; eliminate citizens ability to challenge BLM land use decisions in court; block implementation of Interior’s “wild lands initiative;” authorize the Forest Service to rely on outdated forest plans; forbid the use of eminent domain in support of federal lands management (except in the case of Florida Everglades restoration); exempt livestock grazing permit renewals from environmental review; forbid federal land plans from limiting fishing or shooting activities if they were allowed on January 1, 2013; permanently exempt from environmental review livestock grazing on lands replacing those made unusable by wildfire or drought; permanently prevent BLM or the Forest Service from acquiring water rights to protect fish and wildlife habitat and limit federal land managers ability to restrict activities like hydraulic fracturing to protect waters; and block implementation or enforcement of BLM’s new fracking rule concerning oil and gas wells to protect groundwater).

\textsuperscript{454} For examples, both the Forest Service Organic Act of 1897, ch. 2, 30 Stat. 11, long the governing statute for national forests, and the McCarran Amendment, 43 U.S.C. § 666, by which the federal government consents to state court jurisdiction over its water right in comprehensive water adjudications, were contained in appropriations statutes.
Antimonopoly policy may in fact be a prime example of widely proclaimed high ideals coupled with compromised implementation in relatively low visibility administrative decision-making. Antimonopoly principles are sometimes frustrated through below-cost mineral and timber sales,\textsuperscript{455} grazing permit decisions,\textsuperscript{456} and renewal of park concessions.\textsuperscript{457} Commodity users of public lands can dominate administrative decisions like permit renewals due to the intensity of their interest and their economic ability to participate in complex processes, coupled with a relative lack of participation by the public.\textsuperscript{458} Although imperfectly implemented, antimonopoly policies have persisted from the Founding into the modern age. They are a reflection of the nation’s republican ideals, its agrarian egalitarianism, and the American identity of individualism and equal opportunity.\textsuperscript{459} If future Congresses were walk back from the over two-century old national commitment to antimonopoly principles, that would amount to revolutionary change in public land management policy.


\textsuperscript{456} See Huber, \textit{supra} note 12, at 1004-05.

\textsuperscript{457} See Huber, \textit{supra} note 12, at 1005-07 (renewal of ski resort licenses).

\textsuperscript{458} For a classic anticipation of agency capture in the Gilded Age, see Letter of Richard S. Olney (a prominent railroad lawyer) to Charles S. Perkins (a railroad president) (Dec. 2, 1892), reprinted in \textit{KERMIT L. HALL, ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS} 365-66 (1st ed. 1991), which aimed to assuage industry fears upon the establishment of the Interstate Commerce Commission (suggesting that the Commission would eventually become an industry ally—“the older such a commission gets to be, the more inclined it will be . . . to take the business and railroad view of things. It thus becomes a barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests.” For a modern example of the workings of agency capture, see the effort of the BLM to amend its grazing regulations to reduce public participation in grazing permit renewals, an effort which met with judicial disapproval in \textit{Western Watersheds Project v. Kraayenbrink}, 620 F.3d 1187 (9th Cir. 2010) (affirming a lower court injunction).

\textsuperscript{459} Thomas Jefferson would have inserted a human right to freedom from monopoly in the Bill of Rights. Speaking of the draft Constitution, he stated his critique that it omitted “a bill of rights providing clearly & without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, [and] restriction against monopolies . . . .” Letter from Thomas Jefferson to James Madison (Dec. 20, 1787).