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# Land and Law in the Age of Enterprise: A Legal History of Railroad Land Grants in the Pacific Northwest, 1864-1916

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LAND AND LAW IN THE AGE OF ENTERPRISE:  
A LEGAL HISTORY OF RAILROAD LAND GRANTS IN THE PACIFIC  
NORTHWEST, 1864 - 1916

by

Sean M. Kammer

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
In Partial Fulfillment of Requirements  
For the Degree of Doctor of Philosophy

Major: History

Under the Supervision of Professor William G. Thomas III

Lincoln, Nebraska

May, 2015

LAND AND LAW IN THE AGE OF ENTERPRISE:  
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NORTHWEST, 1864 – 1916

Sean M. Kammer, Ph.D.

University of Nebraska, 2015

Adviser: William G. Thomas III

Federal land subsidies to railroad corporations comprised an important part of the federal government's policies towards its western land domain in the middle decades of the nineteenth century. In all, Congress granted over a hundred million acres to railroad corporations to subsidize construction of a transcontinental railway network. Long after the last such grant in 1871, these land grants continued to incite political contests in Congress and state legislatures and legal disputes in communities across the West. By the end of the century, railroad corporations had become manifestations not just of the threatening growth of corporate power in the United States, but also of the official governmental approach to public lands, the failed and corrupt implementation of that approach, and the apparent threat of resource depletion that resulted. Through its examination of the Northern Pacific's land records, administrative and judicial opinions relating to public lands, and the transcripts of key cases involving land grants, this dissertation makes significant contributions to the historiographies of railroads, of federal land policies, and of the Progressive conservation movement. It treats the

relationship between the government and railroad corporations not as one between regulator and regulated, but rather as one between co-managers of the nation's resources and economy, and as one in which the legal boundaries of authority were uncertain.

Most importantly, though, this dissertation provides insights into the failures of lawmakers and policymakers to standardize and categorize the social and physical worlds they governed. Legal conflicts, including those involving railroad corporations, ultimately exposed contradictions at the heart of the American legal order. These included contradictions between the promotion of individualism and the protection of community order; between notions that land should be owned by as many people as possible for the sake of building a virtuous, fair society and a belief that land should be commodified and exploited for sake of economic growth; and between characterizations of property as bastions of protection from the State and the use of property as a tool of the State in acquiring and maintaining power. Each of these contradictions can be negotiated but never resolved.

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## ACKNOWLEDGMENTS

Earlier this evening I told my wife, Sarah, that the last part of my dissertation left to complete was the “acknowledgments” section. She responded with sound advice: “thank your loving, clever wife, thank your advisor and committee, thank your elderly shiba inu, Maya”—who she also pointed out was a puppy when I started this endeavor—“and be done with it.” I wish I could be so succinct. If this dissertation proves anything, it’s that I can’t.

My first time meeting anyone from the history department at the University of Nebraska was over lunch in the spring of 2007. Months earlier, I had applied for the graduate program in history, and I was meeting a few faculty members to discuss my plans. I don’t remember what I ordered for food, but I still clearly remember being impressed with the energy, intellect, and warmth of the faculty I met with that day. My decision as to whether to attend the University of Nebraska was not finalized that day, to be sure, but I knew it would be a good fit for me if that were what I decided. Thank you, James D. LeSeuer, Andy Graybill, and Will Thomas, for not leading me astray.

Professor Thomas also served as my advisor, and I am especially grateful for that. He always seems to know what to say to get the best out of me when I am on the right track and to help me out of ruts when I am not. He allows me to come up with ideas *seemingly* independently—which is important to me—while still letting me know he has my back whenever needed. Most of all, I have enjoyed simply being around Professor Thomas and being able to share my thoughts with him. His positive energy is infectious, and I look forward to being his friend and colleague.

The same goes for all my committee members. I formed my committee based primarily on who inspired me most through their teaching, scholarship, style, and engagement with the community. Professors Graybill, Margaret Jacobs, and Lloyd Ambrosius clearly met my criteria in addition to offering a variety of invaluable perspectives. The fifth member of my committee is not a historian. One of the college's requirements for doctoral students is that one member of each committee be a faculty member from outside the department of study. I remember struggling to find whom to ask to be on my committee. Fortunately, as the deadline approached for forming my committee, Professor Thomas recommended a faculty member from the law school, Sandi Zellmer, who he thought would be a perfect fit. All I can say now is he was right.

I hope I can someday repay each of the members of my committee for all they have done for me, but I know that is impossible. I suppose I will just have to pay it forward. I *am* excited for that.

Beyond my committee, I owe a special gratitude to John R. Wunder. Even as he neared retirement, Professor Wunder did all he could to help me both in and out of the classroom. He has been a mentor to me in every sense of the word.

Thank you to the history department for supporting my dissertation research, including through awarding me the Addison E. Sheldon Research Fellowship in 2011.

Thank you to all the librarians who helped me track down texts. Thank you to the support staff in the history department, Barbara Bullington and Sandra Pershing, for all of their help in navigating the bureaucratic maze of graduate learning. Thanks as well to Teresa Carlisle here at the University of South Dakota School of Law for her

occasional proofreading and, in advance, for her help printing and mailing copies of this document to my committee members.

My graduate experience could not have been a success without the friendships I formed along the way. Thank you especially to Shayla Swift, Rob Voss, Dave Nesheim, Andy Wilson, Chris Steinke, Jason Heppler, Michelle Tiedje, Brianna Theobald, Brian Sarnacki, Robert Jordan, and Rebecca Wingo for sharing this experience with me. Our mostly ridiculous conversations, whether on the tenth floor of Oldfather or on the back patio of Duffy's, helped keep me sane(-ish).

And of course thank you, Sarah and Maya. I could not have done this without you.

--Sean Kammer

Vermillion, South Dakota

April 16, 2015



## TABLE OF CONTENTS

Acknowledgments .....	v
Table of Contents .....	viii
Introduction .....	1
Chapter 1 – Railroad Land Grants in an Incongruous Land System .....	25
Chapter 2 – Avoiding a Public Lands Tragedy .....	114
Chapter 3 – Lawyering for the Railroad .....	153
Chapter 4 – The Railroads Must Have Ties .....	181
Chapter 5 – Inertia and Undirected Drift.....	224
Epilogue.....	276
Bibliography .....	288

*Ask the man who wonders that there are so many laws, to go with you to the neighboring prairie, and, standing in the door of the farmhouse, with corn-fields and pastures before you, explain to him the title by which the owner holds the land, how far his use is absolute, and how qualified by the rights of his neighbors, or the paramount rights of the State, the relative rights of the wife and husband, the persons who shall succeed when the owner dies, the rights of the adjoining proprietors in the stream which runs through the pasture, the rights of the tenant who tills the meadow, what right the owner has in the shore of the lake, how far he may build into it and on what conditions, the relative rights of himself and the public in the highway before his house, the right which he has to the pew in the church, whose spire shines through the trees, and in the family vault where he expects in due time to be borne.*

--David Dudley Field, Chicago, IL, 1859.

## INTRODUCTION

In 1888, English scholar James Bryce criticized western railroad land grants as “often improvident” and as giving “rise to endless lobbying and intrigue, first to secure them, then to keep them from being declared forfeited in respect of some breach of the conditions imposed by Congress on the company.”<sup>1</sup> Bryce also observed the extent to which the grants of land to the railroads allowed the beneficiary companies to exercise great power not only through their role as carriers of people and commerce, but also through their role as large landowners, a role which brought them “yet another source of wealth and power” and which “brought them into intimate and often perilously delicate relations with leading politicians.”<sup>2</sup> Indeed, from the perspective of the so-called “railroad tycoons” and their financial backers, the land grants became sources of wealth and power independent of and sometimes contrary to the interests of the railroad corporations themselves as carriers.<sup>3</sup> While Congress intended the railroad land grants to serve as a means to the end of railroad construction and the settlement of the federal government’s expansive public domain, the railroads came to see them as an end in themselves—as independent sources of wealth and power.

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<sup>1</sup> James Bryce, *The American Commonwealth*, 1st Ed., Vol. 2 (New York: Macmillan and Co., 1888), 507.

<sup>2</sup> Bryce, *American Commonwealth*, 507.

<sup>3</sup> See Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton & Company, 2011).

Bryce wrote at a time when railroad companies, and the subsidies they had received, had become unpopular. Over the previous decades, however, federal land grants to railroads had been a critical component of the government's effort to settle its newly expanded public domain—an endeavor which Euro-Americans largely celebrated. Stephen Douglas orchestrated the first such grant to the Illinois Central in 1850, made possible by his compromise to grant lands in a checkerboard pattern as a way to pay for the subsidy. The granting of public lands to railroads accelerated during the Civil War with Congress' passage of the Pacific Railway Act of 1862, which chartered the Union Pacific and the Central Pacific and subsidized their construction of a railway from Nebraska to San Francisco, California through the granting of land.<sup>4</sup> This policy continued in subsequent years with similar grants on both sides of the Union Pacific-Central Pacific line. In all, agents of the federal government granted roughly 130 million acres to railroads from 1850 to 1871.<sup>5</sup>

In the middle of the century, railroads represented American modernity. As technological marvels, they symbolized the ability of American society to control and harness nature to better American life, while their carrying of passengers and products represented the freeing of humans from the tyranny of distance and time.<sup>6</sup> By the end of the nineteenth century, though, they had come to represent something much more

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<sup>4</sup> Pacific Railway Act of 1862, 12 Stat. 489.

<sup>5</sup> Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC: Island Press, 1992), 18, 122; Paul W. Gates, "The Railroad Land-Grant Legend," *Journal of Economic History* 14 (Spring 1954): 143-46; Samuel T. Dana, *Forest and Range Policy: Its Development in the United States* (McGraw-Hill Book Co., 1956), 37-38.

<sup>6</sup> See, for example, William G. Thomas III, *The Iron Way: Railroads, the Civil War, and the Making of Modern America* (Yale University Press, 2011).

negative. They had become manifestations not just of the threatening growth of corporate power in the United States, but also of the official governmental approach to public lands, the failed and corrupt implementation of that approach, and the apparent threat of resource depletion that resulted.<sup>7</sup> Many saw the railroads as the primary beneficiaries of the predominant public lands policy of converting the public domain into privately held property as rapidly and cheaply as feasible in order to stimulate economic development.<sup>8</sup> The massive giveaway of land to corporations from 1850 to the end of the century was part of the reason that American historian Vernon L. Parrington famously described the era as “the Great Barbecue.”<sup>9</sup> Railroad officials and other plutocrats got fat, it seemed, while farmers and laborers went hungry.

These land grants led not only to “endless lobbying” in Congress to secure them and to keep them from being forfeited, as Bryce noted, but also to endless disputes in towns and rural areas across the West. The railroads’ ownership (or claimed ownership) of so much land contributed mightily to their fall in public imagination from that of promoter to that of parasite, and from that of savior to that of scapegoat.<sup>10</sup> At the same time, some policymakers and forestry experts began advocating for a new governmental

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<sup>7</sup> See Wilkinson, *Crossing the Next Meridian*.

<sup>8</sup> Wilkinson characterized the “main thrust” of such policies as being the desire “to transfer public resources into private hands on a wholesale basis in order to conquer nature.” Wilkinson, *Crossing the Next Meridian*, 18.

<sup>9</sup> Vernon Louis Parrington, *Main Currents in American Thought*, vol. 3 (Harcourt, Brace, 1954), 23.

<sup>10</sup> Paul Wallace Gates once argued that the railroads’ administration of land grants had more to do with producing the settler-railroad conflicts of the late nineteenth century than the railroad’s shady financial dealings, alleged rate-fixing, or accumulation of political power did. See Paul Wallace Gates, *Fifty Million Acres: Conflicts Over Kansas Land Policy, 1854-1890* (Norman: University of Oklahoma Press, 1997).

approach to forest resources and, to some degree, to land management more generally. In short, they sought for the federal government to retain land rather than to dispose of it, and to manage forests for sustainable use rather than to encourage their destruction.

This dissertation is a case study meant to answer a deceptively simple question. In a period of shifting attitudes towards timber resources beginning in the last decades of the nineteenth century, how did the land use approaches and legal strategies of the land grant railroads, themselves perhaps constrained by the legal environments they encountered, shape the development of natural resources and land law and the development and implementation of federal land-use policies? In answering that question, the scope of this study is limited to the Pacific Northwest, including lands now comprising the states of Washington, Oregon, and Idaho, and the western part of Montana. This is because that region was a central focus of both timber companies and conservationists, and because it was a region in which substantial grant lands and public lands remained during the time in which federal public land policy shifted from land alienation to land retention and management.<sup>11</sup>

The first two chapters cover the railroad companies' acquisition of lands and their efforts to secure them from depredations. Chapter 1 examines the process by which railroad companies actually acquired their extensive land grants. Over several decades, legal disputes between railroads and settlers, miners, speculators, politicians, and

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<sup>11</sup> Federal railroad land grants in the Pacific Northwest consisted of two large land grants, one the western portion of a grant to the Northern Pacific for a railway from Lake Superior to the Puget Sound and the other for a railway from Portland to the California-Oregon border. Under these grants (as amended through subsequent legislative acts) the Northern Pacific received almost forty-million acres stretching from Wisconsin to Washington, and the Oregon & California received over three-million acres in Oregon along the Willamette Valley.

government officials tested a nascent bureaucracy and an over-burdened judiciary. The laws governing such disputes remained unpredictable, despite the efforts of lawmakers to endow American law with stability and certainty. Chapter 2 explores the customs of free land, free minerals, and free timber that pervaded Euro-American communities across the West over the nineteenth century. Railroad officials benefitted from these perspectives, and their companies initially accelerated the rate of resource exploitation that such perspectives promoted. However, railroad land grant recipients, particularly in the Pacific Northwest, also played an important role in confronting such customs, ultimately paving the way for a paradigm shift in federal public lands policy.

Chapter 3 examines the practices and customs of the lawyers representing railroads and some against whom they litigated. While many developments in the legal profession in the Pacific Northwest mirrored those occurring in the East, the scale and speed of developments differed. Lawyers in this region were intimately aware with the physicality of law itself—that it existed as it was written and distributed—and in the limitedness of humanity’s conquest of space and time. This contributed to broader changes in legal literature and in the federal judiciary.

Chapters 4 and 5 explore railroad policies towards land and its resources and the extent to which legal considerations either undermined or supported those approaches. Chapter 4 begins by exploring the efforts of the Northern Pacific and Oregon & California railroad companies to dispose of their lands, especially their agricultural lands (and those they could sell as “agricultural” to those who had never been to the region). It then shows how railroad officials began to recognize, around the turn of the century, the value of their companies’ land holdings not just for securing debt or raising

revenues through sales and ultimately through the production of goods to be transported, but also for sustaining the railroad empires themselves. Railways required a lot of physical material, including timber, and the companies' holdings in the Pacific Northwest were rich in such materials. The political and legal consequences of the Oregon & California's apparent decision to retain its timberland holdings in Oregon is the subject of Chapter 5. After almost a decade of political wrangling and litigation, during which the legal status of over two million acres of prime timberland remained in limbo, the federal government took back the lands. It did so in a way that largely repeated the improvidence of the land grants in the first place.

This dissertation is many things. On one level, this dissertation is about relationships between railroad officials and government officials, representatives, and bureaucrats. Traditional historical accounts of these relationships have largely focused on the government's regulatory efforts in the areas of commerce, political influence, and consumer and labor protections. John F. Stover's studies of railroads during the Progressive era, for instance, include discussions of the government's regulatory attempts to address problems relating to monopoly and corporate organization, political corruption, passenger safety, and labor condition, but they lack any discussion of the influence of railroads on the management of land and natural resources.<sup>12</sup> Similarly, Maury Klein, writing in 1994, examined what he called the "second pioneering era of American railroads" from the Civil War to the first decades of the twentieth century, during which time railroads, according to Klein, helped bring about federal regulation

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<sup>12</sup> See John F. Stover, *The Life and Decline of the American Railroad* (Oxford University Press, 1970); John F. Stover, *American Railroads*, 2nd ed. (University Of Chicago Press, 1997).



of big business in the areas of capital mobilization, corporate organization, accounting, and labor relations by demonstrating the failures of self-rule through a purported “community of interests.”<sup>13</sup> Despite Klein’s assessment of Edward H. Harriman (who headed the Union Pacific, Southern Pacific, and other major railroads around the turn of the century) as “the Moses who dragged the rail industry into the modern era,” and despite Harriman’s and other railroads’ extensive holdings of land and natural resources at that time, Klein neglected the railroads’ role in bringing about “modern” approaches to land and natural resources.<sup>14</sup>

The recent trend in railroad historiography has favored exploring the multifaceted impacts of railroads on broader social, cultural, economic, political, and legal processes. Three legal histories from the last decade demonstrate this trend. First, in his account of southern railroad lawyers during the late nineteenth century, for instance, William G. Thomas III linked the choices these lawyers made not only to the development of increasingly complex corporate forms and mechanisms, but also to the

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<sup>13</sup> Maury Klein, *Unfinished Business: The Railroad in American Life* (Hanover, NH: University Press of New England, 1994), 141. For specific works on the Union Pacific, see Klein, *Union Pacific: The Birth of a Railroad, 1862-1893* (New York: Doubleday, 1987); *Union Pacific: The Rebirth 1894-1969* (New York: Doubleday, 1989). These works are primarily corporate, administrative, and economic histories with an emphasis on key figures including Edward H. Harriman, whose leadership of the Southern Pacific from 1901 until his death in 1909 is relevant to my study). Klein has also published a biography of Harriman, *The Life and Legend of E. H. Harriman* (Chapel Hill: University of North Carolina Press, 2000), using some private manuscript sources made available for the first time to Klein.

<sup>14</sup> Klein, *Unfinished Business*, 112. For a work emphasizing the collaborative aspects of the relationship between the state and the railroads, see Robert Angevine, *The Railroad and the State: War, Politics, and Technology in Nineteenth-Century America* (Palo Alto, CA: Stanford University Press, 2004) (arguing that in the decades following the Civil War, military leaders, understanding the important role railroads could play in conquering and settling the West, allied with the railroads and formed a mutually-beneficial relationship whereby the “government provided the land, the army provided the protection, and private businesses built and operated the railroads”), quote at 226.

integration of the South into the national economy; to the usurpation of the planter class as the dominant power brokers and the development of a local political economy unique to that region; to the bifurcation and increased professionalization of the legal profession; to the weakening of common law defenses such as fellow-servant, contributory negligence, and assumption of risk; and to the shift in regulatory power from states to the federal government.<sup>15</sup> Second, Barbara Welke, in *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920*, analyzed how people's daily experiences with the railroad impacted their conceptions of liberty and, ultimately, shifted the balance in American society and law between individual freedoms and corporate or state power. In so doing, she linked the development of railroads and public streetcars to the formulation of new legal causes of action to redress mental or emotional harms, to the institution of formal racial segregation, and to the general acceptance of the proposition that liberty in such a modern world required state protection (all of which she claimed were also rooted in gendered assumptions).<sup>16</sup> Finally, James W. Ely, in *Railroads and American Law*, showed how railroads affected "the evolution of American law" more generally, including their impact on the role of government as both sovereign and contractor, on issues of corporate liability for personal injury, on law's mediation of broader social conflict, on the separation of

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<sup>15</sup> See generally William G. Thomas III, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge, LA: Louisiana State University Press, 1999).

<sup>16</sup> See generally Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (New York: Cambridge University Press, 2001).

powers (both among the branches of government and within the federalist structure), and on bankruptcy law.<sup>17</sup>

Though not strictly legal histories, two recent works on railroads during the middle to late nineteenth century have greatly influenced this project. One is Richard White's *Railroaded: The Transcontinentals and the Making of Modern America*, published in 2011. In that work, as immense in its depth of research as in its size, White agreed with traditional economic history orthodoxy that railroad entrepreneurs served an important role in "making ... modern America," as his title suggests, but the "contributions" in his account are nothing to be celebrated. Railroad entrepreneurs played their part not through innovating technologies and systems intended to improve society, but rather through developing financial mechanisms to enrich only themselves while bankrupting the corporations whose interests they purportedly represented, as well as undermining the social policies that motivated the federal government's subsidies to them.<sup>18</sup> The other is Thomas' *The Iron Way: Railroads, the Civil War, and the Making of Modern America*, also published in 2011. In this work, Thomas explored

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<sup>17</sup> See generally James W. Ely, *Railroads and American Law* (University Press of Kansas, 2001), quotation at vii. Other recent works exploring railroads' impact on broader society include William Deverell's *Railroad Crossing: Californians and the Railroad, 1850-1910* (Berkeley: University of California Press, 1994) (a cultural and political history which explored why and how various socio-economic groups in California opposed the Southern Pacific and the impact of their opposition efforts on California politics); and Steven W. Usselman's *Regulating Railroad Innovation: Business, Technology, and Politics in America, 1840-1920* (New York: Cambridge University Press, 2002) (arguing that in the period from 1876 to 1904, the railroad experience of embracing those technical innovations consistent with an efficient and orderly railroad operation while rejecting those which threatened to disrupt those rules inspired the Progressive image of an efficient, well-run society attainable through rational and scientific management and provided a model for bureaucracies necessary to implement that vision on a grand scale).

<sup>18</sup> See generally White, *Railroaded*.

the role of railroads in the Civil War, particularly in supporting two different “modern” worlds, one in the North, the other in the South.<sup>19</sup> Whereas the “modern America” in White’s account was one of greed, corruption, and ineptitude, the modernity of Thomas’ America is plural, malleable, and amoral. Railroads “made” something, to be sure, but what that *thing* was, and the meanings attached to it, depended on a host of other factors beyond the control of railroads.

On another level, this dissertation is about the relationships between railroads and the physical environment. Regarding the role of railroads as suppliers of natural resources through their management or disposal of their extensive land grants, traditional railroad histories have tended to focus on the wisdom of congressional policies, the railroads’ subversions of those policies, and the social and political ramifications of the land grant policy. For instance, in a 1946 article, David Maldwyn Ellis examined the political movement for the forfeiture of railroad land grants during the late nineteenth century, a movement that he argued arose from the rising fears of land monopolies combined with a distrust of railroads and their practices. Ellis did not blame the railroads, however. Rather, he considered the railroads to have been rational economic actors and the railroads’ subversions of federal policy and the forfeiture movement that followed to have been the “inevitable outcome of our lavish and poorly-administered land grant policy.”<sup>20</sup> More recently, Lloyd Mercer’s *Railroads and Land Grant Policies* examined the “economic rationality” of land grants to seven

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<sup>19</sup> See generally Thomas, *Iron Way*.

<sup>20</sup> David Maldwyn Ellis, “The Forfeiture of Railroad Land Grants, 1867-1894,” *Mississippi Valley Historical Review* 33, no. 1 (June 1946): 60.

transcontinental railroad systems (including the Canadian government's grant to the Canadian Pacific along with six grants in the United States). Based on the social rates of return, Mercer argued that government subsidies to railroads were economically rational in all but one case (the grant to the Texas Pacific & Santa Fe), but he added the important caveat that while economically rational at the time, the land grants can be deemed after the fact to have been unnecessary in the cases of the Union Pacific, the Central Pacific, and the Great Northern. Still, he ultimately concluded, in contrast to Ellis' assessment, that "[o]n balance, the land grant policy was good for society," at least "in terms of economic efficiency."<sup>21</sup>

Until very recently, scholars have largely neglected the impacts of railroads on natural resources law or policy. A notable exception is Sherry H. Olson's *The Depletion Myth: A History of Railroad Use of Timber*, published in 1971. Her central argument in that work was that the most important responses to the threat of depletions were made by the "major industrial consumers of wood, not by forest owners, managers or lumber producers" in the form of "investments in research ... in the use of wood and its substitutes."<sup>22</sup> Accordingly, her work focused on the railroads as consumers of timber products rather than as suppliers, producers, or managers of natural resources, and she

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<sup>21</sup> Lloyd J. Mercer, *Railroads and Land Grant Policy: Study in Government Intervention* (Academic Press, 1982), 149.

<sup>22</sup> Sherry H. Olson, *The Depletion Myth: A History of Railroad Use of Timber* (Cambridge, MA: Harvard University Press, 1971), 3. *See also*, Frederick J. Yonce, "Lumbering and the Public Timberlands in Washington: The Era of Disposal," *Journal of Forest History* 22, no. 1 (1978): 4-17 (contending that the NP land grant "had a major impact on timber protection, land availability, and concentration that is seldom recognized," and that "the picture that emerges in Washington is much more complex and much less ethically clear-cut than that of wholesale theft, fraud, and monopoly"), quotation at 5-6.

grounded her analysis in the economic realities of supply and demand. More recently, Alfred Runte published a cultural and environmental history that examined the profound role of the railroads in creating and maintaining national parks throughout the West.<sup>23</sup> Runte argued that railroads, by providing the American public access to “nature” and by making it a shared experience, not only fostered the public’s growing appreciation for nature but also strengthened the bonds of fraternity and nationalism. Richard Orsi’s *Sunset Pacific* is the most extensive treatment of a western railroad’s practices towards land and natural resources. His central argument was that the Southern Pacific, because it saw its corporate interests as consistent with the public welfare, “promoted more organized, efficient settlement, economic development, and more enlightened resource policies in its service area.” In so doing, that railroad, according to Orsi, “took a major role in the emergence of modern management of water, wilderness parks, forests, and rangelands.”<sup>24</sup>

On yet another level, this dissertation is about the origins of federal forest management—one part of the wider Progressive-era conservation movement. In recent decades, historians have thoroughly reassessed the Progressive conservation movement, including its central premises, and have undermined the traditional narrative (based on the statements of Progressives themselves) of that movement as one rooted in an altruistic and open-minded concern for nature. This revisionist trend began with Samuel P. Hays’ 1960 work, *Conservation and the Gospel of Efficiency*, in which he argued that

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<sup>23</sup> Alfred Runte, *Allies of the Earth: Railroads And the Soul of Preservation* (Truman State University Press, 2006).

<sup>24</sup> Richard J. Orsi, *Sunset Limited: The Southern Pacific Railroad and the Development of the American West, 1850-1930* (Berkeley: University of California Press, 2007), xiv-xv.

the Progressive conservation movement was not in fact a crusade of the people against the trusts or “interests” as many Progressives had insisted, but was primarily a scientific movement whose central tenet was that scientists and technicians—not politicians—should dictate the course of resource development.<sup>25</sup> Environmental historians have built upon Hays’ work, as well as developments in ecology, to historicize the science of conservation and to reject the view of culture and environment as separate entities. Rather, the trend has been towards viewing culture and environment as interconnected components of an ecological system that is far more chaotic, unstable, and random than previously thought.<sup>26</sup>

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<sup>25</sup> Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920*, paperback ed. (University of Pittsburgh Press, 1999) (originally published in 1960).

<sup>26</sup> For an accessible summation of transformations within the field of ecology and their impacts on environmental history, see Donald Worster, “The Ecology of Order and Chaos,” in *The Wealth of Nature: Environmental History and the Ecological Imagination* (New York: Oxford University Press, 1993): 156-70. Representative of this trend in histories of conservation are Arthur F. McEvoy’s *The Fisherman’s Problem: Ecology and Law in the California Fisheries, 1850-1980* (New York: Cambridge University Press, 1990) (arguing that conservation and effective management by a unified directing power can solve the “fisherman’s problem,” essentially the tragedy of the commons applied to fisheries, only if and to the extent that decision-makers understand the interconnectedness of human interactions and the ecological landscape, and that the “fisherman’s problem” has persisted as long as it has because policy-makers, including Progressive conservationists, failed to grasp that truth); Joseph E. Taylor III’s *Making Salmon: An Environmental History of the Northwest Fisheries Crisis* (Seattle: University of Washington Press, 1999) (arguing that conservationist attempts to prevent a salmon crisis between the 1880s and 1920s damaged fisheries as much as overfishing or habitat destruction, based in large part on the fact that fisheries biologists acted upon faulty logic and failed to heed the extent of genetic differentiation among salmon and the role of climate in influencing and de-stabilizing salmon runs); and Karl Jacoby’s *Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservation* (Berkeley: University of California Press, 2001) (arguing that Progressive conservation’s core values were to standardize resource-use and to enforce those standards on previously autonomous local communities, and that it, thus, constituted an exercise of social authority by conservationists and the State over local communities which had enjoyed and depended upon certain customary, pseudo-legal privileges over the land which conservationists deemed “illegal”).

This dissertation makes significant contributions to the historiographies of railroads, of federal land policies, and of the Progressive conservation movement. It offers a new perspective to the narrative regarding the relationship between railroads and the government, one that has tended to focus on their relationship as one between a sovereign regulator (the government) and a regulated subject, alternatively emphasizing either the government's effectiveness in constraining the railroads or the railroads' successes in exerting political influence to use the government (and the law) as an instrument for its economic gains. This dissertation, in contrast, explores their relationship as one between co-managers of the nation's land and natural resources and economy, and one in which the legal boundaries of authority were uncertain. It follows in the line of other works that have emphasized the impact of railroads on aspects of the American experience not normally associated with railroads—in this case, natural resources law and policy. It will also add to the insights of Orsi's work regarding that subject by adding a legal component. With regard to the field of conservation history, this dissertation focuses on the conservation movement as one challenging established legal paradigms, thus serving as an apt illustration of not only Hays' influential thesis, but also the extent to which conservation was contested terrain throughout the entire Progressive era and the extent to which its "successes" depended on the legal wrangling of "interests" long thought to have opposed it.

This dissertation, though, is predominantly a legal history. Its core questions relate to those historical phenomena categorized as "legal" by those who encountered or related to them. As such, legal historians have primarily shaped the theoretical perspective of this dissertation. Forty years ago, this endeavor would have been



unsatisfying, as American legal historians into the 1970s, for the most part, remained blissfully ignorant of social and political theories, or at least they did not see their relevance to the study of law's development. Christopher Tomlins, one historian who has contributed to transforming the field, recently wrote of U.S. legal history as being "one of the most obdurately atheoretical of intellectual practices."<sup>27</sup> Tomlins' observation echoes similar critiques from years earlier. For instance, Morton Horwitz, in 1973, complained of the "celebratory or self-congratulatory" tone of legal historiography, one Horwitz linked to the fact that legal histories were, at that time, almost exclusively the province of lawyers, not professional historians. Horwitz especially lamented their tendency to emphasize "lawyer-like concerns" while "ignoring the relationship between what lawyers do and their political function."<sup>28</sup>

In recent decades, however, American legal history has matured as a field. Rather than envisioning law as a rational discourse that changes according to lawmakers' reasoned interpretations of precedent, the dominant trend in the legal-historical scholarship has been to emphasize law's interdependent relationship with the social, political, and cultural environment in which it is produced and maintained. To some degree, all legal historians of the last half-century owe an intellectual debt to James Willard Hurst. Through his works, Hurst introduced legal historians to a sociological approach to law, one that focuses on law as a social institution rather than as a body of intellectual doctrines. Such an approach required exploring not just

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<sup>27</sup> Christopher Tomlins, "What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's 'Critical Legal Histories,'" *Law & Social Inquiry* 37 (2012): 155.

<sup>28</sup> Morton J Horwitz, "The Conservative Tradition in the Writing of American Legal History," *American Journal of Legal History* 17 (1973): 275.

decisions of the Supreme Court and other high appellate tribunals, but also the decisions (or even deliberations) of state and county courts, the records of executive agencies, and correspondences of law offices. Although legal historians have moved away from Hurst's historical model of law's relationship with its environment, Hurst provided historians with the intellectual space to do so. Hurst was an "instrumentalist" in that his chief concern was not the logic (or illogic) of legal doctrines but rather how well they served—or *functioned*—as an *instrument* for certain social aims. Moreover, in Hurst's accounts, legal change occurred not due to judicial clarifications of past precedent based on reason and logic, but rather due to changing demands of society upon legal institutions.<sup>29</sup>

One can trace the roots of Hurst's account to the jurisprudential theory of "legal realism" developed much earlier in the twentieth century. Justice Oliver Wendell Holmes Jr., who served on the America's highest court from 1902 to 1932, was a pioneering advocate of this legal theory. In elucidating the central theme for one of his finest works, Hurst made explicit his intellectual debt to Holmes and the legal realists who followed when he quoted the Holmes' succinct summation of legal realism: "the life of the law has not been logic: it has been experience."<sup>30</sup> Holmes' writings, including his judicial opinions, undermined the conception of law as deriving from natural law as realized through an unending process of reasoning, and he believed laws should be judged scientifically according to how well they satisfy "accurately measured social

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<sup>29</sup> In this way, Hurst's work (and that of most functionalist legal historians of the last half century) can also be described as Realist in the tradition of Oliver Wendell Holmes.

<sup>30</sup> Hurst, *Law and Economic Growth*, 608, quoting Oliver Wendell Holmes, *The Common Law* (Boston, MA: Little, Brown, and Co., 1909), I.

desires”—or how well law serves its various “functions”—rather than according to their consistency, or lack thereof, with notions of morality or natural law.<sup>31</sup> His externalist approach to interpreting legal precedents paved the way for all externalist interpretations of law’s role in history.<sup>32</sup>

Hurst’s model has also come to represent the “consensus model” of legal history. In Hurst’s writings, the “lawmakers” were elites, but the demands they made of law represented the shared desires and morals of the community at large. Specifically, nineteenth century legal developments reflected the American consensus that law should “protect and promote the release of individual creative energy to the greatest extent compatible with the broad sharing of opportunity for such expression.”<sup>33</sup> In the

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<sup>31</sup> Oliver Wendell Holmes, “Law in Science and Science in Law,” *Harvard Law Review* 12 (1899): 456.

<sup>32</sup> While the influence of legal realism on Hurst and other functionalist legal historians is fairly obvious, it is less so in regards to the CLS school, particularly as CLS arose as a rebuttal to legal realism. Still, CLS shares with legal realism several features, including chiefly the axioms that law is not dictated by logic or morality and that law often operates in ways that are inconsistent with formal legal concepts. However, whereas legal functionalists replaced logic with experience and pragmatic, object-oriented reasoning, CLS scholars replaced it with subjectivity and cultural hegemony.

<sup>33</sup> Hurst, *Law and Conditions of Freedom*, 6. Hurst failed to recognize the extent to which his “consensus” excluded some peoples from the project of economic development or the extent to which there were peoples whose “creative energies” were to be contained rather than released. For a largely instrumentalist account of how the law was used to serve the needs of the Anglo-Americans at the expense of Native Americans by divesting them of lands and rights, see Vanessa Ann Gunther, *Ambiguous Justice: Native Americans And the Law in Southern California, 1848-1890* (East Lansing: Michigan State University Press, 2006). That Native Americans were excluded from the American project of economic independence was thoroughly demonstrated by the law’s classification of Indians as “domestic dependent nations,” and by the United States’ policies of removal and ultimately general allotment. Hurst also expressed unease at having to discuss the Married Women’s Property Acts of the mid-nineteenth century. Although he recognized them as “a significant step in increasing the self-determining role of the wife in the household and outside,” at another point he characterized these laws as a “diversion” from economic matters which lawmakers turned to only “grudgingly.” Hurst, *Law and Conditions of Freedom*, 24, 29. It appears that it was Hurst who was reluctant to diverge

1970s, scholars began to question Hurst's "consensus model" by arguing either that law represented a balancing of a diversity of social interests, or that elites, far from representing a community consensus, in fact manipulated law to serve their own interests and to bolster their positions within society. Most notably, Morton J. Horwitz argued, in 1977's *The Transformation of American Law, 1780-1860*, that nineteenth century law primarily served the powerful by enabling "emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power" and then to retain that power once gained.<sup>34</sup> What Hurst saw as law's "release of energies," Horwitz saw as law's protection of propertied interests and its promotion of technological and territorial expansion, goals whose social costs fell disproportionately on the unpropertied classes, including minorities and the white working class. To Horwitz (or at least this early version of Horwitz), then, law functions no differently than politics; it is a source of power that designates winners and losers.<sup>35</sup> Although Horwitz's approach

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from discussing economic matters that contravened his consensus model. He seemingly only "grudgingly" included women in his narrative.

<sup>34</sup> Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977), xvi. See also William Edward Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, Studies in Legal History (Cambridge, MA: Harvard University Press, 1975) (arguing that the law became an instrument of certain interest groups to acquire more than their fair share of society's wealth and enforce such disposition on the losing groups).

<sup>35</sup> Lawrence Friedman's general approach fell somewhere in between Hurst's and Horwitz's versions of functionalism. Friedman conceded Horwitz's point that law has served the interests of the powerful, but he contends that that assessment misses the point and should not be the focus of legal-history studies. According to Friedman, the protection of the powerful has been the effect of law, but not its purpose. The law's purpose is not the protection of the powerful, but the protection of stability. See Lawrence M. Friedman, *A History of American Law*, 2nd ed. (New York: Simon and Schuster, 1973); see also John Phillip Reid, *Controlling the Law: Legal Politics in Early National New Hampshire* (DeKalb: Northern Illinois University Press, 2004) for an example of this approach. Other scholars have criticized both Hurst and Horwitz for neglecting the role of non-elites in bringing about legal change. These scholars tend to focus on the way in which ordinary people—as "consumers of law"—influence the course of

differed from Hurst's, their philosophies shared one core principle: the notion that law is an instrument of society and is socially—if not economically—determined. In this way, Horwitz became Karl Marx to Hurst's Adam Smith.

Regardless of its connections to past scholarship, Horwitz's *Transformation of American Law* came at a transitional point in legal historiography, and it proved important.<sup>36</sup> Its influence was primarily in its critical stance towards American law's development. Whereas Hurst had criticized, at times, law's inflexibility in responding to changed social circumstances, Horwitz criticized not just law's failures in serving certain objectives, but also the *objectives* themselves. Others followed suit. The same year of *Transformation's* publication, 1977, a group of legal scholars established the Conference on Critical Legal Studies (CLS) to examine—and to attack—the structures of law that allowed it to protect, if not produce, unjust social hierarchies. Rather than envisioning law as a product of social experiences, CLS scholars treated law as ideology. In a most succinct and straightforward description of CLS, Allan C.

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legal history through the filing of lawsuits or the pressuring of legislators. According to this view, law is often seen as reflecting the competition among various economic and social groups in society as a whole. See Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).for a general text that incorporates this view.

<sup>36</sup> Of course, the selection of any point in time as a transition point is somewhat arbitrary, as some of the ideas that became vogue among legal scholars and legal historians in the late-1970s and early-1980s had been circulating in those fields in the years prior to such point in time and had originated elsewhere in academia years or decades (or even centuries) earlier. For a variety of scholarly assessments of Horwitz's influence on legal history, see Daniel W. Hamilton and Alfred L. Brophy, eds., *Transformations in American Legal History: Essays in Honor of Professor Morton J. Horwitz* (Cambridge, MA: Harvard University Press, 2009); Daniel W. Hamilton and Alfred L. Brophy, eds., *Transformations in American Legal History: Law, Ideology, and Methods: Essays in Honor of Morton J. Horwitz* (Cambridge, MA: Harvard University Press, 2010). See also James Boyle, Introduction to Boyle, ed., *Critical Legal Studies* (New York: NYU Press, 1994), xxi. Although far less favorable, for a contemporaneous acknowledgment of the potential impact of Horwitz's Transformations, see John Philip Reid, "A Plot too Indoctrinaire," *Texas Law Review* 55: 1307.

Hutchinson observed—at the apex of the CLS movement in 1989—that what united CLS scholars was a belief that “the Rule of Law is a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments.”<sup>37</sup> Law’s power, then, is not simply dependent upon the social power of those groups who wield it, but rather in the capacity of legal reasoning, as a discourse, to obscure the political decisions that “lawmakers” have made. In that way, as James Boyle summarized, “the language of legal reasoning and legal rights comes to be seen as a description of the way things are”—and must be!—“rather than a moral and political choice.”<sup>38</sup> The main goals of the CLS movement were thus to undermine the key source of law’s legitimacy, namely the objective impartiality of legal reasoning (in purported contrast with political decision-making), and to proffer alternatives to the “Rule of Law” as it has been constituted.

Over the next generation, the legal history branch of the CLS project—Critical Legal History (CLH)—came to replace instrumental or functional realism as the dominant paradigm in legal history. Rather than seeing law as either a product of or response to a single social context, CLH scholars emphasized the embeddedness of law in a multitude of social contexts.<sup>39</sup> Whereas Realists replaced legal positivism with social determinism, CLH scholars replaced determinism with contingency.

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<sup>37</sup> Allan C. Hutchinson, Introduction to Hutchinson, ed., *Critical Legal Studies* (Rowman & Littlefield, 1989), 3.

<sup>38</sup> Boyle, *Critical Legal Studies*, xiii.

<sup>39</sup> Writing in 1984, Robert W. Gordon also provided a useful overview of the CLH movement up to that time. Although CLH approaches were never unified except in their critiques of legal positivism and in their rejection of legal realism as an alternative, generally,

In addition to legal-historical scholarship, two works of scholars outside the legal and history academies also profoundly influenced this dissertation. The first is James C. Scott's *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. While Scott's focus was on explaining the failures of utopian, high-modernist social revolutions, his approach provides a model for studying the interactions between all States and the social and physical phenomena upon which they rely. In short, States exert control by making their subjects and landscapes "legible" using processes of standardization and abstraction. Ultimately, however, the complex networks of social and physical processes defy such simplifications and their continued existence leads to unintended—and unforeseen—consequences. It also seems from Scott's case studies that the more grandiose a State's goals, the more disastrous the results.<sup>40</sup>

The other is Bruno Latour's *The Making of Law: An Ethnography of the Conseil d'Etat*, in which Latour recounts his extensive observations of the innermost workings of France's central administrative law tribunal. Following the CLS rejection of wholly externalist models for explaining law's developments, Latour conceived of law as

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CLH scholars, according to Gordon, accepted most, if not all, of the following propositions (1) that social experiences and historical developments are undetermined; (2) that the causal links between social conditions and legal concepts or forms are also undetermined; (3) that law is produced through political struggle; (4) that law is a "relatively autonomous" structure that "transcend[s] and, to some extent, help[s] to shape the content" of social interests; (5) that law is best understood as a set of "ideologies and rituals" that guides and constrains people's understandings of social experiences; (6) that our thinking about law and history is as contingent and historically produced as the subjects we study; and (7) that an awareness and appreciation of the meta-narratives deeply embedded in our own minds is necessary to understand the ideological underpinnings of such narratives. Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36, no. 1 (1984): 100-02.

<sup>40</sup> James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).

“indeed autonomous compared to the social” and as “one of the means for producing the social defined as association, for arranging and contextualizing it.”<sup>41</sup> Latour rejected not only the causal power of society, but of the *a priori* existence of society altogether, as he had in his earlier works on the scientific community. This is where his work is most relevant to this dissertation. Rather than taking society as a given and as something that can be used to explain certain phenomena (including legal developments), Latour’s focus is on the constituent parts (the “actors”) and on how they construct the connections that ultimately constitute “society.” Law is but one of these threads that links actors or, in Latour’s words, “weaves the social.”<sup>42</sup>

Latour also attempted to answer the question of *how* law “weaves the social.” This is where his scholarship connects with Scott’s to suggest a promising model for studying legal history. Latour’s model posits that law is not only embedded *within* the social, as CLH scholars typically recognize, but “already *of* the social, *of* association.”<sup>43</sup> Accordingly, one cannot even separate—even fuzzily—the legal from the social (as well as from the political, scientific, or cultural). They are all *of* the social, each lacking its own sphere of influence. In defining what makes the legal aspects of social connections peculiar from the other forms of association, Latour’s conception of law mirrors Scott’s view of the State in emphasizing law’s lightness, its abstractness, its superficiality. Latour’s work thus connects with Scott’s to suggest a strong correlation between

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<sup>41</sup> Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat* (Malden, MA: Polity, 2010), 264.

<sup>42</sup> Latour, *The Making of Law*, 261.

<sup>43</sup> Latour, *The Making of Law*, 262-63 (emphasis added). As Latour described it, “law plunges into everything without having its own domain.” Latour, *The Making of Law*, 263.



legalistic associations and the modern State. States are built upon abstract, superficial renderings of the domain precisely because they are products of associations of which legalistic reasoning—itself *necessarily* abstract and superficial—is a fundamental part. This, it seems, is a key contributor to the indeterminacy of law. Legal reasoning is abstract, and it is produced in two dimensions, namely in printed text on paper. But it is made—and continually remade—by actors in particular contexts whose contours must remain obscured.

As this dissertation shows, the federal government established over the last half of the nineteenth century a multitude of processes for Euro-Americans to exploit and acquire protected rights in the government's massive land estate. Policymakers and lawmakers alike attempted to make the social and the physical legible through systems of standardization and categorization that belied the complexities and contradictions inherent to the social and physical orders they encountered. They also failed to account for a less formal body of law that had taken root in western communities, namely a tradition of free land and free resources. As conflict exposed contradiction, the legal profession proved incapable of shoring up these flawed policies, in part due to its own superficialities and internal contradictions: between the promotion of individualism and the protection of community order; between notions that land should be owned by as many people as possible for the sake of building a virtuous, fair society and a belief that land should be commodified and exploited for sake of economic growth; and between characterizations of property as bastions of protection from the State and the use of property as a tool of the State in acquiring and maintaining power. Each of these

contradictions can be negotiated but never resolved. Therein lies the heart of contingency. Its legacy is written on the landscape.

CHAPTER 1 – RAILROAD LAND GRANTS IN AN INCONGRUOUS LAND  
SYSTEM

THE RISE OF AMERICAN BUREAUCRATIC GOVERNANCE AND THE LIFE  
AND DEATH OF CLASSICAL LEGAL THOUGHT, 1850-1903

Beginning in 1850, federal land grants to railroads became a critical component of the government's effort to settle its newly expanded public domain.<sup>1</sup> They seemingly represented what James Willard Hurst once famously wrote was the central driving force of American law for much of the nineteenth century, the principle that government should promote the “release of creative human energy” by providing humans the greatest extent of freedom as is possible.<sup>2</sup> Indeed, this principle permeated all federal public lands policy and law—not just railroad land grants—through its preference for granting to individuals and companies the liberty, means, and incentive to secure and develop natural resources and to bring the products of those resources to market.

Because railroads received so much land, and because their construction of railways made surrounding lands more valuable, the “creative energies” of these corporations often conflicted with those of settlers, miners, land speculators, politicians, and officials within the federal government. Conflicts over the acquisition of public

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<sup>1</sup> Prior to 1850, Congress granted land and provided other aid for internal improvements other than railroads, e.g., canals, river improvements, and wagon roads. See William S. Greever, “A Comparison of Railroad Land-Grant Policies,” *Agricultural History* 25, no. 2 (April 1, 1951): 83.

<sup>2</sup> James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 5.

lands were nothing new. However, the involvement of large railroad corporations, with extensive legal staffs behind them, as parties to the disputes ensured that a great proportion of them would be resolved not through the extra-legal violence and intimidation of local vigilante groups that had become a predominant feature of the “frontier” experience,<sup>3</sup> but rather through the federal legislative, administrative, and judicial systems.

Congress itself did not grant any land but rather merely provided the legal mechanisms by which railroads could obtain the land. Railroads acquired and secured lands only after the completion of several steps, often occurring decades apart, each of which raised complex legal questions that tested both traditional legal doctrines and the capacity of institutions charged with implementing them. Land grants composed part of what public land historian Paul Wallace Gates termed “an incongruous land system” that also included homesteading, preempting, land auctioning, and mineral locating.<sup>4</sup> Each process of acquiring legal rights to public lands required the administration by government officials, particularly within the General Land Office (GLO) and the Department of the Interior. In this way, public land laws were part of a much broader delegation of governmental authority from an elected legislative branch to an unelected,

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<sup>3</sup> See, for example, Allan G. Bogue, “The Iowa Claim Clubs: Symbol and Substance,” *Mississippi Valley Historical Review* 45, no. 2 (September 1958): 231–253; Richard Maxwell Brown, *American Violence* (Englewood Cliffs, NJ: Prentice-Hall, 1970); Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* (New York: Oxford University Press, 1975); William E Burrows, *Vigilante!*, 1st ed. (New York: Harcourt Brace Jovanovich, 1976); Arnold Madison, *Vigilantism in America* (New York: Seabury Press, 1973); Sean M. Kammer, “Public Opinion is More than Law: Popular Sovereignty and Vigilantism in the Nebraska Territory,” *Great Plains Quarterly* 31, no. 4 (2011): 309–24.

<sup>4</sup> Paul Wallace Gates, “The Homestead Law in an Incongruous Land System,” *American Historical Review* 41, no. 4 (July 1, 1936): 652–681.

professional bureaucracy. Since each of the hundreds of land laws contained ambiguities and inconsistencies, the GLO's duties included acting as a quasi-judiciary by filling any gaps in legislation and resolving any inconsistencies through its adjudication of disputes. Considering the number of complex and novel issues that confronted the GLO, this was a difficult job. The GLO was not up to the task.

Over the last decades of the nineteenth century, the judicial branch also played an increasingly important role in interpreting railroad land grants and in establishing legal precedents in the adjudication of land disputes.<sup>5</sup> During this era, most judges and other members of the legal profession viewed lawmaking in scientific terms; they believed that the logical processes of induction and deduction—free from political choice—could dictate legal decisions. This perspective, now known largely as either “legal formalism” or “classical legal thought,” was an effort not just to depoliticize lawmaking, but also to make the law itself more stable and predictable. In this, the legal profession failed. A review of decisions of the GLO and federal courts shows that the law of railroad land grants developed slowly and inconsistently—with abrupt and unpredictable shifts—through extensive litigation occurring over several decades.

#### I. Public Land Law Development: Firing up “the Great Barbecue.”

Grants of land to railroad corporations continued and expanded Congress' prior policy of granting lands to states for the construction of wagon roads and canals, and of granting rights of way (but not additional grants of land) for the construction of railways.

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<sup>5</sup> Legal historian William Nelson has argued that it was in this branch of government that “decisionmaking in accordance with professionally administered standards attained its fullest development.” William Edward Nelson, *The Roots of American Bureaucracy, 1830-1900* (Cambridge, MA: Harvard University Press, 1982), 133.

Even more than that, they indeed embodied the government's approach to public lands dating back to 1785.<sup>6</sup> In short, it favored disposing of them, whether through public auction, through preemption or homestead, or by granting them to entities that had made (or had agreed to make) improvements in the form of canals or railroads.

The Land Ordinance of 1785 established the general system by which the government would legally and politically divide, identify, and convey its public domain.<sup>7</sup> Given the amount of land the federal government claimed (even before the Louisiana Purchase, the Treaty of Guadalupe Hidalgo, and "Seward's Folly"), the system needed to allow for the quick, efficient, and orderly sale of land. The ordinance largely succeeded in creating such a system. It rendered lands legible through its use of the rectangular (cadastral) survey system that the United States would later extend to virtually all of the land it later acquired. Specifically, the law directed that land be divided into 36-square mile townships, with each township being further divided into numbered "sections" of 640 acres (one square mile) each.<sup>8</sup> Thus, virtually any tract of land within the grid could be described through a uniform, objective, and unchanging

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<sup>6</sup> Federal public lands arguably date to December of 1783, when Virginia ceded its claims in the north and west of the Ohio River. I use the term "arguably" because much if not all of Virginia's claims were also claimed by one or more other states, including Connecticut, Massachusetts, or New York. Two years later, in 1875, Congress passed a law that would influence and constrain natural resource management to today. Credited largely to Thomas Jefferson, this law, the Land Ordinance of 1785, established the rectangular survey system that would later be extended to virtually all of the land the United States later acquired. Land was to be divided into 36-square mile townships, with each township being further divided into numbered "sections" of 640 acres (one square mile) each. Land Ordinance of 1785, *Journal of the Continental Congress* 28 (May 20, 1785), 375.

<sup>7</sup> Land historian Vernon Carstensen identified the 1785 ordinance as being "of primary importance in the history of the public domain." Carstensen, introduction to *The Public Lands*, ed. Vernon Carstensen (Madison: University of Wisconsin Press, 1963), xv.

<sup>8</sup> *Journal of the Continental Congress*, Vol. 28, May 20, 1785, 375.

notation of its size, shape, and location. This stood in stark contrast to the traditional metes-and-bounds system, by which objects such as trees, rocks, fences, or roads (any one of which can be confused for another or even moved or eliminated in time) defined a property's boundaries.

The cadastral survey certainly had important advantages over the metes-and-bounds system. Public lands historian Vernon Carstensen was right when he observed that “had a system of describing land by metes and bounds been employed” after 1850, when land settlement “reached vast proportions,” then “lawsuits and neighborhood feuds would have been one certain harvest of this vast movement of land-seekers on to new land.”<sup>9</sup> However, the ease of transfer and security of title came at a cost, one unforeseen at the time. As political scientist James C. Scott reasoned in *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*, the value of the cadastral system lay “in its abstraction and universality.”<sup>10</sup> While these features allowed for land to be transferred to and from outsiders (people who perhaps had never even seen the land) and for ownership to be clearly delineated, the irony is that the completeness and unambiguousness of the cadastral map depended upon its “abstract sketchiness, its lack of detail—its thinness.”<sup>11</sup> Accordingly, while the federal government found an ideal way to “see” its land for the purposes of disposing of it, such a system allowed for the perpetuation of its blindness to the land's actual, physical

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<sup>9</sup> Carstensen, Intro to *Public Lands*, xvi.

<sup>10</sup> James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998), 44.

<sup>11</sup> Scott, *Seeing Like a State*, 44.

character.<sup>12</sup> Such myopia would allow Congress to continue a public-lands policy ill-suited to conditions in much of the West long after the need for serious reassessment should have become clear.

For several decades, the federal government used the cadastral survey to sell lands by auction with specified minimum prices. Policymakers believed that the public domain was one of the government's most valuable assets and that it should use it for raising revenues while also allowing for the orderly expansion of the body politic.<sup>13</sup> Euro-Americans did not always wait for lands to be surveyed, for the opening of land offices, or for the eventual public auction before settling on federal lands, however. In 1841, Congress legitimated the claims of such settlers—called “squatters”—with its passage of the Preemption Act of 1841.<sup>14</sup> This legislation allowed heads of families, widows, or single men to secure legal title to up to 160 acres of surveyed public lands, provided they followed the prescribed steps. After inhabiting and improving their land, qualified settlers had thirty days to file a declaration of intent to preempt, and they had a year to prove up the settlement and improvement, to submit an affidavit testifying that

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<sup>12</sup> Thomas Jefferson, who many see as the architect of the United States' land system, made important—and woefully incorrect—assumptions regarding the American continent west of the Appalachians, in particular concerning its potential for agricultural productivity. See John Logan Allen, “Imagining the West: The View from Monticello,” in ed. James P. Ronda, *Thomas Jefferson and the Changing West* (Albuquerque, NM: University of New Mexico Press, 1997), 3-23.

<sup>13</sup> The federal government also recognized early on a secondary policy of using the public domain to support public purposes such as education. That is why the Land Ordinance of 1787 provided that one section of each township covered by that act be reserved for the benefit of “common schools.” Similar provisions were later incorporated into land laws covering most of the rest of the public domain.

<sup>14</sup> Preemption Act of 1841, 5 *U.S. Statutes at Large* 453 (September 4, 1841).



they met all of the requirements of the act, and to pay \$1.25 per acre.<sup>15</sup> The law also applied retroactively to persons and families meeting the above requirements, so long as they paid the required \$1.25 to the land office. This was just one of many times in the nineteenth century when Congress validated illegal entries.<sup>16</sup>

During the Civil War, Congress expanded its program for subsidizing western settlement with three monumental laws—the Homestead Act, the Morrill Act, and the Pacific Railway Act—each passed within months of one another in 1862. Under the Homestead Act, heads of households of at least twenty-one years of age could acquire title to up to 160 acres for free, so long as they resided on the land for five years and improved it for agricultural purposes.<sup>17</sup> The Morrill Act granted land to individual states for the establishment of colleges “where the leading object shall be [the teaching of] agriculture and the mechanical arts.”<sup>18</sup> The Pacific Railway Act chartered and granted lands to the Union Pacific and the Central Pacific to aid in the construction of a railway from a point on the Missouri River in Nebraska to a point on the Pacific Ocean at or near San Francisco, and granted land to other corporations for the construction of five eastern branches.<sup>19</sup> The Homestead Act provided free land, the Morrill Act provided the means to learn how to farm it, and the Pacific Railway Act provided for the necessary transportation.

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<sup>15</sup> 5 *U.S. Statutes at Large* 455.

<sup>16</sup> See Homestead Act of 1862, 12 *U.S. Statutes at Large* 392 (May 20, 1862); General Mining Law of 1872, 17 *U.S. Statutes at Large* 91 (May 10, 1872).

<sup>17</sup> 12 *U.S. Statutes at Large* 392.

<sup>18</sup> Morrill Act of 1862, 12 *U.S. Statutes at Large* 503 (July 2, 1862)

<sup>19</sup> Pacific Railway Act of 1862, 12 *U.S. Statutes at Large* 489 (July 1, 1862).

While each land grant was to some degree unique, the Pacific Railway Act shared several features with most other land grants from the era, all borrowed from the first federal railroad land grant for the construction of the Illinois Central in 1850.<sup>20</sup> All of them included “rights of way” across public lands for the construction of the railroads themselves. These “rights of way,” normally one-hundred feet wide, were mere usufructuary rights (rights to use the land owned by another) rather than full property rights, and the law treated them separately from the grants of land. The railroad companies generally received their land grants defined according to a certain number of square-mile sections of land within a prescribed distance—the “place limits”—from the railway. They normally granted only alternate sections of land, thereby creating a “checkerboard” pattern of land ownership, the rationale being that the government would sell the alternate sections it retained for no less than double the typical minimum price of \$1.25 per acre given their proximity to the railway, effectively paying for the subsidy. The “checkerboard” provision dated to the Illinois Central grant and was a key reason why Stephen Douglas was able to get the Illinois Central legislation through Congress.<sup>21</sup> Additionally, railroad land grants normally excluded lands containing minerals other than coal and iron and lands already settled, claimed, or reserved pursuant to federal laws, they provided for “in-lieu lands” (also frequently called “indemnity strips”) outside of the place limits within which the railroads could select

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<sup>20</sup> See Greever, "A Comparison of Railroad Land-Grant Policies," 83-84.

<sup>21</sup> Whether the “checkerboard” provision actually paid for the subsidy has been a matter of some scholarly debate. See Gates, Paul W. Gates, “The Railroad Land-Grant Legend,” *Journal of Economic History* 14, no. 2 (Spring 1954): 143–46.

lands in lieu of excluded place lands, and they required completion of the roads by a certain date, usually within ten years of the granting legislation.<sup>22</sup>

Under the Pacific Railway Act of 1862, the recipient corporations initially received the odd sections of land within ten miles of the railway with an indemnity strip of five miles beyond that.<sup>23</sup> This amounted to a grant of 6400 acres per mile of constructed railway. Even with that amount of land, both the Union Pacific and the Central Pacific still proved unable to find the requisite capital for the massive construction project Congress had envisioned. Two years later, Congress responded by passing new legislation allowing for both corporations to mortgage lands and doubling the size of the land subsidy.<sup>24</sup>

On the same day that Congress increased the land subsidies to the Union Pacific and Central Pacific, it also passed the largest land subsidy of all. Specifically, it chartered the Northern Pacific and provided it with a land grant estimated to include as much as fifty million acres to subsidize the construction of a railway from Lake Superior to the Puget Sound, with a branch line along the Columbia River to Portland, Oregon, then that region's largest commercial center.<sup>25</sup> The immense size of the land grant was

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<sup>22</sup> See Samuel Dana, *Forest and Range Policy: Its Development in the United States* (New York: McGraw Hill, 1956), 36-37; David Maldwyn Ellis, "The Forfeiture of Railroad Land Grants, 1867-1894," *Mississippi Valley Historical Review* 33, no. 1 (June 1946): 27.

<sup>23</sup> See 12 *U.S. Statutes at Large* 489

<sup>24</sup> Pacific Railway Act of 1864, 13 *U.S. Statutes at Large* 356 (July 2, 1864).

<sup>25</sup> Northern Pacific Land Grant of 1864, 13 *U.S. Statutes at Large* 365 (July 2, 1864). During the following seven years, Congress granted land for the construction of two additional "transcontinentals," both to the south of the Union Pacific – Central Pacific line. I put this term in quotation marks because it's a bit of a misnomer, in that the railroads themselves did not cross the entire continent but rather merely connected to a railway system that did. They thus comprised parts, albeit substantial parts, of transcontinental routes but were not themselves transcontinental. That the railroad promoters desired Portland as a terminus of a branch line was

due not only to the length of the route, but also because the average subsidy per mile constructed exceeded that of any other road. For the portion of the route passing through territories—covering all but that portion through Minnesota, the only state along the route at the time—the subsidy was double even the twenty sections per mile given to the Union Pacific and Central Pacific.<sup>26</sup> Northern Pacific promoters justified its larger size by citing the enormity of the task of constructing a railway through such a seemingly desolate region, and by pointing out that Congress had decided not to provide additional subsidies in the form of government bonds or in allowing the Northern Pacific to mortgage lands.

Of course, political influence and the financial self-interests of members of Congress, some of whom served on the Board of Directors of the Northern Pacific, played a role as well, just as it did with other subsidies.<sup>27</sup> Members of Congress and their influential “friends” engaged in self-dealing at every step, from the Pacific Railroad Survey of the 1850s, to the passage of land grant legislation, to the selection of termini and routes, to the construction of the railway itself, and to the ultimate disposal of land. Gates reported in his federally commissioned *History of Public Land Law Development* that the Pacific Railroad Survey “enabled influential people to have

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likely due to the growth of Portland in the decade prior to 1864, during which it had grown from a “mere hamlet” to a “thriving metropolis.” This branch line thus can be seen as a recognition on the Northern Pacific’s part of Portland’s growing importance and of the need to “discourage her interest in any other railway connection.” James Blaine Hedges, *Henry Villard And The Railways Of The Northwest* (Literary Licensing, LLC, 2012), 19-20.

<sup>26</sup> At the time, the only state along the designated route was Minnesota.

<sup>27</sup> See Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton & Company, 2011). That certain Northern Pacific officials had ownership interests in the Tacoma Land Company was a key reason the company selected that city as its Western terminus. Ellis, “Forfeiture of Railroad Land Grants,” 46.

surveys made that favored their political and sectional interests and, indeed in a number of instances, their own land investments.”<sup>28</sup> After railroads received their subsidies, the self-dealing of railroad entrepreneurs, as Richard White recently detailed, contributed mightily to the many failures of the railroad corporations, as well as the more general financial panics and economic recessions they precipitated.<sup>29</sup> Railroad officials routinely awarded construction contracts and sold land to companies with which they were also associated, at a loss to the railroad but at a gain to themselves. White, in *Railroaded: The Transcontinentals and the Making of Modern America*, even went so far as to argue that the railroad companies ought to be regarded “not as new businesses devoted to the efficient sale of transportation but rather as corporate containers for financial manipulation and political networking.”<sup>30</sup>

Even as the Northern Pacific’s grant shared features with each of the others, it is worth describing some of its more significant provisions. Section One created the corporation, gave it the powers to construct a railroad line within proscribed parameters, and defined the corporate structure.<sup>31</sup> Section Two granted the corporation a “right of way” with a width of four-hundred feet through the public lands, as well as the right to use materials—including “earth, stone, timber, and so forth”—from the public lands for the construction of the road. Further, because the vast majority of the land granted was

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<sup>28</sup> Paul Wallace Gates, *History of Public Land Law Development* (Washington, DC: Government Printing Office, 1968), 363.

<sup>29</sup> See generally White, *Railroaded*.

<sup>30</sup> White, *Railroaded*, xxviii.

<sup>31</sup> 13 *U.S. Statutes at Large* 365-67.

already owned by Indians, that section called for the United States to “extinguish, as rapidly as may be consistent with public policy and the welfare of said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill.”<sup>32</sup> Section Three defined the grant of land beyond the right of way. It provided “that there be, and hereby is granted ... every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state.”<sup>33</sup> That section also provided for an indemnity strip of ten miles beyond the place limits.<sup>34</sup> Section Four contained the actual conveyance. It provided that upon the construction of each twenty-five mile portion of the line, and upon the examination and certification that such the railroad had completed the section in a “good, substantial, and workmanlike manner,” patents were to be issued to the company for the granted lands coterminous with the constructed segment.<sup>35</sup> Section Six provided protection for the company prior to patent. Upon the Department of the Interior’s receipt of the Northern Pacific’s map of its proposed general route, it excluded from sale, entry, or preemption all lands within the limits of the grant, as indicated by the map.<sup>36</sup>

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<sup>32</sup> 13 *U.S. Statutes at Large* 367.

<sup>33</sup> 13 *U.S. Statutes at Large* 367.

<sup>34</sup> 13 *U.S. Statutes at Large* 368.

<sup>35</sup> 13 *U.S. Statutes at Large* 368.

<sup>36</sup> 13 *U.S. Statutes at Large* 369.

The rationale for Section Six, variations of which were included in other land grants, was apparently to prevent speculators, who would have sought to benefit from the rise in land values that would attend the railway construction, from taking up the lands once the railroad had identified the general route. Such speculation would not only forestall actual settlement of the country, but would also deprive the railroad company—and perhaps more importantly, its potential lenders—security that it would receive anywhere near the full amount of lands the government promised it, thereby contravening the statute’s purpose of using the lands to facilitate the railway construction in the first place. Because the land grant also contained time limits on completing the respective railways, many likely mistakenly assumed that the land would be closed for no more than ten years, after which the lands would either have been patented to the railroad or restored to the public domain.

The Northern Pacific grant was the first of three applying to lands in the Pacific Northwest. Two years later, in July of 1866, Congress subsidized the construction of a road connecting Portland, Oregon to the Central Pacific at Sacramento in the much more heavily developed central valley of California.<sup>37</sup> Unlike the Pacific Railway acts, however, Congress did not charter a company to receive the Oregon portion of the subsidy—twenty square miles of land per mile of railroad—but rather directed the

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<sup>37</sup> Railway Land Grant Act of July 25, 1866, 14 *U.S. Statutes at Large* 239. The push for such a railroad began over two years prior, when a group of several dozen people in Sacramento “created an association for the purpose of demonstrating the practicability by survey for a line of Railroad from Marysville, California, to Portland, Oregon,” an association to which the California legislature, in April of 1863, granted certain privileges, including a right of way across and right to enter all lands owned by the State of California for the purposes of surveying. John Tilson Ganoë, “The History of the Oregon and California Railroad,” *Quarterly of the Oregon Historical Society* 25, no. 3 (September 1, 1924): 239.

legislature of Oregon to choose the company to construct the roughly 326 mile-long portion from Portland to the Oregon-California border near Ashland, Oregon.<sup>38</sup> Otherwise, the provisions mirrored those in the Northern Pacific land grant, albeit with a smaller land subsidy. In all, the company chosen to receive the Oregon grant potentially could have received over four million acres, much of it in the fertile Willamette valley and all of it covering the most valuable and most inhabitable area of Oregon. Although this amount paled in comparison to the Northern Pacific subsidy, it still exceeded the amount Congress donated to Oregon's citizens upon the state's admittance to the Union.<sup>39</sup>

The Oregon land grant contained a deadline of one year for the Oregon legislature to designate a company and for that company to file its "assent" with the secretary of interior; otherwise the legislation would be "null and void."<sup>40</sup> Likely unbeknownst to members of Congress at the time, this provision would lead to the first notable legal and political controversy involving that grant. In late September of 1866, two months after the act's passage, a group of prominent Portlanders prepared articles of incorporation to form "The Oregon Central Railroad Company." They gave the articles to Joseph Gaston, the road's chief promoter, to file them with the secretary of state (of Oregon) as required to form a corporation. It appears that Gaston, however, on

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<sup>38</sup> The legislation granted the California portion to the California & Oregon Railroad Company, which had been chartered in California the previous year.

<sup>39</sup> See Robert Bradley Jones, *One by One: A Documented Narrative Based upon the History of the Oregon & California Railroad Land Grant in the State of Oregon* (The Source Magazine, Inc. 1973), 7.

<sup>40</sup> 14 U.S. Statutes at Large 241, § 8.



October 6, brought the articles to the secretary, but he also asked that they be filed only “in pencil,” since the incorporators had not yet fully organized the company.<sup>41</sup> On October 10, the Oregon legislature passed a joint resolution naming “The Oregon C. R. R.” as the company to take the grant on the assumption that the incorporation of the Portland-based company had been completed.<sup>42</sup> The following month, before the legislature adjourned for a nearly two-year-long recess, Gaston added his name and those of the other Portlanders to the articles before finally attaching his certificate and seal and filing them with the secretary on November 21, 1866.<sup>43</sup>

It appears that Gaston’s company had not completed its incorporation by issuing stock subscriptions and electing directors prior to April 22, 1867,<sup>44</sup> when another group consisting primarily of Sacramento capitalists formed yet another “Oregon Central” railroad corporation in Salem to compete with Gaston’s for the grant.<sup>45</sup> Because Gaston’s company planned to construct the railway on the west bank of the Willamette

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<sup>41</sup> Ganoë, “History of O&C,” 251. In 1903, Secretary of State F. I. Dunbar wrote that no company had been formed under the name “Oregon Central” in October of 1866. F.I. Dunbar to Samuel A. Clarke, September 2, 1903, Southern Pacific Collection, MSS 1113, Box 3, Folder 7, Oregon Historical Society Research Library, Portland, OR.

<sup>42</sup> The Railroad Committee’s report recommending the designation named J.S. Smith, I. R. Moores, J. H. Mitchell, E. D. Shattuck, Jesse Applegate, Edward R. Geary, S. Ellsworth, and H.W. Corbett as the incorporators of the “Oregon Central” company it was recommending for designation.

<sup>43</sup> F.I. Dunbar to Samuel A. Clarke, September 2, 1903, Southern Pacific Collection. Four days prior to that filing, three of the original incorporators, J.S. Smith, E. N. Cooke, and I. R. Moores, learned of Gaston’s scheme to gain control of the company and formed a new corporation of the same name and filed their papers. These people later joined with the California interests in forming another “Oregon Central” company. Ganoë, “History of O&C,” 251.

<sup>44</sup> Charles Henry Carey, *History of Oregon* (The Pioneer historical publishing company, 1922), 694.

<sup>45</sup> Ganoë, “History of O&C,” 251.

River, his company became known as the “West Side Company.” The other company planned to build along the east bank and thus became known as the “East Side Company.” The East Side Company immediately challenged the validity of the Oregon legislature’s designation of the “Oregon Central” as recipient of the grant, given that no company of that name formally existed at the time. Over the next few years, the two companies “fought each other bitterly,” as one prominent public land historian summarized their contest for the grant.<sup>46</sup> Both companies began construction in May of 1868 as part of their efforts to win over the people along their respective routes and, perhaps more importantly, their legislators. Gaston later admitted to trying to block the East Side’s construction by inciting opposition along the proposed route so as to get the landowners either to refuse to grant the requisite right of way or to do so but at exorbitant prices, by blocking the company from securing labor, by trying to break down its credit, and by stirring up lawsuits against the company.<sup>47</sup> Ben Holladay, an entrepreneur from California who effectively gained control of the East Side Company in the summer of 1868, engaged in similar tactics on the other side.<sup>48</sup> Holladay ultimately proved victorious when the Oregon legislature, in October of 1868, reversed its designation of

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<sup>46</sup> David Maldwyn Ellis, “The Oregon and California Railroad Land Grant, 1866-1945,” *Pacific Northwest Quarterly* 39, no. 4 (1948): 255.

<sup>47</sup> Joseph Gaston testimony, Transcript of Record, Supreme Court of the United States, no. 492, October term, 1916, *Oregon & California Railway Co. v. United States* (hereinafter referred to as “Oregon & California Transcript”), available at <http://gdc.gale.com/products/the-making-of-modern-law-u.s.-supreme-court-records-and-briefs-1832-1978/> (last accessed February 20, 2014), 2422-23.

<sup>48</sup> See Ganoe, “History of O&C,” 253; William Harland Boyd, “The Holladay-Villard Transportation Empire in the Pacific Northwest, 1868-1893,” *Pacific Historical Review* 15, no. 4 (December 1, 1946): 381. Holladay even purchased newspapers to help spread his message.

the West Side Company in favor of Holladay's, with the vote dividing along county rather than party lines.<sup>49</sup>

Some raised the legal question, however, as to whether the East Side Company could accept the grant, given that Congress' one-year deadline to accept its terms and conditions had already passed, with the West Side Company being the only company to file its assent in the Department of the Interior within the one-year time period. The East Side Company, it appeared, needed new legislation renewing the grant and extending the time for acceptance and the construction of the first twenty miles. Unfortunately for Holladay and his backers, a substantial faction in Congress had turned against the railroad land grant policy.<sup>50</sup> According to one knowledgeable observer, Republicans and Democrats alike had soured on railroad land grants to such a degree that Republicans would only vote for them if they contained protections for settlers and against railroad speculation, while Democrats opposed them altogether.<sup>51</sup> Although Holladay succeeded in getting the legislation, opponents of railroad land grants, most notably George W. Julian and William S. Holman, both from Indiana, succeeded in inserting a provision requiring the railroad to dispose of the land only to "bona fide settlers," in parcels no larger than 160 acres, and for no more than \$2.50 per acre.<sup>52</sup> Together, these conditions came to be referred to as the "homestead clause." Decades later, one railroad official

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<sup>49</sup> Ganoe, "History of O&C," 257.

<sup>50</sup> In addition, the legislatures of several Midwestern and Western states had recently petitioned Congress that railroad land grants were a "violation of the spirit and interest of the national Homestead Law and manifestly in bad faith towards the landless." Gates, *Public Land Law Development*, 380.

<sup>51</sup> Editorial Note, *Morning Oregonian*, May 14, 1870.

<sup>52</sup> Railway Land Grant Amendment Act of April 10, 1869, 16 *U.S. Statutes at Large* 47.

described the homestead clause as the “little accident of a few lines that old George W. Julian slipped over on Congress.”<sup>53</sup> In March of 1870, because a court had previously held the West Side Company to have exclusive rights to the “Oregon Central” name, Holladay formed a new company, the Oregon & California, to receive the grant.<sup>54</sup>

After the West Side Company abandoned its claim to the Portland-to-Ashland line in early 1870, it secured another grant from Congress for the construction of a railway from Portland to Astoria, on the coast, with a branch line from Forest Grove to McMinnville.<sup>55</sup> This grant also contained an identical “homestead clause.”<sup>56</sup> Two months later, Holladay acquired control of the West Side Company, and the two companies were thereafter operated more or less as a single enterprise.<sup>57</sup>

Even with the political environment shifting against land grants, the Northern Pacific was able to feed on the trough a few more times in 1869 and 1870. At the behest of that company, Congress passed legislation in 1869 allowing the company to issue bonds on its grant lands, despite the fact that the lack of such authority was a substantial part of the justification for the unprecedented land subsidy.<sup>58</sup> That same year, it also authorized the company to extend its branch line from Portland to Puget Sound, while also providing that there would be no additional financial or land subsidy (aside from a

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<sup>53</sup> Charles W. Eberlein testimony, Oregon & California Transcript, 2367-69.

<sup>54</sup> Boyd, “Holladay-Villard Transportation Empire,” 381.

<sup>55</sup> Oregon Central Land Grant of May 4, 1870, 16 *U.S. Statutes at Large* 94.

<sup>56</sup> Section 4, 16 *U.S. Statutes at Large* 94.

<sup>57</sup> Boyd, “Holladay-Villard Transportation Empire,” 382.

<sup>58</sup> Joint Resolution of March 1, 1869, 15 *U.S. Statutes at Large* 346.

right-of-way) for the extension.<sup>59</sup> The practical effect of this legislation was to allow the Northern Pacific to carry an even greater percentage of the trade from the “Inland Empire” to its port on Puget Sound, thereby rendering Portland, a competitor for regional supremacy, just another stop along the line. A year later, Congress authorized the Northern Pacific to locate and to construct its main line to Puget Sound “via the Columbia River,” and to locate and construct a branch line across the Cascades, each “with the privileges, grants, and duties provided for in [the company’s] act of incorporation” in 1864.<sup>60</sup> Though some in Congress may not have realized it, the practical effect of this legislation was to give the Northern Pacific an additional land grant for its railway between Portland and Tacoma.

In 1870, the House signaled the end of the land grant era when it passed a resolution stating that “the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued.”<sup>61</sup> The last grant, to the Texas Pacific for the southernmost transcontinental route, was passed a year later.<sup>62</sup> Gates attributed the shift against railroad subsidies to Westerners having realized “that railroads were not prompt in bringing their lands on the market and putting them into the hands of farm

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<sup>59</sup> Joint Resolution of April 10, 1869, 16 *U.S. Statutes at Large* 57.

<sup>60</sup> Joint Resolution of May 31, 1870, 16 *U.S. Statutes at Large* 378. Congress added a requirement that the lands granted which, at the expiration of five years after the entire road’s completion, were not yet sold or disposed of, be opened up for settlement and preemption, “like other lands,” with the price being paid to the company not exceeding \$2.50 per acre; and that in the event that the mortgage be enforced through foreclosure, any sales of lands by the trustee be at a public auction, in single sections, and to the highest and best bidder.

<sup>61</sup> Gates, *Public Land Law Development*, 380. The resolution was known as the “Holman Resolution,” and it passed the House on March 21, 1870.

<sup>62</sup> Texas Pacific Railroad Land Grant of March 3, 1871, 16 *U.S. Statutes at Large* 573.

makers,” a realization that caused “the West [to turn] from warm friendship to outright hostility to railroads.”<sup>63</sup> Henry George encapsulated such hostility in the following rant, from 1871, against the Pacific railroad land grants:

Since the day when Esau sold his birthright for a mess of pottage we may search in vain for any parallel to such concessions. Munificence, we call it! Why, our common use of words leave no term in the English tongue strong enough to express such reckless prodigality. Just think of it! 25,600 acres of land for the building of one mile of railroad--land enough to make 256 good sized American farms; land enough to make 4,400 such farms as in Belgium support a family each in independence and comfort. And this given to a corporation, not for building a railroad for the Government or for the people, but for building a railroad for themselves; a railroad which they will own as absolutely as they will own the land--a railroad for the use of which both Government and people must pay as much as though they had given nothing for its construction.<sup>64</sup>

However, inasmuch as railroad land grants were proven imprudent, the damage was already done. In all, the federal government granted roughly 130 million acres to railroads from 1850 to 1871.<sup>65</sup> While almost a third of this was granted to one railroad, the Northern Pacific, over seventy railroads in all received some grant of federal public land.<sup>66</sup> The federal government ultimately patented 38 million acres to the Northern Pacific, over 12 million to the Atlantic & Pacific, over 11 million to the Union Pacific, roughly 8 million to the Central Pacific, and roughly 7 million each to the Kansas Pacific and Southern Pacific.

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<sup>63</sup> See Gates, *Public Land Law Development*, 380.

<sup>64</sup> Henry George, *Our Land and Land Policy, National and State* (White & Bauer, 1871), 8.

<sup>65</sup> See Dana, *Forest and Range Policy*, 37-38; David Maldwyn Ellis, “The Forfeiture of Railroad Land Grants, 1867-1894,” *Mississippi Valley Historical Review* 33, no. 1 (June 1946): 27.

<sup>66</sup> Ellis, “Forfeiture of Railroad Land Grants,” 28.

Several factors contributed to the federal government's subsidization of Western settlement and resource exploitation. In his monumental work on the legal history of the lumber industry in Wisconsin, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, James Willard Hurst emphasized the role of capital scarcity combined with land abundance. In short, because land (and its resources) seemed unlimited but the capital to develop it remained in short supply, the proper role for government was to stimulate development in any way it could including, if necessary, giving away the nation's economic base.<sup>67</sup> In the case of railroads, this capital would come from overseas, including the financial centers of London and Berlin.

If that seems shortsighted, it is because it was. With land seemingly unlimited, most policymakers saw any concern for conserving resources for future use as misplaced. The best way to increase development in the short-term, policymakers thought, was to delegate the State's power over public lands to private parties.<sup>68</sup> This preference can be seen in other areas of law, including certain legislative changes to the common law of contract at the state level that were designed to allow citizens to make maximum use of limited capital, and the lack of regulations governing the timber industry. It was not just the government that was shortsighted. For their part, private landowners were also typically incapable, if not unwilling, to consider the costs of current practices on the future productivity of their lands. Perhaps the most notorious

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<sup>67</sup> James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, MA: Harvard University Press, 1964), 23. Gates agreed with Hurst's interpretation. Gates, *History of Public Land Law Development*; See also John Bell Sanborn, *Congressional Grants of Land in Aid of Railways* (University of Wisconsin, 1899).

<sup>68</sup> Hurst, *Law and Economic Growth*, 125-42.

example of this was the depletion of forests in the upper Midwest over the latter half of the nineteenth century.<sup>69</sup>

Contemporaneous accounts support Hurst's thesis. The central argument of proponents of railroad land grants, for example, was that they were necessary to attract the necessary capital. They reasoned that capitalists would not invest in railroad construction ahead of settlement (and, hence, traffic), but they would invest if the railroad corporations held rights to substantial land as an additional asset. Other arguments centered on the potential for economic growth, the spread of "civilization," national security concerns, and, in the case of the transcontinentals, the potential linking with Chinese markets.<sup>70</sup>

While the "land grant era" ended in 1871, at that time, most of the land "granted" had not in fact been conveyed to the respective recipient railroad companies. Each grant required administering, and that was an overwhelmingly difficult task, one made more difficult by the shifting politics against railroads and their apparent monopolization of western land and resources.

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<sup>69</sup> See generally Hurst, *Law and Economic Growth*.

<sup>70</sup> In 1871, Henry George, a vocal critic of the federal government's lavish land policies, summarized the arguments of railroad land-grant proponents as follows: "'Here are thousands of square miles of fertile land,' cries an eloquent Senator, 'the haunt of the bear, the buffalo and the wandering savage, but of no use whatever to civilized man, for there is no railroad to furnish cheap and quick communication with the rest of the world. Give away a few millions of these acres for the building of a railroad and all this land may be used. People will go there to settle, farms will be tilled and towns will arise, and these square miles, now worth nothing, will have a market and a taxable value, while their productions will stream across the continent, making your existing cities still greater and their people still richer; giving freight to your ships and work to your mills.'" Henry George, *Our Land and Land Policy, National and State* (White & Bauer, 1871), 9.



## II. Administering Railroad Land Grants

The Northern Pacific, the Oregon & California, and the Oregon Central land grants were just a few of the thousands of legislative acts Congress passed over the nineteenth century regarding the federal government's massive estate. Between 1785 and 1880, Congress passed approximately thirty-five hundred such laws, with 241 of those occurring between March of 1869 and March of 1875 alone.<sup>71</sup> Each required governmental administration, and the GLO was the agency charged with fulfilling most of the government's obligations. Formed in 1812 and housed in the Department of the Interior since 1849, the GLO had many duties: it was responsible for surveying the public lands and dividing them into legal divisions and subdivisions, for protecting the public domain from timber depredations and from illegal or fraudulent entries or appropriations, for classifying lands according to their natural resources and to their most valuable uses, for furnishing patent records, and for adjudicating disputes related to the public domain.<sup>72</sup>

The scope and nature of the GLO's responsibilities made it very important. As legal historian William Nelson characterized the office, it was "as politically significant in the newly emerging states of the West as the customs service was in the port cities of the East."<sup>73</sup> In 1840, a Senate committee reported that "few places ... afford[ed] such ready and certain means ... of extending favors and accommodation to a large and

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<sup>71</sup> Carstensen, Intro to *Public Lands*, xxii.

<sup>72</sup> Milton Conover, *The General Land Office : Its History, Activities and Organization* (Baltimore, Md.: Johns Hopkins Press, 1923), 35 to 48.

<sup>73</sup> Nelson, *Roots of American Bureaucracy*, 27.

influential portion of the community, as those attached to the land system."<sup>74</sup> The land office was so influential primarily because of the money it spent and the favors it could do for local citizens, for example by contracting work out to survey teams at inflated prices or by holding public auctions with terms favoring one group or another.

The local register and receiver posts were very valuable assets within the political spoils system of the day, especially considering that receivers were entitled to keep the fees (in addition to any bribes) they collected. In one instance, after Montana elected Wilbur F. Sanders to the U.S. Senate from Montana in 1890, a person by the name of J. D. Jenks wrote Sanders seeking his endorsement of Jenks' application to become receiver for the land office at Helena. In support of his appointment, Jenks, a fellow Republican, cited his military record, his loyalty to the party ("I vote as I fought"), and the "remarkable" manner in which he had gathered signatures, specifically that he did not just "go into a saloon or gambling house" to round up signatures.<sup>75</sup> After Jenks was passed over for the post, he wrote Sanders to complain. He thought the person Sanders had chosen instead to be unqualified due to his young age, his lack of military experience, and his early withdrawal from Sanders' senatorial campaign.<sup>76</sup> Jenks simply could not believe that Sanders had given such an unqualified person "the best position in the State."<sup>77</sup> Given that the bulk of the salaries of GLO receivers consisted of the fees

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<sup>74</sup> Nelson, *Roots of American Bureaucracy*, 27.

<sup>75</sup> J.D. Jenks to Hon. W.F. Sanders, Senator, Montana, Butte City, MT, March 13, 1890, Wilbur Fisk Sanders Papers, Box 2, Montana State Historical Society.

<sup>76</sup> Jenks to Sanders, April 25, 1890.

<sup>77</sup> Jenks to Sanders, May 3, 1890.

paid for their services, not all posts were equal. Thus, although Jenks was “humiliated” by being passed over in favor of someone so unqualified, he implored Sanders not to insult him “by offering [him] a little one horse office that would starve any man to death”; he rather “prefer[red] suffering in silence.”<sup>78</sup>

With the expansion of the federal public domain and in the number of laws governing it through the middle decades of the nineteenth century, the GLO’s already vast powers and responsibilities increased dramatically. This was indicative of a much broader delegation of governmental decision-making from the legislative branch to an unelected bureaucracy.<sup>79</sup> Scholars have debated what contributed to this shift, but one likely factor was simply that the increasing complexity of American social and economic relations required a higher level—in both quantity and quality—of governmental administration. Writing in the 1920s, Max Weber cited to precisely that to explain similar transformations across Europe.<sup>80</sup> One other factor according to Weber was the leveling of economic and social hierarchies.<sup>81</sup> Democratic theory mandated the law treat all citizens as “formally equal,” and this in turn required the elimination of legal privilege and the enactment of legal guarantees against governmental arbitrariness, both of which a government of personally detached and objective experts could best achieve.<sup>82</sup>

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<sup>78</sup> Jenks to Sanders, May 3, 1890.

<sup>79</sup> See generally Nelson, *Roots of American Bureaucracy*, 5.

<sup>80</sup> See Nelson, *Roots of American Bureaucracy*, 4.

<sup>81</sup> Nelson, *Roots of American Bureaucracy*, 4.

<sup>82</sup> Nelson, *Roots of American Bureaucracy*, 4. Writing decades after Weber, Nelson found Weber’s factors to be “necessary but not sufficient conditions” to explain the shift, at least in the United States, particularly since there had been “widespread, powerfully voiced

Even with its increased responsibilities through the middle decades of the nineteenth century, the GLO, at the time of the Northern Pacific and other western railroad land grants, retained the same basic size and structure that it had since the 1830s, despite its increased workload. Heading the GLO was the commissioner of public lands, who one historian noted had “greater duties ... than one man could properly discharge.”<sup>83</sup> On paper, the secretary of interior oversaw the commissioner and the GLO, but with the secretary having so many other bureaus and offices to supervise, the commissioner assumed much of the supervision of GLO in practice. (The GLO, the secretary of interior, and the secretary’s legal advisors, when acting in regards to public lands, are hereinafter collectively referred to as the “Land Department.”) Three principal clerks (one of the public lands, one of private land claims, and another of surveys), a recorder, and a solicitor served directly under the commissioner in the central office in

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demands for the elimination of legally sanctioned privilege” since the 1820s or 1830s. Some other factor was needed, and Nelson contended it was a concern for preserving a pluralist society in the face of increased centralization and concentration of power during and after the Civil War. See Nelson, *Roots of American Bureaucracy*, 2. Other scholars have conceived of the post-Civil War bureaucratization of American governance as part of an effort to preserve not pluralism, but rather social status. Robert Wiebe, for one, argued that the rise of American bureaucracy was due to middle class angst and an effort to impose rational order on an increasingly chaotic world. See Robert H. Wiebe, *Search for Order: 1877-1920* (Greenwood Publishing Group, 1967). Morton Horwitz agreed with Wiebe to a point, but he drew the dividing line between the elites and the middle class, rather than between the middle and working classes. Horwitz characterized the creation of the bureaucratic state as just another facet of an overall effort to preserve, if not enhance, the socioeconomic position of the elites at the expense of the working and middle classes. See Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1977). Like Nelson, however, this author finds this view plausible but difficult, if not impossible, to prove or disprove. See Nelson, *Roots of American Bureaucracy*, 6. Rather, it relies to some degree on the implicit assumption that results are evidence of intent or motive. Given the repeated examples of unintended consequences that follow in this and later chapters of this dissertation, that does not appear to be a safe assumption, at least as to developments of the late nineteenth century.

<sup>83</sup> Harold H. Dunham, “Some Crucial Years of the General Land Office, 1875-1890,” *Agricultural History* 11, no. 2 (April 1, 1937): 119.

Washington, D.C.<sup>84</sup> The clerks of public lands and of private land claims were responsible for whatever work the commissioner needed done within their respective areas, the clerk of surveys directed and oversaw the making of surveys (which another agency conducted), the recorder certified, transmitted, and recorded all patents the GLO issued, and the solicitor served as a legal advisor to the commissioner regarding all disputes and controversies involving the public lands and private land claims.<sup>85</sup> In addition, the GLO opened offices at the local level as the government opened lands to entry and purchase under the myriad of public land laws. Throughout the GLO's history, over 380 offices were established to dispose of the public domain.<sup>86</sup>

The Land Department had several duties as to railroad land grants as their recipients went through the several prescribed steps in availing themselves of their respective subsidies. The first step for the recipients of most grants, including the three in the Pacific Northwest, was filing maps of the projected general routes of their roads with the Land Department, after which the president was directed to have the lands along such routes surveyed.<sup>87</sup> The Northern Pacific grant also contained a provision specifying that upon general location, all lands subject to railroad location were thereafter closed to sale, entry, or preemption before or after survey, while the two Oregon grants directed the administration to withdraw granted lands from disposal

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<sup>84</sup> Act to Reorganize the General Land Office of July 4, 1836, 5 *U.S. Statutes at Large* 107.

<sup>85</sup> 5 *U.S. Statutes at Large* 107.

<sup>86</sup> Not nearly that many existed at any one time. In 1876, for instance, in the height of the so-called "homestead era," there were ninety-eight district offices. Carstensen, *Intro to Public Lands*, at xix.

<sup>87</sup> Northern Pacific Land Grant, § 6, 13 *U.S. Statutes at Large* 369.

under the public land laws.<sup>88</sup> Railroad companies typically filed their maps of general location in multiple sections. The Northern Pacific, for instance, filed its map of “general location” in three separate filings. The secretary of interior accepted its map covering Minnesota and a portion of Washington Territory on August 13, 1870, its map covering the Dakota, Montana, Idaho, and the remainder of Washington territories on February 21, 1872, and its map of the branch line over the Cascades in Washington on August 15, 1873. For their parts, the Oregon & California filed four maps from February of 1870 to April of 1871, and the (“West Side”) Oregon Central two maps, one in May of 1871 and the other in January of 1872.<sup>89</sup>

Because it was impossible to ascertain which sections were subject to future railroad location—i.e., which were odd sections, non-mineral, etc.—prior to survey, the Land Department from the start withdrew all place lands on all three of the grants from sale, entry, or preemption. Once surveyed, the even sections would be re-opened and subject to disposal under the public land laws, with the caveat that the minimum price be doubled from \$1.25 to \$2.50 per acre. The Northern Pacific grant did not direct the administration to withdraw lands but rather excluded the lands by law even without land office action. Still, the agency withdrew Northern Pacific lands as a way of “giving

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<sup>88</sup> Act of July 25, 1866, § 2, 14 *U.S. Statutes at Large* 239, 240; Act of May 4, 1870, § 2, 16 *U.S. Statutes at Large* 94.

<sup>89</sup> Circular, SS. Burdett, Commissioner of GLO, to Registers and Receivers, June 25, 1875, in Henry Norris Copp, *Public Land Laws Passed by Congress from March 4, 1869, to March 3, 1875: With the Important Decisions of the Secretary of the Interior, and Commissioner of the General Land Office, the Land Opinions of the Attorney General, and the Circular Instructions Issued Form the General Land Office to the Surveyors General and Registers and Receivers During the Same Period* (Washington, DC: Henry N. Copp, 1875) (Hereinafter “Copp, *Public Land Laws* (1875)”), 340.

notice of the limits of the grant” and to “avoid confusion and to protect both settlers and the company.”<sup>90</sup> The judiciary—including the Supreme Court—repeatedly upheld the validity and wisdom of this practice.<sup>91</sup>

It became imperative that the Land Department ascertain which preemptions or entries preceded a railroad’s “general location” and withdrawal, both for determining the superiority of rights as between railroads and claimants and for determining the price to be paid upon proving up claims.<sup>92</sup> This was not always an easy matter. On February 10, 1870, Commissioner Joseph S. Wilson issued a circular with instructions for handling preemption claims on lands within the withdrawn limits of a railroad grant. It required persons who had settled on unsurveyed lands within the lateral limits of railroad withdrawals prior to the withdrawal to file their declaratory statements within six months after the land being surveyed, and to make proof and payment within twelve months thereafter. Regarding settlements on surveyed lands, the circular required the settler to file his declaratory statement, “giving therein the date of settlement, within three months from the date of publication [t]hereof by the register and receiver, and

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<sup>90</sup> *Trepp v. Northern Pacific Railroad Co.*, 1 Pub. L. Dec. 380, 382 (1881).

<sup>91</sup> *See, for example*, *Mansfield v. Northern Pacific*, 3 Pub. Lands Dec. 537 (1885); *Vaughn v. Northern Pacific*, 6 Pub. Lands Dec. 11 (1887); *Miller v. Northern Pacific*, 7 Pub. Lands Dec. 100 (1888); *Fugelli v. Northern Pacific*, 10 Pub. Lands Dec. 288 (1890); *Northern Pacific v. Cannon*, 54 Fed. Rep. 252 (D. Mont. 1893); *Buttz v. Northern Pacific*, 119 U.S. 55 (1886).

<sup>92</sup> If preemption was instituted prior to general location, then the price would be \$1.25 per acre rather than \$2.50.

thereafter make proof and payment as provided by law.” Any failure to comply with these requirements, Wilson stated, should result in the forfeiture of the claim.<sup>93</sup>

For many years, the GLO withdrew lands not only within the place limits of grants, but also within any indemnity strips, even though there was no explicit statutory directive to do so.<sup>94</sup> The reason seemed to be that the Land Department interpreted the land grants as promising to convey not just particular parcels of land—the specific amount of which might vary depending upon the character of the land and how much had been claimed prior to the railroads’ rights attaching—but rather particular quantities of land. Accordingly, it saw the withdrawing of indemnity lands as necessary in ensuring that the government met its legal obligation to cover any losses within the place limits with sufficient quantities of lands in the indemnity strips. This policy changed under Commissioner William A. J. Sparks in the late 1880s. First, Sparks declared that past withdrawals of indemnity lands did not actually exclude settlers from preempting such lands but rather merely served as information for defining the limits for when railroads made their indemnity selections at a later date.<sup>95</sup> On this point, Secretary Lucious Q. C. Lamar overruled Sparks, but in 1886 Lamar went a step further and began actually restoring withdrawn indemnity lands to the public domain.<sup>96</sup> By the following

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<sup>93</sup> Circular, Joseph S. Wilson, Commissioner of GLO, to Registers and Receivers, February 10, 1870, in Copp, *Public Land Laws* (1875), 404.

<sup>94</sup> John B. Rae, “Commissioner Sparks and the Railroad Land Grants,” *Mississippi Valley Historical Review* 25, no. 2 (1938): 220-223.

<sup>95</sup> Rae, “Commissioner Sparks,” 220.

<sup>96</sup> Rae, “Commissioner Sparks,” 222-223.



year, with the backing of President Grover Cleveland, Lamar had revoked the withdrawals of almost twenty-five million acres of indemnity lands.<sup>97</sup>

The aggressive stance of Sparks and Lamar toward railroads and their withdrawn lands should not have been surprising, given a growing populist resentment towards railroads and the GLO's apparent approach to them. This angst had indeed been a contributing factor to Cleveland winning the presidency in the first place.<sup>98</sup> During the campaign, Cleveland had specifically advocated reforming the land office in order to deal with the rampant fraud and speculation resulting from the railroad land grants and other land laws.<sup>99</sup> His position garnered some support in Republican circles while alienating other expansionist Democrats. Secretary of Interior Carl Schurz, for instance, led a group of "mugwump" Republicans, dissatisfied with the party's support of big business and its nomination of Jay Gould's "friend" James Blaine, to defect from the party in support of Cleveland.<sup>100</sup> Schurz, a land reformer, supported Cleveland for the presidency because he viewed him as a man of "incorruptible integrity" who possessed "a high sense of official honor" and "a keen instinct of justice."<sup>101</sup> On the other side, Andrew B. Hammond, one of the preeminent lumbermen in western Montana and a Democrat, soon broke from supporting President Cleveland based on his aggressive

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<sup>97</sup> Rae, "Commissioner Sparks," 222-223.

<sup>98</sup> Jack Beatty, *Age of Betrayal: The Triumph of Money in America, 1865-1900* (New York: Alfred A. Knopf, 2007), 99-100.

<sup>99</sup> Gregory Llewellyn Gordon, *Money Does Grow on Trees: A. B. Hammond and the Age of the Lumber Baron* (2010) (unpublished PhD dissertation, University of Montana), 195-96.

<sup>100</sup> Gordon, *Money Does Grow on Trees*, 195-96.

<sup>101</sup> Nelson, *Roots of American Bureaucracy*, 64-65.

public land policies, including most notably Cleveland's threats to retain forests in federal ownership in perpetuity.<sup>102</sup> Upon winning election, Cleveland appointed Lamar and Sparks because of their reputations as land reformers. In his first report to Congress, Sparks signaled that he intended to change things in the GLO with his condemnation of the state of affairs: "I found that the magnificent estate of the nation in its public lands have been to a wide extent wasted under defective and improvident laws and through a laxity of public administration astonishing in a business sense if not culpable in recklessness of official responsibility ..."<sup>103</sup>

A key source of the resentment towards the government's railroad policies was the failure of many land grant recipients to construct their railways within the statutory timeframe. The original deadline for completion of the Northern Pacific line, for example, was July 4, 1876, but the road was far from completed by that date.<sup>104</sup> The Northern Pacific secured multiple extensions from Congress, ultimately moving the deadline to 1879, but even that was not enough time. The company finally celebrated the railway's completion in the fall of 1883, but even then, the line was only "complete" because the Northern Pacific had leased another company's 214-mile road from Wallula, WA to Portland, OR—one built without a land-grant subsidy.<sup>105</sup>

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<sup>102</sup> Gordon, *Money Does Grow on Trees*, 196.

<sup>103</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office, 1885* (Washington, DC: Government Printing Office, 1885), 3.

<sup>104</sup> Northern Pacific Land Grant, § 8, 13 *U.S. Statutes at Large* 370.

<sup>105</sup> The Northern Pacific had completed the bulk of its branch line from Wallula across the Cascades to Tacoma by 1883, but it would not complete the last seventy-five miles until 1887.

The Oregon companies seemingly got off to a faster start. From 1870 to 1872, the newly-formed Oregon & California Railroad completed over half of its East Side line (from Portland to a point near Roseburg), while the “West Side” Oregon Central completed construction of railroad from Portland to McMinnville by way of Forest Grove, a distance of 47 miles. In January 1873, however, the Oregon & California's funds became exhausted and the railroad suspended construction for several years.<sup>106</sup> After a change in ownership and with the support from newly-issued mortgage bonds, construction resumed in the summer of 1881. Construction continued uninterrupted until the beginning of 1884, when funds were again exhausted but by which time the company had extended the main line some 145 miles from Roseburg, Oregon to a point just over a mile south of Ashland, the southern-most terminus in Oregon. The final portion of the road from Ashland to the nearby Oregon-California border would not be completed until 1887, after the Oregon & California had again gone into receivership and come under the control of the Southern Pacific.<sup>107</sup>

Financial failures, which railroad officials largely brought on their companies through their own malfeasance, were largely to blame for the delays. As was the case with the Union Pacific and the infamous Credit Mobilier scandal, many Northern Pacific officials also had financial stakes in various construction and land companies, such that the Northern Pacific routinely awarded contracts and sold land at terms unfavorable to

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<sup>106</sup> Stipulation as to Facts, Oregon & California Transcript, 1560-61.

<sup>107</sup> Stipulation, Oregon & California Transcript, 1562-64.

the railroad company but quite profitable to the railroad's officials.<sup>108</sup> They did not let their company's charter stand in the way. They got around charter's prohibition on building branch lines, for instance, by financially backing local entrepreneurs (including lumber baron Hammond in western Montana) to build the lines and then purchasing them on behalf of the Northern Pacific for much more than the cost of construction.<sup>109</sup> In one case, Missoula entrepreneurs Hammond, Bonner, Hauser, and Marcus Daly joined with Northern Pacific officials Villard and Thomas Oakes to form the Rocky Fork Railway and Coal Trust to construct a branch line to Red Lodge, Montana, which the Trust also founded, to supply the Northern Pacific with coal. Once built, the Trust sold the branch road to the Northern Pacific in 1891 for \$1.4 million, almost twice what it had cost to construct. The Northern Pacific went into receivership—for the second time—two years later.<sup>110</sup>

Delays in construction hindered economic development not only by denying communities a transportation infrastructure, but also by withholding lands within the limits of their grants from market (with other lands being available at only double the price) for many more years than Congress originally anticipated. Since the principal purpose of the grants was to stimulate railway development ahead of settlement, many felt that railroad officials and their capitalist backers received the benefit of the subsidies while intentionally denying the public their part of the bargain. Ultimately, resentment

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<sup>108</sup> See generally White, *Railroaded*. See also Lubetkin, "Twenty-Six Feet and No Bottom: Constructing the Northern Pacific Railroad," *Minnesota History* 60, no. 1 (2006): 8-9.

<sup>109</sup> Gordon, *Money Does Grow on Trees*, 162.

<sup>110</sup> Gordon, *Money Does Grow on Trees*, 168-69.

towards the railroads led to, in historian David Maldwyn Ellis' words, a "ground swell of public opinion which through the 1880's demanded the recovery of grants to companies failing to observe the requirements of the law," in most cases the deadline for completing the railroad.<sup>111</sup> Ellis even characterized the forfeiture movement, despite it never being a "major political issue in the country at large," as being still "an integral part of the agrarian and industrial unrest which characterized the decades following the Civil War."<sup>112</sup>

The forfeiture movement was not just a populist one of "the people vs. the railroads," however. For example, when the Northern Pacific selected Tacoma as its western terminal, it was prominent Seattle businessmen who led the charge to forfeit that railroad's land grant for its branch line from Wallula to Tacoma. They sought to transfer the grant to another company that planned to construct its line across the Cascades to Seattle rather than Tacoma.<sup>113</sup> Likewise, prominent Portlanders for some time sought the forfeiture of the Northern Pacific's grant between Wallula and Portland so that Congress could transfer it to another company promising to construct a line from Portland to Salt Lake City, thereby making Portland a terminus of a transcontinental rather than just a pass-through city.<sup>114</sup>

The forfeiture issue raised a legal question as to whether land grants were forfeited automatically by operation of law and, if not, who in the government had the

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<sup>111</sup> Ellis, "Forfeiture of Railroad Land Grants," 27, 34.

<sup>112</sup> Ellis, "Forfeiture of Railroad Land Grants," 36.

<sup>113</sup> *See* Ellis, "Forfeiture of Railroad Land Grants," 46.

<sup>114</sup> Ellis, "Forfeiture of Railroad Land Grants," 47.

power to declare them forfeited. In 1874, the Supreme Court answered both questions. It held that forfeiture of land grants was not automatic but rather required some governmental action, and that this was a matter for Congress, not the Land Department or the courts.<sup>115</sup> By the early 1880s, a substantial contingent in Congress had come to favor forfeiture, and in 1884, the House passed, by a vote of 251 to 17, a resolution calling for the forfeiture of all unearned grants. Over the succeeding few years, Congress passed laws forfeiting over twenty-eight million acres, including nearly a million acres of the Oregon & California's "West Side" land grant from Portland to Astoria.<sup>116</sup> There might have been much more if not for a disagreement among those supporting forfeiture as to the extent of lands that should be restored to public entry. One group favored the forfeiture of only those lands remaining unearned, another favored the forfeiture of those lands unearned as of the statutory deadline, even if they had been earned subsequently, while still a third pushed for the forfeiture of *all* unearned and earned lands whenever the statutory deadline had been violated.<sup>117</sup> Often, the conflict among these groups led to delay and, in some cases, to no forfeiture bill being passed at all. One prominent federal judge in Portland, Oregon, in 1887, observed that the Northern Pacific's land grant between Wallula and Portland would have already been restored to the public domain "but for the irrational conduct of certain persons in Congress, who

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<sup>115</sup> See *Schulenberg v. Harriman*, 88 U.S. 44 (1874).

<sup>116</sup> Ellis, "Forfeiture of Railroad Land Grants," 42.

<sup>117</sup> Ellis, "Forfeiture of Railroad Land Grants," 52.

stubbornly insist that no part of the grant west of the Missouri river shall be forfeited, unless the bill includes the earned as well as the unearned lands.”<sup>118</sup>

The Northern Pacific came out of the forfeiture era for the most part unscathed. The fight over the forfeiture of portions of its massive grant came to a head in 1886. Congress took up potential forfeiture legislation in May and June of that year, at which time two portions of the Northern Pacific’s road remained uncompleted: the portion of its main line from Wallula to Portland and a seventy-five mile segment of the Cascade branch. In the Senate, Joseph N. Dolph, an attorney from Portland who had previously represented the Northern Pacific, argued against forfeiting the unearned portion of the Cascade branch. He appealed to nationalistic pride by citing to Great Britain’s subsidization of the Canadian Pacific as evidence that it was “attempting to seize and take out of our grasp the commerce of the old East,” such that it was hardly the time for the United States to impede construction of the Northern Pacific’s line by revoking part of its subsidy. He also contended that there were no agricultural lands of any value to settlers within the unearned portion of the Cascade branch.<sup>119</sup>

Dolph’s insistence that the unearned lands along the Cascade branch were worthless prompted Senator Van Wyck of Nebraska—a chief proponent of their forfeiture—to ask what harm there would be in them being forfeited.<sup>120</sup> Dolph explained that the unearned lands, though not valuable for settlement, were valuable to the railroad

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<sup>118</sup> *United States v. Ordway*, 30 F. 30, 35 (D. Or. 1887).

<sup>119</sup> *Northern Pacific Forfeiture, Remarks of Hon. J. N. Dolph, of Oregon, in the Senate of the United States, May 27, 28 and June 1 and 14, 1886* (Washington, DC: Government Printing Office, 1886), 5.

<sup>120</sup> *Northern Pacific Forfeiture, Remarks of Hon. J. N. Dolph*, 11-12.

for securing bonds, such that, if they were forfeited, funding would dry up and construction would cease. That would be to nobody's benefit. Van Wyck and others accused Dolph of still acting on behalf of the Northern Pacific. Dolph responded by insisting that his support for the forfeiture of approximately three million acres adjoining the un-built Wallula-to-Portland section ought to have demonstrated his legislative independence from his old client.<sup>121</sup> However, it seems that the Northern Pacific was eager to have that portion forfeited if it meant subduing the political agitation for more drastic measures against the company, such as those Van Wyck proposed and against which Dolph was fighting.<sup>122</sup> In any event, Congress failed to act in 1886. When the Northern Pacific completed the Cascade branch the following year, the fight over the forfeiture of unearned lands along that section became moot. In 1890, Congress finally passed a General Forfeiture Act, which included the forfeiture of all land adjoining the Wallula-to-Portland section of road. Populists and land reformers, far from celebrating, however, instead alleged that the bill was a "Northern Pacific bill" designed to prevent anything more drastic.<sup>123</sup>

The last step in administering railroad land grants was for lands to be patented. Upon completing each 25-mile section of railway, railroad companies filed selection lists of lands for which they sought patents. Once the federal government received a selection list from a railroad, the list took a circuitous route through the government

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<sup>121</sup> Northern Pacific Forfeiture, Remarks of Hon. J. N. Dolph, 11-12.

<sup>122</sup> Ellis, "Forfeiture of Railroad Land Grants," 51.

<sup>123</sup> Ellis, "Forfeiture of Railroad Land Grants," 51.



bureaucracy.<sup>124</sup> After landing in the local land office, the list was sent to the GLO, where the list was first directed to the Railroad Division so it could determine whether the lands were of the character prescribed in the grant and hence subject to patent by the company. That division's examination consisted of three steps: (1) determining whether the lands were within the limits of the grant, (2) digging through tract-books and the plats and field notes to determine whether there were any conflicting claims, and (3) consulting with witnesses to ascertain whether the railroad had in fact been constructed opposite the lands claimed.<sup>125</sup> Though there was no official designation of which clerks would handle which selection lists, it was customary for each clerk to have charge of a specific state, so that clerks with more intimate knowledge of the lands in question could review each selection list (normally two assigned to each list). If the listed lands were found to be within the prescribed grant and no conflicts were found, the Railroad Division clerks certified the list and forwarded it to the division's chief for approval. Once the division's work was completed, it sent the list first to the Mineral Division to determine whether the list contained any mineral lands, and then to the Swamp Division to ascertain whether the list contained any swamp lands.<sup>126</sup> If these divisions certified that the list was free of such lands, the list was sent to the commissioner of the GLO to sign off on it, at which time it went to the secretary of interior for approval, then to the

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<sup>124</sup> S.S. Marr testimony, Oregon & California Transcript.

<sup>125</sup> S.S. Marr testimony, Oregon & California Transcript.

<sup>126</sup> S.S. Marr testimony, Oregon & California Transcript.

Recording Division to be copied and filed, and then back to the Railroad Division to draw up and issue the land patents.<sup>127</sup>

The operations of the GLO were sometimes disorganized. As one Interior Department employee, Frank Griffith, later recounted, letters from the various companies to the commissioner of the GLO or the secretary were “pretty well scattered around.”<sup>128</sup> The system of filing was to sort by year, with everything relating to a company for a particular year going into a file wrapped with a band. If that band became loose, the papers could become detached and mixed with other files.<sup>129</sup> The Railroad Division, in recommending a list or selection for patent, did not consider whether any of the conditions subsequent had been violated.

Sometimes years, or even decades, separated railway construction and the issuing of patents to the adjoining land grant. As of 1887, when the Northern Pacific completed its Cascade branch and the Oregon & California completed its line, only a small percentage of either railroad’s land grant had been patented. The Northern Pacific

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<sup>127</sup> S.S. Marr testimony, Oregon & California Transcript, 1852-53. When a letter was received by the General Land Office, it first went to the mail room to be docketed and for a jacket to be made for it. All the papers pertaining to that letter were put in one jacket before being referred to the appropriate division. If the letter related to a railroad land grant, it was put in the file box of that grant housed in the Railroad Division; there was a separate file for each grant. J.F. Casey testimony, Oregon & California Transcript, 1861-62.

<sup>128</sup> Frank Griffith testimony, Oregon & California Transcript, 1901. Griffith was in the employ of the government since 1899, both in the Interior Department and under assignment to the government attorneys in connection with public land cases. At the time of testimony, he was under assignment with the Interior Department to assist counsel for the government in the Oregon and California land grant case and other public land cases. Griffith, Oregon & California Transcript, 1897-98.

<sup>129</sup> Frank Griffith testimony, Oregon & California Transcript, 1901.

had only patented less than a million acres of its estimated forty-seven million acre grant, the Oregon & California only 323,000 acres of its three million acres.<sup>130</sup>

The delays in patenting fomented the already potent popular anger directed towards the railroads and the government's land grant policy. Many contemporaries blamed the railroads entirely for the delays, pointing to their self-interest in delaying patents as a way to avoid paying property taxes.<sup>131</sup> Despite the appealing logic of such arguments, little evidence existed at the time of railroads intentionally delaying patents to avoid taxes. Decades later, however, a long-time Oregon & California employee who was in charge of that company's land taxes during the 1880s, reportedly admitted to a government prosecutor that "it was the policy of the Company to avoid selecting as long as possible in order to keep them off the tax rolls."<sup>132</sup>

The goal of the railroad companies was ostensibly to have the land pass effectively straight from the government to purchasers, with the railroads "owning" the land for just enough time to pass the titles along. Doing so required they market lands that the railroads did not yet own and to have a purchaser lined up prior to patenting, but that made some prospective buyers uneasy. Northern Pacific Vice President George Stark, in 1878, wrote to a representative of potential purchasers in Toronto, Canada to alleviate his clients' concerns regarding the security of the titles they would be

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<sup>130</sup> Decker, "Railroads and the Land Office," 698.

<sup>131</sup> Decker, "Railroads and the Land Office," 679-80, 689. So long as the federal government retained the patent to a parcel of land, individual states could not tax it without federal permission, and the federal government did not grant such permission until 1886. An Act to Provide for Taxation of Railroad-Grant Lands, 24 *U.S. Statutes at Large* 143 (July 10, 1886). Perhaps not so coincidentally, after 1886, the patenting process accelerated.

<sup>132</sup> David Loring testimony, Oregon & California Transcript, 2213. Loring later denied making the statement.

contracting to purchase from the Northern Pacific. Stark indicated that it was standard practice for purchasers of unpatented grant lands to pay the GLO the filing and survey fees on behalf of the Northern Pacific. The company would then file a selection list covering all lands “sold” through such a manner, receive the patents, reimburse the purchasers for their payment to the GLO, and convey the patents pursuant to the contractual terms.<sup>133</sup>

However, while the railroads played a role in the delays in railroad patenting, so too did the Land Department. For one, the department often intentionally delayed the patenting process. Indeed, the primary reason the Northern Pacific had patented so few acres by 1887 was that the department, in 1874, had suspended the issuance of patents to that company. Four years earlier, Congress included a provision in an appropriation bill requiring the Northern Pacific to pay the costs of surveys before receiving patents to land. For the following four years, the GLO overlooked the provision and issued patents without the Northern Pacific paying for the surveys. When the GLO discovered its error, it demanded back payments and suspended further patents until such payment was made.<sup>134</sup> The Northern Pacific refused, its officials believing the requirement to be in violation of its charter and not wanting to acquiesce to a precedent that its charter could be amended at the will of Congress.<sup>135</sup> The suspension continued until 1882, when

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<sup>133</sup> Geo. Stark, Vice President, to Messrs. Alexander & Stark, Toronto, December 4, 1878, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 6, Folder 4, Minnesota Historical Society, St. Paul, MN.

<sup>134</sup> Decker, “Railroads and the Land Office,” 691-92.

<sup>135</sup> Stark to Alexander & Stark, December 4, 1878.

the Northern Pacific finally agreed to pay the costs of surveying. However, by that time, the forfeiture movement had taken hold, and the GLO had begun to suspend the issuance of railroad patents in anticipation of forfeiture legislation. The GLO thus issued another order suspending the issuance of patents to the Northern Pacific, one that would remain in effect until 1890, when Congress finally passed a forfeiture bill affecting the Northern Pacific.<sup>136</sup>

The GLO not only suspended the issuance of patents specifically to railroads, but it also suspended *all* patents in particular areas—sometimes encompassing entire states—where land officials knew fraud to be pervasive. For the most part, however, the GLO was ineffective in reducing, much less preventing, the commission of frauds regarding the public domain. The pervasiveness of such frauds—often at the behest of railroad, lumber, or mining interests and allowing for their monopolization of resources—further fueled popular suspicions of both corporations and the GLO. Judge David Davis represented such views when he blamed the stealing of millions of acres of the public domain by corporations and other monopolies on the “collusion and cooperation of agents employed to protect the interests of the people.”<sup>137</sup>

Several factors explain the GLO’s seemingly lax administration of land laws including railroad land grants. For one, the land office was simply under-manned, under-funded, and under-equipped to handle the work. While the land office’s duties and responsibilities greatly expanded after 1862, both due to the amount of new laws

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<sup>136</sup> Decker, “Railroads and the Land Office,” 692-95. As to the Oregon & California’s land grant, it received patents in 1893 based on selection lists that company had filed in 1876. Stipulation as to Facts, Oregon & California Transcript, 1577.

<sup>137</sup> Quoted in Dunham, “Some Crucial Years,” 117.

passed but also because of the expansion of the public domain to be administered, Congress consistently failed, throughout the remainder of the century, to provide it the necessary resources to meet the new demands placed upon it. As historian Harold H. Dunham summarized the problem, its “machinery for handling [its tasks] remained inefficient, antiquated, and inadequate.”<sup>138</sup> Similarly, Gates concluded that the bulk of the blame for the “less favorable features” of public lands policy during the latter half of the nineteenth century should be placed on Congress for “refus[ing] to give the Land Office sufficient staff and appropriations with which to press forward its surveys, scrutinize selections carefully, bring its records up to date, and require the railroads to take title and have their lands made taxable.”<sup>139</sup>

One of the GLO commissioner’s obligations was to make annual reports to Congress, and for most years during the 1870s and 1880s, these reports included requests for more staff, better pay, and more office space. In 1877, for example, Commissioner James A. Williamson reminded Congress that “[y]ear after year [his] predecessors in this office [had] urged upon Congress the necessities of the public service in this regard,” and that he continued working toward “the same end.”<sup>140</sup> As he described Congress’ inaction and its consequences, “it does not appear to have reached the judgment of Congress that a paramount need of the country is daily sacrificed upon the altar of a false economy, and the most sacred interest of the hardy pioneers of

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<sup>138</sup> Dunham, “Some Crucial Years,” 118.

<sup>139</sup> Gates, *Public Land Law Development*, 379-80.

<sup>140</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office, 1877* (Washington, DC: Government Printing Office, 1877).

civilization, that of speedy acquisition and security of their homes and hearthstones, is continually ignored and disregarded.”<sup>141</sup> The lack of a proper workforce, Williamson argued, contributed to a backlog in the work of the public lands division, such that people writing to the office had to wait several months for a reply. Apparently, little changed in the succeeding six years, as Commissioner Noah C. McFarland complained in 1883 that the “increase in working force and appropriations has been doled out in pittances.”<sup>142</sup> The problem was still far from resolved five years later, when the secretary of interior implored Congress to increase the office’s staff and resources, even arguing that it was more deserving of “intelligent, thorough and effective Congressional action for its relief” than any other agency in the government.<sup>143</sup>

As for the pay of GLO employees, a Senate committee acknowledged in 1881 that GLO clerks exhibited more ability than their salaries—which the report characterized as just enough to allow them to “eke out a bare subsistence”—indicated.<sup>144</sup> The low pay arguably made GLO employees more susceptible to bribery and, at the very least, contributed to a high turnover within the GLO, with many of the best legally trained employees resigning to enter into private practice representing land and railroad

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<sup>141</sup> GLO, *Annual Report of 1877*. In 1877 the land office had, under the Commissioner, one chief clerk, one recorder, one law clerk, three principal clerks, 137 lower-level clerks, one draughtsman, one assistant draughtsman, two messengers, three assistant messengers, eight laborers, and two packers.

<sup>142</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office, 1883* (Washington, DC: Government Printing Office, 1883), 31.

<sup>143</sup> U.S. Department of the Interior, *Annual Report of the Department of the Interior, 1888* (Washington, DC: Government Printing Office, 1888), 8.

<sup>144</sup> Dunham, “Some Crucial Years,” 121.

corporations before the GLO.<sup>145</sup> For example, two employees of the GLO, Britton and Gray, moved on to become the Northern Pacific's legal counsel in Washington, D.C.<sup>146</sup> Even as small as the GLO staff was, its working spaces were still too small to accommodate even the small number there were. In 1880, the Public Lands Commission wryly noted that the "room allotted to the General Land Office is not quite the worst that it could be, nor is it wholly inadequate, but it approximates both."<sup>147</sup>

Congress was blameworthy not just for its failure to provide the GLO with the necessary means to administer the public domain, but also for the actual substance of the laws it did succeed in passing. The laws regarding the nation's vast land estate unfortunately formed an "incongruous land system"—one which would have made it difficult for even a perfect agency to administer.<sup>148</sup> Many have seen the Homestead Act as ushering in a new era—the "Homestead Era"—of federal land policies, one focused on giving free land to industrious settlers rather than on raising revenue. Gates showed, however, that the Homestead Law "did not completely change our land system, that its adoption merely superimposed upon the old land system a principle out of harmony with it, and that until 1890 the old and the new constantly clashed."<sup>149</sup>

Specifically, as Gates described the GLO's predicament, "[c]arelessly drafted measures led to uncertainty about routes, about the rights of railroads nearing or crossing

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<sup>145</sup> See Dunham, "Some Crucial Years," 122.

<sup>146</sup> See Dunham, "Some Crucial Years," 126.

<sup>147</sup> Dunham, "Some Crucial Years," 122.

<sup>148</sup> See generally Gates, "Homestead Law in an Incongruous Land System."

<sup>149</sup> Gates, "Homestead Law in an Incongruous Land System," 654.



each other, about the inclusion of swamp or what the states tried to call swampland in grants, about the penalty of forfeiture for failure to build the lines or to build on time, and about restrictions affecting the right to select indemnity lands.”<sup>150</sup> In 1887, Secretary Lamar complained of the confusion that resulted from the magnitude of different laws. “The public land States and Territories,” he argued, “were gridironed over with railroad granted and indemnity limits,” with “the limits of one road [in many instances] overlapping and conflicting with other roads in the most bewildering manner, so that the settler seeking a home could scarcely find a desirable location that was not claimed by some one, or perhaps two or three, of the many roads to which grants of land had been made by Congress.”<sup>151</sup> Decades later, in 1905, one report concluded that “the land laws, court decisions, and departmental practices had become so complicated that the settler was at a marked disadvantage in trying to get his share of the public lands when pitted against the wealth and superior legal services of corporations.”<sup>152</sup> It was not simply the number of laws, but also their imprecision as to the respective rights and duties of grantees and claimants and the times at which they attached, that led to legal complexities and, ultimately, confusion. The complex nature of the land laws would have made the administering of the land laws, even by a land office composed of the most honest and energetic of land officials, difficult.

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<sup>150</sup> Gates, *History of Public Land Law Development*, 380, citing John Bell Rae, *The Development of Railway Land Subsidy Policy in the United States* (New York: Arno Press, 1979).

<sup>151</sup> Ellis, “Forfeiture of Railroad Land Grants,” 32-33.

<sup>152</sup> Roy E. Appleman, “Timber Empire from the Public Domain,” *Mississippi Valley Historical Review* 26, no. 2 (1939): 194.

### III. The Administrative Adjudication of Land Contests

With so many different laws providing for the government's disposal of land, it became difficult for settlers and railroad agents alike to determine whether land was public, whether it had been entered under any number of land laws, or whether it was contained in one or more land grants. Such confusion led to conflicting claims and ultimately to disputes. In addition to all of its executive duties, the Land Department also adjudicated such disputes. In this sense, the Land Department, like other executive agencies, served a judicial function in addition to its executive and, arguably, legislative ones. Its adjudication of such contests, including those involving railroad land grants, in fact became one of its most time-extensive obligations throughout the late nineteenth century and a source of even greater power for the office.<sup>153</sup>

As with its other duties, however, the Land Department (and particularly the GLO), for the most part, did not possess the necessary means to adjudicate claims in a timely manner, such that land titles often remained clouded for several years. It was not just the number of people working in the Land Department, but also their lack of expertise, that was a problem. In 1877, Commissioner Williamson reported that, as to the resolution of land disputes, the office was “still further in arrears,” due to the inability of officials or clerks lacking legal training—or as he called them, “mere novices in official life”—to handle the work. The examination and resolution of

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<sup>153</sup> See U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office, 1873* (Washington, DC: Government Printing Office, 1873), 14 (noting that the resolution of settler-railroad conflicts “forms a large part of the business of the new [railroad] division”). The number of statutes Congress passed correlated closely with the number of cases before the GLO, Interior, and the courts—and there were a lot of statutes. See Ralph James Mooney, “The Deady Years, 1859-1893,” in *The First Duty: A History of the U.S. District Court for Oregon*, ed. Carolyn M Buan (U.S. District Court of Oregon Historical Society, 1993).

conflicting claims required legal training and “the acquisition of those habits of care, research, and judicial observation which enter into the judgments of courts.”<sup>154</sup>

The disputes took many forms. There were disputes between rival claimants for the same tract of land, between claimants and others seeking cancellation of the entries or claims and a preference right to enter the lands, and between the federal government itself and claimants upon allegations of illegality in the entries or claims. The railroads became embroiled in litigation over the nature and extent of their rights to particular tracts of land as against the rights of preemptors, homesteaders, mining claimants, Indians, federal and state governments, and other railroads. Indeed, no public lands legislation produced more litigation than the railroad land grants. The Northern Pacific, on its own, was a party to over three-thousand formal legal disputes involving its land grant.<sup>155</sup>

A recognized procedure existed for resolving such disputes, whether they arose from an application or from a land contest. Typically, the local register and receiver took the first action. The judicial discretion of these officers was quite limited, in that all decisions were subject to review by the commissioner of the GLO whether appealed or not.<sup>156</sup> The commissioner’s role in the process was expansive; at the same time, he served as prosecutor, judge, and jury. He prepared the charge and collected and presented the evidence, decided questions of law and declared legal rules, and made

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<sup>154</sup> GLO, *Annual Report of 1877*, 1-3.

<sup>155</sup> Land Case Docket, Northern Pacific Railway Company records, Land Department records, Land Cases, Docket, 1885-1899, Minnesota Historical Society, St. Paul, MN.

<sup>156</sup> Dunham, “Some Crucial Years,” 117-141.

findings of fact.<sup>157</sup> In the great majority of cases, the commissioner's decision was final and conclusive, though parties could appeal to the secretary of interior and ultimately to the United States Supreme Court, whose scope of review was limited to the secretary's interpretations of law. Given the finality of the great majority of the commissioner's decisions, and given the amount of money involved in such decisions, one member of Congress called the commissioner "the most important law officer of the Government."<sup>158</sup>

The problem land officials faced was that they initially had little guidance in navigating a rather tricky legal terrain. The railroad land grants themselves contained little guidance for administering the grants, particularly as the rights arguably created therein conflicted with rights under the many other public land laws. Rather than leave such decisions to individual registers and receivers and clerks in local land offices, executive officials higher up in the administration took the lead in interpreting railroad land grants and in providing directives to the district land offices.<sup>159</sup>

The commissioner, the secretary, or the attorney general often established precedent later followed not just by lower officials in the Land Department, but also by courts including even the Supreme Court. For example, the Supreme Court's holding regarding the nature of a railroad land grant in its 1874 opinion in the case of

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<sup>157</sup> Dunham, "Some Crucial Years," 117-141.

<sup>158</sup> Dunham, "Some Crucial Years," 117-141. *See also* Nelson, *Roots of American Bureaucracy*, 28 (arguing that the GLO "gained added importance because they gave rise to disputes requiring administrative and sometimes congressional adjudication").

<sup>159</sup> Commissioners of the General Land Office and secretaries of the Interior Department occasionally sought the advice of the Attorney General's office in issuing both legal opinions in resolving particular cases and circulars to the land office for administering the land grants in light of such opinions.

*Schulenberg v. Harriman* has often been cited as establishing two principles: that railroad land grants were grants *in praesenti*, and that, prior to the road being located, they were considered to “float” until the route was located, at which time title related back to the date of the act.<sup>160</sup> This is why public lands historian David Maldwyn Ellis labeled *Schulenberg* “the most important case dealing with land grants.”<sup>161</sup> This interpretation, however, dated back at least to 1856, when Attorney General Caleb Cushing advised the Land Department that “[a railroad land grant] by its text makes a conditional grant *in praesenti* in the nature of a *float*, and which does not attach to any particular parcel of the public lands until the necessary determinative lines shall have been fixed on the face of the earth.”<sup>162</sup> That principle was cited in two more administrative land decisions prior to the Supreme Court’s supposedly precedent-establishing opinion.<sup>163</sup>

The Land Department also developed precedent regarding the meaning of Section Six of the Northern Pacific’s land grant—a source of much settler resentment and legal confusion—before receiving meaningful guidance from the judiciary. Because

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<sup>160</sup> *Schulenberg v. Harriman*, 88 U.S. 44 (1874).

<sup>161</sup> Ellis, “Forfeiture of Railroad Land Grants,” 30.

<sup>162</sup> *Central Pacific v. Nevada* (January 15, 1873), in Copp, *Public Land Laws* (1875), 426.

<sup>163</sup> See the secretary of interior’s decision in *Daniel Freeman v. Union Pacific*, issued on April 29, 1871, in which he held “[t]he grant was a present grant, but in the nature of a float until the line of the road was ‘definitely fixed;’ when definitely fixed it became operative and title vested.” Quoted in Copp, *Public Land Laws* (1875), 426. See also *Central Pacific v. Nevada*, issued on January 15, 1873 and affirmed on appeal by Secretary, June 3, 1874. In that opinion, the Commissioner wrote the following: “From the foregoing it is clear that the grant became effective upon the definite fixing of the line of road, and that the Company could have no interest in the land prior to that date, thus rejecting the view contended for by the Railroad Company.” Copp, *Public Land Laws* (1875), 426.

so much time usually elapsed, along most of the route, between the Northern Pacific's general locations and the ultimate construction of the road, there was much opportunity for settlers, ranchers, miners, timbermen, speculators, or even other railroads to attempt to claim lands within the place limits of the Northern Pacific's grant for themselves. The prospects of railroad construction enticed settlement along the proposed route, with some entering lands prior to the secretary's orders of withdrawal even reaching the local registers and receivers, who had the principal duty in enforcing such withdrawal. In such cases, the practice of registers and receivers was initially to accept such entries at least until such time as they received the withdrawal orders. The Northern Pacific contested that practice, however, and filed with the GLO an application to cancel entries made on odd sections within granted limits after its map of general road had been filed and accepted but before the order of withdrawal had reached the local land offices.<sup>164</sup> The company's lawyers argued that Section Six operated "to reserve from disposition under the general laws of the United States all odd numbered sections within the limits of their grants along the general route, as shown by a map of the same, filed by the company and accepted by the secretary of the Interior, August 13th, 1870, and that all entries or locations made of lands within these limits subsequent to the filing and acceptance of such map should be cancelled, and the lands held to satisfy the grant to the company made by the third section of the act."<sup>165</sup>

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<sup>164</sup> Re: Northern Pacific R. R. (March 15, 1873), in Copp, *Public Land Laws* (1875), 377.

<sup>165</sup> Copp, *Public Land Laws* (1875), 378.

Despite the GLO's reputation—one that has persisted—for favoring the railroads as against settlers, Commissioner Willis Drummond, formerly a practicing attorney, seemingly went out of his way to decide against the Northern Pacific. The commissioner provided two distinct rationales for his decision, one explicitly policy-based and the other purportedly based on legal precedent. He first argued that “bona fide settlers who had continued to improve their claims on the faith of the government withdrawal would be prejudiced” by cancelling their entries as the railroad requested and that such a result should thus be avoided. He then offered a legal interpretation of Section Six—one that would apply just as much to entries even after a land office received an order of withdrawal, and right up to the time of definite location, as to those involved in this dispute. Taking a strikingly narrow view of Section Six's protections, he argued that the section applied only to those lands found, as of the date of definite location, to belong to the company and that it “did not operate as a withdrawal of lands from market” prior to definite location.<sup>166</sup> The commissioner reasoned that the words “hereby granted” in Section Six referred to those granted in Section Three, which were those odd sections, within the place limits, free from preemption, homestead, or other legal claims *as of definite location*. While this interpretation made some sense in isolation, it essentially made Section Six meaningless, since courts and the administration had consistently held, since the attorney general's opinion in 1856, that the company's rights under *in praesenti* grants, such as the Northern Pacific's, attached to such specific parcels as of definite location even without Section Six.

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<sup>166</sup> Copp, *Public Land Laws* (1875), 378.

Not surprisingly, the Northern Pacific appealed the commissioner's decision to the secretary, who sought the advice of the attorney general despite being a respected attorney himself. The Assistant Attorney General, W. H. Smith, gave his advice and recommendation on March 15, 1873.<sup>167</sup> Smith first cited to the rule that all words in a statute are presumed to have meaning, i.e. that no word—much less a whole sentence or paragraph—should be rendered superfluous.<sup>168</sup> Specifically, any construction of Section Six which would render it “a mere repetition of the third [section] must be rejected if any other reasonable construction can be found consistent with the objects of the act and the intention of Congress.”<sup>169</sup>

He considered the commissioner's opinion to represent just such a construction.<sup>170</sup> Therefore, “if any force or effect whatever is to be given to the clause in question . . . , it must be held to extend protection to the odd sections prior to definite location.”<sup>171</sup> Smith found the Northern Pacific's proffered interpretation the only one to be “reasonable,” consistent with “the usual and accepted meaning of the words,” consistent “with every other portion of the act and with the whole act,” and “justified

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<sup>167</sup> Copp, *Public Land Laws* (1875), 378.

<sup>168</sup> This has become a principal rule of statutory construction for courts.

<sup>169</sup> Copp, *Public Land Laws* (1875), 379. Smith cited several sources for the proposition that legislation must be construed as to give “force and effect, if possible, to all of its parts,” with no two provisions being “construed to mean the same thing, if a separate meaning can be assigned to each.”

<sup>170</sup> The commissioner had reasoned that Section Six had meaning only in placing unsurveyed land in the same class as surveyed lands under the grant and to protect the company's rights as to odd sections before survey. According to Smith, the clause was unnecessary as to that purpose, since the right of the Company attached to each class on definite location based solely on Section Three.

<sup>171</sup> Copp, *Public Land Laws* (1875), 379.



by the objects contemplated by Congress in making the grant.”<sup>172</sup> The clear purpose of Section Six, Smith wrote, was to withdraw odd sections within the limits of the grant from the date of the approval of the map of the general route.<sup>173</sup>

As to when the withdrawal took effect—whether it was when the secretary signed the order of withdrawal or when the register and receiver received it—Smith chose a third option. According to his reading of the statute, Section Six’s withdrawal provision took effect as of the date of definite location, and an executive withdrawal order was not necessary for it to occur. The Northern Pacific grant did not speak of “withdrawal” as most other grants did, but rather of lands simply not being liable to sale, entry, or preemption. This was evidence, Smith argued, that Congress intended to offer the Northern Pacific additional protection, based both on an acknowledgement “of the difficulties that would inevitably be experienced in the construction of the road through a wild, uninhabited, and for the most part unsurveyed tract of country,” and on the lack of pecuniary aid in government bonds. He thus recommended to the secretary that the secretary reverse the commissioner’s decision. Secretary Columbus Delano concurred and reversed the commissioner’s decision on March 22, 1873.<sup>174</sup>

One basic problem with the grants was that the lands the federal government granted to railroad companies, as well as the lands through which the railways were to be built, were already claimed and held under various levels of legal (as well as physical) security. They were already privately held, not by Euro-Americans, but by indigenous

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<sup>172</sup> Copp, *Public Land Laws* (1875), 379.

<sup>173</sup> Copp, *Public Land Laws* (1875), 380.

<sup>174</sup> Copp, *Public Land Laws* (1875), 380.

peoples. That fact begged the question as to the relationship between railroad land grants and so-called “Indian country” or “Indian lands.” Justice John Marshall initially defined the nature of Indians’ property rights, for the purposes of American law, in his 1823 opinion in the case of *Johnson v. M’Intosh*.<sup>175</sup> He held that Indians possessed a “right of occupancy” to their lands, one that could only be sold to the United States as sovereign successor to the European “discoverers” of the North American continent.

It is doubtful whether members of Congress thought much about the inherent conflict between the stated objectives of its Indian policy, namely ensuring the welfare of indigenous peoples, and the very purpose of the railroad land grants, namely the colonization and settlement of the West. However, at least one secretary of interior did recognize it, though he had no trouble deciding how the conflict should be resolved. In 1878, Secretary Schurz noted that, while the government was bound to protect the Indian right of occupancy, there was also “a work of national importance ... to be undertaken” with support from the government, namely opening the country up to “settlement and civilized habitation.” This policy, according to Schurz, trumped the duty to protect Indian land, a fact that he found Congress to have apparently recognized in its provisions for the extinguishment of Indian title.<sup>176</sup> During the last two decades of the nineteenth century, administrators and jurists were confronted with resolving the

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<sup>175</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>176</sup> *Hogland v. Northern Pacific* (August 14, 1878), in Henry Norris Copp, *Public Land Laws Passed by Congress from March 4, 1875, to April 1, 1882: With the Important Decisions of the Secretary of the Interior, and Commissioner of the General Land Office, the Land Opinions of the Attorney General, and the Circular Instructions Issued From the General Land Office to the Surveyors General and Registers and Receivers During the Same Period* (Washington, DC: Henry N. Copp, 1883) (hereinafter “Copp, *Public Land Laws* (1883)”), 968.

tensions between an Indian policy of assimilation and railroad land grants that obligated the government to extinguish Indians' property rights, the sanctity of which was presumably a core tenet of the very civilization the government sought to impose upon Indians.<sup>177</sup>

In some cases, the “extinguishment” of Indian titles along railway routes preceded the actual railroad land grants. Even in these cases, railroad and Indian policies were closely linked and complex legal issues were presented. In 1854, for instance, President Franklin Pierce selected the same person, Isaac Stevens, to lead the survey of a potential northern transcontinental route and to become the superintendent of Indian affairs for Washington Territory. The following year, in conjunction with both duties, Stevens entered into a treaty with the confederated tribes of the Salish (or Flathead), Kootenay, and Upper Pend d'Oreilles Indians. It called for the removal of these groups from that portion of the Bitter Root valley below the Lolo Fork—an area Stevens identified as ideal for the transcontinental route to cross—and designated a portion of these groups' lands in the Flathead River valley, out of the way to the north, as a reservation.<sup>178</sup> As for the area of the Bitter Root valley above the Lolo Fork, the treaty called for it to be temporarily reserved from settlement to allow time for government

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<sup>177</sup> The close relationship between Indian policy and the railroad land grants of this region preceded the actual land grants by at least a decade. Between the ratification of the Oregon Treaty in 1946 and the Civil War, the potentiality for constructing a transcontinental railway through the region motivated the federal government to undertake the task of rapidly extending its so-called “reservation policy” to this region, primarily with the purpose of extinguishing Indian sovereignty along the potential route of one of the transcontinental railways then being surveyed. Lands along the probable route of a northern transcontinental railway in the Pacific Northwest included, from east to west, lands “owned by” Flatheads, Coeur d'Alenes, Spokanes, and Yakimas, among other Indian groups.

<sup>178</sup> Treaty of July 16, 1855, 12 *U.S. Statutes at Large* 975 (ratified March 8, 1859).

surveys to ascertain whether it was “better adapted to the wants of the Flathead tribe than the general reservation provided for in [the] treaty.”<sup>179</sup> The treaty directed the president, if he determined that the lands met this condition upon completion of the survey, to set the land aside as a separate reservation for the benefit of the Indian nations privy to the treaty.

This survey would take years, during which time the land remained in a sort of legal limbo. Finally, in November of 1871, President Ulysses S. Grant issued an executive order declaring that the land had been surveyed and examined in accordance with the treaty and that the land had proven “not to be better adapted to the wants of the Flathead tribe than the general reservation.” Accordingly, the president ordered “all Indians residing in said Bitter Root Valley [to] be removed, as soon as practicable” to the reservation specified in the 1855 treaty.<sup>180</sup> Congress complied in June of 1872, passing an act providing for the removal of Indians in the valley to the Jocko reservation, and for land above the Lolo Fork to be opened to settlement “in quantities not exceeding 160 acres to each settler, at the price of \$1.25 per acre.”<sup>181</sup> However, Congress allowed

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<sup>179</sup> Treaty of July 16, 1855, Article XI. This was apparently based on the desire of Flatheads to have a reservation separate from the other Indian nations which were party to the treaty. *Northern Pacific v. Hinchman*, 53 F. 523, 527 (D. Mont. 1892) (reporting as “a matter of public knowledge ... that the Flathead Indians desired a separate reservation for themselves in the Bitter Root valley”).

<sup>180</sup> Ulysses S. Grant, Memorandum, November 14, 1871, in *The Executive Documents of the Senate of the United States for the Second Session of the Forty-Eighth Congress and the Special Session of the Senate Convened March 4, 1885* (Washington, DC: Government Printing Office, 1888), 465.

<sup>181</sup> An Act to Provide for the Removal of the Flathead and other Indians from the Bitter Root Valley (June 5, 1872), 17 *U.S. Statutes at Large* 226. While the act’s settlement provision mirrored the language in the homestead and preemption acts, the lands were not legally covered by either of these laws until two years later, when Congress extended the Homestead Act to

some Indians to remain above the Lolo Fork, but only if they met certain conditions demonstrating their willingness to assimilate into the American way of life. In essence, Congress required they comply with certain “actual settler” requirements that mirrored the more general preemption and homestead laws—and disavow their tribal identities.<sup>182</sup> Notably, upon meeting these conditions, Indians received patents to the land, but these patents did not convey full fee simple absolute but rather the “Indian title” derived from Marshall’s opinion in *Johnson v. McIntosh* decades earlier. These settlers—unlike their Euro-American counterparts—thus continued to lack the power of alienation, normally seen as a fundamental “right” of property owners.<sup>183</sup> Under this system, the Department of the Interior issued dozens of patents to Indians, but many of their recipients declined to receive them on the basis that acceptance would dissolve their tribal relations.<sup>184</sup> The legal status of the Indians remaining in the valley above the Lolo Fork, therefore, remained uncertain for several years.

In the time between the president’s 1871 order and Congress’ legislation providing for the removal of the Indians, the Northern Pacific filed with the GLO the general map of its projected road through Montana and through those lands above the

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cover and benefit settlers in the valley. An Act to Amend [the Flathead Removal Act], 18 *U.S. Statutes at Large* 15 (February 11, 1874).

<sup>182</sup> Any Indian who was the head of a family or twenty-one years of age, who was “actually residing upon and cultivating any portion of said lands” was permitted to remain and to preempt at no cost an amount of land not exceeding 160 acres, provided that he notified the superintendent of Indian Affairs for Montana Territory that he “abandons his tribal relations ... and intends to remain in [the] valley.” Section 3, 17 *U.S. Statutes at Large* at 227.

<sup>183</sup> In these provisions, one can see the roots of an assimilationist policy that would later be extended to even those Indians on supposedly “permanent” Indian reservations fifteen years later with passage of the General Allotment Act of 1887.

<sup>184</sup> *Phelps v. Northern Pacific*, 1 Pub. Lands Dec. 368, 369 (1883).

Lolo Fork. This only further complicated the legal status of lands above the Lolo Fork in the Bitter Root valley. The GLO followed its standard practice at the time of withdrawing lands potentially falling within railroad land grants from entry and for the benefit of the railroad.<sup>185</sup> Faced with interpreting the competing interests of Indian residents, Euro-American settlers, and the railroad, the Land Department initially interpreted Congress' legislation of 1872 (which called for the removal of Indians from the area above the Lolo Fork while recognizing their right to remain given their satisfaction of certain legal conditions) as excluding such lands from the railroad withdrawal. The Land Department instead considered such lands subject to disposal to individual Indians pursuant to the 1872 legislation or otherwise to white settlers under preemption or homestead entry.<sup>186</sup>

The Land Department continued to follow this construction until 1880, when newly appointed Commissioner Noah C. McFarland canceled the homestead entry of James Phelps, to the extent it encompassed an odd section, for the reason that it was previously withdrawn for the benefit of the railroad. The attorney for Phelps, who represented many white settlers in the valley, appealed this decision to the secretary. Over two years later, Secretary Henry M. Teller reversed McFarland's decision and affirmed the Department's prior interpretation. In resolving the controversy, Teller held that the lands were not public lands free from "other claims and rights" at the time of the 1872 withdrawal, such that they were, by law, excluded from it. The executive order

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<sup>185</sup> Phelps, 1 Pub. Lands Dec. at 370.

<sup>186</sup> Phelps, 1 Pub. Lands Dec. at 371. This is yet another example of the land office not favoring the railroads as against settlers, in this case, even including Indian homesteaders or preemptors.

of November 1871 did not extinguish Indian title, according to the secretary, but rather “reserved to the Indians a preference right to the lands, upon conditions, not to be determined until after the time the company filed its map of route.”<sup>187</sup> Further, when Congress later acted to remove Indians “not disposed to remain,” it called for a disposition of all the lands without reserving the odd sections of the grant for the benefit of the Northern Pacific. Instead, the secretary reasoned, it called for a disposition of all land in the valley with proceeds going into a trust for the benefit of the Flathead Nation, without any recognition of the purported rights of the Northern Pacific.<sup>188</sup>

The secretary still faced the problematic issue of whether Congress, in enacting the 1872 law, breached its agreement with the Northern Pacific to extinguish Indian title to lands along the railroad, including those in the Bitter Root valley. The Northern Pacific attorneys claimed that the GLO’s acceptance of the Northern Pacific’s general location triggered that obligation. In previous cases, the Land Department itself had agreed with the Northern Pacific’s contention. However, in these cases, the secretary pointed out, the Indians’ titles consisted only of their “aboriginal” rights of occupancy, and he argued it was a different situation entirely where the lands in question were part of permanent or temporary Indian reservations at the time of the grant, as the lands in this case were. In short, the government’s obligation to extinguish Indian title applied only to lands “clearly granted,” and this included lands covered by the Indian right of occupancy but did not include lands otherwise explicitly reserved for Indians.<sup>189</sup> A

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<sup>187</sup> Phelps, 1 Pub. Lands Dec. at 370-71.

<sup>188</sup> Phelps, 1 Pub. Lands Dec. at 371.

<sup>189</sup> Phelps, 1 Pub. Lands Dec. at 372.

contrary holding, the secretary reasoned, would deprive the government from fulfilling its agreement with the Flathead Nation, particularly in the event that the president found that those lands were “better adapted to their uses than the Jocko reservation.” In that case, the government would have been required to set the land aside for the benefit of the Indians. Thus, Teller held that the requirement to extinguish Indian title could not apply to those lands “set apart for special uses,” including the important government objective of civilizing “wild tribes.”<sup>190</sup>

As the *Phelps* case indicates, Land Department officials did not always follow the precedents their predecessors had established. Another important change in interpretations occurred after Delano replaced Jacob D. Cox as President Ulysses S. Grant’s secretary of interior in 1870. Delano was presented with the issue of what happened to the status of parcels of land within railroad grant place limits and where homestead or preemption claims were active as of the date of definite location but subsequently abandoned. Did the lands pass to the railroad (assuming it had yet to receive its full allotment of lands) or revert to the government? From 1866 to 1871, the department had held that “an abandonment or termination of [valid homestead] claims [after the road was definitely fixed] operated to invest the railroad with title to the land.”<sup>191</sup> However, in 1871, Delano, a former attorney, changed course and held that if a homestead claim “has attached at the time the line of the road is definitely located, then the railroad is excluded,” and that it was “immaterial what became of the claim

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<sup>190</sup> Phelps, 1 Pub. Lands Dec. at 372-73.

<sup>191</sup> Latimer et al. v. Burlington and Missouri River R.R. Co. (May 4, 1872), in Copp, *Public Land Laws* (1875), 402.



after that.”<sup>192</sup> In other words, if the claim is later abandoned, the land goes back to the government (in most cases to be subject to homestead and preemption laws) and not to the railroad.<sup>193</sup>

Such reversals begged the question as to whether the Land Department could re-adjudicate prior decisions (made pursuant to the discarded rule) under the new—and implicitly “correct”—rule. In the judicial system, final decisions made pursuant to subsequently discarded legal rules remained final rather than being subject to retroactive application of the new rule, but it was less than clear the extent to which officials in the Land Department acted as “judges” for the purposes of adjudicating disputes. Delano sought the help of U.S. Attorney General A. T. Ackerman, who advised Delano that, while “it [had] not yet been settled how the decisions of the head of a department have the conclusive force of the judgments of courts,” he still thought that “the better opinion

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<sup>192</sup> *Boyd v. Burlington & Missouri R.R. Co.* (July 21, 1871), in Copp, *Public Land Laws* (1875), 392. After major holdings, especially including those that modified prior interpretations, the Commissioner typically sent the registers and receivers Circulars explaining the new interpretation and how best to implement it. In this instance, Commissioner Willis Drummond sent out a circular on November 7, 1871 calling their attention to the Secretary’s recent holding and instructing them on how to incorporate it into their daily dealings. *See* Circular, Commissioner Willis Drummond to Registers and Receivers, November 7, 1871, in Copp, *Public Land Laws* (1875), at 405.

<sup>193</sup> The Land Department later would grapple with the question as to whether the homestead claim had to be “valid” as of the date of definite location to be excluded from a railroad land grant. The Secretary held, in a May 1, 1872 case, that a homestead claim, in order to except the tract, “must have been valid and subsisting, or in other words, one capable of being perfected, at the date of the definite location of the road.” *Atchison, Topeka and Santa Fe R.R. Co. v. Catlin* (May 1, 1872), in Copp, *Public Land Laws* (1875), 394. However, in an 1878 opinion, Secretary Schurz disagreed with his predecessor. He interpreted *Boyd* as meaning that “if a homestead claim attached to the land at the date of definite location, it was excepted from the operation of the grant.” Reasoning that a homestead claim attached as of “entry” even where the homestead claim was later shown to be invalid, Schurz held that even invalid claims excepted land from railroad land grants. *Stainbrook v. Atchison, Topeka, and Santa Fe R.R. Co.* (August 14, 1878), in Copp, *Public Land Laws* (1883), 845-46.

certainly is that such decisions should not be disturbed except in extraordinary cases.”<sup>194</sup> Further, “extraordinary cases” were apparently only those where there was “haste, ... surprise, ... [or] inadvertence” in the previous ruling.<sup>195</sup> Absent any of those characteristics, a decision of the secretary should be considered “the final adjudication of [the] Department,” even if later found to be incorrectly decided. A year later, the assistant attorney general clarified that the secretary and commissioner did act as “judges” in regard to land disputes. He wrote that “the Commissioner, under the Secretary, was vested by the [railroad land grant] act with limited judicial powers.... [W]hen Congress directed that the Secretary should cause the lands granted to be certified and conveyed to the Company, it evidently intended to give him power, as a quasi-judicial officer, to construe the act and declare what lands should be conveyed. The Commissioner derived through the Secretary a like jurisdiction and power.”<sup>196</sup>

The Land Department also occasionally reversed course because the judicial branch overruled its interpretations. Given the number of complex legal issues and simply the vast number of conflicts regarding lands and resources encompassed in them, the judiciary came to play an increasingly important role in the administration of the railroad land grants. It did this both through the judicial review (by the Supreme Court) of administrative adjudications and through litigants bringing actions (normally either for ejection or trespass) directly in the federal court system.

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<sup>194</sup> Sargents, Treadways et al. v. Western Pacific R.R. Co. (March 7, 1871), in Copp, *Public Land Laws* (1875) 422.

<sup>195</sup> Copp, *Public Land Laws* (1875), 422.

<sup>196</sup> Copp, *Public Land Laws* (1875), 402.

#### IV. Railroad Land Grants as a Challenge to Judicial Lawmaking

The Supreme Court's 1874 opinion in *Schulenberg v. Harriman* established the foundational judicial principles for interpreting railroad land grants. Writing for the majority in that case, Justice Stephen Field held that “unless there are clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts.”<sup>197</sup> While this holding followed Attorney General Cushing's opinion from eighteen years earlier, Justice Field did not cite to Cushing's reasoning; nor is it clear he was even aware of it. Rather, he found dispositive earlier Supreme Court opinions that did not even concern railroad land grants. His opinion thus demonstrated a key difference between lawmaking at the administrative level and lawmaking at the judicial level. Even as administrators in the Land Department attempted to be good judges, their style of reasoning was markedly different. While both incorporated the concept of precedent—whereby decisions in past cases were binding upon future decisions—for administrators, these “precedents” remained unconnected from one another, such that a resolution of a particular legal issue was only constrained by past precedent regarding that same

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<sup>197</sup> *Schulenberg v. Harriman*, 88 U.S. 44, 62 (1874). Years later, Field expanded upon this holding: “The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion.” *St. Paul & P.R. Co. v. Northern Pacific*, 139 U.S. 1, 5-6 (1891).

specific issue. The judiciary, in contrast, increasingly sought to systematize all precedents into a coherent, logical whole, whereby even issues of first impression could be decided based on how they fit into the overarching system.

Speaking on the eve of the Civil War, David Dudley Field—a renowned legal expert from New York, the architect of New York’s Code, and Justice Field’s brother—gave a speech at the opening of a law school at Northwestern University in Chicago. To D. D. Field, law was a science, and he implored those in attendance to teach and to study law as if it were any other “natural science.” In the address, D. D. Field provided two metaphors for understanding the nature of law. First, the law was like “the streams of your own Mississippi Valley, where there is the great parent stream, the father of all rivers; into this pours the Arkansas, the Ohio, the Missouri; into these again pour lesser rivers; and still smaller into these last, and so on, till you reach finally the myriads of rivulets, all over the valley, and trace them to their springs.” But it was also like “a majestic tree that is ever growing,” one with “a trunk heavy with centuries, great branches equal themselves to other trees, with their roots in the parent trunk; lesser branches, and from those lesser branches still, till you arrive at the delicate bud, which in a few years will be itself a branch, with a multitude of leaves and buds.”<sup>198</sup> Like small streams into a river, individual decisions combine into general (or “first”) principles, and like branches from a growing tree, these principles produce, according to laws as neutral and universal as the laws of biology, an ever-growing array of new rules to govern the growing society.

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<sup>198</sup> David Dudley Field, “Magnitude and Importance of Legal Science,” in ed. A. P. Sprague, *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* (New York: D. Appleton and Company, 1884), 527.

Stripped of poetic imagery, what D. D. Field saw as “legal science” was simply a process of systematizing the law through the application of logic. The first task for legal scientists was to induce a set of legal principles from the sources of law, primarily court decisions. This process involved the gathering of seemingly disparate rules from decided cases, generalizing them into “first principles,” then classifying these principles and grouping them together in a cohesive and uniform structure. It was from this structure that judges and attorneys could deduce specific rules and apply them to specific cases predictably, impartially, and consistently. Any preexisting rules that could not be deduced from the general principles were considered to be faulty judgments not in line with “the law” and were eliminated.<sup>199</sup> “Classical legal thought,” as this style of reasoning has come to be known, became closely linked with the concept of “formalism,” a term much maligned throughout the twentieth century. As Robert W. Gordon outlined it in his influential 1983 article, “Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920,” the central task in making law “scientific” was indeed “to make the whole system *formally* realizable, that is, to standardize the definition of rights and duties,” so that parties and lawyers could predict how law would apply to particular activities and judges could “enforce the rules without exercising any discretion of [their] own.”<sup>200</sup>

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<sup>199</sup> William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (New York: Oxford University Press, 1998), 91.

<sup>200</sup> Robert W. Gordon, “Law and Lawyers in the Age of Enterprise,” in ed. Gerald Geison, *Professions and Professional Ideology in America* (Chapel Hill, NC: University of North Carolina Press, 1983), 89 (emphasis added). As another scholar has summarized it, legal science was “an aspiration to universality, certainty, and truth, achieved through techniques of systematic investigation and inductive reasoning.” Wiecek, *Lost World of Classical Legal Thought*, 90-91.

While D. D. Field presented, and perhaps intended, his notion of American law to be descriptive rather than normative, it was not an accurate portrayal of legal developments in America up to that time. Rather, early American law was typified by what he saw as the stark alternative to his view of law as a science; it was a system in which “the decision of litigated questions [depended] upon the will of the Judge or upon his notions of what was just.”<sup>201</sup> In previous decades, law had depended upon judges’ notions of which legal rulings would best serve what they defined as the public interest, namely the promotion of economic activity and growth. However, in the decades following the Civil War, jurists and attorneys increasingly took up the task of making the law into a science.<sup>202</sup> D. D. Field’s account became a sort of self-fulfilling prophecy, as those trained in the “legal science” he advocated came to conceive of the law as a science and of themselves as scientists, and as they filled law firms and judicial seats later in the century, law in fact became what they conceived it to be.

The development of classical legal thought can be seen as an effort to depoliticize law, something that legal historian Morton J. Horwitz has argued “has always been a central aspiration of American legal thinkers.”<sup>203</sup> The specific problem legal scientists attempted to resolve, according to legal philosopher David Delaney, was “how to insure that the processes and products of judicial practice [were] sufficiently

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<sup>201</sup> Field, “Magnitude and Importance,” 530.

<sup>202</sup> Morton J. Horwitz, *Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1994), 10

<sup>203</sup> Horwitz, *Transformation of American Law, 1870-1960*, 9. See also, David Delaney, *Law and Nature* (New York: Cambridge University Press, 2003), 9, in which Delaney characterizes classical legal thought as a compelling example of how law, as a state-centered institution, has always been impacted by its own internal concerns and commitments, namely the effort to depoliticize—and hence legitimize—law’s role in allocating scarce resources.

neutral and objective so as to bear the weight of legitimacy. Their answer was to make legal meaning sufficiently determinate so that any judicial decision could “plausibly be portrayed as being necessitated by ‘law’ rather than as simply the outcome of subjective or ideological choice.”<sup>204</sup> In short, judges maintained or even enhanced their power by denying they had any will, any choice, or any power at all. Rather, the power resided in the law itself, and they merely neutrally and objectively, employing their expertise in the methodology of legal science, deduced the law and applied it to the facts at hand.

It would be an over-simplification, however, to point to the self-interest of judges as an explanation for the effort to depoliticize law. As legal scholar Duncan Kennedy argued in his influential 1975 paper—long unpublished but widely circulated among legal scholars for years—classical legal thought was likely a legitimate attempt at promoting justice through reason, not a right-wing, reactionary attempt to protect self-interests through a retreat to “formalism.”<sup>205</sup> The supposed apolitical nature of law was thought crucial not just to the promotion of justice but also to civilization itself. If law was anything but an objective set of rules to which all members of society must conform, D. D. Field argued, “there could be no civilization and no order, since order is but another name for regularity, or conformity to rule.”<sup>206</sup> American governance was best, in his estimation, because it was a sovereign of laws rather than of men, an attribute

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<sup>204</sup> Delaney, *Law and Nature*, 21. Another way of phrasing the effort to separate law from politics is that it was an effort “to reconcile sovereign power and legal right without subordinating one to the other. Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1975), 76.

<sup>205</sup> See Kennedy, *Rise and Fall*, 2.

<sup>206</sup> Field, “Magnitude and Importance of Legal Science,” 529.

which he saw as “our great security against the maladministration of justice” and the essential condition “of all free government, and of republican government above all others.”<sup>207</sup> In such a government, he explained, the objective application of a system of formal rules derived from “first principles” decided legal questions rather than the judge’s personal notions of what was fair or just.<sup>208</sup>

One important “first principle” in classical legal thought was crucial in Justice Field’s decision in the *Schulenberg* case, and that was the distinction between “public” and “private” law. “Public law” was broadly thought of as a set of laws defining relationships between the government and its citizens, and it was typified by criminal and regulatory law, both coercive in their basic structures. “Private law,” on the other hand, broadly referred to the set of legal doctrines that defined relationships among the government’s citizens, and it was typified by the laws of tort, contract, property, and commerce.<sup>209</sup>

Railroad land grants, because they involved a relationship between the federal government and railroad corporations vis-à-vis the public domain, arguably constituted public law. But these grants also constituted contracts between the government and the railroad corporations, and involved primarily the deeding of property between these two parties, such that it could have been found that the private law of contracts and/or property should apply. Which category of law Justice Field decided to apply was dispositive of his resolution of the *Schulenberg* case. As he himself framed the issue

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<sup>207</sup> Field, “Magnitude and Importance of Legal Science,” 530.

<sup>208</sup> Field, “Magnitude and Importance of Legal Science,” 530.

<sup>209</sup> See Horwitz, *Transformation of American Law, 1870-1960*, 10-11.



before the Court, the timing of the conveyance to the railroad company depended upon its characterization as “public law” or “private law.” The specific issue in the case was whether the granted lands had, without any subsequent action taken by Congress, reverted back to the federal government due to the failure of the state to provide for the construction of the railway within the permitted time. Before arriving at the issue of reversion of title, the Supreme Court first had to determine whether any title had even passed to the state prior to the specific lands being ascertained and the railway being constructed.

Had he deemed the railroad grant to be “private law,” he would have considered the Court bound by rules applicable to private transactions, which held grants of lands not yet designated to be “mere contracts to convey” rather than “actual conveyances,” since the validity of any private transfer required the “possibility of present identification of property to the validity of its transfer.”<sup>210</sup> However, Justice Field found a different line of precedent for public laws involving grants of land. He cited to an 1817 case in which the Supreme Court interpreted a 1782 North Carolina land grant as immediately vesting a title in the grant’s recipient, though surveys were necessary to give “precision to that title and [to attach] it to the lands surveyed.”<sup>211</sup> He also cited to a similar construction of the land grant provisions of the 1820 legislation admitting Missouri into the Union, which the Supreme Court characterized as a “present grant,

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<sup>210</sup> *Schulenberg*, 88 U.S. at 62.

<sup>211</sup> *Schulenberg*, 88 U.S. at 60-61, citing *Rutherford v. Greene’s Heirs*, 15 U.S. 196 (1817).

wanting identity to make it perfect.”<sup>212</sup> Based on these precedents, Field held that, where a legislative grant contains words indicating a present transfer of title, and “unless there are other clauses in [the] statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts.”<sup>213</sup> In this case, the grant used language of immediate transfer—“that there be, and is hereby, granted”—that would be incorporated into all subsequent railroad land grants, and Field held the clause calling for the reversion to the United States of all unsold lands if the road was not completed within a specified time frame not to restrain the operation of these words.<sup>214</sup>

Justice Field’s opinion is as notable for what it did not say as what it did. In its briefing, the plaintiff argued against regarding the grant as *in praesenti* based primarily on public policy grounds. Congress issued the land grant, the plaintiff urged, for a “defined purpose,” one that did not “require the construction that the [recipient] State takes the legal title *in praesenti*.” Rather “it must be presumed,” the plaintiff reasoned, “that Congress in passing the acts considered that the general good would be best subserved by such application of a portion of the public lands, and so made provisions, through the agency of the States and their representatives, the railroad companies, to dispense, *as the improvements go on*, the fund provided to further such object.”<sup>215</sup> This

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<sup>212</sup> *Schulenberg*, 88 U.S. at 61, citing *Lessieur v. Price*, 53 U.S. 59 (1851)

<sup>213</sup> *Schulenberg*, 88 U.S. at 61.

<sup>214</sup> *Schulenberg*, 88 U.S. at 60

<sup>215</sup> *Schulenberg*, 88 U.S. at 53 (emphasis added).

argument may have been persuasive even a decade earlier, but Field, in 1874, did not even explicitly consider it. He did not interpret the grant in terms of public policy or in terms of what Congress may have desired, but rather interpreted the words actually used through reliance upon past judicial precedent. Had he explicitly considered policy concerns, he might have thought of the effect his opinion would have on the development of the West, one of the primary purposes behind all of the railroad land grants. That he did not do so shows he bought in fully to the tenets of classical legal thought. Policy was for Congress; applying the law pursuant to established rules was for the courts.

Legal science was not in fact value-free, however, and classical legal thinkers valued certainty, stability, and predictability, both in society and in law, above all. As regards society, this showed up most notably in doctrines promulgated to protect “vested property rights” and the sanctity of the “free market” from governmental redistribution of wealth or other interference. Such doctrines are the principal reason that many have criticized classical legal thought as being essentially a reactionary pretext for protecting privilege.<sup>216</sup> As for making the law more stable and predictable, legal scientists believed

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<sup>216</sup> See, for example, Oliver Wendell Holmes, “The Path of the Law,” in ed. Sheldon M. Novick, *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (1995), vol. 3, 398; Robert G. McCloskey, *American Conservatism in the Age of Enterprise* (1951); Horwitz, *Transformation of American Law, 1780-1860*, 253-55. But see Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), arguing that classical economic theory, which dominated American economic thought from the Jacksonian era to the New Deal, influenced law’s resolution of economic issues during that time period more than interest group politics.

they had found a way to perfect lawmaking by making law fully cognizable and, hence, predictable, and they claimed this to be the primary virtue of the system.<sup>217</sup>

The law as applied to railroad land grants, however, never reached near that level of predictability. That might have become evident even to Justice Field just a year after his opinion in *Schulenberg*, when a majority of the Supreme Court disagreed with Field as to how his precedent should be applied. In that case, a majority of the Supreme Court held that because the land grant was *in praesenti*, it extended only to public lands owned absolutely by the United States as of the date of the grant. It did not extend to lands that Congress reserved for other purposes, including for the establishment of Indian reservations, even if such lands were later restored to the absolute ownership of the United States by the date of definite location.<sup>218</sup> Justice Field wrote a dissenting opinion in which he held that the date of definite location was the only important date for defining the extent of the land grant; just as the size of the land grant could be reduced by occurrences after the date of the granting legislation, so too could it be enlarged.<sup>219</sup> Seventeen years later, in 1892, Field acknowledged, “after a much larger experience in the consideration of public land grants,” that the majority opinion was correct after all.<sup>220</sup> Interestingly, his rationale was not based on the majority’s logical persuasiveness,

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<sup>217</sup> See Robert W. Gordon, “Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920,” in ed. Gerald L. Geison, *Professions and Professional Ideologies in America* (Chapel Hill: University of North Carolina Press, 1983), 92.

<sup>218</sup> *Leavenworth, Lawrence, and Galveston Railroad Co. v. United States*, 92 U.S. 733, 745 (1875).

<sup>219</sup> *Leavenworth, Lawrence, and Galveston Railroad Co. v. United States*, 92 U.S. 733, 757-58 (Field dissent, 1875).

<sup>220</sup> *Bardon v. Northern Pacific*, 145 U.S. 535, 543 (1892).

but rather on what was better for society. As he stated it, the rule holding that “a grant of public lands only applies to lands which are at the time free from existing claims is better and safer, both to the government and to private parties, than the rule” for which he had advocated in 1875.<sup>221</sup> That Justice Field, one of the leading devotees of legal science, changed his mind shows that his science was not determinative—that judges still had to make choices. That Justice Field did so explicitly on policy grounds shows that even the most ardent legal scientists could be instrumentalist in their reasoning.

Justice Field’s opinion in *Schulenberg* was not even determinative of the nature of the title that passed *in praesenti*. During the 1880s, the Interior Department and judiciary continued to struggle with this issue, and each resolution seemed only to make the land laws less—rather than more—intelligible, and even the Supreme Court failed to clarify the legal milieu. In one line of cases, the Supreme Court stood firmly for the proposition that the railroad land grant acts passed to the railroad companies a present title to the lands in fee, at least to the extent that the government held the fee at the time of the grant.<sup>222</sup> This interpretation relied principally on the fact that the railroad land grants always incorporated language of “absolute donation,” with the usual language being the following: “That there be and is hereby granted....”<sup>223</sup> In another line of cases,

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<sup>221</sup> *Bardon v. Northern Pacific*, 145 U.S. 535, 543 (1892).

<sup>222</sup> *Schulenberg*, 88 U.S. 44; *Leavenworth, Lawrence, and Galveston Railroad Co. v. U.S.*, 92 U.S. 733 (1875) (“They [the railroad land grants] vest a present legal title in [the grantee], though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract.”); *Wood v. Railroad Co.*, 104 U.S. 329 (1881); *Buttz v. Northern Pacific*, 119 U.S. 66 (1876) (The grant “operat[ed] to pass the fee of the land to the company.... The grant conveyed the fee subject to [the Indians’] right of occupancy,” and “the railroad company took the property with this incumbrance.”).

<sup>223</sup> *See, for example*, *Northern Pacific Land Grant*, § 3, 13 *U.S. Statutes at Large* 367.

the Supreme Court characterized the title which passed to the railroads as merely an equitable interest, with the government retaining legal title until the railroad met its obligations in paying the expenses of surveying, selecting, and conveying the lands within the grant.<sup>224</sup>

Some lower-court federal judges used the resulting legal latitude to disregard—or creatively distinguish—binding Supreme Court precedent. In a few cases decided during the 1880s, Judge Matthew P. Deady of the federal court for Oregon, for instance, gained some notoriety for his judicial creativity as it came to getting around Supreme Court precedent.<sup>225</sup> In one 1882 case, he reasoned that the section of the grant calling for the conveyance of lands to the Northern Pacific only after completion of each twenty-five mile section of railway was just such a clause “restraining the operation of words of present grant” so as to render the grant not a present one. Deady further explained that while the grant evidenced the intention of Congress “to set apart and devote the lands in question absolutely to the construction of the Northern Pacific Railroad,” it did not, when taken as a whole, evidence intent “to part with the title” as

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<sup>224</sup> See *Railway Co. v. Prescott*, 83 U.S. 603 (1872); *Railway Co. v. McShane*, 89 U.S. 444 (1874); *Railroad Co. v. Traill Co.*, 115 U.S. 600 (1885). This line of reasoning, however, seems only to have been implemented in cases involving the states’ authority to tax railroad land grants prior to the railroads receiving patents, in order to block the states from taxing lands prior to railroad construction and the costs of implementing the grant were paid. That the railroads were freed from tax obligations arising from their ownership interests in lands prior to the lands being surveyed and their receiving patents to the lands likely contributed to the massive delays in both land surveys and patent issuance. Much of the lands within land grants in the Pacific Northwest were not patented until the 1890s, despite the railways being completed years (or even a decade) earlier. In all other cases, courts seemed to accept that the railroads possessed, from the date of the respective land grants, legal titles to the land, legal titles which remained afloat until definite location, when they could then be applied to specific tracts of land. In other words, the grant passed a present legal title in fee to the railroad company, except when it did not.

<sup>225</sup> See *Northern Pacific v. Cannon*, 46 Fed. Rep. 224, 228-29 (D. Mont. 1891).

of the date of the grant, but rather “only so fast as they were earned by completion of the work.”<sup>226</sup> Deady thus concluded that the legal title to unearned portions of the grant remained in the United States.<sup>227</sup> His holding was a plausible, albeit strained, reading of *Schulenberg*, but it conflicted with other Supreme Court precedent, including at least one opinion that Field himself also wrote. In an 1878 opinion, Field held a grant containing language identical to that which Deady later found to render the Northern Pacific grant a future grant to be a present one.<sup>228</sup> Deady was either ignorant of this other opinion or he chose to ignore it.

Even as the Supreme Court had recently reaffirmed the principle that railroad land grants, including the one to the Northern Pacific, passed present legal titles in fee, Judge Deady doubled down on his previous holding in an 1887 case, *United States v. Ordway*. In this case, however, he addressed the seeming incompatibility between his interpretation and that of the Supreme Court. In particular, he reasoned that a Supreme Court opinion from the previous year, one that seemingly affirmed that court’s prior holdings, did not in fact mean what it said. While acknowledging there to be “language, in the opinion of the [Supreme Court], which, abstracted from its surroundings, may be

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<sup>226</sup> *U.S. v. Childers*, 12 Fed. Rep. 586, 588 (D. Or. 1882). To Deady, other sections in the act allowing the government to take construction of the railway into its own hands if the Northern Pacific failed in its obligations confirmed his view. This power, Deady contended, was “incompatible with the idea of an absolute grant to the corporation in praesenti that would entitle it to dispose of, encumber, or squander the lands in advance of the construction of the road, and thereby prevent the United States from completing it by this means in the contingency contemplated.” *Childers*, 12 Fed. Rep. 588.

<sup>227</sup> The practical result was that the Northern Pacific—or, in this case, another party under contract to purchase land from the Northern Pacific—could be held liable for cutting timber on granted lands prior to the railroad receiving patent to them.

<sup>228</sup> *See MO-KATY v. Kansas Pacific*, 97 U.S. 491, 493 (1878).

so construed ... as authority for the proposition that the [land grant was] an unqualified present grant of the odd sections included therein, whether earned or unearned,” Judge Deady instead interpreted the opinion as standing for two propositions, both consistent with the titles to unearned lands remaining in the United States. First, the filing of a map general route results in the odd sections within the limits of the grant being withdrawn from sale or preemption. Second, the grant became absolute and unqualified upon the lands being earned.<sup>229</sup>

Only months after Deady’s opinion in *United States v. Ordway*, Justice Field and Judge Deady sat together on the circuit court for the District of Oregon, and they decided a case that again called into question the nature of the Northern Pacific’s land grant. Writing for the court, Justice Field took the opportunity to reaffirm the precedent he had helped establish from his seat on the Supreme Court. He first reiterated that “the present title here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government,” and that the railroad land grants “transfer a present legal right to the sections designated, which become attached to them specifically whenever they are identified.”<sup>230</sup> To Justice Field,

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<sup>229</sup> *U.S. v. Ordway*, 30 Fed. Rep. 30, 35 (D. Or. 1887). In this case, Judge Deady also criticized Congress for failing to take action to forfeit unearned grant lands. Such action would have been taken, he lamented, if not for “the irrational conduct of certain persons in congress, who stubbornly insist that no part of the grant west of the Missouri river shall be forfeited, unless the bill includes the earned as well as the unearned lands.” Interestingly, in his diary entry for the day he finished writing the opinion, Deady had more to say about his reading of John Keats’ poetry (including how Keats seemed “more at home ... in the Grecian myths than in the Gothic ones”) and Hubert H. Bancroft’s histories (assessing his recent work as repetitive, as “making mountains out of mole hills,” and as having an inappropriate tone of “mocking levity”) than about his own legal opinion. Matthew Paul Deady, *Pharisee among Philistines: The Diary of Judge Matthew P. Deady, 1871-1892* (Portland, OR: Oregon Historical Society, 1975), 513.

<sup>230</sup> *Denny v. Dodson*, 32 Fed. Rep. 899 (D. Or. 1887).



the Supreme Court had consistently given railroad land grants this same interpretation. He explained that the grant is “in the nature of a float,” with the legal title not becoming “definitely attached to specific sections until they are capable of identification,” at which time, “the title attaches as of the date of the grant, except as to such parcels as in the mean time . . . have been otherwise appropriated.”<sup>231</sup>

Justice Field dealt specifically with Judge Deady’s interpretation. Regarding Deady’s argument that the section calling for the issuance of patents only after completion of each twenty-five miles of road qualified the language of absolute donation, Justice Field reasoned that the issuance of patents, rather than conveying the government’s fee title, merely served as evidence of the grantee’s title—as in effect “deeds of further assurance” that the railroad had met all the conditions of the grant, as confirmation of the grantee’s title, and as “source[s] of quiet and peace in their possession.”<sup>232</sup> The government, in other words, used patents not just to convey title to lands, but often as confirmation of a previously existing title, and that was the case here. Regarding Deady’s argument that an absolute grant of legal title would allow the Northern Pacific to dispose of lands prior to construction, thereby potentially defeating the ability of the government to complete the railway in the event of the company’s failure, Justice Field held that the legal title the company received did not include the power to dispose of it prior to receiving a patent, unless Congress explicitly consented to such disposal.<sup>233</sup> In legal terms, the present title was a fee simple defeasible, and it

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<sup>231</sup> Denny, 32 Fed. Rep. at 903.

<sup>232</sup> Denny, 32 Fed. Rep. at 905-06.

<sup>233</sup> Denny, 32 Fed. Rep. at 905-06.

only became a perfected, indefeasible fee simple upon completion of the road and receipt of a patent.

Having adequately—at least to his satisfaction—disposed of Judge Deady’s arguments, Justice Field then went on the offensive. Citing to Congress’s 1870 authorization for the Northern Pacific to issue bonds to aid in the construction of the railway and to secure these bonds by mortgaging its land grant, Justice Field argued that Congress could not have allowed this mortgage if the company had no legal title to the lands it was to use as security for investors in the event of default. “To suppose that Congress would sanction such a proceeding,” Field reasoned, “would be to impute to it complicity in a fraud, which cannot be entertained for a moment.”<sup>234</sup> The conclusion thus followed, according to Field, that Congress allowed for the mortgage because it had already transferred to the company a legal title to the lands “hereby granted.”<sup>235</sup> This legal title benefited both parties to the contract, in that it secured the application of the property for the construction of the railway and telegraph line, the central purpose of the granting act and the land grant itself, and it secured the company’s right against the government allocating the lands to other purposes. For these reasons, Justice Field stated that he was compelled to reject “the conclusion of the learned judge [Deady] who is so generally right in his decisions that one may well hesitate to dissent from his judgment.”<sup>236</sup>

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<sup>234</sup> Denny, 32 Fed. Rep. at 906.

<sup>235</sup> Denny, 32 Fed. Rep. at 907.

<sup>236</sup> Denny, 32 Fed. Rep. at 907.

Justice Field also felt compelled to clarify the apparent split in Supreme Court jurisprudence regarding the nature of the land grant. Just as Judge Deady five years earlier had explained away apparently disparate Supreme Court precedent—including some of Justice Field’s opinions—by contending that the Court did not mean what it said, Justice Field took the same approach to explaining the meaning of cases holding the railroad title to be merely equitable rather than legal up to the issuance of the patent. As he insisted, “it is not believed that the court intended to hold that a legal title to the lands had not passed by the grant to the company, and thus overrule or qualify a long line of decisions, announced after the most mature consideration, and discredit the security which ... Congress had authorized by mortgage on the lands to raise funds to construct the road.”<sup>237</sup> Rather, the Court intended only “to declare that the power of disposition by the grantee was stayed until the payment of [the cost of surveying, selecting, and conveying the lands] was made, and that the right of the government to enforce such payment could not be defeated by the tax laws” of any territory or state.<sup>238</sup> This declaration, as Justice Field pointed out, was consistent with his interpretation of the nature of the railroad’s present title prior to patent issuance, namely one burdened with a government lien incorporating the terms of the granting act and excluding the right to transfer the legal title.

For his part, Deady avoided an open revolt against Justice Field’s views. In an opinion remarkable for its brevity, Deady found the question as to whether the grant was merely an agreement to convey land upon certain conditions precedent, a grant that

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<sup>237</sup> Denny, 32 Fed. Rep. at 909.

<sup>238</sup> Denny, 32 Fed. Rep. at 909.

only takes effect as each 25-mile section of road is completed, or a present grant of legal title with a restraint on the power of alienation until construction to be immaterial to the case before the court. He then concluded with the following statement: “As to all the other points covered by the opinion of the court, I fully concur in both the conclusions and the reasons given in support of them.”<sup>239</sup> Despite the seeming meeting of minds, because most of Field’s opinion dealt with the question Deady dismissed as irrelevant, “all the other points” seemingly referred to a very small number of points.

In mailing his opinion to Deady, Justice Field confided in him a “good deal of trouble with the opinion,” and he even acknowledged the trouble being due to the Supreme Court’s decisions on grants similar to the Northern Pacific’s having “not always been consistent.”<sup>240</sup> He indicated to Deady that he endeavored to secure the Northern Pacific’s lands “against any arbitrary alienation to others attempted by Congress,” while at the same time ensuring that they be devoted to railway construction and not diverted by the Northern Pacific “to other purposes.”<sup>241</sup> He concluded the letter by proclaiming that he had done his best “to work out what [he] believe[d] to be a just result.”<sup>242</sup> After Deady had replied with his concurring opinion, Field wrote that he was “glad” that Deady could concur “as far as [he] did, while also expressing his hopes that

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<sup>239</sup> Denny, 32 Fed. Rep. at 911.

<sup>240</sup> Stephen Field to Matthew P. Deady, November 17, 1887, Matthew P. Deady Papers, MSS 48, Oregon Historical Society Research Library, Portland, OR. Prior to issuing it, he even submitted it to a few associates—Bradley, Matthews, and Miller—on the Supreme Court to make sure no changes were necessary.

<sup>241</sup> Field to Deady, November 17, 1887.

<sup>242</sup> Field to Deady, November 17, 1887.

the opinion would have “a good effect.”<sup>243</sup> These letters thus seem to confirm that the formalistic reasoning employed by Field and other jurists during this era was at least occasionally more of a rationalization than the axis of decision-making. Even the most formalistic of judges considered the foreseeable results of their opinions, even if they could not articulate such considerations in their opinions. This revelation might be one reason that three years later Field wrote Deady regarding the “great many letters” he had written Deady during the last quarter of a century and asking that he “destroy them all.”<sup>244</sup>

Deady’s opinions caught the attention of at least one federal judge in Montana, Judge Hiram Knowles. In an 1891 opinion, he agreed with Deady that the general language in land grants evidenced a congressional intent not to grant a present legal title to the lands included therein, but rather only an equitable title. But Knowles found the preponderance of Supreme Court precedent to favor the opposite conclusion, and he reluctantly acknowledged that “the views of the Supreme Court must control this.”<sup>245</sup>

However, in an opinion published ten days later, Knowles disregarded decades of legal precedent in finding against the Northern Pacific. The case involved the issue of whether mining claims could attach to land after being withdrawn for the benefit of the railroad pursuant to Section Six of its land grant.<sup>246</sup> Although both the Land

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<sup>243</sup> Field to Deady, December 8, 1887.

<sup>244</sup> Field to Deady, April 24, 1890.

<sup>245</sup> Cannon, 46 Fed. Rep. at 228-29.

<sup>246</sup> The case was an ejectment case brought by the Northern Pacific against James U. Sanders, Junius G. Sanders, Wilbur E. Sanders, and Sarepta M. Sanders for the possession of a section of land near Helena, Montana. The parcel of land at issue was within forty miles of the railroad’s map of general location, filed on February 21, 1872, and thus among those withdrawn from sale, preemption, or entry. *See* Complaint, Transcript of Record, Supreme Court of the

Department and the judiciary, including the Supreme Court, had consistently held that Section Six operated to exclude lands from any other rights attaching, Knowles held that the section should not “be so construed as to withdraw any land from market until the line of plaintiff’s road should be definitely fixed opposite the same, and a plat thereof filed.”<sup>247</sup> Knowles did not completely ignore precedent but rather reasoned around it. As to the prior Supreme Court holdings to the effect that Section Six “withdraws the land granted from sale and entry or preemption from the time the general route is fixed,” Knowles stated he found them “unsatisfactory,” such that “this court is not precluded” by them.<sup>248</sup>

In his interpretation of Section Six, Knowles was influenced by the fact that so much time had passed between the date of general location and definite location. “It could hardly have been contemplated,” he wrote, “that it would be eighteen years after the grant was made before the fixed route of that road would be established in Montana.” He asked rhetorically the following question: “Can it be supposed that Congress

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United States, no. 390, October term, 1894, *Northern Pacific Railroad Co. v. Junius G. Sanders et al.* (hereinafter referred to as “Sanders Transcript”), available at *The Making of Modern Law: U.S. Supreme Court Records and Briefs*, 5.

<sup>247</sup> *Northern Pacific v. Sanders*, 46 Fed. Rep. 239, 249 (D. Mont. 1891).

<sup>248</sup> *Sanders*, 46 Fed. Rep. at 245. Field had interpreted Section Six to exclude lands from sale, preemption, or entry in at least two Supreme Court opinions in the previous five years. *Buttz*, 119 U.S. at 71-72; *St. Paul and Pacific v. Northern Pacific*, 139 U.S. 1, 17-18 (1891) (“The Northern Pacific act directed that the President should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road; and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were, therefore, excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered [*sic.*] until the completion and acceptance of the road.”)

intended, 10 years before the fixed route of plaintiff's road was established, to withdraw the lands granted to plaintiff from market, and leave it to subsequent explorations and surveys to determine what would be the lands granted?"<sup>249</sup> Clearly the answer, to Knowles, was "no." By even asking the question, though, Knowles violated a central tenet of classical legal thought, that being the principle that words have a fixed meaning independent of context. If legal rules can change their meaning based on changed circumstances, law ceases to be a closed, logical system.

Knowles' opinion surprised all of the parties to the dispute. Neither side had even argued the issue of whether Section Six excluded lands from preemption, sale, or entry. They assumed that point settled beyond dispute. Accordingly, the Northern Pacific filed for a rehearing so that the parties could present arguments on the point. In his argument for the railroad, Fred M. Dudley contended rightly that Knowles' opinion was contrary to precedent and that it rendered Section Six effectively meaningless, just as Northern Pacific attorneys had successfully argued before the Land Department almost two decades earlier.<sup>250</sup> Knowles got around Supreme Court precedent by contending any holdings as to Section Six were not essential to the disposition of those disputes and hence not binding. As to the binding effect of administrative rulings, Knowles acknowledged that Land Department practices, especially where they were "begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling." However, he held that to be the case only where there was any "ambiguity" in the statutory language, and Knowles found no such ambiguity in the

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<sup>249</sup> Sanders, 46 Fed. Rep. at 247.

<sup>250</sup> Motion for Rehearing, Sanders Transcript, 40-41.

Northern Pacific land grant. To him, the language was “clear and precise” such that there was “no room for construction”: Section Six did not exclude lands from sale, preemption, or entry until after definite location.<sup>251</sup> Knowles did not venture a guess as to how countless members of the judiciary and Land Department had managed to miss something that was so blatantly obvious to him. As to the issue of his interpretation rendering Section Six superfluous, Knowles admitted that was the case. He shrugged off the issue though by stating simply that “there is nothing unusual in finding in a statute words which might have been omitted.”<sup>252</sup> Rules of statutory construction be damned.

The Northern Pacific appealed Knowles’ decision to the Ninth Circuit Court of Appeals and then to the Supreme Court, both of which upheld the decision, albeit on narrower grounds. Eleven years later, however, the Supreme Court, in another case involving an attempt by the Northern Pacific to eject a settler from a parcel of land, agreed with Knowles that “withdrawn” lands were still open to settlement up to the date of definite location, so long as the settlement was made in good faith. Similarly to Knowles, Justice John Marshall Harlan, in writing for the majority, explained away Field’s holdings to the contrary by explaining that “this language is not to be taken literally.”<sup>253</sup> Unlike Knowles, however, Harlan did not attempt to hide the fact that his interpretation of the Northern Pacific’s grant was influenced by the specific equities involved in the case before him. The settler, Holmes noted, “was not a mere trespasser,

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<sup>251</sup> Northern Pacific v. Sanders, 47 Fed. Rep. 604, 608-09 (D. Mont. 1891).

<sup>252</sup> Sanders, 47 Fed. Rep. at 612.

<sup>253</sup> Nelson, 188 U.S. 108, 120 (1903)



but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed.”<sup>254</sup> Moreover, “for sixteen years before this action, he maintained an actual residence on this land.”<sup>255</sup> Harlan was not a classical legal thinker, and he felt no need to pretend that he was. That Harlan’s opinion incorporated such reasoning to overturn a unanimous Supreme Court judgment, one which the Land Department universally followed for nearly twenty years, indicates that the hold of classical legal thought over the judiciary was already beginning to wane as early as 1903, two years before the Supreme Court, by a five-to-four vote, issued an opinion that would come to represent the entire era—the “Lochner era”—of Supreme Court jurisprudence.<sup>256</sup>

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By the turn of the century, it had become evident to some that legal science had failed in its promise of making law certain, stable, and predictable. As early as 1897, Oliver Wendell Holmes, who would later lead the Supreme Court away from strict formalism, rightly predicted that “certainty ... and repose” would not be “the destiny” of American law in the years to come.<sup>257</sup> The sheer volume of legal cases involving the Northern Pacific’s land grant indicates the legal uncertainty regarding its provisions.<sup>258</sup>

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<sup>254</sup> Nelson, 188 U.S. at 121.

<sup>255</sup> Nelson, 188 U.S. at 121.

<sup>256</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>257</sup> Quoted in Nelson, *Roots of American Bureaucracy*, 147.

<sup>258</sup> In 1894, for example, that company’s land attorney reported 134 land grant cases either pending in or resolved by the courts over the previous year and well over a thousand pending before the Land Department. James McNaught, Memorandum, August 15, 1894,

Where law and the relevant facts are both certain (meaning that disputants agree how a judge will decide), disputants have no reason to assume the costs in terms of both time and money to litigate. They will instead settle based upon their mutual understanding of their respective rights and obligations and hence save the costs of litigation.<sup>259</sup> In most land grant cases, parties agreed upon the facts, such that the only questions typically regarded the law and its application. Apparently, there remained many questions regarding the legal meaning of statutory provisions that Congress enacted three decades earlier.

Holmes had been critical of classical legal thought from the start. In 1881, for instance, he disputed its premise that law was a closed, autonomous system induced and refined through the application of logic free from political influence. As he wrote, “[t]he life of the law has not been logic; it has been experience.”<sup>260</sup> The experience was one of increasing complexity, not clarity, and this was a foreseeable result of the project. In his 1859 speech, for instance, D.D. Field implored the audience to join the project of making American law more “complete,” even as he recognized that making the law “complete”—something he equated with progress or “civilization”—came at the cost of sacrificing simplicity.<sup>261</sup>

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Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 20, Minnesota Historical Society, St. Paul, MN.

<sup>259</sup> See George L. Priest and Benjamin Klein, “The Selection of Disputes for Litigation,” *Journal of Legal Studies* 13, no. 1 (January 1, 1984): 1–55.

<sup>260</sup> Oliver Wendell Holmes Jr., *The Common Law* (1881), available online at <http://www.gutenberg.org/ebooks/2449> (last accessed January 6, 2014).

<sup>261</sup> Field, “Magnitude and Importance,” at 523 (“Ask the man who wonders that there are so many laws, to go with you to the neighboring prairie, and, standing in the door of the farmhouse, with corn-fields and pastures before you, explain to him the title by which the owner

Both classical legal thought and the United States' public land system incorporated a high level of abstraction and generality. Legal professionals sought to standardize all rules governing social phenomena into set categories of rights, duties, liberties, and liabilities, such that judges and bureaucrats could administer the law objectively, neutrally, and predictably. Similarly, Congress sought to systematize its land holdings to allow for their quick and orderly privatization, primarily in 160-acre blocks, the rationale being that this was the minimum size thought to be capable of supporting a family farm. The basic problem for both was that any such system depends upon its lack of detail, and the real world is full of detail. Forms can make the real world legible through abstraction and generalization, but the substances that the forms represent remain concrete and particular. The blindness of judges and policymakers to the reality of the western physical, social, and legal geographies would come at a profound cost, one typified by rampant fraud and corruption, the monopolization and depletion of western resources, and continuing legal uncertainty regarding their exploitation or protection. It also paved the way for a paradigm shift in legal thinking from classical legal thought to legal realism, the latter of which would come to have a profound influence on law over the twentieth century.

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holds the land, how far his use is absolute, and how qualified by the rights of his neighbors, or the paramount rights of the State, the relative rights of the wife and husband, the persons who shall succeed when the owner dies, the rights of the adjoining proprietors in the stream which runs through the pasture, the rights of the tenant who tills the meadow, what right the owner has in the shore of the lake, how far he may build into it and on what conditions, the relative rights of himself and the public in the highway before his house, the right which he has to the pew in the church, whose spire shines through the trees, and in the family vault where he expects in due time to be borne.”). To Field, it was the task of the legal profession to make sense of the morass through the learning and development of legal science, including at institutions of higher learning. It is no accident that the rise of legal science and classical legal thought accompanied the rise in formal legal education.

## CHAPTER 2 – AVOIDING A PUBLIC LANDS TRAGEDY

THE RIGHT OF EXCLUSION AND THE ORIGINS OF FEDERAL FOREST  
MANAGEMENT

Andrew B. Hammond and his business partner Richard Eddy had already cut most of the merchantable timber along the Clark Fork River in the mountains between Missoula and Helena by the summer of 1885, when their company, the Montana Improvement Company, established a new sawmill on the river to process timber from the tributary Cramer Gulch.<sup>1</sup> Having arrived in Missoula just fifteen years earlier, Hammond had helped build Missoula into a “thriving city of five thousand” while also building himself into one of the state’s wealthiest (and hence most powerful) people.<sup>2</sup> Hammond and Eddy had formed, along with E.L. Bonner, a merchandising firm in Missoula nine years earlier, and in 1881, that company entered into a contract to supply the Northern Pacific with lumber for ties and other materials, despite the company lacking construction experience. Just a year later, in 1882, Hammond, Eddy, and Bonner joined with Montana copper magnate Marcus Daly and Washington Dunn, the Northern Pacific’s superintendent of construction, to form the Montana Improvement Company. Because Dunn and other Northern Pacific officials held a bare majority of the shares, people thought of the company as a Northern Pacific subsidiary, though nobody was

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<sup>1</sup> Gregory Llewellyn Gordon, “Money Does Grow on Trees: A. B. Hammond and the Age of the Lumber Baron” (PhD diss., University of Montana, 2010), 172-74, 189. The sawmill was near to Bonita, Montana.

<sup>2</sup> *See* Gordon, “Money Does Grow,” 21.

acting in that company's interests.<sup>3</sup> Upon its creation, the Montana Improvement Company received a twenty-year contract to supply the railroad's lumber needs for construction and maintenance of the railway from Miles City, Montana to The Dalles, Oregon.<sup>4</sup>

When Hammond and Eddy arrived at their new Cramer Gulch mill in the fall of 1885, however, they were surprised to encounter some fifty loggers, all employees of rival Bill Thompson, on the site cutting down trees. Fights ensued but ownership of the timber remained unresolved. As the situation worsened, the parties even violated the custom of respecting at least the rights of others to trees properly branded.<sup>5</sup> They eventually reached a compromise to honor that custom, but still with neither having the exclusive rights to any unbranded timber. It thus became a race as to who could log the fastest. As a result, "there were few gulches in Montana," historian Gregory Gordon concluded, "that were stripped of their timber faster than was Cramer Gulch that winter [of 1886]."<sup>6</sup>

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<sup>3</sup> See Gordon, "Money Does Grow," 11, 32-33.

<sup>4</sup> Gordon, "Money Does Grow," 189.

<sup>5</sup> As historian Gregory Gordon summarized the situation, "with no clear-cut demarcation of ownership, total mayhem broke out."

<sup>6</sup> Gordon, "Money Does Grow," 173-74. Gordon rightly pointed to this story, which repeated itself across the Northwest, as representing the battle among the federal government, private capital, and local residents over natural resources, but Gordon wrongfully pointed to it as an example of the right to access. Really, neither contested the other's right to access because neither had the right to exclude—and it was that right which was crucial.

This story exemplifies what economist Garrett Hardin labeled the “tragedy of the commons.”<sup>7</sup> Wherever there is lacking an ownership system that functions to limit access to and consumption of a given resource, Hardin wrote in his influential 1968 essay, each member of the community is “locked into a system that compels him to increase his [consumption of the resource] without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.”<sup>8</sup> Some have mistakenly explained the tragedy as the failure for individuals to see community interests over their own self-interests.<sup>9</sup> No, the story is a tragedy rather than merely an unfortunate occurrence because even when an individual recognizes the “ruin” towards which the community is headed, and even if that individual values community interests, that person will still over-exploit the resource absent some coercive mechanism to restrict

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<sup>7</sup> Garrett Hardin, “The Tragedy of the Commons,” *Science* 162, no. 3859 (December 13, 1968): 1243–1248.

<sup>8</sup> Hardin, “Tragedy of the Commons,” 1244. In economic terms, the “tragedy” is an example of a market failure. As Arthur McEvoy described the failure, “[i]n a competitive economy, no market mechanism ordinarily exists to reward individual forbearance in the use of shared resources.” Arthur F. McEvoy, *The Fisherman’s Problem: Ecology and Law in the California Fisheries, 1850-1980* (New York: Cambridge University Press, 1990), 10.

<sup>9</sup> See, for example, E. Donald Elliott, *Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law*, 29 *CAP. U. L. REV.* 245, 250 (2001) (arguing that Hardin’s tragedy results “because each individual is only concerned about the potential for selfish gain from the additional cow and pays no attention to the potential disaster looming for the community as a whole”); E. Donald Elliott, *The Tragi-Comedy of the Commons: Evolutionary Biology, Economics and Environmental Law*, 20 *VA. ENVTL. L.J.* 17, 17 (2001) (criticizing Hardin’s apparent view of humans as “narrow-minded and selfish”); Lee Anne Fennell, *Common Interest Tragedies*, 98 *NW. U. L. REV.* 907, 915 (2004) (conceptualizing the tragedy as “the resource-appropriator ... not taking all the costs of her appropriation into account”); Michael Ilg, *Environmental Harm and Dilemmas of Self-Interest: Does International Law Exhibit Collective Learning?*, 18 *TUL. ENVTL. L.J.* 59, 62 (2004) (using Hardin’s model as an explanation for how “individual perceptions of interest rarely result in decisions that are most beneficial to the whole ...”).

the access of others. The reason is that if he were to forego exploitation based on concern for long-term sustainability, he knows that others will still over-exploit the resource, causing him to suffer along with everyone else but without the incremental benefit he would have derived from having fully exploited the resource. The only rational choice is to get what he can before the others do, even if it destroys the resource. Hardin proffered two solutions to the “tragedy”: to restrict access through the vigilance of the community as a whole—“mutual coercion mutually agreed upon”—or to privatize the resource so that each private owner has the capacity to exclude others.

What Hardin labeled a “tragedy of the commons” was really a tragedy of open-access resources, of non-property, or of an unregulated commons. In the Anglo-American common law tradition, the terms “commons” or “common property,” on their own, normally imply some form of communal control over access and use. They in short embody precisely the “mutual coercion” that Hardin pointed to as the solution to the tragedy—not the tragedy itself.<sup>10</sup> For example, beginning as early as the seventh century, settlements in what is now England employed a system of common fields, meadows, and pastures, all with limitations on use. After the Norman Conquest in 1066, communities increasingly regulated who had access to certain portions and the manner of their use, including the enactment of quotas on the amount of livestock allowed to

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<sup>10</sup> See Daniel H. Cole, *Pollution and Property: Comparing Ownership Institutions for Environmental Protection* (New York: Cambridge University Press, 2002), 11; Shi-Ling Hsu, “A Two-Dimensional Framework for Analyzing Property Rights Regimes,” *UC Davis Law Review* (April 2003): 816-17; Amy Sinden, “The Tragedy of the Commons and the Myth of a Private Property Solution,” *University of Colorado Law Review* 78 (2007): 533 - 612.

graze on a given pasture.<sup>11</sup> English colonists much later exported such customs to communities from New Brunswick to Virginia.

By the nineteenth century, however, many Americans had come to view the “commons” differently, and in conflating “commons” with “open-access,” Hardin unwittingly aligned himself with nineteenth century American thinking. Hammond, Eddy, Thompson and others all across the American West largely viewed timber as an open-access resource—at least prior to the government privatizing it. The notion of public timber being free for the taking was not just one of extra-legal, local custom; it had its defenders in Congress as well. For some in Congress, open-access was even an important component of the American constitutional tradition: exclusion was for monarchies, open access for democracies. In 1826, for instance, Senator Thomas Hart Benton admonished his fellow senators that they were “an assembly of legislators” rather than “keeper[s] of the King’s forests.” As representatives of the people, surely they all understood, Benton implored, that “the Public lands belong to the People and not to the Federal Government; who know that the lands are to be ‘disposed of’ for the common good of all, and not kept for the service of a few.”<sup>12</sup> Then, in 1852, when agents of the General Land Office (GLO), the agency charged with administering federal public lands, seized timber illegally cut from public lands in Wisconsin, a representative from that state, Ben Eastman, insisted that the agents were acting “without the least authority of law.” He even complained that lumbermen had been “harassed almost

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<sup>11</sup> Lynda L. Butler, “The Commons Concept: An Historical Concept with Modern Relevance,” *William and Mary Law Review* 23 (1982): 853-54; Robert C. Ellickson, “Property in Land,” *Yale Law Journal* 102 (1993): 1388-90.

<sup>12</sup> *Register of Debates*, Senate, 19th Cong., 1st Sess., 727.



beyond endurance with pretended seizures and suits, prosecutions and indictments until they have been driven almost to the desperation of an open revolt against their persecutors.”<sup>13</sup>

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

[W]hatever nature has provided ... belongs alike to the whole race, and each may, of right, appropriate to his own use so much as is necessary to supply his rational wants. And as the means of sustaining life are derived almost entirely from the soil, every person has a right to so much of the earth’s surface as is necessary for his support .... As it is man’s labor, then, applied to the soil that gives him a right to his improvements ... so he is entitled to a reasonable quantity of wood-land, it being necessary to the full enjoyment of his improvements; for wood is necessary for building purposes, fencing, and fire-wood. Therefore, he becomes entitled out of this common fund to a reasonable amount of wood-land.<sup>14</sup>

As these quotes demonstrate, Americans viewed more than just timber as an open-access resource. As Greeley once remarked, “free timber” was merely one part of the American “free land” tradition represented in the preemption and homestead laws.<sup>15</sup> Preemption laws, the most significant of which Congress passed in 1841, provided for qualified persons to acquire legal title for up to 160 acres by inhabiting and improving the land and paying \$1.25 per acre.<sup>16</sup> The law applied retroactively to validate the claims

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<sup>13</sup> See Gordon, “Money Does Grow,” 183.

<sup>14</sup> Appendix to the Congressional Globe, “Man’s Right to the Soil,” 32nd Cong, 1st sess., 425.

<sup>15</sup> See Robert Bunting, “Abundance and the Forests of the Douglas-Fir Bioregion, 1840-1920,” *Environmental History Review* 18, no. 4 (December 1, 1994): 45. In 1807, Congress passed “An Act to prevent settlements being made on lands ceded to the United States, until authorized by law.” 2 *U.S. Statutes at Large* 445, 9th Cong., 2nd Sess. (March 3, 1807). However, the Preemption Law of 1841 recognized the rights of those who had settled (or squatted) on government land, even in violation of law.

<sup>16</sup> 2 *U.S. Statutes at Large* 445, at § 9.

of people who had previously settled land, even without legal right.<sup>17</sup> Passed in 1862, the Homestead Act expanded upon the preemption laws by providing settlers the option of securing lands for free simply by living on the land for five years and cultivating it.<sup>18</sup> Greeley might have added to that list of laws the nation's mining laws—which declared public lands to be “free and open” to mineral exploration and development—and its lack of restrictions on the use of public rangelands.<sup>19</sup> As late as 1884, a congressional committee charged with reviewing the nation's land laws found cattlemen to be illegally holding roughly fifteen million acres of the public domain, yet it also acknowledged the government lacked any legal mechanism for prosecuting the trespasses.<sup>20</sup> Indeed, the term “public lands” itself came to be understood not as those lands in governmental ownership, but only as those lands free and open for the American public to enter and to acquire.<sup>21</sup>

To a limited extent, the government did assert control of resources prior to privatization. It dictated who could have access to what resources and defined the conditions by which parcels could be privatized, even if such conditions were minimal.

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<sup>17</sup> 2 *U.S. Statutes at Large* 445, at § 10.

<sup>18</sup> Homestead Act of 1862, Pub. L. No. 37-64, § 2, 12 *U.S. Statutes at Large* 392.

<sup>19</sup> General Mining Law of 1872, 17 *U.S. Statutes at Large* 91 (May 10, 1872).

<sup>20</sup> Joseph Arthur Miller, “Congress and the Origins of Conservation: Natural Resource Policies, 1865-1900” (PhD diss., University of Minnesota, 1973), 203. The government could have brought civil actions under a common law trespass theory, but that would have required the government to describe the affected lands to a level of specificity that would have been nearly impossible.

<sup>21</sup> For a discussion of the defense of free timber, at least for the purposes of settlement, in Congress, see Paul Wallace Gates, *History of Public Land Law Development* (Washington, DC: Government Printing Office, 1968): 538-40.

The Preemption Act of 1841, for example, allowed only heads of families, widows, or single men to settle lands and ultimately secure legal title to them, and it limited the size of tracts to 160 acres. It also required settlers to follow several steps. After inhabiting and improving particular parcels, qualified settlers had thirty days to file a declaration of intent to preempt, and they had a year to prove the settlement and improvement, to submit an affidavit testifying that they met all of the requirements of the act, and to pay \$1.25 per acre.<sup>22</sup> However, from the start, these restrictions were frequently violated, sometimes with the backing of extra-legal, vigilante organizations known informally as “claim clubs.”<sup>23</sup> Such a development was foreseeable. In the debates over the preemption law in 1841, in fact, Senator Henry Clay predicted that the federal government would not be able to control the “lawless rabble” that he said would settle lands ahead of surveys. Clay’s warning, however, went unheeded, and at great expense. Thirty years later, Henry George lamented the extent to which speculators had exploited the land laws to benefit themselves at the expense of the public:

A generation hence our children will look with astonishment at the recklessness with which the public domain has been squandered. It will seem to them that we must have been mad...to every importunate beggar to whom we would have refused money we have given land—that is, we have given to him or to them the privilege of taxing the people who alone would put this land to any use.<sup>24</sup>

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<sup>22</sup> The Preemption Act of 1841, 5 *U.S. Statutes at Large* 455-57.

<sup>23</sup> See generally Sean Kammer, “Public Opinion is More than Law: Popular Sovereignty and Vigilantism in the Nebraska Territory,” *Great Plains Quarterly* 31 (2011): 309-324.

<sup>24</sup> Henry George, *Our Land and Land Policy, National and State* (San Francisco: White & Bauer, 1871), 10. His work was instrumental in ending the railroad land grant era. But much of the actual privatization of land under the land grants was still in the future, subject to legal interpretation, of course.

The Homestead law contained similar restrictions and requirements, but they too were often circumvented.<sup>25</sup> One prominent public lands historian, Paul Wallace Gates, once wrote that speculation and land monopolization—in part executed via fraudulent homestead entries—characterized the homesteading era, with “actual homesteading [being] generally confined to the less desirable lands distant from railroad lines.”<sup>26</sup> Gates cited to Commissioner of the GLO William A. J. Sparks, who complained in 1885 that the Homestead Act, “both in Washington and in the field, was frequently in the hands of persons unsympathetic to its principle” and that “Western interests, though lauding the act, were ever ready to pervert it.”<sup>27</sup> In his memoir, Gifford Pinchot, the first head of the United States Forest Service, described one method for circumventing the Homestead Act’s requirements: “The law required a dwelling on a homestead claim. So the claimant would build a toy house, swear to the existence of a dwelling on his claim ‘14 by 16 in size,’ but omit to mention that the said dwelling was 14 by 16 inches instead of 14 by 16 feet.”<sup>28</sup>

The federal government also passed laws prohibiting the unauthorized taking of timber from public lands. Congress enacted the first one in 1817, when it authorized the Secretary of Navy to reserve timberlands for shipbuilding purposes and imposed penalties for commercial exploitation of such forests. Then, in 1831, Congress expanded

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<sup>25</sup> Homestead Act of 1862, 12 *U.S. Statutes at Large* 392 (May 20, 1862).

<sup>26</sup> Paul Wallace Gates, “The Homestead Law in an Incongruous Land System,” *American Historical Review* 41, no. 4 (July 1, 1936): 655.

<sup>27</sup> Gates, “Incongruous Land System,” 656.

<sup>28</sup> Gifford Pinchot, *Breaking New Ground* rev. ed. (Island Press, 1987), 81.

the prohibition to all public lands.<sup>29</sup> These pieces of legislation, however, went largely unenforced. The GLO only began prosecuting timber trespass in 1852.<sup>30</sup> Even then, the government's prosecutions were sporadic, and its policies focused not on preventing illegal timber harvests but rather merely on ensuring the government received the value of the trees illegally cut. Commissioner of the GLO Willis Drummond reported to Congress in 1873, for instance, that when registers and receivers received reliable information that "spoliation of public timber is committed, their instructions require them to investigate the matter, to seize all timber found to have been cut without authority on the public land, to sell the same to the highest bidder at public auction, and deposit the proceeds in the Treasury."<sup>31</sup> While Drummond increased prosecutions, he emphasized that their purpose was "not to indulge in vindictive prosecutions." Instead, he advised prosecutors "to compromise with the parties" to pay only a reasonable price for the stumpage plus the government's costs in bringing suit.<sup>32</sup> By merely fining trespassers for the value of the timber taken, the federal government ignored the negative impact of the timber harvest on the land's future productivity. This is why James Willard Hurst saw this approach as yet another example of the legal system's

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<sup>29</sup> There was initially some doubt as to whether this act applied to all public land or just those the Secretary of Navy had reserved, but in 1847, the Supreme Court held that the legislation applied to all public land.

<sup>30</sup> See Gordon, "Money Does Grow," 182-185.

<sup>31</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office*, 1873 (Washington, DC: Government Printing Office, 1873) 13.

<sup>32</sup> GLO, *1873 Annual Report*, 13. For discussion of federal policies towards protecting federal timber from 1873 to 1885, when the Cleveland administration reformed the Land Department and more aggressively acted to protect the public domain from depredations, see Gates, *History of Public Land Law Development*, 545-57.

preference for present over future yield, a preference that resulted from the perceived abundance of land and resources and perceived shortage of capital.<sup>33</sup> It also contributed to countless timber “tragedies,” at least on the local scale, as Hurst’s history of the Wisconsin lumber industry demonstrates.<sup>34</sup>

Railroads initially exacerbated such tragedies by creating demand for timber and by linking timber to distant markets. They stimulated timber demand both because they required timber for railroad construction and because they made industrial-scale mining—requiring large amounts of timber—feasible. In the Missoula Valley for instance, sawmills remained small-scale water-powered mills, intended only to supply lumber for immediate local consumption, until the arrival of the Northern Pacific, when railroad contracts allowed Hammond and others to build dozens of steam-powered mills to supply railroad construction and the burgeoning mining industry such railroads made possible.<sup>35</sup> Railroads also participated, typically through “improvement company” subsidiaries, in the trespasses themselves, as the Northern Pacific’s relationship with Hammond’s Montana Improvement Company exemplifies.<sup>36</sup>

However, railroads can also be seen as having helped save American forests from tragedy, at least on a national scale. Environmental historian Robert Bunting, for

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<sup>33</sup> See James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, MA: Harvard University Press, 1964), 62-142. Of course, railroad land grants were also a manifestation of this preference.

<sup>34</sup> See generally Hurst, *Law and Economic Growth*.

<sup>35</sup> Gordon, “Money Does Grow,” 181-82.

<sup>36</sup> John B. Rae, “Commissioner Sparks and the Railroad Land Grants,” *Mississippi Valley Historical Review* 25, no. 2 (1938): 217. Rae labelled the Northern Pacific as apparently “the worst offender.”

one, has argued that the acquisition of extensive timber holdings by powerful corporations like the Northern Pacific led to a decline in timber trespasses in the Pacific Northwest.<sup>37</sup> One reason is that railroads possessed the motivation to enforce rights as to which the government had long been indifferent: the right to exclude others. The Supreme Court has referred to this right as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>38</sup> The right to exclude is indeed *the* reason that Hardin advocated privatization as one of the two solutions to the tragedy of the commons.<sup>39</sup> Whereas the federal government, at least until the latter part of the nineteenth century, lacked the combination of will and means to enforce its right of

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<sup>37</sup> Bunting, “Abundance and the Forests,” 41.

<sup>38</sup> *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987). Writing for the majority in a 1979 case, Justice Rehnquist went even further in concluding that the right to exclude was not only the most important component of property, but “fundamental” to it. *Kaiser Aetna*, 444 U.S. at 179-80. Legal scholars have largely agreed. For instance, Thomas W. Merrill has argued that “the right to exclude others is a necessary and sufficient condition of identifying the existence of property,” such that the right to exclude is “fundamental to the concept of property” itself. He reiterated in his conclusion that “property means the right to exclude others from valued resources, no more and no less.” Thomas W. Merrill, “Property and the Right to Exclude,” *Nebraska Law Review* 77 (1998): 754. James E. Penner, in *The Idea of Property in Law*, argued that “the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.” While the right is grounded in the owner’s use of the thing, “the law of property is driven by an analysis which takes the perspective of exclusion, rather than one which elaborates a right to use.” James E. Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997), 71. *But see*, Jerry L. Anderson, “Comparative Perspectives on Property Rights: The Right to Exclude,” *Journal of Legal Education* 56 (2006): 539 (questioning the essentialness of exclusion by pointing to property regimes outside of the English common law tradition that have implemented property regimes that incorporate public rights of access).

<sup>39</sup> Of course, private property holders can also over-exploit a resource, especially in situations where their individual fortunes are not tied to the sustainability of either that resource or the local communities dependent upon it. For instance, lumbermen could over-exploit the forests of the upper Great Lake region because they knew more timber was available in the Pacific Northwest, such that their fortunes were not tied to Great Lakes timber or to the local communities built up to exploit it.

exclusion, railroads had both a pecuniary incentive to protect their resources and staffs of investigators and attorneys to do so.

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That railroads were both willing and able to enforce their rights of exclusion is perhaps best demonstrated by the great number of land contests and ejectment actions—both legal mechanisms for enforcing an exclusionary right—railroads initiated, as discussed in the previous chapter of this dissertation. Railroads became embroiled in litigation over the nature and extent of their rights to particular tracts of land as against the rights of preemptors, homesteaders, mining claimants, Indians, federal and state governments, and other railroads. Indeed, no public lands legislation produced more litigation than railroad land grants. The Northern Pacific, on its own, was a party to over three-thousand formal legal disputes involving its land grant.<sup>40</sup>

The approach of another railroad, the Oregon & California, was typical. Upon having a selection list approved and receiving patents to sections of land, the company first made its possession of lands clear to all would-be settlers, both by recording its patents in the various counties in which the lands lay, and by keeping on record its approved selection lists as well as patents issued by the government. The company also established its ownership by paying the taxes on such lands.<sup>41</sup> When the company found a party occupying a parcel of its unsold lands, it sent agents to ascertain the situation

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<sup>40</sup> Docket, 1885-1899, Northern Pacific Railway Co. Records, Land Dep't Records, Land Cases, Box 136.G.14.8F, Minnesota Historical Society, Saint Paul, MN.

<sup>41</sup> David Loring testimony, Transcript of Record, Supreme Court of the United States, no. 492, October term, 1916, *Oregon & California Railway Co. v. United States* (hereinafter referred to as "Oregon & California Transcript"), available online at *The Making of Modern Law: U.S. Supreme Court Records and Briefs*, 2202.



and to determine the rights, if any, of the possible trespassers to the land. If the person was indeed without legal right to occupy the land, the company asserted its ownership and demanded that the party either take a lease on the land or vacate it. If the individual refused, the company then filed an ejectment suit to force them from the land.<sup>42</sup> The company made “a good many leases” of lands for grazing purposes, according to land official Brian A. McAllaster; in many of these cases, the company's purpose was to prevent the statute of limitations running against the company by virtue of the occupancy.<sup>43</sup> The company also took efforts to prevent depredations, destruction, or waste of timber by persons not entitled to it by law.<sup>44</sup>

Because so much of the railroads’ grants remained unpatented even at the turn of the century, they developed policies on how to treat timber trespassers on lands not yet patented to them. In the case of the Northern Pacific, wherever the company suspected timber trespasses, the company’s land commissioner sent out an investigator to gather information as to any past transgressions and to prevent future ones. That person then reported to the land office, which then referred any prosecutable trespasses to the Western Land Attorney with a directive to settle for the amount cut. The Northern Pacific typically would demand \$1.50 per thousand board feet, but the company’s land

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<sup>42</sup> Loring testimony, Oregon & California Transcript, 2203.

<sup>43</sup> Brian A. McAllaster testimony, Oregon & California Transcript, 1980-81.

<sup>44</sup> Loring testimony, Oregon & California Transcript, 2203.

department usually authorized the company's land attorneys to settle for \$1.25 or even \$1.00 per thousand board feet.<sup>45</sup>

Some did not take well to the Northern Pacific's demands. In late 1896, for instance, a Northern Pacific investigator, Charles E. Woodworth, notified the sheriff of Missoula County, William H. McLaughlin, that he was responsible for taking timber from Northern Pacific lands. Frank M. Dudley, the Northern Pacific's Western Land Attorney in Spokane, Washington, later followed up with McLaughlin demanding settlement at \$1.50 per thousand board feet unlawfully cut.<sup>46</sup> The sheriff responded by requesting both an extension of time and for the amount to be lowered to one dollar. As to the need for an extension, he confessed that he was "unable to pay just now" and needed until May or June of the following year, the reason being that his lumber mill was seasonal: it had shut down on October 1 and would not reopen until spring. As for the price demanded, McLaughlin considered it "out of all reason the way lumber is selling and was selling when the timber was cut."<sup>47</sup> He stated that he would be "perfectly willing to pay the going price for timber," which he estimated at \$1.00 per thousand board feet, based primarily on the price for processed lumber at the railway car being less than \$6.00. He finished with a plea: "Hoping you will consider the price of timber very carefully."<sup>48</sup> What McLaughlin sought, in short, was to pay the market value for

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<sup>45</sup> *See generally* Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 22, Minnesota Historical Society, St. Paul, MN.

<sup>46</sup> William H. McLaughlin to Charles E. Woodworth, Land Grant Litigation Files, 1864-1950, Box 1, Folder 22.

<sup>47</sup> McLaughlin to Woodworth.

<sup>48</sup> McLaughlin to Woodworth.

the timber without paying anything for violating the Northern Pacific's right of exclusion.

In its reply, the railroad made clear it wanted redress not just for the value of the timber taken, but also for being deprived its right of exclusion. First, Dudley forwarded McLaughlin's letter to Land Commissioner William H. Phipps with a request for instructions on how to proceed. In reply, Phipps acknowledged the rate of \$1.50 per thousand board feet to be high, but he emphasized that such was intentional: he sought "to make it unprofitable for people to cut our timber without authority."<sup>49</sup> Unlike the federal government, the Northern Pacific recognized that its property rights entitled it not just to the market value of commodities on the land, but also to decide how and when they were to be extracted and to determine who would receive the benefits from their use. Moreover, it perhaps also recognized that the value of the property was not just in its present value, but also in its future productivity. Still, Phipps authorized Dudley to settle for \$1.25 per thousand board feet, an amount splitting the difference between the railroad's initial demand and McLaughlin's estimated market value. As to the extension of time, Phipps thought that was fine, so long as the railroad received sufficient security.<sup>50</sup>

Because railroad construction was a primary impetus for timber trespasses, the Northern Pacific sometimes caught people cutting timber for the purposes of selling it to another railroad, just as the Northern Pacific sometimes purchased timber stolen from

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<sup>49</sup> William H. Phipps, Land Commissioner, to Frank M. Dudley, General Land Attorney, January 2, 1897, Land Grant Litigation Files, Box 1, Folder 22.

<sup>50</sup> Phipps to Dudley, January 2, 1897.

another's land. In the spring of 1897, for example, a railroad investigator discovered piles of ties in multiple locations along the Montana-Idaho border. He soon concluded that they had been taken from within the place limits of the Northern Pacific's land grant and were earmarked for use on the competing Great Northern line. Upon the investigator reporting the matter to the land department, Land Commissioner Phipps sought the advice of Dudley, who directed that the company wait for the Great Northern to inspect and accept the ties before calling its attention to the Northern Pacific's claims. The reason was simple: if the Northern Pacific were to sue prior to the other railroad's acceptance, it would have to proceed against each of the individual trespassers, possibly entangling the company in twenty or more lawsuits.<sup>51</sup> Though not made explicit, that the Great Northern had deeper pockets than small-scale timber operators likely played a role as well.<sup>52</sup>

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

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<sup>51</sup> Dudley to Phipps, March 2, 1897, Land Grant Litigation Files, Box 1, Folder 22.

<sup>52</sup> In another case, an alleged trespasser claimed not to have any money at all, insisting that he would have shut down if he could afford to buy off his five employees. Woodworth to Wilsey, March 4, 1897, Land Grant Litigation Files, Box 1, Folder 22.

otherwise aid in the prosecution; in exchange, the district attorney agreed to give half of the suit's proceeds to the company.<sup>53</sup>

Lands remaining unsurveyed for so long was especially difficult given the exclusion of mineral lands from railroad grants.<sup>54</sup> The Supreme Court compounded the uncertainty in 1894 when it held the exclusion of mineral lands to include those unknown to contain minerals at the time of the route being fixed, so long as minerals were discovered prior to patent.<sup>55</sup> That case involved land in western Montana on the outskirts of Helena. The railroad fixed the definite route through that area in 1882, at which time nobody knew the land at issue to contain minerals. Six years later, however, a group of four men entered the land without the consent of the railroad and located quartz lode mining claims on it. They subsequently discovered gold, silver, and other precious minerals on their claims. The Northern Pacific then asserted its right of exclusion in filing a complaint, in federal court, for the recovery of the possession of the land, for the value of minerals extracted, and for the costs associated with the litigation. The railroad's attorneys insisted that the grant's exclusion of mineral lands applied only to those known to contain minerals as of the date of definite location or to those the railroad identified as mineral in its definite location.

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<sup>53</sup> Dudley to Phipps, April 16, 1897, Land Grant Litigation Files, Box 1, Folder 22, MHS.

<sup>54</sup> From the perspective of the Northern Pacific, the exclusion of minerals can be seen as an exercise of the government's right of exclusion, but this was only to keep minerals free and open to entry by the general public.

<sup>55</sup> *Barden v. Northern Pacific*, 154 U.S. 288 (1894).

Writing for the Supreme Court's majority, Justice Stephen Field rejected the railroad's argument. He first made a formalistic statutory construction argument. He reasoned that the company's position amounted to adding the word "known" into the statute, something he was unwilling to do. As he interpreted the plain meaning of the land grant, "the intention of Congress was to exclude from the grant actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral."<sup>56</sup> Field then offered an additional rationalization for his opinion, this one relating to the policies behind the land grants. He first noted that when Congress passed the land grant, it was impossible to know what parts of the vast tract contained minerals; rather, the mineral character of lands "could only be ascertained after extensive and careful explorations." He then surmised that "it is not reasonable to suppose that Congress would have left that important fact [as to the mineral character of the lands] dependent upon the simple designation by the [Northern Pacific] of the line of its road, and the possible disclosure of minerals by the way, instead of leaving it to future and special explorations for their discovery."<sup>57</sup> Such a reading of the statute, according to Field, would amount to an imputation to Congress that it intended its exclusion of minerals to be defeated, something that Field found "impossible to admit."<sup>58</sup> To Field, those "future and special explorations" were to take place as part of the GLO's investigation prior to issuing patents. Once the government issued patents to the railroad, they were final and determinative absent fraud.

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<sup>56</sup> Barden, 154 U.S. at 316.

<sup>57</sup> Barden, 154 U.S. at 318.

<sup>58</sup> Barden, 154 U.S. at 318.

Field's holding had the practical effect of calling into question the right of exclusion of railroad land grant recipients, including the Northern Pacific, prior to patent, at least as to those entering lands to explore for minerals. That was especially the case given that private entry and exploration remained the primary legal mechanism for the government to identify which lands contained minerals (and hence which lands were excluded from railroad land grants). At the very least, railroads could no longer eject an alleged "trespasser" once a discovery of minerals had been made. Since many years, if not decades, typically passed between submitting maps of definite location and applying for patents, this was quite a troubling development for the Northern Pacific and other land grant railroads.

Another problem was that the GLO had neither the means nor the explicit legal authority to investigate lands as to their mineral character, as Field seemingly assumed it did, prior to issuing patents. Field's opinion spurred Congress to action, however, as not even a year passed before Congress, in early 1895, directed the president to appoint three commissioners for each of four designated districts in western Montana and Idaho. Congress directed such commissioners, once appointed, to classify—based on personal examinations and the taking of affidavits—lands within the limits of the Northern Pacific grant as to their mineral character. Further, Congress showed real urgency in providing actual money to fund the enterprise and in directing the commissioners to begin "immediately upon their appointment."<sup>59</sup> There would be no waiting for the Northern Pacific to file its selection lists.

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<sup>59</sup> Mineral Classification Act, 28 *U.S. Statutes at Large* 683, 53<sup>rd</sup> Cong., Sess. 3 (1895).

The exclusion of mineral lands from railroad land grants raised legal questions not just as to railroads' rights to exclude prior to receiving patents, but their duty to do so. Railroad attorneys recognized that American law not only *bestows* upon owners of property a *right* of exclusion, but also *imposes* a *duty* to exclude. This doctrine, the doctrine of "adverse possession," holds that where a deed holder allows another to possess its land in an actual, hostile, exclusive, and continuous fashion, under a claim of right and for some requisite period, that deed holder loses the right to eject the trespasser.<sup>60</sup> Given that the Northern Pacific acquired its interest in lands over several steps, with arguably increased property rights at each step, questions were raised as to the time at which the Northern Pacific's duty to exclude adverse uses of its lands attached. This was of concern not just to the Northern Pacific, but also those who purchased or were considering purchasing lands from the company. One such case involved Miles J. Cavanaugh, a miner and a member of the Mineral Land Classification Commission for the district encompassing Butte. In the summer of 1899, Cavanaugh purchased a section of land just to the west of Butte near the mining town of Anaconda, a section he and the commission had classified as non-mineral in a report approved by

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<sup>60</sup> There has been some debate as to the historical origins of the modern, American form of adverse possession, one which arose during the nineteenth century. Traditionally, adverse possession law was seen as mere application of the statute of frauds to real property disputes, and this is indeed how attorneys at the turn of the twentieth century saw it. Recently, though, scholars have begun to emphasize the role of the pro-development ideology that has dominated American law, politics, and culture. As legal scholar John G. Sprankling argued, "adverse possession functions to facilitate the economic exploitation of land" and thus "mirrors the historic American view that forests, wetlands, grasslands, deserts and other lands in natural condition contribute nothing to the social welfare until they are converted to economic use." John G. Sprankling, "An Environmental Critique of Adverse Possession," *Cornell Law Review* 79 (1994): 840.



the Commissioner of the GLO the previous summer.<sup>61</sup> Prior to Cavanaugh's purchase of the property, however, a portion of it—the northeastern part—had reportedly been enclosed by someone with the last name Hays, and before that by someone with the last name McCleary, as part of what locals knew as the Saw Mill Ranch.<sup>62</sup>

Early in the spring following his purchase, Cavanaugh began to remove the fence before receiving a complaint from Hays claiming the tract as his own. Hays sought an ejectment of Cavanaugh and his employees, accusing them of having, “without right, unlawfully and without the consent of the plaintiff, entered upon said premises and trespassed thereon.”<sup>63</sup> “Unless restrained by the order of this Court,” the defendants would, according to Hays,

enter upon the same and tear down, take away and destroy plaintiff's fence enclosing said premises, and may themselves, their servants, agencies and employes [sic.], continually enter and trespass upon said premises and destroy the said grass and hay, and will allow stock and cattle to enter and trespass upon the same, and that if they are permitted to remove or break or tear down or destroy said fence of any portion thereof, stock and cattle will continually enter upon the same and tread down said grass and render said premises worthless to the plaintiff for the purpose of raising grass or hay thereon.<sup>64</sup>

Neither Hays nor McCleary had received patent from the United States, neither claimed to have purchased the land from the Northern Pacific, which had received a patent, and

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<sup>61</sup> William Wallace, Division Counsel, to James B. Kerr, Assistant General Counsel, March 9, 1900, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS.

<sup>62</sup> Edward W. Beattie & Miles J. Cavanaugh to Bunn, March 13, 1900, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS.

<sup>63</sup> Beattie & Cavanaugh to Bunn, March 13, 1900.

<sup>64</sup> Cavanaugh to Bunn, March 13, 1900.

neither claimed to have rights under the land settlement laws of the United States. Rather, Hays based his claim on the doctrine of adverse possession.

A Butte law firm of Miles J. Cavanaugh Jr., the defendant's son, and Edward W. Beattie, Jr., the surveyor general's son, represented Cavanaugh.<sup>65</sup> In March 1900, after a judge had ordered a preliminary injunction against Cavanaugh entering the premises and had scheduled a court date for trial, the firm wrote to the Northern Pacific's division counsel, William Wallace, asking for information and for other assistance in the defense. The question was important enough for Wallace to forward it to Assistant General Counsel James B. Kerr. Wallace summarized the plaintiff's claim as relying upon "the proposition that the statutes of limitation begin to run on the definite location of the line and the fixing of the grant."<sup>66</sup> He also predicted what authority plaintiff's attorneys would use as support, all cases from California.<sup>67</sup>

Wallace initially thought that the Supreme Court had settled this question in an 1889 case.<sup>68</sup> In that case, the Court held that "[w]hile the title to public land is still in the United States, no adverse possession of it can, under a statute of limitations, confer a title which will prevail in an action of ejectment in the courts of the United States

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<sup>65</sup> See Beattie & Cavanaugh to Henry Neill, State Land Agent, March 5, 1901, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS.

<sup>66</sup> Wallace to Kerr, March 9, 1900, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS.

<sup>67</sup> Wallace to Kerr, March 9, 1900.

<sup>68</sup> Wallace to Kerr, March 9, 1900.

against the legal title under a patent from the United States.”<sup>69</sup> He was surprised to have found, however, that he was unable to locate another similar holding in his “hurried examination.”<sup>70</sup> He hoped that Kerr might have access to some such decisions “where you can lay your hands on them” and asked Kerr to “furnish me with them by return mail.”<sup>71</sup> Wallace ended his letter by relaying Cavanaugh’s request that the NP help defend his title and asking what Kerr’s desire was in that regard.<sup>72</sup>

Kerr did not have an answer. As he characterized it, Wallace’s question was “a very difficult one.”<sup>73</sup> He did cite to one case, from just a few years earlier, that he thought could potentially support a claim that the statute of limitations had not begun to run until mineral classification. In that case, *Michigan Lumber Company v. Rust*, the Supreme Court held that legal title did not pass under the Swamp Land Grant Act until lands were determined to be “swamp.”<sup>74</sup> Since the Northern Pacific only received title to lands determined to be non-mineral under the Mineral Classification Act, he thought

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<sup>69</sup> *Redfield v. Parks*, 132 U.S. 239 (1889).

<sup>70</sup> Wallace to Kerr, March 9, 1900.

<sup>71</sup> Wallace to Kerr, March 9, 1900. Wallace then went on to discuss other case law which he felt inapplicable, including one case he found “not in point because the adverse claimant was the grantee of one who afterward became the patentee.”

<sup>72</sup> Wallace to Kerr, March 9, 1900.

<sup>73</sup> Kerr to Wallace, March 17, 1900, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS.

<sup>74</sup> *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897)

the case could be analogous, though he acknowledged “not [being] satisfied that the case falls within the doctrine of [that Supreme Court opinion].”<sup>75</sup>

As to whether the Northern Pacific should aid in Cavanaugh’s defense, Kerr answered in the negative. He reasoned that the issue was “such a dangerous one that it seems to me it is better to have it undecided than decided adversely and the common understanding is likely to be that the statute did not begin to run until the issuance of patent.”<sup>76</sup> In other words, the common understanding was better for the railroad than the great weight of precedent, and it was best not to risk alerting potential adverse claimants (as well as the attorneys representing them) to that fact.

Even as Kerr thought it best for the Northern Pacific not to be directly involved in the lawsuit, he urged Wallace to make it clear that “the company stands ready at any time to refund to Mr. Cavanaugh the whole or such portion of the purchase price as he is entitled to receive,” especially since the portion of land involved is small.<sup>77</sup> Kerr also wrote to attorneys Beattie and Cavanaugh directly to offer them some legal advice. In particular, he recommended “a strong effort ... be made to show that the nature of the possession of McCleary and Hays was not such a nature as to come within the statute.” He also summarized his understanding of the law regarding when the statute of limitations began to run. After recounting that the Supreme Court’s prior decisions had “uniformly been to the effect that on definite location the full legal and beneficial title to land in the place limits passed to the company,” he surmised that the Mineral

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<sup>75</sup> Rust, 168 U.S. at 589.

<sup>76</sup> Kerr to Wallace, March 17, 1900.

<sup>77</sup> Kerr to Wallace, March 17, 1900.

Classification Act may cast some doubt upon that issue, again citing to *Michigan Lumber Company v. Rust*. Kerr hoped such “authority may be of some assistance to [Beattie and Cavanaugh.]”<sup>78</sup>

The Northern Pacific’s legal department encountered the same issue a few years later in 1903, and the issue’s resolution remained uncertain. One party, E.C. Pace, from Whitehall, Montana, wrote to Assistant Land Commissioner F. W. Wilsey asking two deceptively simple questions: (1) does the statute of limitations run against the Northern Pacific as it does against an individual, and (2) does it begin to run on the date of patent issuance, on the date of definite location, or on the date of filing of maps of definite location with the land office? Pace also desired any Supreme Court opinions on the issue.<sup>79</sup> Wilsey forwarded the letter to Land Attorney J. B. McNamee, who replied to Pace that his questions “cover so much ground that a complete answer to them would be equivalent to writing a brief on the subject.” Moreover, McNamee claimed that such a brief “would be unsatisfactory to [Pace] because of the impossibility of foreseeing just how the question will arise as to a given tract of land.” Like Kerr, he did not want “to pass on the general question, as the answer might prove misleading.”<sup>80</sup>

Purchasers of land from the railroads also faced legal obstacles in an uncertain legal environment. Railroad companies typically sold land by contracts under which

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<sup>78</sup> Kerr to Beattie & Cavanaugh, March 17, 1900, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 12, MHS. Beattie and Cavanaugh sent a simple “thank you” in reply. Beattie and Cavanaugh to Kerr, March 21, 1900.

<sup>79</sup> Pace to F. W. Wilsey, Assistant Land Commissioner, January 22, 1903, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 15, MHS.

<sup>80</sup> Pace to Wilsey, January 22, 1903.

several years might pass before actual titles changed hands. Under American law as of the turn of the century, this posed a problem, namely that to maintain an ejectment suit, persons were required to show that they had “a valuable and subsisting interest and immediate right to the possession.”<sup>81</sup> Because persons under contract to purchase lands from the railroad did not receive title until fulfilling the terms of their contract, they arguably lacked the “immediate right to possession” necessary to exercise in court any exclusionary right.

John H. Jackson encountered this issue. On Christmas Eve in 1898, Jackson contracted for the purchase of Northern Pacific land in southeast Washington near the town of Pomeroy.<sup>82</sup> Almost four years later, he sought to eject someone from the property who had been occupying it with a claim of ownership, but he could not do so because his contract with the Northern Pacific, like all others, was silent as to possession. Accordingly, his attorneys, from Pomeroy, wrote to the railroad’s land department requesting that a company official sign a document confirming that the contract indeed entitled Jackson to possession of the land from the date of its execution.<sup>83</sup> Assistant Land Commissioner Wilsey refused, stating his understanding that the railroad did not in fact “place purchasers of its lands in possession thereof” but rather makes possession contingent upon all of the conditions included in the

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<sup>81</sup> Gose & Kuykendall, Pomeroy, Washington, to H.M. Stephens, Division Counsel for Northern Pacific Railway Co., Spokane, Washington, March 1902, NP Records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 15, MHS.

<sup>82</sup> The tract was just north of the Tucannon River in section 5, township 11, range 40 E of Willamette Meridian.

<sup>83</sup> Gose & Kuykendall to Stephens.

contracts.<sup>84</sup> He thus advised the attorneys to take the matter up with the company's division counsel in Spokane, H. M. Stephens. They did just that.<sup>85</sup> Stephens disagreed with Wilsey's interpretation and did not object to signing the instrument attached. He forwarded the letter to Kerr to confirm, and Kerr agreed. Kerr then asked Land Commissioner Phipps to sign the instrument.<sup>86</sup>

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

A major shift in the GLO's stance towards land and timber depredations occurred after the election of Grover Cleveland as president in 1884. During the campaign, Cleveland had specifically argued for reforms in the GLO to address its acquiescence to the rampant frauds and timber poaching up to that time. Upon assuming office, he appointed Lucious Q. C. Lamar as secretary of interior and William A. J. Sparks as commissioner of the GLO, both of whom already garnered reputations as land

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<sup>84</sup> Gose & Kuykendall to Stephens.

<sup>85</sup> Gose & Kuykendall to Stephens.

<sup>86</sup> Gose & Kuykendall to Stephens.

reformers. Their appointments spelled trouble for the lumber interests that had grown dependent upon “free timber” from the public domain. The administration’s stated policies even caused Hammond, a fervent Democrat, to switch party allegiances.<sup>87</sup>

As head of the GLO, Sparks confirmed Hammond’s worst fears. While he was not the first head of the GLO to seek to clean up the office’s administration of the public domain, Sparks was more aggressive—and, hence, more successful—than any of his predecessors. Most notably, he effected a major shift in the GLO’s approach to timber depredations. When he first arrived at his post, he found not just a gross indifference among land officials in the government to protecting the public domain, but actually a firm belief that the administration in fact lacked the legal authority to prevent or punish depredations at all. As Sparks lamented in his first annual report to Congress, in 1885, “It seems that the prevailing idea running through this office ... was that the government had no distinctive rights to be considered and no special interests to protect.”<sup>88</sup> Notions of “free land” and “free timber” not only pervaded communities of “looters,” but it also extended to those supposed to be standing guard at the gates.

Sparks committed resources to investigating and prosecuting timber trespasses. Within his first year, he sent over twenty special agents to Washington to investigate over a thousand cases of timber trespass involving the alleged theft of timber worth

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<sup>87</sup> Gordon, “Money Does Grow,” 195-96.

<sup>88</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office*, 1885 (Washington, DC: Government Printing Office, 1885), 3; for discussion, see Gates, *History of Public Land Law Development*, 557-58. As Lawrence Rakestraw dryly noted in his 1955 dissertation, “land office agents concerned with timber trespass were few and inactive; and often the Registers and Receivers of the local land offices were in sympathy with the depredators.” Lawrence Rakestraw, “A History of Forest Conservation in the Pacific Northwest, 1891-1913” (PhD Diss., University of Washington, 1955), 6.



more than nine million dollars. This was not just for show, as such investigations led to prosecutions by the following year.<sup>89</sup> Sparks did not just go after minor offenders. In July of 1885, he filed suit against the Northern Pacific and Hammond's Montana Improvement Company for their illegal cutting of federal timber in western Montana. Unfortunately, this prosecution would demarcate the limits of Sparks' power. In defense, Hammond and other officials claimed that they only took timber from railroad lands (i.e., odd sections), but this seems implausible given that much of the land remained unsurveyed. They also claimed that the previous administration, including Secretary of Interior Henry Teller, had authorized their activities. That argument seems believable, given the laxity of the previous administration's protection of the federal domain. Regardless of the merits of the government's case and the companies' defenses, Hammond won victories outside the courtroom. For example, he was able to rally local support by temporarily closing down mills and blaming the closures on the government's suits. By the fall of 1886, Sparks had found that it would be difficult to secure witnesses to testify against the companies, and by 1887, Sparks ran out of money and had to suspend the investigation. This gave Hammond and the other officials in the Montana Improvement Company an opportunity to insulate themselves legally from further prosecution.<sup>90</sup>

From the start, Sparks also committed himself to cleaning up land office operations, including addressing the rampant frauds that had long been a feature of the public lands administration. The Timber and Stone Act, which Congress passed in 1878,

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<sup>89</sup> Gates, *History of Public Land Law Development*, 557.

<sup>90</sup> See Gordon, "Money Does Grow," 199-214.

seemed to invite more fraudulent entries than any past legislation. That law provided for the sale of California, Oregon, Nevada, and Washington “timberlands” (defined as lands “valuable chiefly for timber, but unfit for cultivation”) in 160-acre tracts for \$2.50 per acre.<sup>91</sup> Each applicant had to submit an affidavit declaring, under oath, that the land was primarily valuable for timber, unimproved, and unfit for cultivation; that the applicant had not previously applied for land under the act; that the application was not for speculative purposes but rather “in good faith to appropriate it to his own exclusive use and benefit”; and that the applicant had not agreed to sell the title to another person or company.<sup>92</sup> In truth, timber companies routinely paid dummy locators to file applications under the act with the understanding, if not explicit written agreements, that they would convey the lands to the companies upon receiving title.<sup>93</sup> Indeed, Sparks investigated 2591 entries made pursuant to the act and found 2223 of them—over eighty-five percent—to have been fraudulent. In response, in 1886, Sparks suspended all entries under the Timber and Stone Act and most entries under other land laws in the western states and territories, wherever frauds were most prevalent. In defending his extreme actions, he bluntly pointed to the fact that the “public domain was being made the prey of unscrupulous speculation and the worst forms of land monopoly through systematic frauds.”<sup>94</sup>

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<sup>91</sup> Timber and Stone Act, 20 *U.S. Statutes at Large* 89 (1978).

<sup>92</sup> 20 *U.S. Statutes at Large* 89.

<sup>93</sup> See generally S.A.D. Puter and Horace Stevens, *Looters of the Public Domain* (Portland, OR: Portland Printing House, 1907).

<sup>94</sup> Gordon, “Money Does Grow,” 197-98; Gates, *History of Public Land Law Development*, 557-58. Sparks’ first reporting found that land worth up to \$25 for its standing trees was being acquired under the Timber and Stone Act for \$2.50 per acre. It’s easy to

Sparks was so aggressive that one Montana paper, in 1885, suggested that Sparks had preservationist motives. It wrote, “Sparks must be of the opinion that timber is one of the most sacred products of nature, not to be defiled by the rude hand of man but intended by God to grow and die and rot, safe from the profanation of the axeman’s stroke, and that it were sacrilegious to use it for fuel, building or mining purposes.”<sup>95</sup> In the West in the 1880s, there was perhaps no greater insult. Though there is no evidence that Sparks in fact cared about nature per se, his goals aligned with those of an emerging conservationist movement, the very movement to which the Montana newspaper sought to link the commissioner. Beginning in the 1860s, the acceleration in the exploitation of natural resources including timber contributed to a growing awareness in the United States (and elsewhere) of the scarcity of resources and of the need for some sort of rational management of their use. What came to be known as the conservation movement had many strands: some sought to ensure a broad segment of the population had access to resources, some sought to ensure a resource base for future generations, some sought to preserve the watershed-protection functions of certain forests (particularly those in the mountains), some sought to protect certain areas for their aesthetic or recreation value, and yes some (albeit a far smaller number) sought to protect nature for nature’s sake. Each of these “conservationist” goals were impossible to achieve given the broken land law system and the rampant fraud and theft of public resources, the same problems Sparks aggressively confronted for his own reasons.

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understand the lengths to which lumber interests went to avail themselves of the law. *See* Gates, *History of Public Land Law Development*, 557-58.

<sup>95</sup> Gordon, “Money Does Grow,” 200.

Sparks' term as head of the GLO set the stage for great conservationist victories in Congress in the 1890s. In response to the perceived waste and destruction of the nation's forests, as well as the anticipated threat of a timber famine, Congress, in 1891, passed what Gifford Pinchot later called "the most important legislation in the history of Forestry in America."<sup>96</sup> In the legislation that came to be known as "the Forest Reserve Act," Congress authorized the president to "[s]et apart and reserve ... public land bearing forests ... or in part covered by timber or undergrowth, whether of commercial value or not, as public reservations."<sup>97</sup> Pinchot was not alone in forestry circles in his praise of the act, which many indeed saw as the first step towards protecting public timberlands from waste and depredations.<sup>98</sup> Soon after it was passed, GLO Commissioner Thomas H. Carter predicted the act would "do much in the way of caring for portions of the public lands bearing forest which it is needful to preserve from spoliation."<sup>99</sup> In his report to Congress a few months later, Secretary of Interior John Noble concurred. He noted that if the law were "prosecuted systematically and thoroughly, posterity will look upon the action as that to which the country owes much

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<sup>96</sup> Pinchot, *Breaking New Ground*, 85.

<sup>97</sup> Forest Reserve Act of 1891, 26 *U.S. Statutes at Large* 1095 (March 3, 1891). Strikingly, Congress passed the Act "without question and without debate," as Pinchot noted. Pinchot, *Breaking New Ground*, 85. The Act was the twenty-fourth section of a public lands reform bill, inserted into the bill in committee, behind closed doors. A hundred years after the Act's passage, prominent public land historian Harold K. Steen expressed the lament of all historians "that the record is not complete enough to state with certainty what happened in the conference committee when Section 24 was added." Harold K. Steen, "The Beginning of the National Forest System," (Washington: Dept of Ag, 1991)

<sup>98</sup> See James Muhn, "Early Administration of the Forest Reserve Act: Interior Department and General Land Office Politics, 1891-1897," available at [http://www.foresthistory.org/Publications/Books/Origins\\_National\\_Forests/](http://www.foresthistory.org/Publications/Books/Origins_National_Forests/)

<sup>99</sup> Muhn, "Early Administration," ¶ 4.

of its prosperity and safety.”<sup>100</sup> Notably, the legislation—one of the first calling for the conservation or protection of resources—did not call for any sort of management but rather was one simply of excluding others from designated reserves.

Despite the enthusiasm for the act in the Department of the Interior, Secretary John W. Noble initially advised that the government withdraw only those forests “not absolutely required for the legitimate use and necessities of the residents,” the promotion of settlement, or the development of natural resources in the immediate vicinity.<sup>101</sup> Still, in the next two years, President Benjamin Harrison, a Republican, designated fifteen reserves encompassing over thirteen million acres.<sup>102</sup> In addition, while Noble took a conservative view of the qualification of lands for inclusion in the reserve system, he took a liberal view of what activities were prohibited within the reserves, namely all commercial activities. This interpretation received great applause from those who had advocated for forest reserves for aesthetic, preservationist reasons.

Noble’s commitment not to reserve lands desirable for settlement or development may have been a ploy to gain favor—or at least minimize dissent—amongst the public. However, it may also have had to do with the simple fact that neither the GLO, nor the Department of the Interior of which it was a part, had the capacity to enforce the act’s provisions even to the lands that still qualified for reservation. While Congress passed legislation calling for the GLO to exclude others from forest reserves,

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<sup>100</sup> Muhn, “Early Administration,” ¶ 4.

<sup>101</sup> See Muhn, “Early Administration,” ¶ 5.

<sup>102</sup> *The Executive Documents of the House of Representatives for the Second Session of the Fifty-Third Congress* (Washington, DC: Government Printing Office, 1895), 324

it failed to provide any money for the GLO to implement Congress' directive. The GLO, already overworked, simply lacked the work force to take on this new task. It not only had too few special agents to monitor the reserves, but these agents also had many other responsibilities, a combination that led to them only giving "cursory attention" to the reserves.<sup>103</sup> In 1893, after legislators ignored his request for the establishment of a new corps to supervise the reserves, Secretary of Interior Hoke Smith complained that the reserves were no better protected than unappropriated, unreserved lands.<sup>104</sup> Smith was right; at the time, the GLO employed only eighty-two part-time special agents to investigate frauds, timber depredations, illegal fencing, and other transgressions over the entire public domain consisting of not just the thirteen million acres of forest reserves, but the entire public domain then exceeding over five-hundred million acres.<sup>105</sup> Accordingly, the secretary determined no new reservations should be created until Congress gave them the means—both financial and legal—to protect and manage them.<sup>106</sup>

In 1894, Smith promulgated regulations calling for the prosecution of trespasses within the reserves.<sup>107</sup> However, Smith still encountered the same issues as his predecessors: a lack of enforcement power. The regulations made Smith unpopular in the West. Even the relatively few prosecutions that Smith instituted were enough to lead

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<sup>103</sup> Muhn, "Early Administration," ¶ 18.

<sup>104</sup> Muhn, "Early Administration," ¶ 21.

<sup>105</sup> U.S. General Land Office, *Annual Report of the Commissioner of the General Land Office, 1893* (Washington, DC: Government Printing Office, 1893), 77-79.

<sup>106</sup> Muhn, "Early Administration," ¶ 25.

<sup>107</sup> Muhn, "Early Administration," ¶ 28.

western stock and timber interests to push Congress to open reservations to resource use and extraction. They also led to legal challenges regarding the validity of the regulations. In one notable case, ranchers in Oregon insisted the regulation violated their fundamental rights of open access to the range resource, as well as every other resource, on public lands. The circuit court disagreed, finding there was “no implication of a license to use the [forest reserves] to the destruction or injury of these forests,” and reiterated the judicial doctrine that the federal government had the right to protect its interests against the threat of trespass and injury.”<sup>108</sup> This opinion sparked outrage among cattlemen.

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

My predecessors in office for the last twenty years have vainly called attention to the inadequacy and confusion of existing laws relating to the public timber lands and consequent absence of an intelligent policy in their administration, resulting in such conditions as may, if not speedily stopped, prevent a proper development of a large portion of our country; and because the evil grows more and more as the years go by, I am impelled to emphasize the importance of the question by calling upon

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<sup>108</sup> Muhn, “Early Administration,” ¶ 40.

you for the opinion and advice of that body of scientists which is officially empowered to act in such cases as this.<sup>109</sup>

Smith requested the academy issue the report during that session of Congress, but there was not enough time.<sup>110</sup> Nearly one year later, at the end of Cleveland's term, the committee's work remained incomplete. However, prior to Cleveland leaving office, the commission made oral recommendations to Smith's successor, Secretary David R. Francis. The oral recommendations included the establishment of thirteen new reserves encompassing twenty-one million acres. Cleveland agreed and decided to issue the order creating the reserves on February 22, George Washington's birthday. If the intent was to link forest reserves with the proud American tradition of representative democracy, it failed. Indeed, echoing Senator Benton's statement from decades earlier linking restrictions on access to public resources to monarchism, the Seattle Chamber of Commerce represented a large segment of Western opposition when it complained bitterly that even "King George never attempted so high-handed an invasion upon [Americans'] rights."<sup>111</sup> Laws can change, but customs die hard.

Even with strong resistance remaining, Cleveland's action signaled that the era of free land and free timber was over, at least as applied to the remaining federal timberlands. Thus, when President William McKinley submitted the committee's full report to Congress in May of 1897, there was ample support for a compromise measure that would recognize federal authority over its timberlands while still allowing for use

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<sup>109</sup> *S. Doc. No. 105*, 55th Cong., 1st Sess. (1897), 7.

<sup>110</sup> Harold K. Steen, *The U.S. Forest Service: A History*, Centennial ed. (Seattle: University of Washington, 2004), 31.

<sup>111</sup> Steen, *U.S. Forest Service*, 33. See also, Gates, *Public Land Law Development*, 569.



to meet the existing resource needs of local communities. Within a month, Congress passed a bill providing for the management of federal timberlands to sustain the timber resource and to provide watershed protection, while allowing for timber cutting, mining, and livestock grazing—just the privilege westerners claimed to possess, though it would no longer be unrestrained or free.<sup>112</sup>

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

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

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<sup>112</sup> The bill contained two additional compromises to Westerners: it suspended for one year Cleveland's wildly unpopular "Washington's Birthday Reserves," and it continued to allow some free use of timber for mining and domestic purposes. Forest Management Act of 1897, 30 U.S. Statutes at Large 35.

ignore the need to reform its land policies. The model of conservation embodied in the Forest Management Act required not only planning and restraint on the part of the government (or other property holders), but also the willingness and ability to exclude others from exploiting the land's resources. In this regard, railroads showed the way, even if most policymakers and government officials were slow to see it.

Still, by the late nineteenth century, the customs of free land, free minerals, and free timber had become too entrenched to be eradicated. And the divergence between federal policies as promulgated, federal policies as enforced, and local informal legal regimes—of which this chapter's story is a prime example—would continue to influence and constrain land management well into the next century.<sup>113</sup> This may not be a tragedy, but it is unfortunate.

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<sup>113</sup> Actually, it has even extended into the twenty-first century, as the recent episode in Nevada involving rancher (and serial public trespasser) Cliven Bundy makes clear. See John M. Glionna and Richard Simon, "At Scene of Nevada Ranch Standoff, 'Citizen Soldiers' are on Guard," *Los Angeles Times*, April 24, 2014, available at <http://www.latimes.com/nation/la-na-nevada-range-war-20140425-story.html#page=1> (last accessed May 14, 2014).

## CHAPTER 3 – LAWYERING FOR THE RAILROAD

### LAW AND CULTURAL ECONOMY IN THE AMERICAN WEST

Lawyers were omnipresent across the West in the last half of the nineteenth century. In many ways, developments in the legal profession in that region mirrored those occurring elsewhere. First, the role of lawyers greatly expanded. The complexities of laws (including those covered in this dissertation) led business officials to seek legal advice in navigating the uncertain legal terrain with the purpose of avoiding unnecessary conflict rather than just relying on lawyers to litigate disputes once they arose. Given the expanding role of legislatures in making law, lawyers also began to serve as *de facto* lobbyists on behalf of their clientele. Second, as the role of lawyers expanded, new structures of practice emerged such as the law firm and “in-house” corporate law offices. Within law firms, lawyers were encouraged to represent only certain categories of interests, primarily to avoid conflicts, and this resulted in a bifurcation of the bar between “corporate lawyers” and the plaintiffs’ bar. Lawyers also began to specialize in certain areas of legal practice, both due to the growing number and complexity of laws and as a way for a single firm to meet all of its clients’ needs. At the same time, lawyers solidified their position within the burgeoning industrial economy through the formalization and standardization of a legal culture that included measurable standards for entry and practice.

There was a distinct quality to practicing law in the West, however. Given the distance between population centers that were home to judicial tribunals and the rough terrain that in most cases separated them, lawyers in the West learned quickly of the

need for reliable reports of court decisions to be available to them where they lived and practiced. This contributed to a transformation in legal publishing, one that has had a profound impact on the American legal profession to today.

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Even as the legal profession changed dramatically in the late nineteenth century, one important feature remained the same, namely the profound role of lawyers in political bodies. Writing in the 1830s, French political theorist Alexis de Tocqueville wrote, based on his travels in the United States, that lawyers “occup[ied] the highest stations” in the American political order.<sup>1</sup> Tocqueville indeed saw lawyers as an “American aristocracy” in a country where “the wealthy, the noble, and the prince” were all “excluded from the government.”<sup>2</sup> Much later, political scientist Mark C. Miller wrote in *The High Priests of American Politics* that “[l]awyers are, and always have been, omnipresent in American political institutions and in the American public-policy-making process.... And it seems that the more important the political office, the more lawyers occupy that office.”<sup>3</sup> Empirical data supports the generalizations of both Tocqueville and Miller. From the second decade of the nineteenth century to the middle of the twentieth century, at least half of all members of the U.S. House of Representatives in each decade were lawyers.<sup>4</sup> During the period of this dissertation,

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<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve, available online at Project Gutenberg, <http://www.gutenberg.org/files/815/815-h/815-h.htm>.

<sup>2</sup> Tocqueville, *Democracy in America*.

<sup>3</sup> Mark C. Miller, *The High Priests of American Politics: The Role of Lawyers in American Political Institutions* (Univ. of Tennessee Press, 1995), 1.

<sup>4</sup> Miller, *High Priests*, 58.

the number never dipped below sixty percent.<sup>5</sup> Lawyers have typically been even better represented in the Senate, with roughly two-thirds of Senators from 1790 to 1930 having law backgrounds.<sup>6</sup> This phenomenon held true as much, if not more, in the West. In Oregon, for instance, nine of the ten Senators elected between 1865 and 1905 were attorneys, with three of whom having represented either the Northern Pacific or the Oregon & California railroads.<sup>7</sup> Likewise, in Montana, one of the most powerful politicians in Montana's late-territorial and early-statehood periods was Wilbur F. Sanders, who represented the Northern Pacific in Montana land matters through the 1880s.<sup>8</sup>

Scholars continue to debate why lawyers have been so omnipresent in American politics generally. The one takeaway is that there seemingly is no single explanation. Some scholars have emphasized, for instance, the social status of lawyers, whether it be that they represent a "high status" akin to an aristocracy or that they represent the middle class interests in a society oriented towards the middle class.<sup>9</sup> Echoing Tocqueville's observations from the 1830s, Stevens perhaps best represented the "high status" thesis, albeit with an instrumentalist flavor, when he wrote the following in his 1983 work on legal education: "Without a monarch or clearly defined aristocracy, with a practical

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<sup>5</sup> Miller, *High Priests*, 58.

<sup>6</sup> Miller, *High Priests*, 57.

<sup>7</sup> Oregon Blue Book, <http://bluebook.state.or.us/state/elections/elections35.htm>. In this reference, "Oregon & California" includes its predecessor "Oregon Central" companies. In Montana, two of six Senators elected or appointed between 1890 and 1905 were railroad attorneys, with another two having strong railroad connections.

<sup>8</sup> *See supra*, Chapter 1.

<sup>9</sup> *See* Miller, *High Priests*, 64, 72.

utilitarian outlook, with little by way of competing professions, the new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically, a development that partly explains why even today lawyers play a more significant role in the United States than in any other developed society.”<sup>10</sup> Another explanation points to the role of America’s political culture in treating policy questions as legal or constitutional ones, while yet another posits that lawyers gain political power primarily through exploiting the same skills that make them successful attorneys, namely in advocating, communicating, negotiating, and compromising.<sup>11</sup>

One last explanation deserves some discussion, namely that the practice of law is flexible enough in terms of time commitments to allow for political aspirations. Lawyers have typically been able to devote sufficient time to political endeavors while still practicing, and they are often able to leave practice if necessary to serve in state or federal political roles. Add in the prospect of courting new clients and making other powerful allies while serving in a public office, and entering into politics becomes an even more attractive option.<sup>12</sup> Sometimes getting out of politics was more difficult than lawyers envisioned, however. After being elected for a second term as Oregon’s governor in 1907, for instance, George E. Chamberlain expressed that he had “no senatorial aspirations” and seemingly no desire to run for any political office again. He

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<sup>10</sup> Stevens, *Law School*, 7.

<sup>11</sup> Miller, *High Priests*, 64-75. Friedman also pointed to the unique skill set of attorneys to explain their political power. Friedman, *History of American Law*, 647.

<sup>12</sup> Miller, *High Priests*, 67-68.

stressed that he had reached “a time in my life where it is necessary for me to endeavor to build up a practice and accumulate something for declining years. I cannot do it in any political office, for as you know, public life has kept me poor all these years.”<sup>13</sup> Chamberlain also expressed concern about the amount of money politics required, not in campaigning for office, but in actually governing once elected. Being a politician required entertaining, and that required money. Chamberlain wrote that even if he could be “elected Senator without effort I could not afford in my financial condition to go to Washington and undertake to do my whole duty to the public, for there you know most of the work is accomplished around the banquet table and not in the halls of the Senate. To entertain properly costs a mint of money, and no poor man has any business in the Senate of the United States, under conditions as they exist there at this time.”<sup>14</sup> Despite these concerns, Chamberlain ultimately ran for and won one of Oregon’s Senate seats, holding that office from 1909 to 1921. When he finally retired from public office, he parlayed his time in the nation’s capital to a position at a prestigious Washington D.C. law firm. Law begets politics; politics begets law.

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<sup>13</sup> Chamberlain to Sam White, Baker City, Oregon, January 17, 1907, George Earle Chamberlain Papers, MSS 1025, Box 5, Folder 5, Oregon Historical Society Research Library.

<sup>14</sup> Chamberlain to Sam White, January 17, 1907, Chamberlain papers, MSS 1025, Box 5, Folder 5, Oregon Historical Society Research Library. It was not just elected representatives that felt obligated to entertain. In his visit to Washington D.C. as Oregon’s delegate to the American Forest Congress in 1905, Samuel A. Clarke reported to Governor Chamberlain regarding the extravagant party Gifford Pinchot threw for the delegates. Pinchot’s hospitality surprised Clarke. Unfortunately, however, Clarke had fallen ill and could not attend. He heard from others who went in his stead that the Pinchots lived in “fine style” and that the reception was “one of the most elegant affairs they had ever attended. Refreshments of the finest and ‘Champagne flowed like water.’” Clarke also observed that Pinchot was rich, a fact that seemingly caused Clarke to resent Pinchot. Samuel A. Clarke to Chamberlain, January 9, 1905, Chamberlain papers, Box 1, Folder 3.

To understand the impact of legal decision-making on American society then, one must look beyond the scope of judicial opinions to the perspectives of lawyers serving in American legislative bodies. If in law school and in practice, lawyers are socialized into “thinking like a lawyer,” how does that thought process impact policymaking when lawyers enter into politics? As early as the 1830s, Tocqueville argued that lawyer-politicians would act as defenders of “order” and “security” against what he saw as “the excesses of democracy.”<sup>15</sup> Scholars agree with Tocqueville’s observations regarding the conservatism of the bar. Friedman, for example, believed that lawyers generally disfavor radical social change based on the legal profession’s emphasis on predictability and stability.<sup>16</sup> Similarly, in his study of lawyer-politicians, Miller added that lawyers tend to emphasize the regularity of socio-legal procedures over the substantive justness of results.<sup>17</sup> Moreover, when lawyers do advocate for social change, they tend to do so by pushing for changes in the law’s definition of rights and in its protection of formal equality.<sup>18</sup> Their impact can be seen in the number of policy issues that have been framed as legal questions.

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<sup>15</sup> Tocqueville, *Democracy in America*.

<sup>16</sup> This conservatism has even pervaded the field of American legal history, at least according to Morton Horwitz. He wrote, “It is the ideological character of professionalization that makes lawyer’s history inevitably conservative... An elitist and anti-democratic politics pervades most of the traditional writings on American legal history, just as it appears in virtually all of the rhetorical literature of the legal profession throughout American history.” Morton J Horwitz, “The Conservative Tradition in the Writing of American Legal History,” *American Journal of Legal History* 17 (1973): 281-83.

<sup>17</sup> Miller, *High Priests*, 27.

<sup>18</sup> Miller, *High Priests*, 25.



A professional legal culture has shaped how lawyers have answered those questions. During the late nineteenth century, the legal profession changed in important ways, including in the Northwest. First, the emergence of the corporate law firm and in-house legal offices represented a major transformation in American legal culture. Legal historian Lawrence M. Friedman went as far as to call it “one of the most striking developments of the late nineteenth century.”<sup>19</sup> As of 1850, legal issues remained simple (and even understandable by non-lawyers), and the most successful lawyers were “generalists” whose primary role was to represent their clients’ interests in court in regards to a variety of legal concerns. In the last decades of the nineteenth century, however, law became more complex, and the most powerful lawyers were increasingly “specialists” housed in law firms. As historian Jerold S. Auerbach concluded, “[b]y the turn of the century corporate law firms were edging to the pinnacle of professional aspiration and power . . . . [T]he emergence, rapid proliferation, and growth of corporate law firms, their impact upon patterns of recruitment and styles of practice, and their appeal to ambitious young attorneys invested them with significance (and their partners with professional power) that far exceeded their number and size.”<sup>20</sup>

With the emergence of law firms also came a bifurcation of the bar between corporate and plaintiffs’ attorneys. In his study of railroad attorneys in the American South, historian William G. Thomas III showed how the emergence of corporations contributed to the bifurcation of the bar between those with “corporate clientele” and

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<sup>19</sup> Lawrence M. Friedman, *A History of American Law*, 2nd ed. (New York: Simon and Schuster, 1986), 640.

<sup>20</sup> Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press, 1976), 22.

those who “represented plaintiffs confronting corporations.”<sup>21</sup> This bifurcation of the bar was due both to the lawyerly duty not to represent clients whose interests were directly adversarial to the interests of other past and present clients, but also to the fact that the increasing complexities encouraged lawyers to specialize in one area of the law. The “railroad lawyer” epitomized the corporate side of the bar. He was, for the most part, detested.<sup>22</sup>

At the same time, the role of lawyers shifted from advocate to counsel, their forum from court to office. For Friedman, the New York Code of Civil Procedure, promulgated in 1848, symbolized this change in lawyers’ functions. For one, a code was only necessary because lawyers had begun to lose “the art of pleading” due to spending less time in the courtroom. This was merely the start of what Friedman called “[t]he slow estrangement of the lawyer from his old and natural haunt, the court.”<sup>23</sup> While Friedman acknowledged that most lawyers still went to court, at least on occasion, at the end of the nineteenth century, “the Wall Street lawyer, who perhaps never spoke to a judge except socially, made more money and had more prestige than any courtroom lawyer could.”<sup>24</sup> As legal historians Kermit Hall summarized the changed work of lawyering, “the leading lawyers [at the end of the nineteenth century] were negotiators

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<sup>21</sup> William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge, LA: Louisiana State University Press, 1999), 38.

<sup>22</sup> James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little Brown, 1950), 297.

<sup>23</sup> Friedman, *History of American Law*, 633.

<sup>24</sup> Friedman, *History of American Law*, 633.

and facilitators, and practical men of business who knew the uses and means of wealth.”<sup>25</sup>

For its part, the Northern Pacific contributed to these transformations in maintaining its own extensive law department, in utilizing its legal labor for much more than litigation, and in giving work to firms in cities along its railway network. At the head of the department was the General Counsel office, established in 1873. By the turn of the century, the department also included an assistant general counsel, western and eastern division counsels, a land attorney, western and eastern land attorneys, and Washington D.C. counsel, in addition to their support staffs.<sup>26</sup> These lawyers were involved in litigation, to be sure, as particularly chapters one and two of this dissertation demonstrate. But they also advised the company’s president and land officials on policies to protect the Northern Pacific’s interests without litigation.<sup>27</sup> Moreover, the Northern Pacific, the Oregon & California, and other railroad companies utilized extensive legal networks, including many law firms, not formally in their employ.

Divisions not only arose between corporate lawyers and plaintiffs’ lawyers, but among lawyers within firms based on their unique skill sets. This happened even at small firms in small cities in the Northwest, as the experiences of Miles Cavanaugh Jr.

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<sup>25</sup> Kermit Hall, *The Magic Mirror: Law in American History* (Oxford University Press, 1989), 213.

<sup>26</sup> See generally Northern Pacific Railway Company Records, Law Department, Land Grant Litigation Files, Boxes 1 – 8, Minnesota Historical Society, Saint Paul, Minnesota.

<sup>27</sup> See, for example, Northern Pacific Railway Company Records, Law Department, Land Grant Litigation Files, Box 1, Folder 15. As just one example, over the course of several months in 1901 and 1902, Assistant General Counsel James B. Kerr advised the assistant land commissioner as to how best to reserve mineral rights in land contracts, and how to provide in such contracts for the refund prices where the Northern Pacific lost lands due to federal mineral classifications.

exemplify. Upon graduating from law school in the East, Cavanaugh returned to Helena, Montana and was admitted to the state bar in 1891. Cavanaugh joined the law office of Carter & Clayberg in Helena. Even in this small firm, with only two partners, legal work was divided not by client, but by type of work. Tom Carter, who would later become a U.S. Senator, was the “business getter” and litigator, while Clayberg handled the preliminary research and briefing of legal issues. The division of labor took advantage of each partner’s strengths. As Cavanaugh assessed Carter, he was a “political genius, a natural advocate, and one of the most understanding students of human nature I have ever known.”<sup>28</sup> To Cavanaugh, these skills all stemmed from Carter’s “hypnotic” personality. As Cavanaugh explained, “I have seen him many times enter a train to assume a journey, and whether in smoking or parlor car within fifteen the bulk of the passengers would be crowded about him, absorbed in his conversation, whether about politics, religion or ordinary topics. He was a marvellous [*sic.*] story teller.”<sup>29</sup> While Carter was not “a plodding student of the law,” the hard work of studying the law and preparing cases could fall to Clayberg and Cavanaugh, while Carter assumed the much more public role of “trial lawyer.”

Of course, it took much more to be a trial lawyer than a “hypnotic” personality; one also had to have an intimate familiarity with the law and facts of the case. In that regard, Cavanaugh raved at Carter’s ability to absorb information and develop new strategies in the matter of days. After consulting with Clayberg, Cavanaugh noted,

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<sup>28</sup> Autobiography, 1869-1891 (handwritten), Miles J. Cavanaugh Papers, Coll. 349, Montana State University Special Collections, Bozeman, MT.

<sup>29</sup> Autobiography, Cavanaugh Papers, MSU Special Collections.

Carter “would know more about the facts and the law than all the rest of us. He simply absorbed the whole case as if it were water and he a sponge, and by a sort of lixivation the soluble was separated from the insoluble, and often under the microscope of his reasoning an entirely new case was disclosed, and presented to court or jury in all its beauty and strength.”<sup>30</sup>

Scholars have offered several explanations for the rise of the law firm. A consensus seems to have formed, though, that the shifting demands of economic entities on the legal profession at least played a role. According to Auerbach, for instance, increasingly large and complex business enterprises required efficient legal practitioners to service their needs, not just in advocating on their behalf in court, but in organizing the companies and their relationships and preventing litigation in the first place.<sup>31</sup> Thomas has proposed a different—albeit, still instrumentalist—interpretation in contending that it was the strategic attempts of corporations to monopolize the best legal talent to promote their interests that contributed to new structures such as regional and national law firms and in-house corporate legal departments.<sup>32</sup> Once one member of a firm represented a particular client, it became difficult if not forbidden for any other member of the same firm to represent a client with conflicting interests. Auerbach’s *Unequal Justice: Lawyers and Social Change in Modern America* also points to a deeper cultural element that contributed to its transformation, namely the legal profession’s

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<sup>30</sup> Autobiography, Cavanaugh Papers, MSU Special Collections.

<sup>31</sup> Auerbach, *Unequal Justice*, 23.

<sup>32</sup> Thomas, *Lawyering for the Railroad*, 43-45.

“search for order in a complex society.”<sup>33</sup> Similarly, legal scholar Robert Stevens has argued that there was an “urge to professionalize” that combined with the economic changes “to promote the growth of a new type of law firm, with several partners and assistants, catering to the needs of the developing corporations.”<sup>34</sup>

This “urge to professionalize” can also be seen in the re-emergence and rapid growth of bar associations and in the rise of formal legal education. What separates professions from mere occupations is the “special power and prestige” they hold in society, to quote sociologist Magali Sarfatti Larson.<sup>35</sup> Though the boundaries of what defines something as a “profession” are blurry, there are generally two components, one of knowledge, the other of norms. Both are necessary to justify the special advantages bestowed on professions. As historian Burton J. Bledstein summarized the knowledge component, a profession requires its members attain and demonstrate, typically through “a fairly difficult and time-consuming process, ... an esoteric but useful body of systematic knowledge.”<sup>36</sup> As for normative values, professions tend to be those occupations purportedly dedicated to public service rather than individual accumulation of wealth.<sup>37</sup>

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<sup>33</sup> Auerbach *Unequal Justice*, 23.

<sup>34</sup> Robert Bocking. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 22.

<sup>35</sup> Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977), x.

<sup>36</sup> Burton J Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: Norton, 1976), 86-87.

<sup>37</sup> Hall, *Magic Mirror*, 211-12; Larson, *Rise of Professionalism*, x.

Whatever the field, professional associations normally have served an important purpose in the formation and maintenance of a professional culture, namely in ensuring compliance with both the intellectual and the normative requirements of a profession. Thus, it is no coincidence that in the generation following the Civil War there was what Hall called a “rebirth of bar associations.”<sup>38</sup> Legal communities in the Pacific Northwest were at the leading edge of this “rebirth.” Founded in 1866, the Portland Law Association was part of this rebirth. Speaking at the association’s first meeting, Matthew P. Deady, a federal judge for the U.S. District Court of Oregon, lectured before the newly-formed Portland Law Association. He described the association’s purpose to be “the advancement of its members, in a knowledge of the law, considered both as a science and an art.”<sup>39</sup> Deady also felt it a “necessary auxiliary” that within the scope of the organization’s purpose was “to cultivate an acquaintance with history, English literature, logic, eloquence, and polemics or debate.”<sup>40</sup> He seemed to recognize already that lawyers would comprise the leader class in communities across the West, a privilege he felt implied a reciprocal duty to the public that lawyers be honorable, well-rounded citizens.

Deady also gave the audience of lawyers what seemed like sound advice. Quoting to the famous Supreme Court Justice Joseph Story, he warned them that “[l]aw

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<sup>38</sup> Hall, *Magic Mirror*, 214.

<sup>39</sup> Matthew P. Deady, *Law and Lawyers: A Lecture Delivered before the Portland Law Association, Dec. 6, 1866*. (Gale, *Making of Modern Law*, 2010), 1. Deady conceived of law as “the knowledge of abstract rights and elementary principles, and the ascertainment, enforcement and protection of these, by means of the practical rules and proceedings that obtain in our courts of justice, and which are known as the practice of law.”

<sup>40</sup> Deady, *Law and Lawyers*, 1.

is a jealous mistress.”<sup>41</sup> What he meant was that law was a rewarding career, but it was one that demanded the full attention of its practitioners. It was not just the job itself that required a lawyer’s full attention, but also its professional culture. Specifically, the profession could not claim to be composed of neutral, disinterested advocates for the public good while its members also moonlighted as self-interested capitalists. The lawyer’s dedication to public service could never be a part-time job. Over the following decades, however, lawyers continued to exploit their legal expertise and connections with business leaders, politicians, and land office bureaucrats to gain personal wealth and power in communities all across the West. Sometimes this even involved defrauding the very legal systems lawyers proclaimed to uphold.

While bar associations tried to promote the development of a professional legal culture through informal means, states imposed higher standards on admission to the bar. Whereas in 1860 admission standards were “largely nonexistent,” to quote one legal historian, by 1890 admission had “tightened noticeably.”<sup>42</sup> In that year, nearly all states required bar applicants pass an examination, and over half of the states also required either some duration of legal education or a formal apprenticeship to enter the profession.<sup>43</sup> According to Lawrence Friedman, this was a form of unionization “to protect the boundaries of the calling.” As he explained, “[t]he organized profession raised (or tried to raise) its ‘standards’; [*sic.*] tried to limit entry into the field, and (above

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<sup>41</sup> Deady, *Law and Lawyers*, 2.

<sup>42</sup> Stevens, *Law School*, 25.

<sup>43</sup> Stevens, *Law School*, 25.



all) tried to resist conversion of the profession into a ‘mere’ business or trade.”<sup>44</sup> If professions require their members to have a certain intellectual expertise and to hold certain ethical values, admission standards (as well as standards of practice) were meant to ensure lawyers measured up to the bar, so to speak.

Although few state bars, even at the end of the century, required formal legal education prior to practicing, law schools still played an increasingly important role in the development of a professional legal culture. The last half of the nineteenth century indeed saw a dramatic rise in the number of law schools. In 1850, there were just fifteen law schools; by the end of the century, there were more than a hundred. Accompanying this increase in schools, of course, was a similar explosion in the number of law students, as in just twenty-four years from 1870 to 1894, the number of law students more than quadrupled.<sup>45</sup> In 1900, more than ten-thousand were enrolled in law schools across the country.<sup>46</sup>

If professionalization required an occupation be grounded in “an esoteric but useful body of systematic knowledge,” legal educators provided that system of knowledge. It is hence no coincidence that a philosophy regarding law as a science accompanied the rapid growth in legal education as an institution. Beginning as dean of Harvard Law School in 1870, Christopher Columbus Langdell developed what came to

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<sup>44</sup> Friedman, *History of American Law*, 634-35. See also, Larson, *Rise of Professionalism*, 40-52 (arguing that professionalization is a project to translate “superior cognitive rationality” into a commodity, while at the same time monopolizing the market that is consequently established).

<sup>45</sup> Friedman, *History of American Law*, 608; Albert J Harno, *Legal Education in the United States* (San Francisco: Bancroft-Whitney Co., 1953), 82.

<sup>46</sup> Kermit L. Hall and Peter Karsten, *The Magic Mirror: Law in American History*, 2nd edition (New York: Oxford University Press, 2008), 239.

be the model of law school curriculums for at least the next century. His “case method” of teaching was rooted in his scientific view of law. As he prefaced his first case book,

*Contracts*,

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.<sup>47</sup>

To Langdell, law was a science, and it was an empirical one whose object of study was confined to the universe of reported cases. The “legal science” that Langdell expounded and that came to dominate legal education was not value-free. Rather, through the case method, students learned most notably that law was inaccessible to lay people, that law was impartial and defined through logic, that law’s development was divorced from all other social and political processes, and that legal change occurred slowly if at all.<sup>48</sup> In this way, the modern law school founded on Langdell’s vision came to be a crucial

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<sup>47</sup> Friedman, *History of American Law*, 613-14.

<sup>48</sup> *See supra*, Chapter 1.

component of socializing aspiring members of the legal profession into accepting its core ideologies.<sup>49</sup>

Even if not required for entry into the bar, a degree from a law school held a prestige that an apprenticeship at a law office lacked. This prestige came with a price, however, namely the cost of tuition. Here too, Cavanaugh's experiences exemplify this development. After Cavanaugh graduated from Butte High School in 1882, he became interested in attending college and law school in the East so that he could become a lawyer.<sup>50</sup> As he later wrote, for three years after his graduation, he "diligently devot[ed] my spare time to reading while working and saving with a view of entering college to finish my law course."<sup>51</sup> His father, Miles Sr., who was then developing a gold property owned by Phil Sheehan near Bannack, concocted a plan to subsidize Cavanaugh's education. As Miles Sr. also roomed with the Sheehans, he was able to observe that Mr. Sheehan (who was "about seventy-four years old") and his wife ("a very beautiful blonde with soulful blue eyes") were "unstable play fellows" and that their marriage

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<sup>49</sup> The importance of Langdell's model of legal education to the profession of law can perhaps best be demonstrated by the fact that his model still dominates law school curricula, even though a vast majority of legal scholars have long rejected the notion of law as a science whose development proceeds based on logic, on which Langdell's model was based. See Lawrence M. Friedman, "Law, Lawyers, and Popular Culture," *The Yale Law Journal* 98, no. 8 (June 1, 1989): 1581 (observing that "[p]robably no serious scholar clings absolutely to either one of the two polar positions; nobody thinks that the legal system is totally and absolutely autonomous").

<sup>50</sup> Cavanaugh was a member of the school's first graduating class. There were two other students. Mary Murphy, "Making Men in the West: The Coming of Age of Miles Cavanaugh and Martin Frank Dunham," in Valerie J. Matsumoto and Blake Allmendinger, eds., *Over the Edge: Remapping the American West* (Berkeley: University of California Press, 1999), 134-35.

<sup>51</sup> Cavanaugh papers, MSU.

could “not long endure.”<sup>52</sup> Miles Sr. also speculated that “upon a separation [Mr. Sheehan’s] wife would acquire quite a sum of money.” As Miles Jr. later surmised, his father broached the topic to Mrs. Sheehan of his plan for her to file for divorce and to apply a portion of her settlement to pay for Miles Jr.’s education, apparently in exchange for Miles Jr. marrying her after completing his schooling. He thus invited Miles Jr. to stay at the house in December of 1882 to become acquainted with Mrs. Sheehan.<sup>53</sup>

Miles Jr. accepted his father’s invitation. He apparently made a good impression too, as Mrs. Sheehan was very open with him. As Miles Jr. recounted, she “frankly discussed with her plans, though without discussing Father’s part in the conspiracy .... Her intention was to divorce her husband in the near future, she would finance my college career, wait until I finished, set me up in business and become my wife. This plan was brazenly presented. She advertly [*sic.*] arranged that she and I should be alone as much as possible during this visit.” This time alone included at breakfast, when Miles Sr. and Mr. Sheehan were at the mine. Mrs. Sheehan would appear, Cavanaugh remembered, “in attractive morning wrapper, her blue eyes swimming provocatively, and we would spend a unnecessary length of time chatting at breakfast table while her maid would wait upon us.”<sup>54</sup> Miles Jr. was clearly attracted to Mrs. Sheehan, even as he felt uncomfortable with his father’s scheme and his own prurient thoughts, given his emotional attachment to a teacher in Butte named Isabelle. His attraction and discomfort came to a head one morning when she approached him in the library and asked if he

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<sup>52</sup> Cavanaugh papers, MSU.

<sup>53</sup> Cavanaugh papers, MSU.

<sup>54</sup> Cavanaugh papers, MSU.

minded if she were to kiss him. When he replied, “I should say not,” she gave him “such a kiss as almost take my breath. It terrified me, and there and there determined to cut short my visit. I did not openly reject or favor her plans, but she seemed to take my silence as consent, but my mind was so full of Isabelle, that as soon as I could conveniently do so, without showing disrespect for the hospitality shown me I returned to Comet and my adored Isabelle.”<sup>55</sup> Mr. Sheehan sold the mine in the spring to an English syndicate for \$450,000, after which Mrs. Sheehan filed for divorce and obtained, by Cavanaugh’s estimate, “a goodly portion of her husband’s wealth.” Miles Jr. would not get any of it. Worse yet, his Isabelle, whom he claimed never to have kissed, married a miner and moved away. Still, by 1887, Miles Sr. had saved enough money to send Miles Jr. to college and law school in the East.<sup>56</sup>

Langdell’s vision of law required not only the development and availability of “case books” with selected cases for law students to learn fundamental doctrines, but also the publication and distribution of legal materials for practicing attorneys across the country. If the law library was a lawyer’s laboratory, all lawyers needed access to one. It was not just that lawyers needed access to books, as the practice of law has always depended upon written materials (it is a “bookish profession,” as Michael H. Hoeflich labelled it).<sup>57</sup> In the antebellum era, though, lawyers could get by with access only to a given state’s statutes and one or two general treatises, such as William Blackstone’s

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<sup>55</sup> Cavanaugh papers, MSU.

<sup>56</sup> Cavanaugh papers, MSU.

<sup>57</sup> Michael H Hoeflich, *Legal Publishing in Antebellum America* (Cambridge; New York: Cambridge University Press, 2010), 4-29.

*Commentaries on the laws of England*—originally published in the 1760s but later reprinted specially for American audiences—and James Kent’s *Commentaries on American Law*—a work originally published in the late 1820s but periodically updated. Lawyers of the postbellum era required specialized treatises (to match their increasingly specialized practices) and up-to-date reports on cases.<sup>58</sup> Unfortunately, into the 1870s, case reporting—whether state-licensed or not—was both slow and unreliable.<sup>59</sup>

Even if reports had been timely and reliable, the physical and economic geographies of the West, including the Northwest, presented unique problems, namely that of distance between population centers and rough terrain. Although lawyers could order law books by mail, many did not have the financial capacity to build their own libraries. Lawyers thus occasionally had to solicit necessary information from other attorneys known to have more extensive collections, such as the corporate legal office for the Northern Pacific, whose records are filled with such requests. Lawyers especially needed information regarding public land laws. This was because land and resource law was an important component of many practices, because the necessary materials came from a variety of sources, mostly far away in Washington, D.C., because the materials were voluminous, and because most of the materials remained difficult to find at least until the 1870s.

With problems came opportunities. In 1874, Henry N. Copp, a lawyer and publisher in Washington, D.C., published and self-distributed a monthly periodical

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<sup>58</sup> Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 2006), 27-32.

<sup>59</sup> See generally Hoeflich, *Legal Publishing*.

called *Land Owner* with legal materials relevant to land and mining attorneys, as well as to land agents, land claimants, and mineral prospectors. When Copp began publishing, there was no official reporter of decisions by the General Land Office or Interior Department. Although that changed in 1881, Copp's combination of materials made it so that his periodical remained useful. Even as late as 1887, Copp could advertise that the material contained in his *Land Owner* editions "cannot be found in any other paper in the country."<sup>60</sup> Not only that, but Copp selected only the "important" decisions, saving attorneys the effort of sifting through every decision made in every tribunal with any authority over land laws. They contained congressional enactments; important decisions, instructions, and regulations of the General Land Office and secretary of interior; important judicial opinions impacting land law in both state and federal courts; and lists of patents issued. Copp advertised the periodical as being "of incalculable value to Attorneys, Miners, and Settlers," even as he charged three dollars for a yearlong subscription.<sup>61</sup> The following year, Copp published a stand-alone volume compiling similar materials going back to 1869; in 1882, he did the same for the intervening years. As even the "selected" land-law materials he published came to be overwhelming in scale for some, he published in 1887 an even more selective collection of materials intended for non-lawyer settlers.<sup>62</sup>

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<sup>60</sup> Henry Norris Copp, *The American Settler's Guide: A Popular Exposition of the Public Land System of the United States of America* (Henry N. Copp, 1887), post material.

<sup>61</sup> Copp, *American Settler's Guide*, post material.

<sup>62</sup> See generally Copp, *American Settler's Guide*

The year after Copp began his *Land Owner* newspaper, John B. West, a bookseller in St. Paul, Minnesota—the location of the Northern Pacific’s headquarters—and his brother, Horatio, established a weekly periodical to provide Minnesota lawyers with current and reliable excerpts of all decisions from the Supreme Court of Minnesota. The idea clearly struck a chord, as within a year the two brothers had expanded to covering Wisconsin as well, under the new moniker *The Northwestern Reporter*, before expanding to Iowa, Michigan, Nebraska, and the Dakota Territory in 1879. In 1882, the West brothers formed the West Publishing Company with additional investors, and they continued to grow their operations. In 1887, at John’s direction, the company began efforts to catalog every case by legal issue—or issues—so that lawyers could find the cases they needed quickly and reliably. In this way, John found a way to provide lawyers with all decisions, without the editorial interference of publishers, while not overwhelming them with the pure volume of them. After the American Bar Association witnessed an early demonstration of the digest system, it celebrated West Publishing as “the nation’s acknowledged leader in *indexing* as well as *reporting* the case law of the country.”<sup>63</sup> The company has yet to relinquish that title.

Before legal opinions could be indexed and distributed, they had to be produced. The work of the judiciary also profoundly changed during the last decades of the nineteenth century. Most notably, justices struggled to keep up with an increasing caseload, one made even more daunting considering the increasing complexity of the law throughout the period. From the 1860s to the end of the 1880s, the court’s caseload

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<sup>63</sup> Robert M. Jarvis, “John B. West: Founder of the West Publishing Company,” *The American Journal of Legal History* 50, no. 1 (January 1, 2008): 1–22 (quote at 8).



more than quadrupled.<sup>64</sup> In 1860, the court had just over three-hundred cases on its docket, and it decided ninety-one of them. In 1886, the court had almost fourteen-hundred cases on its docket, and it decided 451 of them. By 1890, the court was over three years behind on its docket, and it remained obligated to dispose of them all. The more cases the court decided, the greater the number of cases seemingly remained on its docket.<sup>65</sup> The court's appellate caseload was just one part of each justice's work, as each was also required to "ride the circuit." Through the 1880s, Congress mandated for Supreme Court justices to preside with district court judges throughout the United States as a way to ensure justices participated in trials and remained familiar with their practices.<sup>66</sup>

This was an especially burdensome requirement for justices with circuit duties in the West, given the time involved in traveling to and from the region and from court to court within the region. The experiences of Justice Stephen J. Field show how difficult it was to keep pace. President Abraham Lincoln appointed Field, from California, to the court in 1863 to fill its new tenth seat and to be assigned to fulfill circuit court duties in the newly formed Tenth Circuit comprised of California and Oregon. When Congress reorganized the circuits and reduced them from ten to nine

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<sup>64</sup> Friedman, *History of American Law*, 380.

<sup>65</sup> Jonathan Sternberg, "Deciding not to Decide: The Judiciary Act of 1925 and the Discretionary Court," *Journal of Supreme Court History* 33 (2008): 4.

<sup>66</sup> In 1869, Congress had recognized the increased workload of federal judges in establishing circuit court judgeships to substitute for either the Supreme Court justice or the district court judge on any given circuit court panel, but the extra judge did not match the increasing work load. 16 Stat. 44.

three years later, Field's circuit duties remained on the West Coast in the Ninth Circuit.<sup>67</sup> In arranging his circuit trips and in communicating regarding the substance of cases and the writing of opinions, Field often wrote to district court judges in California and Oregon, including Judge Matthew P. Deady of Portland, Oregon. In these letters, Field often complained of being overwhelmed with his judicial responsibilities. Occasionally, circuit court duties had to give way to the justice's Supreme Court appellate obligations. In one April 1875 letter, Field apologized for not having the time to write the opinion for a case the two had heard together the previous term. Deady had agreed to write it for Field. Field wrote, "I can only promise by way of atonement that I will not again leave Oregon, after hearing a case, until it has been decided and the opinion written." He claimed he had never been "so absolutely absorbed by the business of the Supreme Court as during the present term."<sup>68</sup>

For the next several years, Field continued to express frustration at his being overworked. He also had a plan to reform the federal judiciary to account for its expanded caseload. While some had proposed the establishment of an intermediate appellate court (between the district or circuit trial courts and the Supreme Court) to handle appeals as of right, with the Supreme Court having some power to select which cases it would hear, Field doubted whether the House of Representatives would pass such a measure. As he summarized in an 1883 letter to Deady, "[t]here is too much

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<sup>67</sup> In 1866, Congress passed legislation to lower the number of justices to seven, but it backtracked three years later and kept the number at nine. Judicial Circuits Act of 1866, 14 Stat. 209; Judiciary Act of 1869, 16 Stat. 44.

<sup>68</sup> Field to Deady, April 4, 1875, Matthew P. Deady Papers, MSS 48, Oregon Historical Society Research Library.

uncertainty as to the appointment of the Judges for either party to be very anxious that eighteen new offices of so high a grade should be filled.”<sup>69</sup>

Field’s plan—one he thought had a much better chance of getting through Congress—was to expand the Supreme Court to twenty-one justices and to divide the court into sections. As he explained to Deady, “One section could then take the equity cases, another section the common law cases, and the third the patent cases and perhaps the revenue cases also. If a Constitutional question should arise or a question upon the construction of a treaty which would have to be determined for the decision of the case, then the case could be turned over to the full bench.”<sup>70</sup> This plan, Field boasted, would allow for one court to hear constitutional questions and the equivalent of three courts to hear all other matters. While he admitted that the federal Constitution would possibly need to be amended to allow for the plan’s implementation, he insisted that it “grows more and more every day into favor.”<sup>71</sup> In the event Deady needed any more convincing of the efficacy of Field’s plan, Field concluded the letter by stating that he expected Deady to be among the judges that would be tapped to fill the twelve new seats on the Supreme Court were Field’s plan adopted.<sup>72</sup> It wasn’t.

At times, Field relied upon Deady to keep his work in Oregon to a minimum. In August of 1885, Field wrote Deady from San Francisco to advise him that he hoped not to spend more than a couple days in Portland and to plead with him to “arrange it so that

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<sup>69</sup> Field to Deady, February 18, 1883.

<sup>70</sup> Field to Deady, February 18, 1883.

<sup>71</sup> Field to Deady, February 18, 1883.

<sup>72</sup> Field to Deady, February 18, 1883.

my judicial duties will not extend much beyond the hearing of one or two cases.”<sup>73</sup> Field may have just been flattering Deady to make him more agreeable, but Field also implicitly recognized the value of the circuit judge position in easing his caseload. He wrote to Deady that “[y]ou always are very good in regard to this matter. Indeed I do not see why I am called to hear any cases in your district inasmuch as you and [Circuit] Judge Sawyer dispose of all the cases as fast as they come up, and with an ability and learning which is above all praise.”<sup>74</sup>

In 1891, Congress finally gave Field and the other justices some real relief. It did so in two ways. First, it created a level of federal appellate courts beneath the Supreme Court to handle appeals as of right, allowing the Supreme Court the discretion to reject hearing certain types of cases. Specifically, it made the Court’s appellate jurisdiction discretionary in cases where federal courts only had jurisdiction due to the parties residing in different states and in certain other specific types of cases. “Diversity jurisdiction” cases were “the most numerous class of cases,” but they still only comprised less than thirty-percent of the court’s caseload.<sup>75</sup> Second, it alleviated justices of the obligation of “riding the circuit.” Given the limited reduction in the number of cases the Supreme Court was required to hear, this provision was perhaps more important than the creation of another layer of appellate courts. As Field’s letters show, circuit obligations were a huge strain on justices even though they did not show up in the Supreme Court’s docket or case reports.

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<sup>73</sup> Field to Deady, August 25, 1885.

<sup>74</sup> Field to Deady, August 25, 1885.

<sup>75</sup> Sternberg, “Deciding not to Decide,” 5-6.

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Western lawyers did not heed Deady's advice to devote themselves entirely to the legal profession. In particular, lawyers used their knowledge of the web of public land laws not just to represent clients in acquiring and securing legal rights to land and its resources, but also to enter into land and mineral deals themselves. As the last chapters of this dissertation demonstrate, some also used their knowledge of the law to subvert it to their own pecuniary advantage. Whatever their methods, lawyers established and maintained an elite status in western society. While this also occurred elsewhere, their stature took a unique form in the West. This was in part due to the American tendency to rely upon law to determine human relationships with the land and its resources. Indeed, if one institution has been more intertwined with American political culture than a belief in the rule of "law," it is the institution of property—that which defines the web of social relationships as they apply to the enjoyment and exploitation of land. As Tocqueville wrote, "[i]n no other country in the world is the love of property keener or more alert than in the United States."<sup>76</sup> More recently, Donald Worster argued that "[p]rivate property in land grew up as America did," and that it "may be our most cherished institution."<sup>77</sup> The last chapters also show the extent to which the dependence on law to define relationships with nature can constrain the ability of communities to adapt to changed circumstances in managing lands to promote public

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<sup>76</sup> Tocqueville, *Democracy in America*.

<sup>77</sup> Donald Worster, *The Wealth of Nature: Environmental History and the Ecological Imagination* (New York: Oxford University Press, 1993), 98.

welfare, as well as the capacity of landowners themselves to change their approaches to their lands even for their own self-interests.

## CHAPTER 4 – THE RAILROADS MUST HAVE TIES

THE BUILDING OF TIMBER EMPIRES AND THE RISE OF PRIVATE  
CONSERVATION, 1887-1907

The end of the nineteenth century and start of the twentieth was a time of great consolidation within the railroad industry. While the financial moves of the so-called “robber barons” has garnered much attention, building and maintaining a railroad empire required not just the outmaneuvering of opponents on Wall Street, but also the obtaining of the physical resources necessary to construct, maintain, repair, and improve the actual railway lines. That required timber, and a lot of it. The Northern Pacific, on its own, required over two million cross ties each year just for the maintenance of existing tracks; that does not even account for the construction of additional mileage.<sup>78</sup>

At the same time James J. Hill and Edward H. Harriman (and their financial backers) fought for control of the Chicago, Burlington & Quincy Railroad, primarily for its access to Chicago, they also fought to secure stable supplies of raw materials including timber. In addition to seeking additional resource bases, they also reassessed their approaches to the lands and resources their companies already owned. In the first decade of the twentieth century, just as the federal government was establishing forest reserves to sustain the national economy into the foreseeable future, two of the largest

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<sup>78</sup> Land Commissioner Thomas Cooper to H. J. Horn, General Manager, September 20, 1904, Northern Pacific Railway Company records, Land Department records, Land Commissioner letterpress books, 1882-1908, Volume 114, Minnesota Historical Society, St. Paul, MN.

private owners of timber, Hill's Northern Pacific and Harriman's Southern Pacific, sought to reserve timberlands as necessary to sustain their railways.

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In the same year that the Northern Pacific celebrated the completion of its transcontinental railway, that railroad's land department published yet another map and advertisement meant to entice settlement on lands along its route, millions of acres of which the federal government gave to the company. It described "an immense new country, where almost anyone can make money, either in prolific and sure Wheat Crops, in Cattle and Sheep Raising on the largest area of grazing country, growing the finest Bunch Grass in the World, and in the best Gold and Silver Regions in the United States."<sup>79</sup> It announced "millions and millions of acres" for sale by the Northern Pacific, lands traversing the Dakotas, Montana, Idaho, Washington, and Oregon. It was common to distribute such maps to communities not only in the eastern United States, but also throughout Western Europe. All of this seemed to be calculated to fill up the country in a hurry.<sup>80</sup> The Oregon & California made similar efforts at attracting settlers.

Still, the companies sold very little land in the Pacific Northwest prior to completion of their roads. Of the millions of acres the Oregon & California had acquired prior to 1887, for instance, the railroad had disposed of only 163,430 acres by the middle

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<sup>79</sup> "Northern Pacific Railroad traverses the great wheat belt, grazing range, vast gold and silver regions," Washington State Historical Society, available at [http://digitum.washingtonhistory.org/cdm4/item\\_viewer.php?CISOROOT=%2Fephemera&CISOPTR=175&DMSCALE=100.00000&DMWIDTH=600&DMHEIGHT=600&DMMODE=viewer&DMFULL=0&DMOLDSCALE=15.22843&DMX=0&DMY=0&DMTEXT=%2520Pacific&DMTHUMB=1&REC=1&DMROTATE=0&x=12&y=38](http://digitum.washingtonhistory.org/cdm4/item_viewer.php?CISOROOT=%2Fephemera&CISOPTR=175&DMSCALE=100.00000&DMWIDTH=600&DMHEIGHT=600&DMMODE=viewer&DMFULL=0&DMOLDSCALE=15.22843&DMX=0&DMY=0&DMTEXT=%2520Pacific&DMTHUMB=1&REC=1&DMROTATE=0&x=12&y=38) (last accessed June 24, 2014)

<sup>80</sup> See Richard O'Connor, *Iron Wheels and Broken Men: The Railroad Barons and the Plunder of the West* (New York: Putnam, 1973), 125.



of 1887. Most of that was to actual settlers and in small quantities, though in a few instances sales were made in quantities exceeding 160 acres and for prices slightly in excess of \$2.50 per acre.<sup>81</sup> There was very little movement on the company's timberlands prior to 1887, aside from a small number of cases in Clackamas County near Portland, where a few Germans bought parcels on which they made small clearings for homes and sold timber to sawmills, and this was sufficient to survive.<sup>82</sup> Robert A. Booth later confirmed that the timberlands of the Oregon & California grant had no market value in 1880 for timber purposes or otherwise, aside from a few small tracts of forty to 160 acres used by mills to meet local needs.<sup>83</sup>

Most of the settlement in Oregon was in the Willamette valley, where much of the land capable of cultivation was taken under the public land laws prior to the railroad land grant taking effect. In addition to having good soils, the valley had the additional advantage of not being heavily timbered. As one early settler recounted, even the removal of scattered timber could be difficult to clear, given the prevalence of Douglas fir in the region. Removing timber from more heavily forested or more mountainous areas—a necessary condition even for grazing—was often cost prohibitive. In the words of one settler, “[i]f one would undertake the job of burning down one of these big fir

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<sup>81</sup> Stipulation, Transcript of Record, Supreme Court of the United States, no. 492, October term, 1916, *Oregon & California Railway Co. v. United States* (hereinafter referred to as “Oregon & California Transcript”), available at <http://gdc.gale.com/products/the-making-of-modern-law-u.s.-supreme-court-records-and-briefs-1832-1978/> (last accessed February 20, 2014),1565-66.

<sup>82</sup> David Loring testimony, Oregon & California Transcript, 2206-07.

<sup>83</sup> Robert A. Booth testimony, Oregon & California Transcript, 2589.

trees and burning it up, it would ... be a big obstacle.”<sup>84</sup> Because no market for timber existed at least until the 1890s, the costs of removing timber prior to that time could not be recouped; that is, the timber could not be made to pay for the clearing. In many cases, the costs of removing timber exceeded the value of the land once cleared.<sup>85</sup> According to one credible estimate, the costs of removing timber in some areas could range from \$50 to \$500 per acre, depending upon the contours of the land, the thickness of the trees, and the amount of underbrush, and this far exceeded the value of the lands once cleared.<sup>86</sup>

Prior to disposing of lands, the railroads first needed to ascertain what they in fact possessed. Accordingly, the Oregon & California, once it completed its road in 1887, increased the size of the cruising force. In a few years' time, there were three or four cruising parties, each comprised of two or three men, in the company's employ. William H. Mills, land agent for the Oregon & California, instructed these field men to examine certain districts or townships and furnished them with books to record their observations and calculations, including the quantity, type, and quality of timber.<sup>87</sup> The work done was extensive, but the work yet *needed* to be done was even more so. When David Loring, the chief clerk of the Oregon & California's land office, retired in 1894, he reported that just over half the company's lands, including those remaining

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<sup>84</sup> J.C. Moreland testimony, Oregon & California Transcript, 2473-74. The experience of the Morelands was typical of settlers in the valleys and foothills prior to the 1890s, where settlers were forced to burn the timber in order to settle the land. Booth testimony, Oregon & California Transcript, 2628.

<sup>85</sup> Moreland testimony, Oregon & California Transcript, 2473-74.

<sup>86</sup> Booth testimony, Oregon & California Transcript, 2579-2591.

<sup>87</sup> Loring testimony, Oregon & California Transcript, 2197-98.

unpatented, had been cruised in the field and reported upon. Not all work was delegated to lower-level employees. For his own part, Loring traveled over a “greater part of the lands” south of Roseburg, sometimes making use of annual hunting trips to do so.<sup>88</sup>

One of the main tasks of cruisers was to classify lands as to their potential uses and value. There was little prime agricultural land within either land grant, and the little amount there was had mostly been sold by 1890. Most of the remaining land of the Northern Pacific was either grazing land or timberlands. The grazing land was of poor quality and could only fetch fifty cents per acre, with some being assessed as low as seven cents per acre.<sup>89</sup> The bulk of the value in the land grant came from its timberlands, in addition to any iron and coal, which the railroad nearly always reserved from sale.<sup>90</sup>

The same was true for the Oregon & California. The vast majority of its land remaining unsold as of 1888 was deemed “non-agricultural”—meaning that it lacked the capacity for cultivation.<sup>91</sup> While acknowledging that a “small quantity might be made available for settlement with a great deal of expense,” Loring later insisted that transportation facilities were not the limiting factor for the great bulk of the lands.<sup>92</sup> Indeed, he surmised there were not any large tracts remote from the Willamette valley

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<sup>88</sup> Loring testimony, Oregon & California Transcript, 2199.

<sup>89</sup> Ross Ralph Cotroneo, *History of the Northern Pacific Land Grant, 1950-1952* (PhD diss., University of Idaho, 1966), 240.

<sup>90</sup> Cotroneo, *History of the Northern Pacific Land Grant*, 240.

<sup>91</sup> McAllaster explained that the classification of lands as “non-agricultural” was not based on lands being incapable of settlement merely because of a lack of transportation facilities, but rather on their capacity for cultivation. B. A. McAllaster testimony, Oregon & California Transcript, 2013-14.

<sup>92</sup> McAllaster testimony, Oregon & California Transcript, 2013-14.

that could be settled and upon which “a man could make a living.”<sup>93</sup> Even the parcels theoretically capable of being cultivated were too small and scattered as to feasibly be settled. As Loring described, “there were some small places which would make a very good residence and perhaps could make a garden, but he would have to clear the heavy timber to do anything further, and they were not very near together.”<sup>94</sup>

Accordingly, any sales the railroads made in this region were likely not of the character Congress envisioned when it passed the land grants, namely, to settlers who would establish sustainable family farms on 160-acre spreads. This presented a special problem for the Oregon & California, since Congress not only expected that its land be sold to “actual settlers,” but required it be so at terms mirroring the Homestead Act. The demand for Oregon & California’s timberlands began in 1889 or 1890, with most of the company’s sales occurring after 1894.<sup>95</sup> The majority of the lands sold were done so in violation of the grant’s homestead clause. From 1894 until 1903, in fact, out of the 820,000 acres the railroad disposed of in total, it sold 524,000 acres in parcels exceeding 160 acres, and “substantially all” of those were not to “actual settlers” and were for prices in excess of \$2.50 per acre. A mere thirty-eight purchasers accounted for 370,000 of the acres purchased, with each parcel exceeding 2000 acres and with prices ranging from \$5.00 to \$20.00 per acre. The largest such sale was a sale of 45,000 acres at \$7.00

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<sup>93</sup> Loring testimony, Oregon & California Transcript, 2201.

<sup>94</sup> Loring testimony, Oregon & California Transcript, 2201-02. Regarding mineral lands, Loring claimed that where mineral lands were discovered, the sold them as mineral lands once they were patented if they were not already. In selecting lands, the railroad, according to Loring, did not actively explore for mineral lands in making its selections.

<sup>95</sup> Stipulation, Oregon & California Transcript, 1578.

per acre to a single purchaser. However, the vast majority of the sales (rather than the amount of land sold) were for parcels less than 160 acres.<sup>96</sup> While there was “scarcely much of anything” prior to 1894 (maybe only “a few scattering cases”), the interest increased gradually in the coming years as timber men came out to Oregon from Michigan, Wisconsin, and Minnesota.<sup>97</sup> When the demand for timberlands began, the Oregon & California encouraged it. It sent experienced timber cruisers to examine timberland with reference to watershed, rather than confining themselves to township, so that they could report the large bodies of timber that could be sold and operated together.<sup>98</sup>

A large portion of the timberlands the Oregon & California sold at the turn of the century was to the Booth-Kelly Lumber Company, which was very active in the area. The attention of Booth-Kelly was first drawn to the Douglas fir timber at Saginaw in 1896, after which Oregon & California officials examined that area over the period of two seasons. Negotiations were then entered into between George H. Andrews, in the Oregon & California’s land department, and John Kelly of Booth-Kelly, ultimately

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<sup>96</sup> Stipulation, Oregon & California Transcript, 1578-79. There were 5306 separate sales, and 4930 of those were for 160 acres or less. Ellis cited to a 1908 government report with the following break-down of sales: 127,000 - not more than \$2.50 an acre and not more than 160 acres to any one settler; 170,000 - more than \$2.50 an acre, but not more than 160 acres to any one settler; and 515,000 - more than \$2.50 an acre, and more than 160 acres to the purchaser. David Maldwyn Ellis, “The Oregon and California Railroad Land Grant, 1866-1945,” *Pacific Northwest Quarterly* 39, no. 4 (1948): 260.

<sup>97</sup> Loring testimony, Oregon & California Transcript, 2195-96. The only large sales of timber lands prior to 1894 were to Neppach of lands in eastern Multnomah County and another to Gardiner Mill Co., and these were both before Loring's time. Loring testimony, Oregon & California Transcript, 2225.

<sup>98</sup> Loring testimony, Oregon & California Transcript, 2223-24.

leading to the first large transaction between the two companies in 1898.<sup>99</sup> In all, Booth-Kelly acquired about 70,000 acres from the railroad from 1898 to 1902, much of which it used to supply its large mills at Eugene, Springfield, and Wendling. Booth-Kelly also made numerous purchases from individual holders who had taken title directly from the government—pursuant to either the Homestead or the Timber and Stone acts—or from the railroad, amounting to over 30,000 acres.<sup>100</sup> In one purchase, Booth-Kelly secured a body of over 17,000 acres in the area of Wendling, the nearest point of which was seventeen miles from a railroad. Though the land was originally on the market for between six dollars and \$6.50 per acre, the purchase price ended up being seven dollars per acre. The increase was based on the fact that Booth-Kelly took less land than was originally contemplated.<sup>101</sup> As part of this agreement, Booth-Kelly also agreed to furnish the ties and right of way for the Southern Pacific to construct a branch line to connect the timber with a shipping point.<sup>102</sup>

The Oregon & California's relationship with Booth-Kelly was not exclusive. In the summer of 1901, in fact, the company sold over 45,000 acres of timberland in Tillamook, Yamhill, and Washington counties of northwest Oregon to Charles J.

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<sup>99</sup> Loring testimony, Oregon & California Transcript, 2224-25. The Booth-Kelly Company had already been operating in Josephine County for about ten years prior to its interest in Oregon & California lands.

<sup>100</sup> Eberlein testimony, Oregon & California Transcript, 2262-68.

<sup>101</sup> Booth testimony, Oregon & California Transcript, 2586.

<sup>102</sup> Dixon testimony, Oregon & California Transcript, 2643-45.

Winton, who had come to Oregon from Wisconsin, Andrew B. Hammond, from western Montana, and two of their business associates.<sup>103</sup>

Occasionally, deals fell through. When Winton returned to sign the above contract in September of 1901, he spoke with Andrews about the prospect of further purchases of timberlands, and to his understanding, he in fact procured a verbal option from Andrews on the purchase of 100,000 acres in addition to the 45,000 acres for which he had already contracted. They were to be selected in lots of at least 10,000 acres, excluding burned and bare spots. The price was eight dollars per acre, with a ten percent down payment and the balance in nine annual payments with six percent interest.<sup>104</sup> Winton's understanding was that the lands would be withdrawn from sale until such time as Winton could make the selections. There was no definite deadline for deciding to make the purchase, but the understanding was that it would be within a couple weeks, just enough time to allow him to return to Wisconsin to confer with his associates. Then once deciding, these Wisconsin lumber men would have one year to make the selections. Nothing was reduced to writing.<sup>105</sup>

Upon his return home to Wisconsin, Winton decided not to exercise the option and informed Andrews accordingly. Winton continued to favor the deal because it allowed a chance to do a "big amount of business on a small amount of money," and in much less time than going through individual homesteaders—which Winton predicted would take at least two years. He thought if they could select out the "choice tracts" at

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<sup>103</sup> Winton testimony, Oregon & California Transcript, 1888.

<sup>104</sup> Winton testimony, Oregon & California Transcript, 1890-91.

<sup>105</sup> Winton testimony, Oregon & California Transcript, 1892-94.

eight dollars per acre, they could “in turn sell them and make a good turn on them at an advance over what we had paid.”<sup>106</sup> His associates did not agree, however. They thought they could get the lands being offered (on the Kilches River) for less money (from six dollars to \$6.50 per acre) by purchasing them from homesteaders rather than from the railroad, and that they should just “rest a little bit and await developments.”<sup>107</sup> Winton also suspected that his associates were simply wary of entering into a transaction of such greater magnitude than they had originally contemplated. Without the backing of his business associates, Winton had no choice but to decline exercising the verbal option.<sup>108</sup>

Sales of timberlands around the turn of the century were so substantial that Charles W. Eberlein concluded that the railroad had already disposed of the “best timberlands” prior to his appointment as land agent in 1903. By his estimate, some 400,000 acres in the heart of the sugar pine belt in Oregon had already passed into private ownership.<sup>109</sup> Also by this time all of the principal valleys of western Oregon—those lands most suitable for agriculture or grazing—had generally been settled, and the railroad owned very little if any land in the valley.<sup>110</sup>

Although lumber companies generally preferred to own the lands on which their timber stood, in some cases, smaller enterprises contracted with railroads for the right to cut timber without acquiring title to the underlying lands. In 1901, for example, the

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<sup>106</sup> Winton testimony, Oregon & California Transcript, 1896.

<sup>107</sup> Winton testimony, Oregon & California Transcript, 1894-96.

<sup>108</sup> Winton testimony, Oregon & California Transcript, 1897.

<sup>109</sup> Eberlein testimony, Oregon & California Transcript, 2315.

<sup>110</sup> Booth testimony, Oregon & California Transcript, 2589.



firm of McKeen & Erickson paid the Northern Pacific \$2100 to be “let, license[d] and permit[ted] ... to cut and remove the pine and other merchantable timber for suitable for saw-logs” on a half-section in Missoula County, Montana. The license was to automatically expire on May 15, 1904, if not terminated before then. McKeen & Erickson promised not to cause undue damage to other standing timber, and to release the Northern Pacific from any liability due to such timber during the license term. The Northern Pacific reserved the right to sell the land during the license’s term, albeit subject to McKeen & Erickson’s lien.<sup>111</sup>

Beginning in the last years of the nineteenth century, the Northern Pacific also sold millions of acres of its Pacific Northwest timberlands, most to just a handful of corporations. Timber empires—including most notably that of Frederick Weyerhaeuser—were built from such sales. Weyerhaeuser had become a trusted friend of Hill in the years since he moved next door to Hill’s mansion on Summit Avenue in Saint Paul in 1891. Over the next decade, the two formed a powerful business alliance. In 1894, Hill sold Weyerhaeuser 900,000 acres of his St. Paul and Pacific railroad land grant.<sup>112</sup> Transactions such as this one helped Weyerhaeuser to become the dominant

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<sup>111</sup> The form of payment was \$1000 cash and a promissory note for \$1100 payable in six months and with seven percent interest. The promissory note was required to be guaranteed by the Western Lumber Company. The tract was the southern half of section 20, township 12 N, range 20 W of the Montana principal meridian in Missoula County. The land attorney drafted the contract and sent it to Land Commissioner W.H. Phipps to execute and to prosecute the transaction. Enclosure to letter, Land Attorney to Mr. W.H. Phipps, Land Commissioner, May 17, 1901, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 1, Folder 15, Minnesota Historical Society, St. Paul, MN.

<sup>112</sup> Roy E. Appleman, “Timber Empire from the Public Domain,” *Mississippi Valley Historical Review* 26, no. 2 (1939): 205.

figure in the lumber industry in the upper Midwest if not the entire Mississippi valley.<sup>113</sup> Hill allowed his friend to control the timber while he sought to establish control of transportation from the Mississippi Valley to the Pacific Northwest.

Like other upper Midwest lumbermen, Weyerhaeuser turned his attention to the Pacific Northwest in the final years of the nineteenth century. In 1899, Weyerhaeuser formed a new company, the Weyerhaeuser Timber Company, to acquire Northern Pacific lands in that region. Within a year, Weyerhaeuser, through his new company, bought 900,000 acres of western Washington timberlands from the railroad at six dollars per acre.<sup>114</sup> One sticking point in the negotiations was over the Northern Pacific's insistence on a requirement that Weyerhaeuser's transportation of processed lumber to the east be via the Northern Pacific line. Such a provision had become standard practice for the railroad company, but Weyerhaeuser balked. The railroad came back with a demand of \$7.50 per acre without such a requirement, but that was also unacceptable to the lumber magnate. Ultimately, the parties reached a compromise whereby the sale price stayed at six dollars, and whereby the exclusive transportation requirement remained but was only operative for fifteen years.<sup>115</sup>

At that time, Weyerhaeuser also secured an option for the purchase of additional lands, at the same six dollars per acre, as they became patented to the railroad. Given the normal annual rise in timberland values, this was an astute move for Weyerhaeuser

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<sup>113</sup> Appleman, "Timber Empire," 204.

<sup>114</sup> Charles E Twining, *F.K. Weyerhaeuser: A Biography* (St. Paul, Minn.: Minnesota Historical Society Press, 1997, 18).

<sup>115</sup> Cotroneo, *History of the Northern Pacific Land Grant*, 248-49.

and one Northern Pacific officials would soon regret. On March 1, 1902, Weyerhaeuser wrote William H. Phipps, land commissioner for the Northern Pacific, with an offer to exercise his option for the purchase of all of the railroad's lands, including those unsurveyed and unpatented, west of the Cascade Mountains in western Washington. After specifying certain surveyed lands in particular townships that Weyerhaeuser requested be sold to him at the option price of six dollars per acre, Weyerhaeuser also offered to buy, also at six dollars per acre, all other lands in that part of the state, whether they were then "surveyed, unsurveyed, unpatented, or unexamined, acquired or to be acquired" by the Northern Pacific. Weyerhaeuser qualified this otherwise all-encompassing provision by specifying it applied only to "lands which in the aggregate will average not less than 16,667 feet per acre of live standing fir, cedar, spruce, larch and pine timber."<sup>116</sup> The total amount of land covered by the option was believed to be just over 200,000 acres.<sup>117</sup>

Weyerhaeuser thought he had a deal in place with Phipps by the next day. However, Phipps' superiors on the Executive Committee apparently withheld approval of the deal. The Committee argued that Weyerhaeuser's option did not cover lands containing iron and coal, as it had become such a standard practice for the company to reserve any such lands from sales as to be an implied condition in the original contract. On May 28, 1902, nearly three months after Weyerhaeuser first sought to exercise his

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<sup>116</sup> Agreement, November 16, 1904, Northern Pacific Railway Company records, Law Department records, General Counsel Files, File 576.

<sup>117</sup> L. L. Schwarm, Memorandum as to sales of unsurveyed lands to Weyerhaeuser Timber Co., October 7, 1925, Northern Pacific Railway Company records, Law Department records, Land Grant Files, Land Grant Litigation Files, 1864-1950, Box 4, Folder 6, Items 3-5, Minnesota Historical Society, St. Paul, MN.

option, the Committee authorized President Mellen to accept the deal, but only with the condition that lands containing coal, iron, and other hard minerals be reserved to the company.<sup>118</sup> Weyerhaeuser responded by insisting that the option covered all other timberlands as soon as they were surveyed and patented. This included, according to Weyerhaeuser, not just timberlands containing minerals, but also all lands owned by the Northern Pacific subsidiary, the Northwestern Improvement Company.<sup>119</sup> The parties reached a compromise agreement in November of 1904. It provided that mineral rights, but not the lands containing such minerals, be reserved. This would allow the Northern Pacific to extract or convey such minerals for its benefit, while also allowing Weyerhaeuser to harvest the timber on the land above. The deal also included Northwestern Improvement Company lands, as Weyerhaeuser demanded, but at a price exceeding six dollars, with the specific price depending upon the amount of merchantable timber.<sup>120</sup>

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<sup>118</sup> Cotroneo, *History of Northern Pacific Land Grant*, 253-54.

<sup>119</sup> Cotroneo, *History of Northern Pacific Land Grant*, 255.

<sup>120</sup> Agreement between Northern Pacific Railway Company and Weyerhaeuser Timber Company, November 16, 1904, General Counsel Files, File 576. The price of such lands was set at \$0.36 per thousand board feet. This calculates to \$6.00 for every 16,667 board feet, the minimum for inclusion of unsurveyed, unspecified lands in the contract. There were two controversies regarding that minimum: (1) whether the six dollar per acre price applied to lands regardless of the amount of timber on them; and (2) how the average amount of standing timber was to be calculated (i.e., using the entire western Washington Northern Pacific land grant, going county by county, going township by township, or otherwise). The parties compromised. Weyerhaeuser would pay six dollars for every 16,667 feet of timber, much as with the Northwestern Improvement Company lands, but that Weyerhaeuser would not be obliged to take the timber in any township where the average amount of timber in the township was less than 12,000 feet per acre. Plummer, Western Land Agent to Cooper, Land Commissioner, November 29, 1904, General Counsel Files, File 576.

In all, Weyerhaeuser purchased some 1.5 million acres of timberland from the Northern Pacific, roughly eighty percent of its total holdings.<sup>121</sup> These purchases helped make the Weyerhaeuser Timber Company the second largest holder of timberlands in the United States, with holdings totaling roughly 95 billion board feet of standing merchantable timber.<sup>122</sup> Its holdings were exceeded only by those of the Southern Pacific, which through its land grants, including the Oregon & California's, owned over four million acres of timberland with an estimated 105 billion board feet.<sup>123</sup> Interestingly, even with its sales to Weyerhaeuser and others, the Northern Pacific had the third largest timber holdings in the country as of 1910. At that time, it still owned over three million acres with an estimated thirty-six billion board feet. As with Weyerhaeuser and the Southern Pacific, the vast majority of the Northern Pacific's timber holdings were within the Pacific Northwest.<sup>124</sup>

Part of the reason the Northern Pacific, as of 1910, still held so much timber was that, in 1903 or 1904, the Northern Pacific shifted policies from disposing of timberlands to maintaining ownership of those lands it deemed necessary for supplying the company, and its subsidiaries, with ties.<sup>125</sup> In addition to ceasing sales, this policy required much work from the company's land department, including acquiring additional timberlands and solidifying its holdings through exchange of its lands within

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<sup>121</sup> Appleman, "Timber Empire," 206.

<sup>122</sup> Appleman, "Timber Empire," 207.

<sup>123</sup> Appleman, "Timber Empire," 198.

<sup>124</sup> Appleman, "Timber Empire," 200.

<sup>125</sup> Cooper to H. J. Horn, September 20, 1904.

federal Forest Reserves, and determining the quantity and quality of its tie timber through field examinations.<sup>126</sup> The “principal objective” of such work, as Land Commissioner Thomas Cooper summarized it, was “to secure control of the largest possible quantity” so as to have a supply that could be considered “fixed, determined and unalterable.”<sup>127</sup>

The Northern Pacific entered into few sales over the succeeding few years. When it did so, it was not for revenue but rather to reduce the risk of catastrophic fires. In 1907, the work was still ongoing when Weyerhaeuser again applied to purchase timberlands, this time in the timber-rich region of northern Idaho. Cooper urged his superiors to reject the deal and to hold onto its remaining timberlands until the land department’s work was done and until it could verify the company’s tie supply was adequate. In the meantime, Cooper implored, the value of timberlands would only increase, at least if recent history was any guide. It was a no-lose proposition. The Executive Committee agreed. From then on, any offer purchase of timberland would be investigated completely regarding the potential impact of the proposed sale on the company’s resource base.<sup>128</sup>

Oregon & California officials, under Harriman’s leadership, also seemingly came to disfavor the selling of timberlands. According to his contemporaries and subsequent scholars, Harriman, in 1903, ordered the termination of all land sales.<sup>129</sup>

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<sup>126</sup> Cooper to H. J. Horn, September 20, 1904.

<sup>127</sup> Cooper to H. J. Horn, September 20, 1904.

<sup>128</sup> Cotroneo, *History of Northern Pacific Land Grant*, 257.

<sup>129</sup> This policy was not limited to the Oregon & California land grant but rather applied to all lands of the Southern Pacific and Central Pacific as well. See Richard J. Orsi, *Sunset*

Scholars have disagreed as to why. Historian David Maldwyn Ellis concluded that “*apparently* his aim was to keep for his company any rise in stumpage values” (i.e., for speculative purposes), though his support is wanting, as Ellis’ use of the “*apparently*” qualification indicates.<sup>130</sup> Subsequent scholarly works have followed suit, though they have seemingly relied principally upon Ellis’ work.<sup>131</sup>

Much evidence, however, indicates that the order was not based on a change in policy at all but was rather meant to be temporary to allow for re-organization of the railroad’s land operations.<sup>132</sup> By 1901, Harriman had already earned a reputation for rehabilitating damaged railroad properties.<sup>133</sup> He did so by focusing on improving efficiency, both in the transportation networks themselves and in their business administration. For Harriman, everything was to be seen as part of a system; each part

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*Limited: The Southern Pacific Railroad and the Development of the American West, 1850-1930* (Berkeley: University of California Press, 2007), 123-25.

<sup>130</sup> Ellis, “Oregon and California Railroad Land Grant,” 261 (emphasis added). For support, Ellis cites the following passage that Harriman was reported to have uttered: “The agricultural land we will sell, but the timber-land we will retain, because we must have ties and bridge timbers, and we must retain our timber for future supply .... Yes, we will sell to settlers, but speculators will get none.”

<sup>131</sup> See, for example, Orsi, *Sunset Limited*, 125; Donald J. Pisani, *Water, Land, and Law in the West: The Limits of Public Policy, 1850-1920*, Development of Western Resources (Lawrence, KS: University Press of Kansas, 1996); Michael C. Blumm and Tim Wigington, “The Oregon & California Railroad Grant Lands’ Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict,” *Boston College Environmental Affairs Law Review* 40 (2013): 12. In one law review article, however, attorney Paul G. Dodds states that the no-sale order was a reaction to the government’s scrutiny of past sales made in violation of the law. It is not clear whether the author had any documentary support for that contention, however. Paul G. Dodds, “The Oregon and California Lands: A Peculiar History Produces Environmental Problems,” *Environmental Law* 17 (1987): 749.

<sup>132</sup> Stipulation, Oregon & California Transcript, 1581; Eberlein testimony, Oregon & California Transcript, 2231.

<sup>133</sup> Maury Klein, *The Life and Legend of E. H. Harriman* (Chapel Hill: University of North Carolina Press, 2000), 124-30.

was required to work with all others for the good of the larger whole. Thus, when Harriman acquired effective control of the Southern Pacific, along with its constituent lines including the Oregon & California, he sought to integrate their land portfolios into systems he had established as head of the Illinois Central and Union Pacific.

Maintaining a system that included the Union Pacific, Central Pacific, and Southern Pacific lines, among others, required a massive amount of timber. Among the best sources of timber was the area of Oregon traversed by the Oregon & California. Thus, systematizing land policies necessitated a changed approach to the Oregon & California's land grant. While the various land departments of the constituent railroads had previously enjoyed much autonomy within the Southern Pacific empire, Harriman sought to centralize authority and to develop a comprehensive land-use plan, whereby any of his railroads' lands would be used to benefit his entire system.<sup>134</sup> As Eberlein later explained, the land department tried to administer the land grants with reference to one another to serve the common interests of the constituent companies and of the parent company, such that, for example, ties could be purchased in Oregon not only for the lines in Oregon but for all other Southern Pacific or Union Pacific lines.<sup>135</sup> The basic intent was to administer the land grants in a "careful, conservative, economical way in which they would produce the greatest results, both in money and in other ways for the roads."<sup>136</sup>

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<sup>134</sup> Eberlein testimony, Oregon & California Transcript, 2229, 2302-03, 2399, 2746.

<sup>135</sup> Eberlein testimony, Oregon & California Transcript, 2302-03.

<sup>136</sup> Eberlein testimony, Oregon & California Transcript, 2304.



Prior to Harriman's takeover, each railroad company had official control over its land policies, and they operated entirely independently of one another. Centralization thus first required an extensive review of what each of the constituent lines had done to that point, as well as of their respective land holdings. Accordingly, Harriman sent Eberlein to the West Coast to examine the affairs of the Southern Pacific lines, including the Oregon & California.<sup>137</sup> Upon his arrival, Eberlein encountered three completely separate organizations in regards to the land grants, the Southern Pacific, the Central Pacific (which had jurisdiction over the California & Oregon land grant), and the Oregon & California, "all of them running on different plans—plans that had been the growth of a great many years."<sup>138</sup> Because of the divided control, he found many discrepancies in the organizations' record keeping, including the form of their books and blanks, their method of doing business, and their methods of accounting.<sup>139</sup> Even worse, he uncovered "a great many errors and omissions ... in the tract books," preventing him from ascertaining the status of the grants, including the financial situation of the sales and the condition of the taxes. In some cases, deeds had been issued, consideration received, and the lands afterwards lost. Often sales occurred on unpatented lands in which the patents were later denied.

Complications also arose from the significant amount (as many as 10,000) donation land claims found within the limits of the grant in Oregon, claims whose boundaries were irregular since there were no quadrangular surveys in Oregon at the

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<sup>137</sup> Eberlein testimony, Oregon & California Transcript, 2229.

<sup>138</sup> Eberlein testimony, Oregon & California Transcript, 2229.

<sup>139</sup> Eberlein testimony, Oregon & California Transcript, 2229-30.

time the lands were taken.<sup>140</sup> A large portion of these lands remained unsurveyed. Eberlein concluded that changes were long overdue, and that “complications in title” called for a radical overhaul of the land departments.<sup>141</sup> Eberlein did not blame Andrews for the condition of the Oregon land grant, clarifying that Andrews was “subject to very vexatious limitations.” Specifically, the divided control between Andrews, who held the title of acting land agent of the Oregon & California, in Portland and Mills, the land agent of the Central Pacific, in San Francisco allowed for Mills to interfere in the business of Andrews, including about matters “he did not know anything about.” It was this interference that led to the “confusion in the records,” according to Eberlein.<sup>142</sup>

It would make sense that Harriman would also suspend land sales to allow for a cleaning up of their operations, only to resume once the review was complete and the land offices reorganized. At least that was Eberlein’s understanding of the situation. In the fall of 1904, Eberlein notified his superiors that sales could resume since the “affairs of the two land grants had been thoroughly reorganized,” minus some “general cleaning up.”<sup>143</sup> Under Eberlein’s direction, the department had examined its lands to determine which lands the company should reserve for operating and traffic purposes, including for the extension of yards, for water supply for engines, and for fuel supply. It had been his experience with the Union Pacific that the expansion of traffic resulting from increased settlement required larger stockyards at central shipping points. Once his

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<sup>140</sup> Eberlein testimony, Oregon & California Transcript, 2231-32.

<sup>141</sup> Eberlein testimony, Oregon & California Transcript, 2231-32.

<sup>142</sup> Eberlein testimony, Oregon & California Transcript, 2230.

<sup>143</sup> Eberlein testimony, Oregon & California Transcript, 2236.

work was done, Eberlein transferred all of the records, files, and property of the land department to San Francisco to be kept with the records of the Southern Pacific Railroad Company under his care and supervision.<sup>144</sup>

Eberlein later insisted that his central focus remained divesting the railroad company of its land grant, which he considered a burden. He thought it was in the interests of the railroad to promote population growth and industry, an objective which could be thwarted by withholding large bodies of land from sale. “There was no advantage,” according to Eberlein, “to this line of road, or any line of road, to have a contiguous land grant without settlers, without people on it.”<sup>145</sup> His recommendation in 1904, one which he reiterated in 1906, was that the land grant

should be sold out reserving only so much of it as was necessary to the operation and to the traffic of the road.... That would mean simply reservation for stations and rights of way for various purposes, stock yards for traffic, and land that had water for engine supply, gravel banks, and thing of that kind, which were of more value to the road than to anybody else and which the road would have to acquire from someone else if it disposed of them; and after those reservations had been made, to sell that grant in such a manner as to produce the best business results for the Railroad Company and by doing so it would produce the very best results for the community.<sup>146</sup>

The company even advertised its Oregon lands as being for sale. In the fall of 1904, Eberlein spoke with A. L. Craig, the general passenger agent of both the Oregon Railroad and Navigation Company and the Oregon & California. Because his concern was also securing passengers for the lines, Craig urged that lands capable of settlement

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<sup>144</sup> Eberlein testimony, Oregon & California Transcript, 2233-35.

<sup>145</sup> Eberlein testimony, Oregon & California Transcript, 2302-04.

<sup>146</sup> Eberlein testimony, Oregon & California Transcript, 2312.

be opened to purchase by settlers. While they both acknowledged that there was “very little land in this grant” that would be suitable for settlement, they still felt that “any movement at all” by the railroad “would probably stimulate people to come in and buy land here, and settle.”<sup>147</sup> Based on their conversations, Eberlein and Craig advertised for the sale of land in a railroad pamphlet intended for general distribution across the country and beyond.

Sales were soon thereafter again suspended, seemingly indicating that Eberlein’s superiors had overruled him. However, this suspension in sales was due to legal complications, not any change in permanent policy. In particular, W. W. Cotton, the legal advisor of the Oregon Railroad and Navigation Company, called Eberlein to Portland late in 1904 to inform him that sales could not in fact proceed because of complications arising from the fact that taxes remained outstanding on some of the lands, and because the records were still in such a shape that the railroad could not know which lands had already been lost due to delinquencies.<sup>148</sup> Having to reverse course because of issues he had neglected embarrassed Eberlein a great deal.<sup>149</sup>

As to the course that needed to be taken, Cotton advised Eberlein that there needed to be a thorough examination of the tax records of the assessors’ offices in every county in which the grant lay, as to each tract of land, for a period of fifteen years. Cotton recommended the appointment of W. C. Bristol to lead that review and to

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<sup>147</sup> This advertisement was not explicitly limited to agricultural lands. Eberlein testimony, Oregon & California Transcript, 2246, 2252.

<sup>148</sup> Eberlein testimony, Oregon & California Transcript, 2237.

<sup>149</sup> Eberlein testimony, Oregon & California Transcript, 2247.

organize a staff to make that examination.<sup>150</sup> This process was so cumbersome in part due to the “peculiarity in the laws of Oregon,” which allowed for lands to be assessed to the owner, if known, or to an “unknown owner.” Cotton believed there to be much land assessed to “unknown owners,” and that some of it had been lost (or “gotten away”).<sup>151</sup> In any event, this investigation into tax matters, according to Eberlein, “was a very long-winded affair” that took over a year to complete. Eberlein turned over the results of that investigation on a piecemeal basis to O'Brien, with the final report being on March 30, 1906. Enclosed with this report was a request that O'Brien “place it in the hands of attorneys to be cleaned up.”<sup>152</sup>

Ultimately, only a very small amount of land—not enough to justify the time and expense of the investigation in Eberlein’s estimation—was lost due to unpaid taxes. The loss of land was due to failing to pay taxes in instances where the purchaser from the railroad had neglected to pay the taxes as required by his contract, causing the land to become delinquent, and the contract forfeited. Not only did the railroad neglect paying taxes on land it owned, but it also continued to pay taxes on some lands it no longer owned.<sup>153</sup> The root cause of the confusion, Eberlein quipped, was that “things had been run ... very lax in the [land] department.”<sup>154</sup> The typical process that the

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<sup>150</sup> Among Bristol’s staff were Angell and Fisher. At some point, Bristol quit, after which time the staff reported directly to Eberlein. Eberlein testimony, Oregon & California Transcript, 2239-41.

<sup>151</sup> Eberlein testimony, Oregon & California Transcript, 2240.

<sup>152</sup> Eberlein testimony, Oregon & California Transcript, 2241.

<sup>153</sup> Eberlein testimony, Oregon & California Transcript, 2242.

<sup>154</sup> Eberlein testimony, Oregon & California Transcript, 2242-43.

railroad had followed was that the land agent would send out a list of lands to each county and ask for an extension of the current taxes, and the county officer, perhaps because of being overworked, would normally send back the list with a memorandum stating the total taxes due, without regard to specific legal subdivisions. In response, the railroad's land office simply paid the full amount without regard to specific tracts of land.<sup>155</sup>

While the suspension in sales was likely originally intended to allow for the standardization and re-articulation of land policies, and while it was only extended to allow for the resolution of certain tax complications, Eberlein's investigation convinced him that sales to one prominent lumber company, Booth-Kelly, should perhaps be permanently curtailed, if not ceased altogether. Specifically, he became troubled by what he characterized as the "exceedingly favorable contracts" Booth-Kelly had received from the railroad, the terms of which often included very small initial cash payments and sales prices at which the company could use the credit to raise money. These terms were well known throughout lumbering circles both on the West Coast and in the East. Eberlein received many "bitter complaints" from other timber buyers of Booth-Kelly's preferential treatment.<sup>156</sup>

Not being able to answer the questions of other lumbermen as to why Booth-Kelly received such favorable deals, Eberlein commenced a specific investigation into Booth-Kelly's past dealings with the railroad.<sup>157</sup> These investigations showed that a

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<sup>155</sup> Eberlein testimony, Oregon & California Transcript, 2243-44.

<sup>156</sup> Eberlein testimony, Oregon & California Transcript, 2262-63.

<sup>157</sup> Eberlein testimony, Oregon & California Transcript, 2262-63.

substantial reason for Booth-Kelly's apparent beneficial treatment was the system that company pursued in acquiring timbered tracts. Eberlein described Booth-Kelly's tactics as follows:

they would go through three townships, and take a string of forties [forty-acre sub-sections] down through the center, in some cases, of a section, take a piece off another section, and so on down through the entire purchase, and in that way they beat down the value of the remaining timber, and they then came in immediately on the heels of this, and would say, 'Now, here is the rest of the timber in these townships, and nobody will want it, nobody can use it but ourselves. We will give you \$2.00, or some such price, an acre for it.'<sup>158</sup>

The simple fact was that the railroad had become too dependent on Booth-Kelly for its supplies of timber. There were no mills within the grant of any size not controlled by that company. Eberlein suspected that this was partly because Booth-Kelly often purchased the mills of small proprietors just to shut them down.<sup>159</sup> He was committed

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<sup>158</sup> Eberlein testimony, Oregon & California Transcript, 2263. Eberlein also found what he thought were instances of collusion between Booth-Kelly and certain Southern Pacific officials, instances where they shared interests in the purchases. One example he later cited was a contract between the Oregon and California and "John F. Kelly, Trustee" for the sale of about twenty-thousand acres comprising three whole townships. In that case, as Eberlein recollected, "[p]ieces of timber were taken out of a whole section, the whole thing was riddled up and down one side and another, so that the remainder of the timber on that purchase must come to the holder of that contract at practically his own price." This, he contended, was "a special privilege" that should not have been given. Eberlein testimony, Oregon & California Transcript, 2356-58. (The lands subject to the contract with John F. Kelly were townships 20, 21, and 22 south, range 1 west.) However, there was little evidence of collusion between the purchasers and the Oregon and California's land department in this case. The only person whom Kelly represented in the deal with any connection to the land department was Britt, a cruiser for the railroad who had nothing to do with the fixing of values. Eberlein testimony, Oregon & California Transcript, 2399. Further, as government attorneys later pointed out, the reason that the contract was in the name of John F. Kelly rather than the Booth-Kelly Company with which he was affiliated was that Kelly, Dixon, and a few other stockholders were unable to convince the company to buy the land. If the deal was so favorable, then one would expect Booth-Kelly to jump at the opportunity, not reject it. Eberlein testimony, Oregon & California Transcript, 2359. There were 25 people interested in this deal for whom John F. Kelly was trustee. Eberlein testimony, Oregon & California Transcript, 2399.

<sup>159</sup> Eberlein testimony, Oregon & California Transcript, 2270.

not to allow Booth-Kelly to monopolize the timber operations in Oregon and to hold both the railroad and the state hostage. Believing that the company already “had all the timber at that time that was necessary to a profitable operation for a great many years to come,” he concluded that further sales to that company “would only foster a monopoly, and that in the end it would result in curtailment of product in detriment to both the state and the railroad.”<sup>160</sup> The system Booth-Kelly utilized to control the timber market in Oregon, according to Eberlein, “was not good for the railroad and was good for nobody but the people interested in that enterprise,” and “that is all.”<sup>161</sup>

Despite his reservations regarding Booth-Kelly, Eberlein remained convinced during his tenure (which ended in 1908) that the railroad should sell not only so-called “agricultural lands,” but also timberlands, provided that such sales were done in a manner which protected the railroad’s interests in a secure timber supply. He recommended that the land should be sold to “responsible people who would within a reasonable time develop” the land with the railroad reserving the right to traffic any products. He called for covenants running with the land which would guarantee to the railroad the transportation of the land’s products, much like the Northern Pacific included in most of its contracts.<sup>162</sup> As far as Eberlein knew, his proposal was never adopted, however.<sup>163</sup>

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<sup>160</sup> Eberlein testimony, Oregon & California Transcript, 2263.

<sup>161</sup> Eberlein testimony, Oregon & California Transcript, 2353.

<sup>162</sup> Eberlein testimony, Oregon & California Transcript, 2313.

<sup>163</sup> Eberlein testimony, Oregon & California Transcript, 2400.



Once the tax issues were finally resolved on March 30, 1906, Eberlein was poised again to begin offering lands for sale. Not three weeks later, however, an earthquake and resulting fire in San Francisco made the resumption of sales impossible. The fire destroyed everything that the land departments of the Southern Pacific owned in the way of records and correspondence, aside from about ten boxes of files which were only “partially charred” but unfortunately of very little value. Officials in the land department learned that there were downsides to the centralization of the land departments’ operations, at least in regards to record-keeping. All of the tract books that Eberlein had prepared were destroyed, as were records of deeds and sales contracts.<sup>164</sup> The company only recorded duplicate originals if for the purposes of a lawsuit, and neither California nor Oregon required executor contracts for the sale of land to be recorded with the state. The fire was so devastating that even several years later Eberlein reported that thinking about the fire made “the back of [his] head ache.”<sup>165</sup>

Still, after the fire, the company again showed a willingness to sell lands, at least under the right conditions. The “right conditions” apparently included that the purchasers be small operators and that the sales include an agreement to supply the Oregon & California with lumber. Eberlein, for one, felt that “small mill men should have a chance and not be compelled to go to these large holders and get at a large price what they needed for their mills.”<sup>166</sup> Accordingly, Eberlein allowed for the sale of several sections of timber to such “small mill men,” including the Cole Brothers and

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<sup>164</sup> Eberlein testimony, Oregon & California Transcript, 2248.

<sup>165</sup> Eberlein testimony, Oregon & California Transcript, 2250-51.

<sup>166</sup> Eberlein, Transcript, 2351.

Fisher Brothers. These contracts provided that the purchasers would pay for the land by agreeing to provide the railroad with all of their output each month at current prices for timber.<sup>167</sup>

Some timber companies, however, sought to exploit the railroad's plight by taking some of its best timberlands off its hands. As Eberlein accounted, "before the remains of the city was cool," there was "an immediate and fierce onslaught" on the land office for the sale of timberlands. Those leading the charge were timber investors including Booth-Kelly and the Weyerhaeuser Timber Company.<sup>168</sup> It appears they sought to exploit the company's lack of records to acquire some of the best timberlands at less than their value. In one instance, Weyerhaeuser made an application to purchase timber from the area around Pokegama, where his company already owned 12,000 acres of railroad land.<sup>169</sup> Its application was for about 50,000 acres at a price of \$5.00 per acre. This offer precipitated much discussion in the railroad offices, including between Eberlein and his superiors Kruttshnitt and William D. "Judge" Cornish. Eberlein argued against taking any action at that time, because the company was simply unprepared, no longer having any cruising reports from that country, regarded as having the "heaviest timber" (sugar pine) in the grant.

The others disagreed, however, and they ordered Eberlein to have the land cruised. He complied and sent "as many cruisers" as the company could rely upon to

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<sup>167</sup> Eberlein, Transcript, 2364.

<sup>168</sup> Eberlein testimony, Oregon & California Transcript, 2258.

<sup>169</sup> Weyerhaeuser had bought those acres from a man named Hervey Lindley, who had built the branch line from Thrall Junction on the SP main line north to Pokegama in Oregon, where he had a mill. Eberlein testimony, Oregon & California Transcript, 2278.

examine the land in the fall of 1906. From this cruise, Eberlein confirmed his suspicions. It showed that Weyerhaeuser had asked for just the “nucleus” of the country, such that the 50,000 acres would render the remaining 70,000 acres tributary to it of little value to anybody but Weyerhaeuser. He thus insisted the 120,000 acres be sold together—a reasonable request but one which prompted Weyerhaeuser to cease negotiations. That company’s effort to monopolize the timber in one of the best timber regions of the entire grant had failed. Though the deal fell through, the railroad, for its part, evidenced a willingness to sell timberlands, provided that the condition of the lands were adequately ascertained and the terms were right.<sup>170</sup>

As for getting its records back in order, the company was fortunate that O’Brien, vice president of the Oregon & California, held many of the lists that Eberlein had prepared in the preceding years at Portland rather than in the San Francisco headquarters. They classified the railroad’s lands by their location (section, town, range, and county) and by whether the land was patented, unpatented, selected, unselected, or unsurveyed. They also provided each tract’s contract number if it was under contract. However, they did not list the other contracting party and were only current as of the date they were originally prepared and sent to him.<sup>171</sup>

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<sup>170</sup> Eberlein testimony, Oregon & California Transcript, 2278-79.

<sup>171</sup> Eberlein testimony, Oregon & California Transcript, 2253-54. At trial, government attorney Townsend noted that the Oregon & California could also have utilized the corporation’s minute books, which contained all deeds executed since 1879. In that year, the Oregon & California had adopted a bylaw prohibiting the execution of any conveyances unless specifically approved and authorized by the board of directors. Eberlein had no specific recollection of utilizing that particular source of information. Eberlein testimony, Oregon & California Transcript, 2371.

Even with their shortcomings, the lists at least gave Eberlein's department a foundation from which it could rebuild the railroad's land records. Regarding lands under contract, railroad employees had to examine the General Land Office records, as well as the deed and contract records, going back to 1866. At that time, such records were held not in a centralized location, but rather in the recorder's offices in every county of the grant. With this examination, the land department was able to supply much of the missing information, but in many cases deeds had not been properly recorded, a result of either ignorance or in some cases the intention of the purchasers themselves.<sup>172</sup> Further, the land department asked for the assistance of purchasers under contract with the railroad, who the railroad asked to send in their contracts so that they could be copied and the information could be recorded. In most cases, the purchasers acquiesced, though many found that they too had lost their contracts.<sup>173</sup> Finally, in cases where a tract of land had been deeded to a private party, but the deed had been lost, the law department determined whether the purported purchaser had made a sufficient showing warranting the issuance of a new deed. In some cases where the law department found the purported landowner's evidence to be lacking, the purchaser brought suit to restore their title, and in other instances the company simply issued quitclaim deeds.<sup>174</sup> There remained as late as Eberlein's departure in 1908 about twenty tracts of land where the company was unable to ascertain, to its satisfaction, the identity of the landowner.<sup>175</sup>

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<sup>172</sup> Eberlein testimony, Oregon & California Transcript, 2254-55.

<sup>173</sup> Eberlein testimony, Oregon & California Transcript, 2255.

<sup>174</sup> Eberlein testimony, Oregon & California Transcript, 2256-57.

<sup>175</sup> Eberlein testimony, Oregon & California Transcript, 2257.

O'Brien's lists allowed the land department to resume operations (at least in regards to non-timbered lands) within six months of the fire, including giving notice of the sale of such agricultural or grazing lands the company was able to sell at that time. In late August, Eberlein notified his superiors that they could act upon applications for agricultural or grazing lands, and he also distributed circulars notifying the public that the railroad would begin accepting such applications.<sup>176</sup> But Eberlein could not remember any applications being accepted between 1906 and his departure in 1908. He claimed this was because there were, in fact, no genuine applications for agricultural or grazing purposes. On examination of the so-called “agricultural applications,” the land department found them to be either for minerals, timber, or water power, not settlement.<sup>177</sup>

As for timberlands, the company could not yet sell them, as selling those lands required extensive cruising reports, forty-years worth of which had been “entirely wiped out by the fire.”<sup>178</sup> Selling those lands had to wait until Eberlein and the land department could cruise them and restore of the records at least to a point where officials could “act intelligently”—and this was being done, Eberlein later insisted, “as quickly as possible.”<sup>179</sup> While Cornish authorized Eberlein to sell agricultural and grazing lands,

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<sup>176</sup> Eberlein testimony, Oregon & California Transcript, 2253, 2258-59.

<sup>177</sup> Eberlein testimony, Oregon & California Transcript, 2258-59.

<sup>178</sup> Eberlein testimony, Oregon & California Transcript, 2253.

<sup>179</sup> Eberlein testimony, Oregon & California Transcript, 2258-59.

subject to his approval, Cornish never authorized the sale of timberlands, over the advice and protest of Eberlein.<sup>180</sup>

While the no-sale order may have initially been intended to be only temporary, the policy of the railroad, by 1907, had shifted to retaining certain lands beyond those necessary for transportation facilities. When Brian A. McAllaster replaced Eberlein as head of the land department at San Francisco during that year, Cornish advised him that as soon as the records could be straightened out, after the fire, the intention was to offer lands “not needed for company uses” for sale.<sup>181</sup> Lands that were deemed necessary for “company uses” included lands reserved from sale on account of timber, iron, coal, or oil.<sup>182</sup>

The fire also contributed to this shift in policies. In addition to delaying sales for long enough for railroad officials to reevaluate policies, it also showed them the danger in being so heavily dependent upon lumber companies for their timber supplies. Specifically, as a result of the fire, the price of ties nearly tripled overnight, with the

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<sup>180</sup> Eberlein testimony, Oregon & California Transcript, 2327-32. In one telegram dated April 5, 1907 from Cornish to Eberlein, Cornish wrote: “Please mail me report at convenience showing progress made in rehabilitating your office and also what extent you are receiving and handling applications for lands and especially lands other than timber and mineral.” According to Eberlein, this did not imply an instruction not to sell timber or mineral lands, but rather merely referred to the impossibility of making such sales at that time. Eberlein testimony, Oregon & California Transcript, 2327-28.

<sup>181</sup> McAllaster testimony, Oregon & California Transcript, 1977.

<sup>182</sup> McAllaster compiled a schedule of such lands after the San Francisco fire based in large part on a list which O'Brien, as Vice President and General Manager of the Oregon & California, furnished as being the list given him prior to the fire. The land department itself did not determine that the substances supposedly in these lands were actually necessary for the railroad's operation and maintenance, but merely that they were there. McAllaster testimony, Oregon & California Transcript, 1979-80.

threat that they would continue to rise, perhaps even above a dollar.<sup>183</sup> This confirmed to railroad officials that they had indeed become too dependent upon the large timber interests in the region.

To protect itself and the public from being further exploited in the future, the company thereafter reserved a large block of 100,000 acres of timberlands from sale for the company's uses. These lands were primarily along the Umpqua River and were all near the railroad and convenient to transportation, such that they could be used for the manufacture of ties and bridge timbers.<sup>184</sup> Though some cited this move as proof that the Oregon & California was bent on maintaining a land monopoly in the state, Eberlein defended it based on the need to secure a supply of timbers and ties from its body of timber, which, while still considerable, "was fast disappearing from its ownership." This reservation, Eberlein claimed, was not an effort for the railroad to monopolize the timber of the area, but was rather an attempt to confront monopolies which were already emerging in the state. In his examination of the purchases and activities of the large timber interests in the state, including Booth-Kelly and the Hammond and Winton interests, he had found that these interests were consolidating their holdings with the purchase of even-numbered sections. It thus appeared to Eberlein that "the timber of Western Oregon was gradually becoming consolidated into a few large holdings," to the detriment of not just the Oregon & California but also to the people of Oregon.<sup>185</sup>

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<sup>183</sup> Eberlein testimony, Oregon & California Transcript, 2265.

<sup>184</sup> Eberlein testimony, Oregon & California Transcript, 2235.

<sup>185</sup> Eberlein testimony, Oregon & California Transcript, 2264. As to the size of the reservation, Eberlein thought that this block of 100,000 acres would supply the lines on the coast with timber for ties and trestles. It was not desired to supply the entire Harriman system because

Later in 1907, Harriman confirmed the company's changed approach to its timberlands—one which extended beyond the 100,000 acre reservation. At the National Irrigation Congress, held in Sacramento, California, Harriman reported that the railroad would withhold timberlands from sale based on the need for conservation. He insisted that his companies were not “holding those lands for speculation,” but were instead “holding those lands to protect [the people] in the future.” Considering that “ties are the foundation of the transportation line,” he stated his intent “to have a reserve with which we can maintain these great transportation lines for those that come after, that they may not accuse us of wasting the resources which we had at our command.”<sup>186</sup> Harriman's 1907 speech was consistent with a statement he made to a newspaper reporter that same year:

The Southern Pacific will sell land to settlers, but not to speculators. We can tell a speculator from a settler as well as anyone. The agricultural land we will sell, but the timber-land we will retain, because we must have ties and bridge timbers, and we must retain our timber for future supply. The Southern Pacific has an insufficient amount of timber now,

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of the cost of freight. The extent of the reservation was determined in conference with Kruttschnitt. Eberlein testimony, *Oregon & California Transcript*, 2303.

<sup>186</sup> *The Official Proceedings of the 15th National Irrigation Congress*, September 2-7, 1907, Sacramento, California; also quoted in U.S. Congress, House Committee on the Public Lands, *Oregon and California Land Grants*, 64th Cong., 1st sess. (Washington, DC: Government Printing Office, 1916) (hereinafter referred to as the “Oregon & California Hearings of 1916”), 143-44. See W. G. Robbins, “Lumber Production and Community Stability: A View from the Pacific Northwest,” *Journal of Forest History* 31, No. 4 (October 1987): 187-196; Wesley C. Ballaine, “The Revested Oregon and California Railroad Grant Lands: A Problem in Land Management,” *Land Economics* 29, No. 3 (August 1953): 219-232; John Messing, “Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903-1910,” *Pacific Historical Review* 35, No. 1 (February 1966): 35-66.



and we have had to buy large tracts, looking to the future supply of ties and material. Yes, we will sell to settlers, but speculators will get none.<sup>187</sup>

Harriman's goal, in other words, was to prevent harmful speculation and to conserve the timber for future railroad use.

At first glance, Harriman's conservationist justification seems inconsistent with the dominant brand of conservation represented by President Theodore Roosevelt and Gifford Pinchot, neither of whom ever advocated massive curtailing of development. Rather, they advocated managing forests with the goal of promoting more efficient and prolonged development without sacrificing present yield. In one instance, at the meeting of the American Forestry Congress in 1905, Roosevelt assured pro-development westerners that the government's policy was "consistent to give to every portion of the public domain its highest possible amount of use."<sup>188</sup> Pinchot added that "[t]he administration of the forest reserves is based upon the general principle ... that the reserves are for use. They must be useful first of all to the people of the neighborhood in which they lie."<sup>189</sup> On their face, Harriman's policies appeared to violate this simple rule of conservation.

Assuming that the termination of land sales thwarted development, it would indeed seem that his policies contradicted the very conservationist principles he

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<sup>187</sup> Oregon & California Transcript, 4267. According to Orsi, this statement may have been a lie, based on the fact that the initial sale order applied to all lands and very little sales occurred on any lands during Harriman's tenure. See Orsi, *Sunset Limited*, 124-25.

<sup>188</sup> American Forestry Association, *Proceedings of the American Forest Congress*, January 2-6, 1905, Washington, DC (Washington, DC: H.M. Suter Publishing Co., 1905), 11. It was after this meeting that the management of forests was transferred to the Department of Agriculture under the newly-renamed Forest Service,

<sup>189</sup> American Forestry Association, *Proceedings*, 392.

attempted to evoke. However, it is not at all clear that his policy impacted development at all. Harriman had come to believe that selling lands cheaply in order to stimulate development—a policy which the government and railroad had long followed—in fact impeded development by encouraging speculation. This was both because the annual rise in value of the timber exceeded the taxes and interest payments required to retain the land, thus making it profitable simply to hold the land, and because there was not much of a market for the grant’s timber, due to its relative inaccessibility as compared to the still-plentiful forests of Washington and California. Accordingly, only “a very, very small fraction” of the timberlands that the Oregon & California sold, including those which it sold either directly or indirectly to lumber companies such as Booth-Kelly, had been milled even by 1912.<sup>190</sup> Based on these experiences, Eberlein ultimately concluded that “anybody that comes in and wants to buy all the timber in [multiple] townships of land has no immediate intention of doing anything with it.”<sup>191</sup> Rather, the lands were simply “held for the rise.”<sup>192</sup> And the “rise” could be quite profitable, as some of the lands the Oregon & California had sold for less than \$10 at around the turn

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<sup>190</sup> The Weyerhaeuser Timber Company also adopted a policy of not selling any of its timber from its Oregon lands, apparently due to the rising value of the lands. Appleman, “Timber Empire,” 208.

<sup>191</sup> Eberlein testimony, Oregon & California Transcript, 2342-44.

<sup>192</sup> Eberlein testimony, Oregon & California Transcript, 2342-44. As another example of this phenomenon, Eberlein discussed the example of T. B. Walker’s handling of his timberlands in northeastern California: “They bought out timber concerns and mills and shut them down and they have existed all this time simply upon the increase in the growth of the timber which, as I have told you, is large enough in timber of certain age to more than equal the taxes and interest on the investment; and in this particular case it must be remembered that this timber was sold by the Railroad on conditions that never were duplicated that I know of in this country.” Eberlein testimony, Oregon & California Transcript, 2351-52.

of the century would be worth over \$100 a decade later.<sup>193</sup> That the lack of development was due more to physical and economic geography than to Harriman's decisions would later be confirmed both by government reports and the government's own experiences once it reacquired the lands in 1916.<sup>194</sup>

Given these realities, which Harriman and other railroad land officials appreciated long before Congress did, Harriman's termination of land sales can better be seen not as anti-development but as a recognition that the market system, in this instance, had failed—and would likely continue to fail—to promote the rational, efficient use of the land's natural resources.<sup>195</sup> This rationale was thus consistent with the conservation movement, which was above all, as Samuel P. Hays has articulated, a scientific movement advocating that scientists take the lead in ensuring the efficient use of natural resources rather than leaving such noble obligations to inhuman, if not at

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<sup>193</sup> See Gregory Llewellyn Gordon, *Money Does Grow on Trees: A. B. Hammond and the Age of the Lumber Baron* (PhD diss., University of Montana, 2010), 288. This phenomenon was not limited to Oregon either. In 1910, for instance, Minnesota lumberman Charles A. Smith argued that it was “a mistaken belief that the manufacture of lumber is a profitable business, the wealth of the lumber has been made by an increase in the value of his timberlands.” Gordon, *Money Does Grow*, 289.

<sup>194</sup> See Ballaine, “Revested Oregon and California Railroad Grant Lands,” 224.

<sup>195</sup> Even Eberlein, who generally favored selling lands as rapidly as possible, became convinced of the efficacy of Harriman's approach. Indeed, he later characterized Harriman's statement as “gospel” and simply “good sense.” Eberlein testimony, Oregon & California Transcript, 2335. He fully believed Harriman's anti-speculation rationale, citing to the fact that all of the demand for timberlands at the time was for speculative purposes. Eberlein later reasoned that “it is just as well not to sell land to speculators, though. That is, as I say, what the road and the country have suffered from. You take the Weyerhaeuser timber interests, for one thing; they have an enormous investment in this state in timber but not to my knowledge have they ever milled a foot.” Eberlein testimony, Oregon & California Transcript, 2337.

times inhumane, political or economic forces.<sup>196</sup> Harriman was both a benefactor and consumer of the emerging sciences of conservation.

Harriman had already demonstrated his personal support of the natural sciences when he arranged and funded a maritime expedition to Alaska in 1899. What began as a vacation for him and his family was radically transformed when Harriman conceived of inviting an entire community of scientists to explore and document the coastlines of Alaska. The expedition included biologists, botanists, geographers, geologists, and zoologists, as well as several artists and intellectual writers. John A. Muir, C. Hart Merriam (chief of the U.S. Biological Survey), William E. Ritter (president of the California Academy of Sciences), Henry Gannett (chief of the U.S. Coast and Geodetic Survey), George B. Grinnell (editor of *Forest and Stream*), and Bernhard E. Fernow (former chief of the Department of Agriculture's Division of Forestry) were among the scientists on the journey.<sup>197</sup>

In the decade following their time together on what was referred to as the "Harriman Expedition," Muir and Harriman maintained a regular correspondence and formed what environmental historian Donald Worster has labeled "an improbable bond" based on a "mutual understanding ... [of] the value of an efficient railroad system and

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<sup>196</sup> Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (Pittsburgh, PA: University of Pittsburgh Press, 1999), 3. As a counter to Hays' thesis, see Donald J. Pisani, *Water, Land, and Law in the West: The Limits of Public Policy, 1850-1920* (Lawrence, KS: University Press of Kansas, 1996), 119-23 (To Pisani, conservation was more of an "emotional and moral response"—and a much more decentralized and disorganized one at that—"to perceived abuses" than the scientific movement that Hays depicted).

<sup>197</sup> See "The Harriman Expedition," *Los Angeles Times*, August 1, 1899.

on the wisdom of establishing national parks.”<sup>198</sup> Worster recently argued that, from the expedition until Harriman’s death a decade later, Muir saw Harriman “as a well-meaning friend and potential ally of the conservation movement.”<sup>199</sup> Harriman even once helped Muir recover from writer’s block.

Harriman was also a consumer of conservation science. In 1902, he personally applied to the Bureau of Forestry for experts to be dispatched to Arden House, his 15,000-acre estate in Orange County, New York, to advise him on how to conserve the estate’s 8,000 acres of dense forest.<sup>200</sup> Upon receiving Harriman’s request, the bureau sent nine men instead of the normal two to develop a working plan for improving Harriman’s timber. The foresters reported being excited at the opportunity to use “ingenious methods” for examining the abilities of various species of trees to bear shade, to reproduce, and to withstand damage from forest fires.<sup>201</sup> The nine forestry students completed the necessary fieldwork between April 1 and June 15, during which time they created a forest map of the entire tract and compiled, according to the Department of

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<sup>198</sup> Donald Worster, *A Passion for Nature: the Life of John Muir* (New York: Oxford University Press, 2008), 408.

<sup>199</sup> Worster, *Passion for Nature*, 362-63.

<sup>200</sup> In 1898, Pinchot had issued “Circular 21” as head of the Division of Forestry. This document offered to assist private landowners to develop plans for forest management and fire protection, provided that the owners pay all expenses. Thomas R. Cox et al., *This Well-Wooded Land: Americans and Their Forests from Colonial Times to the Present* (Lincoln, NE: University of Nebraska Press, 1985).

<sup>201</sup> “To Improve the Harriman Forest,” *New York Times*, April 20, 1902.

Agriculture's annual report, "a careful study of the forest, by which its character, condition, present stand, and future yield were ascertained."<sup>202</sup>

There is also evidence that Harriman was motivated not just by a form of utilitarian conservation but also by a preservationist ethos. After visiting Harriman's New York estate, Muir for one concluded that Harriman had saved that timberland from timber speculators out of a love for the forest and its wildlife. This indicated to Muir that Harriman considered land something to cherish and conserve, at least in select places and when consistent with economic development.<sup>203</sup> Beyond preserving his own 8,000-acre timbered estate in New York, Harriman's desire to leave certain places alone was also demonstrated in 1905 when he lobbied in support of the Sierra Club's efforts to incorporate the Yosemite Valley into the national park which then surrounded it. Later, in his 1907 speech before the National Irrigation Congress, he showed an aesthetic concern for the preservation of Oregon's natural beauty. He argued that "Oregon ought to be the country's playground. There's a vastness of fine scenery there."<sup>204</sup> Through his words and actions, Harriman was able to convince Muir of his concern for nature beyond its mere economic value. In the spring of 1909, Muir visited Harriman and his family in Pasadena, California, as Harriman lay on his death bed. Muir was asked how he, "a nature lover, [could] happen to be visiting a cold-blooded financier." He answered, reportedly while fighting back tears, that "Mr. Harriman has a

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<sup>202</sup> *Annual Reports of the Department of Agriculture for the Fiscal Year Ended June 30, 1902*. Report of the Secretary of Agriculture, Departmental Reports (Washington, DC: Government Printing Office, 1902).

<sup>203</sup> See Worster, *Passion for Nature*, 412

<sup>204</sup> "Magnate Wins Applause for Funny Speech," *San Francisco Call*, Sept. 5, 1907

heart. People may not know it, but he loves the flowers and the trees. He loves nature and human nature.”<sup>205</sup>

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Muir’s unabashedly gushing description of Harriman certainly came as a surprise. The same year that Harriman seized control of the Southern Pacific, Muir scoffed at how each of the transcontinental railroads invariably advertised its line as the “scenic route.” He proposed a new and much more honest advertisement: “Come! Travel our way. Ours is the blackest.... The sky is black and the ground is black, and on either side there is a continuous border of black stumps and logs and blasted trees appealing to heaven for help as if still half alive, and their mute eloquence is most interestingly touching.... No other route on this continent so fully illustrates the abomination of desolation.”<sup>206</sup> Observations such as this one regarding the ecological destructiveness of railroads have tended to obscure the fact that railroad companies themselves were not necessarily enemies of the environment. Indeed, in some cases they were at the forefront of the conservationist movements that were still in their infancy at the time of Muir’s writing in 1901.<sup>207</sup>

That railroad officials had a profit motive in seeking to ensure a continuous supply of timber for the maintenance their respective railroad empires should not undermine their conservationist credentials. Indeed, notable conservationists within the

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<sup>205</sup> “Sidetracks all Callers,” *Los Angeles Times*, March 17, 1909.

<sup>206</sup> John A. Muir, *Our National Parks* (Boston: Houghton Mifflin Co., 1901), 357-58.

<sup>207</sup> See, for example, Orsi, *Sunset Limited*, xiv-xv; Alfred Runte, *Allies of the Earth: Railroads And the Soul of Preservation* (Kirksville, MO: Truman State University Press, 2006).

federal forest bureaucracy recognized that the movement depended on the willing participation of business interests. Writing just a year before Harriman's supposed termination of land sales, for instance, former chief of the Division of Forestry, Bernhard E. Fernow, predicted that wealthy capitalists, like Harriman and Hill, "who can see the financial advantages of the future in forest properties," would quickly become the newest "class" of conservationists. Fernow thus concluded that, aside from being owned by the government, forest resources were most likely to be conserved when in "the hands of perpetual corporations and wealthy owners."<sup>208</sup> Other conservationists, including Pinchot, recognized that their movement would only succeed when private commercial entities appreciated the extent to which their continued prosperity depended on the rational management of natural resources. As Roosevelt asserted at the American Forest Congress in 1905, the conservation movement—as well as America's continued economic growth—would depend not on philanthropists or the general public, but on "the men who are actively interested in the use of the forest in one way or another."<sup>209</sup> Roosevelt defended his conservationist agenda by asserting that "the railroads must have ties."<sup>210</sup> Decision-makers within the Southern Pacific and Northern Pacific administrations agreed.

Still, others had stakes in the continued availability of timberlands on the cheap. The frustration of lumber companies at having their supply curtailed was soon translated

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<sup>208</sup> Bernhard E. Fernow, *Economics of Forestry: A Reference Book for Students of Political Economy and Professional and Lay Students of Forestry* (New York: T. Y. Crowell & Co., 1902), 345-46.

<sup>209</sup> American Forestry Association, *Proceedings*, 390-393.

<sup>210</sup> American Forestry Association, *Proceedings*, 6-8.



into public outrage against the Oregon & California and its land policies, which in turn translated to political action against that company. The Northern Pacific largely avoided this fate, primarily by keeping its policy of retention private. While Booth-Kelly spearheaded the drive against the Southern Pacific subsidiary, “big timber speculators alone,” in public lands historian David Maldwyn Ellis’ assessment, “could not secure mass support for their selfish aims.”<sup>211</sup> Rather, small speculators soon “joined the hue and cry,” followed by business owners along the route who “favored any move which would unfreeze the [railroad’s] timber holdings,” followed by those who simply disliked railroad management in general, followed finally by politicians who recognized a popular issue they could exploit.<sup>212</sup> All of this led to a federal government lawsuit for the forfeiture of the Oregon & California land grant. That is the subject of the next chapter.

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<sup>211</sup> Ellis, “Oregon and California Railroad Land Grant,” 263.

<sup>212</sup> Ellis, “Oregon and California Railroad Land Grant,” 263.

## CHAPTER 5 – INERTIA AND UNDIRECTED DRIFT

## FRAUD, FORFEITURE, AND LESSONS UNLEARNED, 1904-1916

The shift in railroad policies from rapid disposal (often at cheap prices) to retention and management met with public resistance. Considering the custom of free land and free timber that pervaded communities throughout the American West, and considering the unpopularity of railroad corporations, this should not have been a surprise. Indeed, opposition to railroad land policies came to unify the public in a way no other issue could do. Using the Oregon & California land grant's "homestead clause" as its legal basis, the federal government responded to the public outcry by filing suit in 1908 seeking either the forfeiture of the land grant or a requirement for the railroad to sell the remaining lands under the terms of the land grant.

This suit led to seven years of litigation and political wrangling, during which time the status of over two million acres in Oregon remained in legal limbo. All this time, railroad officials continued to insist that much of the remaining land was unsuitable to the sort of settlement that the homestead clause required, and that, in general, sales of timbered lands according to legal subdivision only encouraged speculation and inhibited economic development and effective management. Ultimately, the Supreme Court agreed with the railroad that the homestead clause was unworkable as applied to the remaining lands, but it also sided with the government in authorizing Congress to dispose of the remaining lands in accordance with a "policy as

it may deem fitting under the circumstances.”<sup>1</sup> Although it should have been clear to Congress that the remaining lands should be managed for a sustained timber supply rather than being cleared and sold in legal subdivisions for the purposes of agriculture, Congress disregarded not just railroad testimony, but the recommendations of government experts, in providing for exactly that. This whole episode is thus a prime example of James Willard Hurst’s famous thesis that, even in a time of rapid change, the course of lawmaking tends to be driven more by “inertia and undirected drift put in motion by the cumulative impact of countless narrowly focused actions than by plan or conscious choice of values.”<sup>2</sup>

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The Oregon & California’s largest purchaser of lands, the Booth-Kelly Lumber Company, spearheaded the campaign against the railroad. As part of the effort to force the sale of lands, A. C. Dixon, a manager of Booth-Kelly, traveled to Washington, D.C. in 1908 to testify before Congress. He testified to all of the development and settlement that had been made possible through the railroad’s selling of lands prior to 1903, processes which were then thwarted by the termination of land sales. He admitted that the lumber interests were indeed “behind and favored every resolution [on the question

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<sup>1</sup> Oregon & California Railroad Co. v. United States, 238 U.S. 393, 438 (1915).

<sup>2</sup> James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge, MA: Harvard University Press, 1964), 5. See also Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* (Washington, DC: Island Press, 1992) (arguing that natural resource issues, even at the end of the twentieth century, continued to be governed by outmoded ideas and policies from the nineteenth century); Donald J. Pisani, *Water, Land, and Law in the West: The Limits of Public Policy, 1850-1920*, Development of Western Resources (Lawrence, KS: University Press of Kansas, 1996) (exploring the gap between American ideals and the implementation of them and the resulting extent to which law is the product of many disparate choices rather than the logical extension of abstract legal principles).

of disposal of lands] adopted in the state and are still in hearty accord with the original purpose of the movement, it being necessary for the perpetuation of their business.”<sup>3</sup> John W. Blodgett and Arthur C. Hill, both officers and large stockholders in Booth-Kelly, accompanied Dixon to Washington. While Dixon was navigating the political waters in Washington, Blodgett and Hill traveled to New York to meet with Charles W. Eberlein, land agent for the Southern Pacific’s constituent lines, to try to resolve their issues directly with the railroad. At this meeting, they not only reiterated their threat to force the Oregon & California to sell its remaining land through the political process but also complained about the railroad beginning to operate its own mills rather than purchasing lumber from Booth-Kelly. Eberlein explained to Hill that the railroad only started its mills because Booth-Kelly was unreliable; it had canceled contracts and was unable to furnish materials when the Oregon & California most needed them—particularly after the San Francisco fire when Booth-Kelly and others dramatically raised the price of timber and ties.<sup>4</sup>

According to Eberlein, the people stirred to excitement by Booth-Kelly and other lumber companies completely disregarded—and “brutally so”—the facts that the San Francisco fire had left the railroad helpless in terms of the rapid disposal of lands, and that the railroad was working rapidly to recommence the selling of agricultural and

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<sup>3</sup> A. C. Dixon, Statement to Congress, Committee on the Public Lands, March 12-14, 1908, included in Transcript of Record, Supreme Court of the United States, no. 492, October term, 1916, *Oregon & California Railway Co. v. United States* (hereinafter referred to as “Oregon & California Transcript”), available at <http://gdc.gale.com/products/the-making-of-modern-law-u.s.-supreme-court-records-and-briefs-1832-1978/> (last accessed February 20, 2014), 2644.

<sup>4</sup> Charles W. Eberlein testimony, *Oregon & California Transcript*, 2372-73.

grazing lands.<sup>5</sup> And the movement, Eberlein later argued, actually had the effect of delaying sales, not speeding them up. In his words, “the excitement that was fomented against the Railroad Company ... had a very quieting effect on” applications for the purchase of land. After the Weyerhaeuser application in December of 1906, there were no bona fide applications to purchase lands, according to Eberlein, though there were “a number of cases where people asked that an application be filed.” In most of these cases, however, there was no immediate desire for the land.<sup>6</sup>

Even as Dixon and other lumbermen advocated for action against the Oregon & California based on its violations of the grant's terms by selling lands in large tracts, they resisted all effort to void those sales as part of the remedy. As Dixon articulated, “[i]t has never been contemplated that lands already sold and upon which development has been in progress for years should be taken from the present holders and again placed on the market.”<sup>7</sup> His purported rationale was that doing so would “arrest development” in the state and “give its chief industry a blow from which it would perhaps never fully recover.”<sup>8</sup> In a prophetic moment, Dixon also contended that “even attack[ing] the titles of the present holders would be almost as serious a matter,” as “none of the lands,”

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<sup>5</sup> Eberlein testimony, Oregon & California Transcript, 2259-60.

<sup>6</sup> Eberlein testimony, Oregon & California Transcript, 2331. Although railroad officials may have felt the vehement opposition against the railroad's land policies were unwarranted and ultimately misguided, this opposition was not altogether unanticipated. Eberlein, for one, had projected years earlier that the railroad would likely face just such an occurrence. In a 1904 letter to Herrin, he predicted that “the matter is going to come to a head without any action on our part. ... I have advice from Oregon that there is considerable excitement and undoubtedly we shall be obliged to defend ourselves vigorously.” Eberlein testimony, Oregon & California Transcript, 2395-96.

<sup>7</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2644.

<sup>8</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2644.

whether on even or odd sections, could be logged during the duration of the resulting lawsuit.<sup>9</sup>

Having been elected to serve a constituency frustrated with the railroad's apparently anti-development land policies, Representative Willis C. Hawley, from Oregon, exploited Dixon's testimony to procure the passage of a resolution, on April 30, 1908, authorizing the attorney general to institute proceedings to enforce the government's legal rights against the railroad.<sup>10</sup> Attorney General George W. Wickersham complied and filed suit in September of 1908 against the railroad, one of its creditors, and many individuals and companies who had purchased lands in violation of the grant's terms.<sup>11</sup> While Congress did not follow Dixon's advice in not attacking the validity of past sales made in violation of the Oregon & California grant's terms, years later, in 1912, Dixon finally got his way. That year, Congress dropped the government's claims against individuals and companies that had purchased large tracts of land in good faith and without knowledge of the grant's homestead clause forbidding such sales.<sup>12</sup> This legislation, the Forgiveness Act, was passed in no small part because

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<sup>9</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2644.

<sup>10</sup> Joint Resolution instructing the Attorney-General to institute certain suits, and so forth, 35 *U.S. Statutes at Large* 571 (1908) Prior to that, the Oregon State Senate passed Joint Memorial 3 requesting that Congress "enact such laws and take such steps by resolution, or otherwise, as may be necessary to compel said railroad company to comply with the conditions of said grant, and to enact and declare some sufficient penalty for noncompliance therewith by way of forfeiture of the grant, or otherwise, as in the wisdom of Congress may seem best." *General Laws and Joint Resolutions and Memorials Enacted and Adopted by the Twenty-fourth Regular Session of the Legislative Assembly* (Salem, OR: Willis S. Duniway, State Printer, 1907), 516-17.

<sup>11</sup> Eberlein testimony, Oregon & California Transcript, 2266-67, 2380.

<sup>12</sup> The Forgiveness Act of 1912, 37 *U.S. Statutes at Large* 320.

the lawyers at the Department of Justice had convinced members of Congress that the individuals who purchased the affected 524,000 acres were “small fry” settlers and were so numerous that litigation would be virtually unending, meaning also that the land would be tied up for decades. The legislation provided that innocent purchasers could keep title so long as they paid the government \$2.50 per acre, even though some of the land was worth as much as \$500 per acre.<sup>13</sup>

It is doubtful whether members of Congress actually believed most purchasers of railroad lands were innocent, good-faith purchasers, given past experiences in Oregon and elsewhere. Indeed, several of the purchasers were lumber companies and other interests purchasing tracts in excess of ten thousand acres, and many of these “innocent purchasers” had been indicted—and some convicted—of land frauds over the previous decade. During that time, the brazenness of those committing frauds in Oregon land deals had become a national spectacle, a real achievement given the pervasiveness of public lands frauds across the West. The defrauders may have been justified in feeling insulated from any legal repercussions, given that most of those charged with implementing the land laws and reporting, investigating, and prosecuting irregularities were themselves among the defrauders. In 1902, however, things began to change.

That year, a resident of Tucson, Arizona, Joost H. Schneider, wrote to the General Land Office (GLO) to report on a land fraud ring operating in northern California. Specifically, he wrote that two California real estate agents, John Benson and F. A. Hyde, led an expansive ring that fraudulently bought up valueless lands at

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<sup>13</sup> See *Oregon and California Land Grants: Hearings before the Committee on the Public Lands* (Washington, DC: Government Printing Office, 1916) (hereinafter “Oregon & California Hearings of 1916”), 203.

prescribed prices and then bribed land officials to have the lands included in proposed forest reserves so they could be exchanged for valuable lands under the Forest Management Act of 1897's "In Lieu Land" provision.<sup>14</sup> Schneider, a former employee of the fraud ring, felt that Benson and Hyde had cheated him of his share of the spoils, and this letter was his revenge. Unfortunately, Schneider's first letter was ignored, as were multiple follow-ups. The reason was likely that their recipient, Commissioner of the GLO Binger Hermann, was himself complicit in land frauds in Oregon, and he feared that increased attention on land dealings in California would ultimately lead to Oregon. Schneider finally broke through Hermann's stone-walling when he sent a letter that arrived at GLO headquarters when Hermann was on vacation. The office directed the letter to the assistant commissioner, who in turn sent a special agent to investigate. When Hermann found out, he did not give in easily. He first tried to intercept the agent and prevent him from interviewing Schneider. When that failed, he filed the completed report away upon his receipt of it, hoping that would be the end of the matter. It was not. The assistant commissioner searched for and ultimately found the report, which he then forwarded to Secretary of Interior Ethan A. Hitchcock. The secretary sent special

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<sup>14</sup> Forest Management Act of 1897, 30 *U.S. Statutes at Large* 11, 36 (providing that "in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent"). This provision served as the basis for many fraudulent land acquisitions; whenever a defrauder learned of areas proposed (or soon to be proposed) to be included within reserves, he would pay people to locate and fraudulently perfect homestead claims on such lands, with an agreement they transfer the resulting patents to the defrauder. Those lands could then be exchanged for more valuable, unreserved timberlands, which in turn could then be transferred to timber companies for many times more what the defrauder had paid.



agents to California and Oregon to investigate the allegations further.<sup>15</sup> Even with continuing interference from Hermann,<sup>16</sup> the agents sent to Oregon found much more than they were looking for, as they soon stumbled upon another fraud ring with connections to some of the highest officers in Oregon and United States politics.<sup>17</sup> This ring, headed by Stephen A. D. Puter, a timber cruiser, Franklin P. Mays, an Oregon attorney and state senator, and Horace G. McKinley, a small-time timber speculator, had been in operation for years before the special agents' arrival in 1903.

In one of the ring's previous deals, Puter in 1899 agreed to supply Minnesota lumberman Charles A. Smith with over nine thousand acres of prime timberland on the South Santiam River in Linn County, Oregon. Puter lined up fifty-seven dummy locators, mostly from Portland, to make claims under the Timber & Stone Act.<sup>18</sup> Unfortunately for Puter, the Northern Pacific eyed the same tracts as potential indemnity selections under its land grant. When that company learned of the entries, it formally protested them, knowing that the vast majority of claims under the Timber & Stone Act were fraudulent. Despite being a friend and frequent co-conspirator of Puter's, Mays represented the Northern Pacific in the proceedings before the Roseburg land office.

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<sup>15</sup> John Messing, "Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903-1910," *Pacific Historical Review* 35, no. 1 (February 1966): 39-40.

<sup>16</sup> This interference led Secretary Hitchcock to fire Hermann, but not before Hermann was able to destroy many files, likely those that most implicated him in frauds. Gregory Llewellyn Gordon, "Money Does Grow on Trees: A. B. Hammond and the Age of the Lumber Baron" (PhD diss., University of Montana, 2010), 300.

<sup>17</sup> Messing, "Public Lands, Politics, and Progressives," 39-41. As with Schneider alerting the GLO to the Benson-Hyde ring, it was a disgruntled associate who provided evidence against Mays, Puter, and McKinley. Messing, "Public Lands, Politics, and Progressives," 41.

<sup>18</sup> Puter was one of the fifty-seven locators.

Puter had asked him to represent his interests, but he had said he was too busy. When Puter found out that his friend was representing his opponent, he confronted Mays, who responded (“rather haughtily” according to Puter), “[d]on’t you know that I am one of the regular attorneys of the Northern Pacific Railway Company?”<sup>19</sup> Mays reassured Puter that Puter would still be “well represented” and that Mays would “be easy with him.”<sup>20</sup> After Puter’s testimony as the first witness, which Puter told Mays went well, Mays visited Puter at his hotel room and suggested a settlement whereby they let the Northern Pacific have half the land. Ultimately, they reached an agreement that Smith would keep thirty-three, and that Puter would withdraw the other twenty-four entries to allow the Northern Pacific to file indemnity selection.<sup>21</sup>

It was not a done deal, however, as all patents required approval from Washington, D.C. Though this step was normally ministerial, the Northern Pacific’s involvement apparently aroused suspicions in the GLO and the Department of the Interior, causing the patents to be suspended pending a special investigation. The delay in patents prompted Puter to dispatch his financial associate Frederick A. Kribs to Washington, D.C., where Kribs reached an agreement with Senator John H. Mitchell, from Oregon, to pay Mitchell twenty-five dollars for each patent he could expedite, both

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<sup>19</sup> Stephen A. D. Puter & Horace Stevens, *Looters of the Public Domain* (Portland, OR: Portland Printing House, 1908), 40.

<sup>20</sup> Puter, *Looters of the Public Domain*, 40.

<sup>21</sup> Puter, *Looters of the Public Domain*, 41-42.

in this case and in all future cases.<sup>22</sup> In the coming years, there was much corruption to keep Mitchell busy.<sup>23</sup>

Puter had friends in all the right places. Just as defrauders from Benson and Hyde in California and Arizona to Puter and Mays in Oregon had allies at the GLO headquarters, so too did they enjoy much support at the local level. Puter and his associates, for instance, frequently relied upon sympathetic local land officials. One such official was Marie Ware, commissioner of the Eugene land office and intimate acquaintance of Puter's associate McKinley. In one case, Puter's ring was so blatant as to do away with the typical practice of paying people to make fraudulent locations and instead simply filing a stack of locations themselves using fictitious names. With Ware in charge of the land office, there was nobody they even needed to fool.<sup>24</sup>

They also had allies in the Department of Justice. Mays himself was a prime example of this, as he first met Puter as a United States Attorney for the District of Oregon. From the time Puter met Mays in 1890 until Puter stopped operations some fifteen years later, Puter claimed he consulted with Mays "in regard to a large majority of the deals in which [Puter] was interested."<sup>25</sup> Mays not only offered advice but also helped protect Puter and his other associates from prosecution. In one deal after special agents had been sent to Oregon, Mays advised Puter to be careful because he did not

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<sup>22</sup> Puter, *Looters of the Public Domain*, 44.

<sup>23</sup> In one case just a year later, he allegedly accepted a bribe of two \$1000 bills directly from Puter to expedite the issuance of patents in another fraudulent land deal, this one involving the Forest Reserve Act's "In Lieu Land" provision. Messing, "Public Lands, Politics, and Progressives," 42-43.

<sup>24</sup> Gordon, "Money Does Grow," 297.

<sup>25</sup> Puter, *Looters of the Public Domain*, 22.

want to have to prosecute him if the agents found Puter out.<sup>26</sup> In 1903, after the special agents found sufficient evidence to justify formal federal proceedings against Puter and others involved in land frauds in Oregon, U.S. District Attorney John Hall took over the cases, and he too proved a reliable friend through his efforts to stall the prosecutions. However, Hall's assistant, Francis Heney, appointed over Hall's objections, proved to be just the opposite. Upon suspecting Hall was shielding certain prominent people from prosecution. Heney traveled to Washington, D.C. to meet with Attorney General Philander Chase Knox and Secretary Hitchcock, both Roosevelt Republicans eager to eliminate corruption in politics. After that meeting, Knox appointed Heney as a special prosecutor to investigate and prosecute the Oregon land frauds.<sup>27</sup> At that point, Mays reportedly said to Puter, "[i]f Hall should continue to have full swing, I shall not fear the outcome; but should this man Heney gain control of the reins, there is no telling where we might all land."<sup>28</sup>

Heney immediately issued indictments in what he considered the strongest case, one Heney did not know also involved an alleged two thousand dollar bribe to Mitchell. Although at the start of trial, in November of 1904, Hall attempted to continue treating Heney as his assistant, Heney took over the prosecution in a matter of days. Heney expected Mitchell to cooperate, but Mitchell refused to answer certain of Heney's questions.<sup>29</sup> Even without Mitchell's compliance, Puter was convicted. When Mays

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<sup>26</sup> Puter, *Looters of the Public Domain*, 30.

<sup>27</sup> Gordon, "Money Does Grow," 302.

<sup>28</sup> Puter, *Looters of the Public Domain*, 106.

<sup>29</sup> Puter, *Looters of the Public Domain*, 145-46.

declined to post bond on his behalf, Puter felt betrayed and isolated, and he decided to testify against his co-conspirators and others who were complicit, including Mays and Mitchell.<sup>30</sup> At the end of 1904, Heney convened a grand jury that over the next several months returned twenty-six indictments against one hundred people, including State Senator Mays, Senator Mitchell, U.S. Representative Hermann (who had been fired from his post in the GLO for his interference with the initial investigation only to be elected to U.S. Congress representing Oregon), U.S. Representative John H. Williamson, U.S. District Attorney Hall, and many other state and federal government officials.<sup>31</sup> Heney served as prosecutor until December 3, 1905, at which time Theodore Roosevelt nominated William C. Bristol, a Portland attorney, to replace him. As with Heney, government officials involved in the frauds but not yet prosecuted opposed his nomination. Senator Charles W. Fulton (who despite his own extensive involvement in the frauds remained the only member of Oregon's congressional delegation not yet indicted) led the Senate in opposing his nomination based on Bristol's reputation, according to one notable observer, as a man of "strict integrity and marked legal ability, and as one possessed of the courage of his convictions."<sup>32</sup> Fulton escaped prosecution but lost his seat in 1908, due in part to Heney's active campaign against him.<sup>33</sup>

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<sup>30</sup> Gordon, "Money Does Grow," 302; Puter, *Looters of the Public Domain*, 172-174

<sup>31</sup> Gordon, "Money Does Grow," 302-303. For a non-exhaustive list of the indictments, see Puter, *Looters of the Public Domain*, 442-451.

<sup>32</sup> Horace Stevens, "Siletz Land Fraud," [http://www.corvalliscommunitypages.com/Americas/US/Oregon/OregonNotCorvallis/story\\_of\\_the\\_siletz\\_land\\_fraud\\_b.htm](http://www.corvalliscommunitypages.com/Americas/US/Oregon/OregonNotCorvallis/story_of_the_siletz_land_fraud_b.htm)

<sup>33</sup> Charles A. Smith, one of the Minnesota lumbermen who used Puter's services, escaped prosecution altogether due to the passing of the statute of frauds, as did Puter's financial associate, Kribs.

Heney and his successors enjoyed many successes in the trials that carried on into the next decade. His most notable victory was the conviction of Mitchell in July of 1905.<sup>34</sup> Despite the evidence against him, Mitchell continued to proclaim his innocence, not based on factual discrepancies but rather on his inability to see what he did as wrong. As historian Jerry A. O'Callaghan characterized Mitchell's situation, "Mitchell belonged to a passing generation which did not comprehend the change in public temper. He was caught in a shift of public mores, which is a cruel thing."<sup>35</sup> Even Democrats within the state had begun to feel sorry for Mitchell. In December of 1905, while Mitchell's case was on appeal to the Supreme Court, Mitchell died from complications flowing from having a tooth pulled.<sup>36</sup> James H. Raley, an attorney and former state senator, wrote to Governor George E. Chamberlain, also a Democrat, that Mitchell's death was "the most fortunate solution of a most unfortunate and deplorable situation."<sup>37</sup> Still, Raley wrote, "no one who has known him personally, or who has known of his past services to this State and to the Nation at large, can refrain from a deep feeling of sorrow of this sad ending of a useful life."<sup>38</sup> In all, over a thousand

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<sup>34</sup> Later, Hall and Mays would also be convicted. Hermann narrowly avoided conviction in 1910.

<sup>35</sup> Jerry A. O'Callaghan, *The Disposition of the Public Domain in Oregon* (U.S. Government Printing Office, 1960), 92.

<sup>36</sup> Messing, "Public Lands, Politics, and Progressives," 56.

<sup>37</sup> J. H. Raley to George E. Chamberlain, December 8, 1905, George Earle Chamberlain papers, MSS 1025, Box 1, Folder 4, Oregon Historical Society Research Library, Portland, Oregon (OHSRL).

<sup>38</sup> Raley to Chamberlain, December 8, 1905.

people in twenty-two states were indicted, with 126 being convicted, for actions relating to land frauds.<sup>39</sup>

As to the jury of public opinion, Governor George E. Chamberlain recognized the potential political windfall for himself and other Democrats, considering that most public officials involved were Republicans. In 1905, he wrote,

The outlook here for at least partial Democratic success is flattering. The land fraud prosecutions have involved so many of the old Republican leaders that the people are very apt to hold them all measurably responsible for the disgrace that has overwhelmed the States. One of our Senators (Mitchell) and one Congressman (Williamson) have been convicted, and another (Hermann) stands indicted here and in Washington for complicity in these frauds, and the end is not yet. The methods resorted to to accomplish Republican success in the East, the levying of tribute upon the widow and the orphan through the instrumentality of Insurance Companies, the sale of official information for speculation purposes in the Departments at Washington, fraud and speculation on the part of officers in said Departments, which are daily being brought to light, disagreements among the leaders of the party as to tariff revision, railway regulation and trust suppression, all combined, are arousing in the people a spirit of opposition to the party in control.<sup>40</sup>

Of course, to take full advantage, Chamberlain also had to show that he had acted to prevent the frauds, or at least to prosecute them after the fact. He considered himself to have been proactive in addressing the problem of frauds and an important part of bringing the defrauders to justice. As he wrote in one letter, “I have worked at this matter for three years through the instrumentality of our State Land Agents, Morrow and West,

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<sup>39</sup> Puter, *Looters of the Public Domain*, 452-54. After Mitchell’s conviction in 1905, Williamson was convicted, though the Supreme Court overturned it. Mays was convicted in September of 1906 and Hall in 1908. Penalties were typically some months in county jail with fines ranging from hundreds of dollars to a maximum of \$10,000. Hermann narrowly escaped conviction when his 1910 trial resulted in a hung jury. Puter, *Looters of the Public Domain*, 452-54.

<sup>40</sup> Chamberlain to N.O. Fanning, New York, October 13, 1905, Chamberlain papers, MSS 1025, Box 5, Folder 4, OHSRL.

who in turn have done all in their power to ferret out fraud, and the results are now being attained.”<sup>41</sup>

Not all supported Chamberlain’s handling of the Oregon land frauds, including at least one person, A. T. Kelliher, a timberland dealer from Chicago. Of course, Kelliher was also accused of participating in the frauds, so he was far from impartial. Kelliher especially disapproved of the governor placing pressure on Kelliher's defense attorney in Portland to withdraw from Kelliher’s representation. This attorney, according to Kelliher, “received a quasi social and political call from [Chamberlain] and on account of [Chamberlain’s] influence refused to proceed further in [Kelliher’s] behalf.”<sup>42</sup> This astounded Kelliher as an act beneath the integrity of the Office of the Governor: “Only think of the Governor of the great state of Oregon condescending to such an act,” he wrote.<sup>43</sup> Kelliher even offered to give five hundred dollars to charity if Chamberlain could “point out any case where any governor of any state or territory in the United States has ever personally used his influence to prevent the attorney who has been selected by the person who has been charged with a crime, from acting for the accused.”<sup>44</sup> Chamberlain’s response was simple. He referred to records containing evidence that Kelliher was not a good faith purchaser (or seller) of Oregon timberlands,

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<sup>41</sup> Chamberlain to T.H. Crawford, May 1, 1905, Chamberlain papers, MSS 1025, Box 5, Folder 4, OHSRL.

<sup>42</sup> A.T. Kelliher to Chamberlain, September 26, 1905, Chamberlain papers, MSS 1025, Box 1, Folder 4, OHSRL.

<sup>43</sup> Kelliher to Chamberlain, September 26, 1905.

<sup>44</sup> Kelliher to Chamberlain, September 26, 1905.



such that there was little ground for his “apparently righteous indignation.”<sup>45</sup> “Where lands have been stolen from the State,” he wrote, “I propose to find the thief if I can, and I expect the thieves to assail me. I propose to get the stolen property back if I can, and I expect to meet resistance.... Your implied threats have no effect upon me, nor will they deter me the least in the discharge of my duty as I see it.”<sup>46</sup>

Even at the time, some questioned why there were so many frauds. Some predictably pointed to moral failings. Horace Stevens, a former land office clerk who collaborated with Puter on his jail-house tell-all memoir, for one, blamed the participation of one person on his being the son of a man who had served in the Confederate army, reasoning that the “stunting of such men’s ethical growth by the practice and defense of human enslavement might, as has sometimes been theorized, have been a factor in their lack of any meaningful moral compass.”<sup>47</sup> But the comprehensiveness of the frauds belied Stevens’ accusation. It was not just Confederates, or even “speculators” or “monopolists,” who engaged in illegalities. Rather, as Pisani has argued, people across the West used “speculators” as scapegoats in part “to hide their own extensive, and often illegal, land dealings.”<sup>48</sup>

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<sup>45</sup> Chamberlain to A.T. Kelliher, Chicago, IL, September 20, 1905, Chamberlain papers, MSS 1025, Box 5, Folder 4, OHSRL.

<sup>46</sup> Chamberlain to Kelliher, September 20, 1905.

<sup>47</sup> Horace Stevens, “The Siletz Land Fraud and Corvallis, Oregon” (1908), available at [http://www.corvalliscommunitypages.com/Americas/US/Oregon/OregonNotCorvallis/story\\_of\\_the\\_siletz\\_land\\_fraud\\_b.htm](http://www.corvalliscommunitypages.com/Americas/US/Oregon/OregonNotCorvallis/story_of_the_siletz_land_fraud_b.htm)

<sup>48</sup> Pisani, *Water, Land, and Law in the West*. Moreover, it is perhaps too simplistic to cast those engaged in land frauds as unethical or immoral, in that they were in fact motivated by a natural rights view of land based on notions of popular sovereignty that had deep roots in American society and political culture. See Pisani, *Water, Land, and Law*, 52-53.

Given the pervasiveness of land frauds, there must have been some systemic failure in addition to any human ones. As early as 1883, a congressional committee concluded that “[t]he present system of laws seems to invite frauds.” As one author later summarized that committee’s conclusion, “the impossibility of purchasing, in a straightforward, honest way from the Government either timber or timber-bearing lands” was the principal cause of the timber deprecations and frauds.<sup>49</sup> In the midst of the Oregon land fraud scandal, the editor of the *American Lumberman*, James Defebaugh, succinctly summarized the key problem with all of the land laws when he wrote that 160 acres “is hardly adequate for the establishment of a lumber manufacturing operation.”<sup>50</sup> Even Puter himself attributed the frauds to legal barriers to acquiring Oregon’s land and resources.<sup>51</sup> Prominent historian Vernon Carstensen agreed that a combination of human frailties and systemic failures were to blame; he wrote, in 1963, that “the alienation of the public land exhibits much human cunning and avarice, but in many instances what was called fraud represented local accommodation to the rigidities and irrelevance of the laws.”<sup>52</sup>

In that vein, Edward H. Harriman’s apparent refusal in 1903 to sell his railroad empire’s land holdings seemed yet another barrier to Oregon’s economic development.

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<sup>49</sup> Gordon, “Money Does Grow,” 287.

<sup>50</sup> Gordon, “Money Does Grow,” 287.

<sup>51</sup> Puter, *Looters of the Public Domain*, 11.

<sup>52</sup> Vernon Carstensen, introduction to *The Public Lands*, ed. Vernon Carstensen (Madison: University of Wisconsin Press, 1963), xxvi. Also, in 1979, two economic historians argued that “in the face of restrictive land laws, fraud was necessary if lumber companies were to acquire large tracts of land to take advantage of economies of scale of logging.” Gary D. Libecap and Ronald N. Johnson, “Property Rights, Nineteenth-Century Federal Timber Policy, and the Conservation Movement,” *Journal of Economic History* 39, no. 1 (1979): 129–42.

However, while the cessation in sales precipitated the 1908 lawsuit, the many sales the railroad made prior to 1903 in violation of the homestead clause served as its legal justification. Not only did the Oregon & California ignore that provision in its disposal of lands, but government officials and the public had also neglected it prior to 1904. Early in that year, however, the *Oregonian* published a notice of an identical homestead clause in a 1969 charter and land grant to the Coos Bay Wagon Road Company for the construction of a military road from Coos Bay to Roseburg in southern Oregon.<sup>53</sup> When the Oregon & California's Land Agent, George Andrews, saw the notice, railroad officials became concerned that it was only a matter of time for the clause in the Oregon & California's grant also to be discovered. Andrews thus wrote to the Southern Pacific's chief counsel for advice as to whether to keep silent or whether to help the Coos Bay company to defend its grant.<sup>54</sup> The response was not to get involved but to watch for changes in circumstances.<sup>55</sup> As Andrews and other railroad officials feared, railroad opponents soon discovered the Oregon & California's homestead clause and used it in its effort to compel the company to sell the remainder of its grant at an amount far less than market value.<sup>56</sup>

Interestingly, the discovery of the homestead clause resuscitated a decades-old legal controversy. Potentially, if the Southern Pacific could claim to be a successor of

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<sup>53</sup> David Maldwyn Ellis, "The Oregon and California Railroad Land Grant, 1866-1945," *Pacific Northwest Quarterly* 39, no. 4 (1948): 262-63.

<sup>54</sup> Ellis, "Oregon & California Land Grant," 263.

<sup>55</sup> Ellis, "Oregon & California Land Grant," 263.

<sup>56</sup> Ellis, "Oregon & California Land Grant," 263.

one of the two “Oregon Central” corporations (the so-called “East Side” and “West Side” companies) of the 1860s, and if it could show that its predecessor “Oregon Central” entity legally availed itself of the original 1866 grant, then it might not be beholden to the homestead clause contained in the 1869 grant. In 1907, publisher and historian Leslie M. Scott recognized that issue’s potential importance. After the *Oregon Historical Quarterly* published rival first-person accounts from two surviving members of the “Oregon Central” companies, Joseph Gaston and Samuel A. Clark, Scott wrote to the journal’s editor, Frederick G. Young, a professor of sociology and economics at Eugene. Scott argued that the Oregon & California’s predecessor was the “East Side” company, and that such company could not have acquired a vested interest under the 1866 grant. He also acknowledged that he was not an unbiased historian regarding the matter. Rather, he admitted, “these historical conclusions of mine have been but accessories to my real purpose in studying into the railroad controversy,” namely “to convince myself that the Southern Pacific is bound to observe the terms of the act of April 10, 1869, in selling the lands yet retained from the grant.”<sup>57</sup>

An anti-conservation impulse fueled the opposition to Harriman and his policies. Indeed, while historians have questioned Harriman’s motives in ordering the termination of land sales, Oregon residents fully believed his conservationist rationale. And this was the primary reason they opposed the Oregon & California’s retention of lands. Harriman’s explanation of his railroad’s new policies in Sacramento in 1907 enraged a wide cross-section of the public, particularly in the affected localities of

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<sup>57</sup> Leslie M. Scott, the *Oregonian*, to Professor Frederick G. Young, April 16, 1907, Southern Pacific Collection, Box 3, Folder 7, OHSRL.

Oregon. Harriman defended the company's withdrawal as not being motivated by speculation. Rather, he stated, the railroad would hold "those lands [as necessary] to protect [the people] in the future."<sup>58</sup> His view of protecting Oregonians was in ensuring the railroad maintained an adequate supply of timber through retaining a "reserve" so that nobody in the future could "accuse [the company] of wasting the resources which we had at our command."<sup>59</sup> His use of the word "reserve" was especially problematic. While the opposition against Harriman and the Oregon & California undoubtedly fed off a populist distrust of railroads as malevolent monopolies that threatened to hold local populations hostage to their economic whims,<sup>60</sup> people also linked Harriman to what they saw as an equally menacing force: the conservation movement. In the weeks following his 1907 speech at Sacramento, the *Oregonian* accused Harriman of desiring "to make a reserve out of the whole of Oregon." In fact, said the paper, "he counts it his reserve now."<sup>61</sup>

The *Oregonian* questioned not just Harriman's motivations, but also those of all who purported to be concerned with conservation: "this state is plastered from one end to the other with timber speculators in syndicates and as individuals. All pretend to be saving for the nation a wood supply. The truth is they are keeping out settlement and

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<sup>58</sup> *Official Proceedings of the Fifteenth National Irrigation Congress* (Sacramento, CA, 1907).

<sup>59</sup> *Official Proceedings of the Fifteenth National Irrigation Congress* (Sacramento, CA, 1907), quoted in *Oregon & California Hearings of 1916*, 143-44.

<sup>60</sup> See Richard J. Orsi, *Sunset Limited: The Southern Pacific Railroad and the Development of the American West, 1850-1930* (Berkeley: University of California Press, 2007); Larry Haeg, *Harriman vs. Hill: Wall Street's Great Railroad War* (Minneapolis: University of Minnesota Press, 2013).

<sup>61</sup> "Mr. Harriman's Apology Not Accepted," *San Francisco Call*, Sept. 17, 1907.

maintaining a wilderness in order at some future day to gratify their lust for wealth.”<sup>62</sup> The *Oregonian* believed that the state needed, above all, “the clearing up of forest land” near the railroads so that it could “be used for agriculture and for sustaining a larger population.”<sup>63</sup> To the people along the Oregon & California line, whether Harriman epitomized the speculator or the conservationist was immaterial, as the conservationist was merely a new form of speculator. Both were seen as equally threatening to the rapid development of the region.

Oregon residents made their anti-conservation views known through their political opposition to forest reserves. One person involved in real estate, insurance, and mines, Frederick R. Mellis, wrote to Chamberlain in July of 1903 with his opposition to a proposed forest reserve in Grant County. According to Mellis, the federal government “seem[ed] to have gone ‘forest reserve mad.’”<sup>64</sup> He linked the establishment of reserves with taking lands away from Oregon residents. “Every few weeks,” he wrote, “there is an announcement [*sic*] from Washington that some other unfortunate section of this state has been discovered, where divorce proceedings would prove beneficial to Oregon.”<sup>65</sup> He also questioned the integrity of agents sent to the state to survey lands and to recommend which should be reserved: “it all depends on the report of inspectors who

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<sup>62</sup> “Mr. Harriman’s Apology Not Accepted.”

<sup>63</sup> “Mr. Harriman’s Apology Not Accepted.”

<sup>64</sup> Frederick R. Mellis to Chamberlain, July 24, 1903, Chamberlain papers, MSS 1025, Box 1, Folder 1, OHSRL.

<sup>65</sup> Mellis to Chamberlain, July 24, 1903. He apparently misunderstood that mining would be prohibited in forest reserves, though this could have represented not a misunderstanding but distrust.

in my opinion are not sent here for the purpose of making an unbiased statement of conditions as they find them, but to make converts for the governments [*sic*] policy.”<sup>66</sup>

A substantial part of Mellis’ concern came from a misunderstanding of both the law of forest reserves and the physical geography of Oregon timberlands. Mellis seemed to assume that mining would be prohibited from forest reserves, though the 1897 legislation first providing for the management of reserves explicitly extended mining laws to the reserves.<sup>67</sup> He also argued that the land was more valuable to farmers in the valley after being deforested, despite all of the evidence of the exponential rise in value of timberlands, the costs associated in clearing the timber, and the unsuitability of the soils and terrain to agriculture.<sup>68</sup> He insisted,

this land was worth absolutely nothing until the prospector came along and demonstrated its value for mining. It will again be worth nothing if the miner is harrassed [*sic*] by the government and driven away. The farmer in the valley will gain nothing by government protection of trees, for the rapid growth of brush where the trees have been cut off, prevents the snow from quick melting, far better than where the trees are permitted to stand.<sup>69</sup>

The willful ignorance of Oregonians to physical and economic realities would continue for decades. Unfortunately, it would also impact federal policy.

Mellis claimed to represent the views of not just himself, but the entire mining industry, when he asserted that “every miner interested in the section affected by the

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<sup>66</sup> Mellis to Chamberlain, July 24, 1903.

<sup>67</sup> 30 *U.S. Statutes at Large* 11, 36 (1897) (“Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof”).

<sup>68</sup> See Eberlein testimony, Oregon & California transcript, 2290.

<sup>69</sup> Mellis to Chamberlain, July 24, 1903

proposed reserve, is bitterly and unqualifiedly opposed to it.”<sup>70</sup> Indeed, it was not just miners that opposed the reserves, as Oregonians assembled all across western Oregon to protest additional reserves. In May of 1905, for example, a group wrote to Governor Chamberlain claiming to represent the interests of “certain citizens” in the town of Tory in Wallowa County, who had assembled in a mass meeting “for the purpose of considering the most expeditious means of getting portions of [two townships] now included in the Walla Walla reserve restored to settlement.”<sup>71</sup> Regarding federal forest policy, they wrote the following in support of their petition: “We understand the forestry act [*sic*] to define that land more suitable for Agricultural purposes than for timber shall not be included in reserves, and there is no question but that the land is equal to any in the state. Hoping you will be able to consider this matter favorably.”<sup>72</sup>

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<sup>70</sup> Mellis to Chamberlain, July 24, 1903

<sup>71</sup> J.A. Baker, A.B. Davies, W.S. Adams, and W.P. Davis to Chamberlain, May 30, 1905, Chamberlain papers, MSS 1025, Box 1, Folder 3, OHSRL. They had passed a motion “that a petition setting forth the matter fully be sent to the President and also to Senator Fulton.” Having encountered difficulties getting the petition “into the hands of the President,” someone suggested Baker write Chamberlain to ask if he would forward the petition to the president.

<sup>72</sup> Baker et al. to Chamberlain, May 30, 1905. Chamberlain forwarded the petition to the president, who in turn sent it to Pinchot, who responded that a report on the area would be prepared, upon which “action can be taken.” Pinchot to President Roosevelt, June 21, 1905 (copy), Chamberlain papers, MSS 1025, Box 1, Folder 3, OHSRL. Later, in a letter to Pinchot, Chamberlain said he “sincerely trust[ed] that [his] Department may eliminate the lands mentioned by settlers in their petition. You will observe from an examination of the map which you have that the area sought to be eliminated is at one end of the reserve and will not materially affect the boundary thereof.” Regarding the character of the land in question, Chamberlain wrote: “Personally I do not know the conditions there, nor am I acquainted with many of the petitioners but have reason to believe that they are all honorable men. I would want you, of course, to have the matter fully investigated before finally taking action in the premises. Whilst I believe the allegations in the petition are true, I know that in these land matters we are some times [*sic.*] imposed upon.” Chamberlain to Gifford Pinchot, June 28, 1905, Chamberlain papers, MSS 1025, Box 5, Folder 4, OHSRL.



Part of the effort to force the Oregon & California to sell its remaining lands was for people actually to apply to purchase them. Beginning in 1907 and continuing for the entire seven years of litigation, thousands of individuals filed applications with the railroad company for the purchase of quarter sections. In 1907, as the political movement to force the forfeiture of the land grant gained momentum, residents of Oregon began “rushing into the rich timber country and gobbling it up.”<sup>73</sup> This movement was apparently based on the government’s indications that, once individuals offered to purchase lands at \$2.50 an acre and were refused, they would then have standing to sue the railroad to force such sales and would “have a pretty good case.”<sup>74</sup> The *Wall Street Journal* reported “a frenzy of excitement” in Oregon, where “thousands are leaving home and stampeding to the railroad land grants ... to force Harriman to surrender” the land.<sup>75</sup> By June of 1907, it was reported that “in many counties every quarter section of the land held by the railroad has a claimant.”<sup>76</sup>

Although the government later used these claims as evidence that the land was indeed capable of being settled under the homestead clause—contrary to the claims of Harriman and his railroad—it appears that the vast majority were fraudulent. Upon having examined the lands, Land Commissioner Brian A. McAllaster and the Oregon

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<sup>73</sup> “Ignorant Oregon Farmers,” *Washington Post*, June 4, 1907.

<sup>74</sup> “Ignorant Oregon Farmers.” As it turned out, they did not have a good case, as the Supreme Court ultimately dismissed the claims of these prospective purchasers. Based on the fact that the grant did not compel the railroad to sell and did not even define “actual settler,” the prospective purchasers did not have any right to enforce the grant’s conditions, according to the Court. *Oregon & California v. United States*, 238 U.S. at 434-35.

<sup>75</sup> “After Harriman Road’s Land,” *Wall Street Journal*, June 5, 1907.

<sup>76</sup> “After Harriman Road’s Land.”

& California's land office concluded that the lands covered by applications were all valuable timberlands, including some of the most valuable of the entire grant.<sup>77</sup> The federal government later confirmed that most applicants had no intention of homesteading on their claims. In his extensive overview of the Oregon & California land grant, David Maldwyn Ellis concluded that "these so-called settlers were speculators or dummies for speculators who hoped to make good their title to valuable timberlands at a nominal sum."<sup>78</sup> Indeed, "practically all" of the almost fifteen thousand applications to buy land from the railroad company during this time period, according to Ellis, "were speculative in character," a fact that was revealed over the next decade as the Department of Justice convicted nine professional locators, each representing several hundred applicants, for fraud in connection with these purported applications for purchase and actual settlement.<sup>79</sup>

As with other frauds, the process was simple. Typically, some person, usually one claiming to be the attorney or agent of each applicant, came into the office with anywhere from five to a hundred applications, and for each one, he presented the application and tendered four hundred dollars, only to have the application rejected and the process repeated. In nearly all cases the blanks used by the applicants were printed forms.<sup>80</sup> Generally, the applicants paid a locator or attorney fifty dollars or more to file the application and submit the payment on their behalf, with the agreement that they

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<sup>77</sup> Brian A. McAllaster testimony, Oregon & California Transcript, 1960-61.

<sup>78</sup> Ellis, "Oregon and California Railroad Land Grant," 264.

<sup>79</sup> See Ellis, "Oregon and California Railroad Land Grant," 268.

<sup>80</sup> McAllaster testimony, Oregon & California Transcript, 1959.

pay the \$2.50 per acre whenever the lawsuit was finally determined, and often with the additional agreement for the applicant to sell the locator the land at an agreed price per thousand feet of stumpage, with this “agreed price” often being about one-half the timber's market value.<sup>81</sup>

The lawsuit was tinged with irony. Inasmuch as the railroad’s policies thwarted development, the lawsuit only added to the problem. In short, it not only forced the railroad to extend its suspension of land sales due to the clouding of title, but also caused the railroad to cease cutting or permitting others to cut timber growing on its unsold lands for fear it would be held liable if the land were declared forfeited.<sup>82</sup> After McAllaster took over as the land commissioner for the Southern Pacific system in 1908, for instance, he did not make any sales of “any consequence” during the entire duration of the lawsuit. Most of the deeds he executed during those years were in completion of contracts outstanding prior to the lawsuit.<sup>83</sup>

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<sup>81</sup> McAllaster testimony, Oregon & California Transcript, 1962. Locators and agents placed advertisements in newspapers across the country to attract applications for railroad lands. They all promised a quick buck. *See* McAllaster testimony, Oregon & California Transcript, 1964-69.

<sup>82</sup> Stipulation, Oregon & California Transcript, 1584.

<sup>83</sup> McAllaster testimony, Oregon & California Transcript, 1928. The only exceptions were sales made either pursuant to condemnation proceedings or in settlement of a lawsuit brought against the railroad. These included an October 1908 sale of forty acres at \$10 per acre to the City of Sheridan after the city had instituted proceedings to condemn the tract for water supply, a December 1908 sale of 160 acres at \$2.50 per acre to Franklin Martin in settlement of a lawsuit Martin had previously brought against the railroad (unrelated to any purported rights associated with the homestead clause), a January 1910 sale of a right-of-way to the Portland Southwestern Railway Company for \$1220.80 pursuant to condemnation proceedings, a June 1910 sale of eighty acres at \$22.50 per acre to Roy M. Minkler (one of the defendants in the government’s lawsuit against the O&C) in settlement of a suit brought by Minkler, a December 1910 sale of a right-of way, comprising 3.2 acres, to the Salem, Falls City, and Western Railway Company, at \$15.62 per acre, pursuant to condemnation proceedings, and finally a May 1912 sale of a right-of-way, comprising 2.6 acres, to the Oregon Electric Railway Company, for \$500,

Given his position with the Southern Pacific and his experience as a long-time employee of the Union Pacific, McAllaster was in a unique position to be able to compare the western land-grant railroads' seemingly divergent policies towards their land grants. As McAllaster explained, the policy of the Union Pacific "was always to induce settlement by every means possible, for the reason that settlement means building up the country and traffic for the road."<sup>84</sup> Similarly, according to McAllaster, the policies of the Southern Pacific system were along the same lines, at least for as long as he had been affiliated with the companies. The only reason that the Oregon & California was not making more sales, McAllaster insisted, was the lawsuit itself. The railroad's policy, he claimed, "would have been to have offered the lands for sale, had it not been for the fact that this suit had been instituted."<sup>85</sup> The primary inducement for settlement was the long-term contract, and this was infeasible given the uncertainty of titles.<sup>86</sup>

McAllaster insisted that "but for this suit," he would have proceeded to secure his examination of the land, to determine valuations, and to make sales of the land as opportunity offered. In support, McAllaster pointed to the fact that other Southern Pacific lands, also under his jurisdiction but not subject to the lawsuit, had begun to be advertised for sale and that a "considerable area of land" had actually been sold in the

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pursuant to condemnation proceedings. McAllaster testimony, Oregon & California Transcript, 1928-29.

<sup>84</sup> McAllaster testimony, Oregon & California Transcript, 1930-31.

<sup>85</sup> McAllaster testimony, Oregon & California Transcript, 1930-31.

<sup>86</sup> McAllaster testimony, Oregon & California Transcript, 1930-31.

previous year. He claimed he would have followed the same policy with reference to lands in Oregon actually capable of settlement, but the lawsuit made such a policy impossible.<sup>87</sup>

But little of the land was even amenable to settlement. At trial, Eberlein summarized the general nature of the remaining grant lands. Of the remaining 2,200,292 acres, the cruisers' reports showed 1,496,640 acres covered with timber and unsuitable for agriculture and an additional 703,652 acres of grazing land unsuitable for agriculture, leaving only 7320 acres that might be used for agricultural purposes. Even that small amount of acreage suitable for agriculture was less than ideal, according to Eberlein, because it "consist[ed] of small isolated tracts, many of them remote from transportation and settlements, and scattered in small bodies in different places throughout the whole extent of the grant, along creek bottoms, and on hillsides."<sup>88</sup> Thus, "they are not easily saleable because more lands may be had and demand does not equal supply."<sup>89</sup> Of the timberlands, Eberlein estimated that about a quarter-million acres could be reduced to conditions suitable for agriculture by clearing the ground of timber and stumps, but the expense of doing so would exceed the resulting value of the land. The remainder of the grant consisted of 150,000 acres of "waste land"—land of steep hillsides and rocky cliffs not timbered and not fit for agriculture or grazing.<sup>90</sup> The lands ranged in value, according to McAllaster, from ten to a hundred dollars an acre. This he

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<sup>87</sup> McAllaster testimony, Oregon & California Transcript, 1982-83.

<sup>88</sup> Eberlein testimony, Oregon & California Transcript, 2290.

<sup>89</sup> Eberlein testimony, Oregon & California Transcript, 2290.

<sup>90</sup> Eberlein testimony, Oregon & California Transcript, 2290.

determined based on the amount of timber found on the land, as measured in the number of thousand feet board measure, the value of which ranged from seventy-five cents to two dollars per thousand feet based on the kind and character of the timber, and its location and accessibility to transportation.<sup>91</sup>

Developments on the ground perhaps provided the best evidence for the unsuitability of lands to the sort of land use Congress envisioned in requiring that the Oregon & California's lands be sold according to the homestead clause. Even the director of Booth-Kelly, Robert A. Booth, testified that most of the pine grew in granite soils, which had little value once the timber was removed. While some of the granite soils were being cleared, offered for sale, and sold by 1912, it still had not been demonstrated that the lands could effectively produce vegetables, particularly without the additional expenditure of adding irrigation works, the costs of which remained prohibitively high.<sup>92</sup> In fact, in all of his work in the railroad's land department since he was first employed in 1889, F. A. Elliott could not remember a single instance where the railroad sold a quarter section to a person who then actually made a home and a living on that acreage.<sup>93</sup> The same was apparently true on the even sections within the grant, as Homer D. Angell, a surveyor for the railroad and the government, observed that "lands acquired by homestead from the government on the timbered areas are never occupied for any appreciable period after title has been acquired."<sup>94</sup> In many cases, those

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<sup>91</sup> Brian A. McAllaster testimony, Oregon & California Transcript, 1960-61.

<sup>92</sup> R. A. Booth testimony, Oregon & California Transcript, 2591, 1618-19.

<sup>93</sup> F. A. Elliott testimony, Oregon & California Transcript, 2727.

<sup>94</sup> Elliott testimony, Oregon & California Transcript, 2774.

who attempted to establish homesteads on these lands failed. Elliott noted that the few improvements existing on these lands in the 1880s had, by the first decade of the twentieth century, “grown up to brush.”<sup>95</sup>

As for timberlands, the trial also corroborated Harriman’s insistence that such lands were being held by lumber companies for speculative purposes rather than for development. As Eberlein explained, the railroad’s prior policy of selling all lands cheaply only encouraged speculation. Such a policy made the holding of such lands less expensive and, therefore, also made it more profitable for the companies to hold them. Indeed, this was the chief reason why Booth-Kelly and others “wanted to buy very cheap” from the railroad.<sup>96</sup> Eberlein testified at trial that the railroad “tried this experiment for years of disposing of timber lands to whoever would come for them and let them cut out what they wanted and practically at their own price.... [T]he net result of that was that the Railroad Company sold timber, standing timber, merchantable timber, for less than twenty cents a thousand feet on the average. I believed, and so recommended, that the selling of timber at such very low prices up to the present time had but one effect,” that is “to tie the timber up.” Quite simply, “it was more profitable to hold it than it was to manufacture it.”<sup>97</sup>

The reason for not selling to speculators was that doing so had the effect of “tying up timber land for an indefinite time.” This had indeed been the pattern on the Oregon & California lands in Oregon that the railroad had sold since 1898. Only a “very,

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<sup>95</sup> Elliott testimony, Oregon & California Transcript, 2727.

<sup>96</sup> Eberlein testimony, Oregon & California Transcript, 2344.

<sup>97</sup> Eberlein testimony, Oregon & California Transcript, 2350.

very small fraction” of these lands, by Eberlein’s calculation, “ha[d] ever been milled.” Instead, such lands were “held for the rise,” meaning that the land could be carried so long as the annual increases in the value of the timber was more than the cost of interest and taxes. And the annual increases after 1898 were certainly sufficient for the land to be profitably held. Because the increase in the value of timberlands was “quite marked” after Booth-Kelly’s purchase of Oregon & California’s lands in 1898, that company cut “very, very little” of its more than seventy thousand acres even by 1912.<sup>98</sup>

Lest the anti-speculator rationale be considered a pretext, Eberlein also provided evidence that the Oregon & California would in fact consider sales of timberlands if shown not to be for speculative purposes. In cases not involving demonstrated speculators such as the Weyerhaeuser or Booth-Kelly interests, the land department made determinations regarding the intent of the applicants on a case-by-case basis. In one instance, an individual by the name of Mrs. Potter Palmer applied for several thousand acres southwest of Eugene near the McKenzie River. Eberlein and Harriman met with Palmer in New York and Eberlein had the land cruised. Her sons, who were involved with Michigan timber interests, were interested in the land.<sup>99</sup>

The deal ultimately fell through, but not because of the railroad’s unwillingness to sell timberlands whatsoever. Rather, it was because it became clear that the purchase

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<sup>98</sup> Eberlein testimony, Oregon & California Transcript, 2343. Booth claimed that his company was responsible for the rise in values, insisting that it was only after the company demonstrated that the timber had value and that an operator in the interior of Oregon compete with timber interests on the coast, that other large timber buyers from the coast and the Midwest began to make investments there. Booth testimony, Oregon & California Transcript, 2587-88.

<sup>99</sup> Eberlein testimony, Oregon & California Transcript, 2337-38.



was for speculation rather than for “any immediate use at all.”<sup>100</sup> Eberlein deduced that Palmer’s application was for speculative purposes from the railroad’s examination of it combined with conversations with the applicant—as was normal practice. Eberlein later explained the process: “Well, you can tell sometimes from the location of the land. It is queer but it is the fact. And you can tell very frequently by your conversations, your conversations with people, what they propose to do with the land.” In that case, “the cruising was done as rapidly as possible” and the report of the cruisers was sent on to New York about the same time that Eberlein relocated there. The report was typical in that it included the character of the land, the character of the timber, the classification of it, and the value of it.<sup>101</sup> While Palmer’s initial application was for a relatively small body of timber which was capable of being used for a small milling operation, Palmer revealed during their second and final conversation that she wanted to purchase all of the timber in “about six townships down the east side of the grant” close to the Booth-Kelly holdings, a statement from which Eberlein deduced she had “no immediate intention ... to make use of them,” even without having cruised that timber.<sup>102</sup> As Eberlein explained, “anybody that comes in and wants to buy all the timber in six townships of land ... [has] no immediate intention of doing anything with it,” as had been “borne out in the case of every large purchase,” including purchases made by Booth-Kelly.<sup>103</sup>

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<sup>100</sup> Eberlein testimony, Oregon & California Transcript, 2337-38.

<sup>101</sup> Eberlein testimony, Oregon & California Transcript, 2340-41.

<sup>102</sup> Eberlein testimony, Oregon & California Transcript, 2340-42.

<sup>103</sup> Eberlein testimony, Oregon & California Transcript, 2344.

Accordingly, Eberlein's policy was that timberlands should be sold, but only with covenants requiring their use and not to parties with already large holdings. Eberlein proposed that any sales of timberlands at such low prices include a covenant requiring that "some kind of use [be] made of it industrially" rather than allowing it to be "tied up," which had the effect of "strangling industry" as well as preventing the entry of any competing railroad.<sup>104</sup> He argued against "augment[ing] any more large holdings," because such sales would "limit the number of operators in the state" and would further restrict competition. His recommendations were, thus, at least partly based on the view that "small mill men should have a chance and not be compelled to go to these large holders and get at a large price what they needed for their mills."<sup>105</sup>

Eberlein's justification for the Oregon & California not selling to large timber interests may seem disingenuous, since the proposed alternative appeared to be for the railroad to hold such lands itself. In Eberlein's assessment, however, it was better for Oregon to have the railroad hold onto the land rather than sell it to speculators because the railroad had no intention of holding on to it indefinitely "for the rise." Eberlein felt that the holding of tens of thousands of acres by Booth-Kelly posed a menace to Oregon's development not posed by the railroad's holding of over two million acres, since the railroad's interests in disposing of the land were consistent with the interests of "this whole body politic."<sup>106</sup> In other words, "there can be no throttling of industry that does not injure the railroad, and there can be no expansion of industry without

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<sup>104</sup> Eberlein testimony, Oregon & California Transcript, 2344.

<sup>105</sup> Eberlein testimony, Oregon & California Transcript, 2351.

<sup>106</sup> Eberlein testimony, Oregon & California Transcript, 2349.

benefiting both the state and the railroad.” Those truths were “self-evident,” at least to Eberlein.<sup>107</sup>

Also, Eberlein argued that the railroad could not have “tied up the country” even if it had desired to do so because of its ownership being limited to odd sections. As he explained, whereas other large holders were able to “body up their timber ... and make a complete monopoly and ... limit output,” the railroad, with its ownership of alternate sections, could not do so as long as there were intervening lands in private ownership.<sup>108</sup> Large purchasers like Booth-Kelly and Weyerhaeuser intended to acquire both railroad lands and the intervening even-numbered sections, something the railroad never intended to do and was legally incapable of doing.<sup>109</sup>

Booth-Kelly officials disagreed. Booth, for instance, testified that preventing the occupation of lands would “retard the growth in a general way and prevent the normal increase of population.”<sup>110</sup> The impact arguably went beyond the railroad’s lands, given the checkerboard pattern of land ownership. Booth contended that where a large portion of lands are held in alternate sections by a single proprietor, be it a lumber interest or railroad, that proprietor exerts a great influence over the market value of the intervening

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<sup>107</sup> Eberlein testimony, Oregon & California Transcript, 2349-50.

<sup>108</sup> Eberlein testimony, Oregon & California Transcript, 2345.

<sup>109</sup> Eberlein testimony, Oregon & California Transcript, 2345. It was incapable of doing so, Eberlein thought, because doing so would have been “ultra vires”; the company was not authorized by law to go into the timber business. This potential legal obstacle did not prevent the formation of subsidiary land companies, but that was because the purpose of such companies was not the acquisition of new lands for the purpose of engaging in the timber business, but rather the disposal of the remainder of the grant. Eberlein testimony, Oregon & California Transcript, 2346-48.

<sup>110</sup> Booth testimony, Oregon & California Transcript, 2623.

lands: “if the odd sections are held by one concern there can be no large grouping of lands, and without the grouping or continuous ownership the milling industry cannot be profitably carried on.”<sup>111</sup> Booth further argued that the retention of lands allowed the railroad to maintain and entrench its monopoly, even though it owned only alternate sections. He explained that the ownership of odd sections not only allowed the railroad to remove timber from its own lands and ship the timber over its own lands, but also allowed the railroad to require owners of even sections to do the same.<sup>112</sup> Booth acknowledged, however, that the railroad’s policy had no impact upon the *settlement* of intervening lands.<sup>113</sup>

Another Booth-Kelly official, Dixon, laid out a similar argument before Congress in 1908, as he sought the forfeiture of the railroad grant. He contended that the removal of odd sections from sale made it impossible for any lumber interest to accumulate the large, unbroken tracts necessary for lumbering operations, as well as to build the logging roads necessary to transport lumber. Rather than owning piecemeal sections of timberland, “the manufacturer” he emphasized, “must have access to timber in bodies more or less solid and united in character.”<sup>114</sup> Regarding Booth-Kelly’s purchase of seventeen thousand acres near Wendling, he testified that by 1908, this town

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<sup>111</sup> Booth testimony, Oregon & California Transcript, 2627.

<sup>112</sup> Booth testimony, Oregon & California Transcript, 2624.

<sup>113</sup> Booth testimony, Oregon & California Transcript, 2625. More recently, the problem of a resource becoming under-exploited due to the resource being broken up into too many pieces, each held in private property, has been referred to as the “tragedy of the anti-commons.” It was one unintended consequence of checkerboarding and one that resource managers continue to grapple with today. *See, for example*, Michael A. Heller, “The Tragedy of the Anticommons: Property in the Transition from Marx to Markets” *Harvard Law Review* 111 (1998): 621-688.

<sup>114</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2643.

had grown from a scattering of families to six hundred to eight hundred people emerged along this seventeen-mile branch line, along which there had been constructed ten sawmills. These sawmills employed about three hundred men. This “little valley,” according to Dixon, was “alive with the hum of industry and has developed beyond the dream of those who were familiar with it ten years ago.”<sup>115</sup> While there had been merely a half-dozen families within a radius of five miles prior to Booth-Kelly’s purchase and its construction of mills, the construction of milling operations had made settlement for farming possible, in that it appreciated the value of farm land in the area and provided employment for men to support their families.<sup>116</sup> Dixon hypothesized that development and settlement such as what had occurred at Wendling would not have been possible “if the mill owners had not been able to buy grant lands and had not felt that they could purchase” additional lands in the future as needed.<sup>117</sup>

Regardless of developments on the ground, the federal government appeared to have the law on its side in its lawsuit against the Oregon & California. In 1913, the district court for the District of Oregon ruled in the government’s favor by decreeing the unsold grant lands forfeited and quieting the government’s title to such lands. The railroad, however, appealed this decision on several legal grounds, including that the homestead clause, rather than being a condition subsequent justifying forfeiture, was merely a set of restrictive and unenforceable covenants, and alternatively that the government had waived its right to enforcement of the provision through its years of

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<sup>115</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2645.

<sup>116</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2645.

<sup>117</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2643.

acquiescence. In delivering the opinion of the Supreme Court, Justice Joseph McKenna agreed with the railroad that the homestead clause lacked the required technical language to support forfeiture of land grant, in that it did not constitute a condition subsequent touching the railroad's property interest. However, he also disagreed with the railroad's contentions that the conditions were unenforceable. He held instead that the grant's conditions constituted both contractual covenants and laws and were, thus, strictly enforceable.

As to the appropriate remedy, however, the Supreme Court agreed with the railroad's contention that the land invited "more to speculation than to settlement."<sup>118</sup> It therefore declined to order the railroad to sell the remaining lands pursuant to the terms of the grant or merely to enjoin the railroad from violating the grant any further. Instead, apparently in recognition that the homestead clause was unworkable as applied to the remaining grant lands, it enjoined the railroad from "any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon," and it directed Congress to provide by legislation for their disposition in accordance with such policy as it may deem "fitting under the circumstances."<sup>119</sup> In disposing of the lands, Congress was required to secure to the railroad "all the value the granting acts conferred upon the railroads."<sup>120</sup>

The Supreme Court's opinion seemed to raise as many legal questions as it answered, and members of Congress were left to debate what, in fact, Congress was

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<sup>118</sup> Oregon & California v. U.S., 238 U.S. at 438.

<sup>119</sup> 238 U.S. at 438.

<sup>120</sup> 238 U.S. at 439.

permitted or required to do in its “disposition” of the lands. Members of Congress expressed confusion as to whether they even had the power to revest title to the lands, and testimony from attorneys only exacerbated the confusion. A fundamental legal issue was whether the court intended for Congress to pass legislation which would supplant what the court determined to be an unworkable system, or whether it merely allowed for Congress to provide legislation to supplement the original grant with new enforcement mechanisms. Unsurprisingly, legal experts disagreed regarding the proper interpretation of the court’s opinion depending upon which side in the dispute they represented.<sup>121</sup>

The issue of whether Congress was allowed to supplant the land grant or merely supplement it manifested itself first in the debate over whether Congress had the power, under the Supreme Court’s decision, to revest the Oregon & California’s titles in the federal government. Attorneys for the Department of Justice repeatedly insisted that Congress had the power to deal with the remaining grant lands in any way it deemed appropriate, including the possible first step of revesting title to the lands, provided only that it ensured the railroad company the full compensation to which it was entitled under the grant. Justice Department attorney C. J. Smyth, for instance, declared without reservation that the court settled the question of whether Congress had the power to revest the remaining grant lands, in that it authorized Congress to dispose of them in any way it deemed necessary. According to Smyth, disposing of them necessarily required that Congress first revest them.<sup>122</sup> Smyth further contended that Congress could

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<sup>121</sup> See generally Oregon & California Hearings of 1916.

<sup>122</sup> Oregon & California Hearings of 1916, 56.

“select any means that it pleases, whether it be the one authorizing or directing the railroad to go on and make the sales, or one proceeding along the lines of the Chamberlain bill, or in any other way that Congress may see fit. The only question is what, in the judgment of Congress, is the best way to accomplish the end.”<sup>123</sup>

Not all concurred in the Department of Justice’s legal assessment, however. Senator Irvine L. Lenroot, from Wisconsin, raised the possibility that, by giving Congress the power “to provide ... for [the lands] disposition” rather than directly giving Congress the power to dispose of them, the Supreme Court merely gave Congress the authority to direct the Oregon & California as to the lands’ disposition.<sup>124</sup> Smyth and his colleague, Stephen W. Williams, rejected this as a potential interpretation of the opinion. Williams argued that Congress had the same authority to do directly with the lands what it could do indirectly through the railroad; since it had authority to require the railroad to sell the lands in certain quantities and prices, it also had the power to revest and sell the lands under those same terms. In a corollary argument, Smyth contended that if Congress lacked the authority to revest title to the lands and dispose of them directly, then it would likely have the same difficulty in “disposing of the legal title to the money” in excess of the \$2.50-per-acre restriction, which would be the legal effect of restricting the railroad to that price.<sup>125</sup>

Representative Hawley, who sponsored the bill authorizing the lawsuit in the first place, disputed the Justice Department’s legal contentions regarding Congress’

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<sup>123</sup> Oregon & California Hearings of 1916, 60.

<sup>124</sup> Oregon & California Hearings of 1916, 56.

<sup>125</sup> Oregon & California Hearings of 1916, 57.



power to revest title. He argued that reversion would amount to a “legislative forfeiture, or a forcible entry of the land against the will of the company which has received the land.”<sup>126</sup> He, therefore, doubted whether the Supreme Court would sustain any legislative act of reversion, just as it had denied the government's claim for a judicial forfeiture.<sup>127</sup> This argument, however, was unpersuasive, as even Wisconsin Representative Irvine Lenroot, who shared Hawley's concern over the scope of Congress' power, flatly rejected Hawley's contention. Lenroot reasoned that since a forfeiture “always implies a wiping out of all the rights of grantees without compensation,” Congress' reversion of titles with full compensation to the railroad was not legally analogous to a forfeiture, whether judicial, legislative, or otherwise.<sup>128</sup>

Undeterred, Hawley insisted that Congress' power was limited to enforcing the provisions of the original grant or to amending the restrictions with the railroad company's assent. Hawley indicated that a majority of lawyers with whom he had spoken interpreted the Supreme Court's opinion as meaning that Congress should supplement the existing law “to cause the lands to be sold under the terms of the original grant.”<sup>129</sup> The Court, in other words, did not intend for Congress to revest title pursuant to a new policy, but rather “to see that that disposition ordained by the original act of Congress is carried out.”<sup>130</sup> Congress' power, according to Hawley, was limited to

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<sup>126</sup> Oregon & California Hearings of 1916, 59.

<sup>127</sup> Oregon & California Hearings of 1916, 59.

<sup>128</sup> Oregon & California Hearings of 1916, 59.

<sup>129</sup> Oregon & California Hearings of 1916, 165.

<sup>130</sup> Oregon & California Hearings of 1916, 167.

providing a means to enforce the restrictive covenants—something the Court had determined the original grants lacked. Specifically, the original grants failed to define who should be considered “actual settlers,” such that the Court could not enforce the covenants. Therefore, the Court, according to Hawley, left it to Congress only to supplement the original grants with this definition to make the restrictions judicially enforceable. Hawley recommended Congress integrate the definitions of “settlers” from the Homestead Act. In addition to serving the purposes of the original grant and interests of Oregonians in having the land developed and settled, this would also prevent any further litigation, for the railroad, he reasoned, could not “complain that such legislation is imposing an unexpected burden on it, because when it took the grant it took it with a condition that the lands should be sold by it, and that would imply that they assumed the burden of the sale of the lands.”<sup>131</sup>

If Congress did in fact have the power to revest title to the lands, the basis of that authority had important legal ramifications. In his questioning of government attorney Williams, Lenroot placed Congress’ authority to revest title to land on the provision in the 1866 grant reserving for Congress the power “to alter, amend, or repeal” the grant.<sup>132</sup> However, he also noted that no such provision was contained in the 1870 grant, under which the railroad had acquired several hundred thousand acres. If that provision in the 1866 grant was the basis of authority, he wondered if that then limited Congress’ power to revest to those lands acquired under that grant. Williams shrugged off this question with his assertion that Congress’ power to amend or repeal the land

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<sup>131</sup> Oregon & California Hearings of 1916, 177.

<sup>132</sup> Oregon & California Hearings of 1916, 30.

grants would exist even without such a provision; that the provision was essentially superfluous. In support he cited the fact that the Supreme Court, in its lengthy opinion, made no distinction between the land grants of 1866 and 1870. The grant, Williams reasoned, as a law, could be amended or changed just as any other law: “Congress can pass any law it sees fit, within its limitation, taking private property, provided only it secures to the individual the full value that he had before.”<sup>133</sup> General Counsel for the Southern Pacific, J. P. Blair, contended that the government’s reserved right “to alter, amend, or repeal” the grant—if that in fact was the basis of authority—was severely limited. Citing to the Supreme Court’s opinion in the *Sinking Fund* cases,<sup>134</sup> he argued that Congress could not forfeit lands given to the railroad without making compensation, could not make changes in the title created by the grant without the consent of the railroad, could not take property the railroad had already acquired, and could not make any alterations to the grant deemed unreasonable or inconsistent with the grant and act of incorporation.<sup>135</sup>

Members of Congress and the lawyers who testified also realized that Congress arguably had the power to revest title to the grant lands under its broad power of eminent domain. Relying upon this power, however, would trigger the requirement the taking be for a “public use,” the traditional basis for that sovereign power.<sup>136</sup> In analyzing this issue, representatives conflated “public *use*” with the seemingly broader “public

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<sup>133</sup> Oregon & California Hearings of 1916, 30.

<sup>134</sup> *Union Pac. R. Co. v. United States*, 99 U.S. 700 (1878).

<sup>135</sup> Oregon & California Hearings of 1916, 118-38.

<sup>136</sup> U.S. Const. amend. V.

*purpose.*” Even so, some members of Congress still rightly raised the issue of whether taking the lands to sell them to settlers and lumber companies qualified even as a public purpose. Justice Department attorney Smyth answered this question in the affirmative, the public purpose of such an act being “the reclamation of these forest lands and the settlement of the country.”<sup>137</sup> He argued that since the purpose of the grants in the first place was a public purpose, and that sales of land to settlers and timber to private companies would only further that original purpose, then these actions must also qualify as fulfilling that public purpose. Hawley, who argued against revesting the railroad’s grant at all, disagreed, arguing that “taking the lands from one private party or person to be disposed of to another private person” relying upon the theory of eminent domain “must fail.”<sup>138</sup> Congress did not explicitly resolve this issue.

Regardless of whether Congress chose to proceed on the theory of eminent domain, it was required to provide to the railroad compensation for “all the value” conferred by the grant. Not only did the Fifth Amendment require it for all eminent-domain actions,<sup>139</sup> but the Supreme Court’s opinion also directly required it, as did prior precedent regarding amendments to land grants. The value of the lands was quite large, with one estimate, as of 1912, placing it at over thirty million dollars.<sup>140</sup> The value of

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<sup>137</sup> Oregon & California Hearings of 1916, 117.

<sup>138</sup> Oregon & California Hearings of 1916, 180. The debate over whether economic development itself is a “public purpose” that can justify taking lands from one to give to another has replayed itself countless times over the century since. As a political question, it remains far from resolved, even if a majority of the Supreme Court has taken Smyth’s side in answering the question in the affirmative. *See Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

<sup>139</sup> U.S. Const. amend. V.

<sup>140</sup> Stipulation, Oregon & California Transcript, 1582. In addition to the purchase prices received from sales, the Oregon & California had already received value in the form of defaulted-on contracts (\$88,205.06), leases (\$5,582.07), the authorized cutting and use of timber

specific lands varied greatly. Booth, for one, estimated the value of the timber in the best quarter section of Lane County to be about one-dollar per thousand board feet on a stumpage basis, and the value of that land to be about ten thousand dollars.<sup>141</sup> Dixon agreed, estimating the maximum value of any quarter section to be between eight and ten thousand dollars. Dixon knew, however, of one case where a lumber company, the Nehalem River Lumber Company, the owner of a quarter section in Tillamook County, had submitted a price of forty thousand dollars for the timber on that quarter section, and that price did not include the title to the land for reforestation or for any other useful purpose. That land, he explained, was of a different character from the remaining Oregon & California lands and was nearby a sawmill on the Pacific Railway and Navigation Company's line.<sup>142</sup>

Arguably, though, the law only required Congress to compensate the railroad for the value of its privileges and rights under its land grant, not the value of the lands themselves, since the railroad arguably did not "own" the lands in the full legal sense.

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(\$18,850.25), and payments from timber trespassers (\$10,687.92). Id. J.B. Eddy testified that the lands in the valleys made "first class agricultural land," while the mountain lands, "when they are cleared, would not be worth much, if anything." J.B. Eddy, Oregon & California Transcript, 2561.

<sup>141</sup> Booth testimony, Oregon & California Transcript, 2584.

<sup>142</sup> Dixon, Statement to Congress, Oregon & California Transcript, 2656. The value of lands partly depended upon their location relative to sawmills. Dixon testified before Congress regarding the number and size of sawmills along the Oregon & California line. As of 1908, there were over 250 sawmills along the Oregon & California line and within the exterior limites of the grant. These mills produced 600 million feet of lumber per year, employed at least 8000 men, and had a yearly payroll exceeding \$4.8 million. Dixon, Statement to Congress, Oregon & California Transcript, 2643. In general, many of the smaller mills were on lands acquired from the railroad, while the larger mills were necessarily acquired from both the railroad and from private parties on even sections. Dixon, Statement to Congress, Oregon & California Transcript, 2647.

That argument, however, was seemingly undercut by the government's own treatment of the land grant for tax purposes. The lands of the Oregon & California, despite the grant's restriction that the railroad could not receive more than \$2.50 per acre, were in many cases assessed at a much higher value. According to J. B. Eddy, a tax and right of way agent for the Southern Pacific Company and the Oregon & California, the company never objected to a valuation above \$2.50 per acre as one would expect if that were indeed the limit of the company's interest in the lands. There was no intent whatsoever to keep the assessments down to that point. Instead, the railroad and county assessors proceeded as if the railroad were the "absolute owner" of the lands, without reference to the grant's homestead clause.<sup>143</sup> Still, there seemed to be a consensus building in Congress that it need only compensate the railroad for the \$2.50 per acre it was entitled to receive from purchasers.

However, even assuming the railroad had the right only for the value of the rights and privileges to which it was entitled under the grant, that value potentially included not just the \$2.50 per acre it could receive for the lands through sales, but also a guarantee that the lands be developed or settled. In testifying before the joint committee, Williams stated his own view that the act revesting title to the lands should also provide for their disposition to private developers and settlers. This was based on his interpretation that the grant "contemplated that the grant should be settled and developed, so that the railroad company would acquire business and the revenue from such business."<sup>144</sup> He did not, however, go so far as to contend that such was required

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<sup>143</sup> J.B. Eddy testimony, Oregon & California Transcript, 2566.

<sup>144</sup> Oregon & California Hearings of 1916, 10.

of Congress, but merely that “there may be some doubt as to the validity of an act of Congress which would merely give the railroad company its money value and nothing else.”<sup>145</sup> He thus recommended taking the safe route to avoid litigation. Another government attorney, Smyth, however, was less equivocal in his pronouncement that placing some or all of the lands in a reserve would not harm the legal rights of the railroad, but even he argued against such an action from a policy standpoint, stating that such an action would take the lands out of the taxable property and would constitute “a great hardship to the state.”<sup>146</sup>

Beyond these legal questions to what Congress *could* do, there remained the important issue of what Congress *should* do, given its legal options. In making that decision, some in Congress insisted that the lands were still amenable to the type of settlement that Congress originally contemplated, despite all the evidence to the contrary. Representative Hawley, for instance, claimed to have received “a large number of letters from men ... stating that there have been people living on these lands, with good houses and good improvements, who settled on the lands and made their improvements in good faith and are living there and have been making a home for a number of years on the land.”<sup>147</sup> “All through the grant,” he insisted, “with the exception of comparatively small areas, there are farms of agricultural lands.”<sup>148</sup> Representative

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<sup>145</sup> Oregon & California Hearings of 1916, 10.

<sup>146</sup> Oregon & California Hearings of 1916, 64.

<sup>147</sup> Oregon & California Hearings of 1916, 187.

<sup>148</sup> Oregon & California Hearings of 1916, 188. Clay Tallman, commissioner of the General Land Office, corroborated Hawley’s testimony by estimating that as much as seventy-five percent of the land was suitable for settlement and cultivation.

Clifton N. McArthur, also from Oregon, however, disputed Hawley's claims. He cited a joint investigation conducted by the Interior, Justice, and Post Office departments, which found that "all but a comparatively small percentage" of the thousands of applications for the purchase of land from the railroad were "secured by so-called locators," and that there were "very few, if any, actual settlers on these lands" as of 1916.<sup>149</sup>

The proclaimed interests of Oregonians weighed heavily on Congress' deliberations. Immediately after the Supreme Court delivered its opinion, Oregon's governor called together delegates in Salem to discuss the matter. The conference attendees resolved that Congress should "enact laws defining and settling who shall be considered actual settlers ... and what shall be considered an actual settlement, and requiring the [railroad] to perform the terms and conditions of the [grant] and to sell and dispose of said lands according to the true intent and purpose of [the grant]."<sup>150</sup> They also declared their "unalterable" opposition to the creation or enlargement of any forest reserves in Oregon. They proposed, instead, that Congress provide for the immediate sale of grant lands under the conditions of the homestead clause, while also protecting the process from fraud.<sup>151</sup> Despite the appearance of unanimity, however, McArthur contended that Oregonians were in fact divided on how the lands should be handled. He cited the fact that, immediately after the conference passed its initial resolutions, it passed a new set of resolutions directing the conference chairman to form a committee

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<sup>149</sup> Oregon & California Hearings of 1916, 203, 251.

<sup>150</sup> Oregon & California Hearings of 1916, 7.

<sup>151</sup> Oregon & California Hearings of 1916, 7.



to negotiate a settlement with the Southern Pacific that could then be presented to Congress, the apparent purpose being to avoid a prolonged dispute above all.<sup>152</sup>

The politicians from Oregon largely followed suit in arguing that Congress provide for actual settlement of the lands. Senator George Chamberlain, who had moved from the governorship to the Senate in 1909, drafted the bill that largely dominated the debate in Congress. He reported that he had realized after Harriman's speech at the Irrigation Congress in 1907 "the importance to the people of the State to have these lands brought under actual settlement by sale or otherwise so as to assist the State in its development and in the purposes of government."<sup>153</sup> Though he claimed to be "nearly alone in the West ... in defending the policies of the Forestry Service" and to have been "one of the original advocates of that for the welfare of the people, with Mr. Pinchot," he argued that no more lands in Oregon, except those deemed necessary to protect water supplies, should be added to the forest reserves.<sup>154</sup> Representative Hawley purported to relay his constituents' demands "that no part of the lands be placed in the forest reserves; that all of these lands be made available for development under proper conditions; that all lands capable of any agricultural use be disposed of for that purpose; that the just rights of the State and counties of Oregon be recognized and provided for; that provision be made for the payment of accrued taxes; and that all of these lands remain on the tax rolls."<sup>155</sup> Finally, Representative McArthur insisted that what Oregonians wanted most

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<sup>152</sup> Oregon & California Hearings of 1916, 200.

<sup>153</sup> Oregon & California Hearings of 1916, 144.

<sup>154</sup> Oregon & California Hearings of 1916, 156.

<sup>155</sup> Oregon & California Hearings of 1916, 200.

were “actual settlers, people who will go there and make homes in the wilderness ... and build up communities that will be of material benefit to the development of the state.”<sup>156</sup>

A report submitted by the Department of Agriculture, as well as the testimony of department officials, belied the assertions of the Oregon delegation. They not only confirmed the Oregon & California’s assessment of the unsuitability of the grant lands for settlement, but also implicitly vindicated both the railroad’s policy of selling timberlands in large tracts prior to 1903 and its effective termination of land sales after that date. The department considered “some” of the lands to be agricultural, but it determined that “most of it was heavily timbered.”<sup>157</sup> Furthermore, just as the railroad had found it untenable to sell heavily timbered lands in 160-acre legal subdivisions, the department’s report criticized any attempt to limit land sales to small legal subdivisions as “not consistent with the natural requirements of the industry.”<sup>158</sup> Assistant Forester William B. Greeley testified that limiting sales by “any legal subdivision” would “likely lead to mismanagement,” and he encouraged Congress to leave it to the Interior or Agriculture departments to make sales in “in accordance with the topography—normally by watershed—and the natural logging factors.”<sup>159</sup> He indicated that even

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<sup>156</sup> Oregon & California Hearings of 1916, 201.

<sup>157</sup> Oregon & California Hearings of 1916, 219. Regarding those timberlands deemed agricultural, Assistant Forester William B. Greeley testified that the costs of clearing timber for the purposes of cultivation—which could be as much as \$400 per acre—would be “relatively heavy,” the clear insinuation being that such costs would act as an economic barrier to such development. Oregon & California Hearings of 1916, 240.

<sup>158</sup> Oregon & California Hearings of 1916, 224.

<sup>159</sup> Oregon & California Hearings of 1916, 242.

sales in excess of twenty thousand acres could be justified. Finally, the Department of Agriculture confirmed the contention of railroad officials that there was little market for the immediate consumption of timber, and that any purchases of timberlands would be at very low prices and only for speculative purposes. Based on western Oregon's market position, the department reported that "it [was] obvious that vast quantities of privately owned timber must be held for many decades before it can be marketed" for consumption. Thus, the department recommended holding the lands from sale, except in the few cases where local mills demanded stumpage, until such time—possibly even decades into the future—that the market conditions considerably changed.<sup>160</sup>

Unfortunately, Congress disregarded many of the observations and recommendations of the Department of Agriculture in its Chamberlain-Ferris Act of 1916. This act revested the remaining grant lands in the federal government and provided for their sale as well as the disposal of the timber upon them. Rather than providing for the efficient management of the forests pursuant to conservationist principles, as government foresters had advised, it directed the secretary of interior to sell off the timber to the highest bidder, at which time the timberlands could be reclassified as agricultural land and opened for settlement. Moreover, Congress disregarded Secretary David F. Houston's recommendations that any sales of timberlands be in large tracts and not according to legal subdivision when it instead

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<sup>160</sup> Oregon & California Hearings of 1916, 220-22. Of course, representatives from the Forest Service differed from the railroad's policy in one important respect: it pushed for all of the timberlands to be held in public ownership under the jurisdiction of the Forest Service. Even this, however, was not based on a distrust of the railroad's motives, but rather on a concern that carrying the lands would be too heavy a burden for any private party to carry. *See* Oregon & California Hearings of 1916, 236-37.

provided that each legal subdivision be offered for sale separately before any larger sales are made. Finally, Congress failed to heed the department's advice regarding the lack of an immediate market for standing timber and the extent to which the immediate sale of timber would depress its price, when it designated that proceeds from land and timber sales in excess of the amount owed to the railroad would adequately compensate the Oregon counties for tax revenues lost as a result of the land's being ordered forfeited in 1913 and ultimately transferred to public ownership in 1916.<sup>161</sup> Sure enough, sales were slow, the system Congress created proved unworkable, and the counties were on the verge of economic collapse in 1926, when Congress approved a loan to the counties in the amount of lost tax revenues and passed a new formula for distributing the revenues from the lands.<sup>162</sup>

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With its 1916 legislation, Congress exchanged a land regime in which the Oregon & California had demonstrated its interest in managing the lands for long-term sustainability for one that perpetuated the federal government's nineteenth-century approach to public lands. All of this occurred despite the concerns expressed over the

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<sup>161</sup> Chamberlain-Ferris Act of 1916, 39 *U.S. Statutes at Large* 218 (June 6, 1916). After the district court's decree of forfeiture on July 1, 1913, the railroad stopped paying taxes on unsold lands. Prior to the forfeiture, the railroad had paid a total of \$1,820,000 in taxes on the land, much of which was in recent years due to the increased assessed value of the lands. In his testimony before the congressional committee considering the Oregon and California land grant, government attorney Stephen W. Williams estimated that the tax burden had increased ten-fold in the previous ten years and that the railroad owed about \$1.3 million in unpaid taxes for the previous three years. Oregon & California Hearings of 1916, 6. The Department of Justice's report recommended that the government pay the back taxes immediately, not only in fairness to the adversely impacted counties, but also to remove the "cloud upon the Government's title" which would "embarrass any attempt to dispose of the lands to settlers." Oregon & California Hearings of 1916, 26.

<sup>162</sup> Stanfield Act of July 13, 1926, 44 *U.S. Statutes at Large* 915 (1926).

prior generation regarding the exhaustibility of the nation's natural resources and the waste and possible irreversible damage which had resulted (and would continue to result) from the government's policies favoring privatization and rapid exploitation. President Calvin Coolidge would later complain about the land-grant railroads' ability to use the law as an instrument not only to insulate themselves from prosecution for their supposed subversions of federal land-grant policies, but also to secure additional benefits contrary to the interests of the public and of the government in efficiently managing the nation's natural resources.<sup>163</sup> However, the experiences of the Oregon & California during the first decades of the twentieth century provide a far different narrative. While certainly corroborating Coolidge's lament that law had operated to inhibit effective management of natural resources, the Oregon & California's experiences show, at least in this important instance, that it was the government, and not the railroad, that used outmoded laws as instruments to block conservationist advances, and it was the railroad, and not the democratically-elected branches of government, that sought cooperation with the federal bureaucracy to implement management regimes which would ensure sustainable economic development, even if at the cost of short-term gains.

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<sup>163</sup> U.S. Congress, House of Rep., 68th Cong., 1st Sess., *Northern Pacific Land Grants*, House Report 512 (Washington, DC: Government Printing Office, 1924), 1-2.

## EPILOGUE

Almost a century after Congress forfeited a portion of the Northern Pacific's land grant in the Pacific Northwest, a congressional committee again considered taking action to assert the public's interest in the benefits flowing from the land. The issue arose as to whether Congress had the authority to forfeit the remaining land grant and, if so, whether it *should* do so. (The Northern Pacific, for its part, no longer existed. In 1967, it merged with the Great Northern, the Chicago, Burlington, & Quincy, and other subsidiaries to form the Burlington Northern.) Prompting the renewed attention to the land grant was a plan the stockholders of the Burlington Northern approved in 1981. The plan was to create a new company to hold the land and mineral assets of the railroad empire, unencumbered from the railroad's debts. To some, this seemed to violate the terms of the 1864 legislation granting the Northern Pacific its massive land subsidy. Specifically, the legislation arguably required that the land grant be used to support railway functions, something that would no longer occur if a separate company held the land assets. Accordingly, Congress formally asked a legislative attorney for the American Law Division of the Congressional Research Service, itself a branch of the Library of Congress, to analyze the legal issues pertaining to the Burlington Northern's plan, specifically whether it had the authority to do so and, if not, what legal remedies Congress had.<sup>1</sup>

In her report to Congress in October 1981, the assigned legislative attorney, Pamela Baldwin, concluded that the various pieces of legislation relating to land grants,

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<sup>1</sup> Pamela Baldwin, *A Legal Analysis of the Land Grants of the Northern Pacific Railroad* (CRS Report No. AML-0043) (Washington, DC: Congressional Research Service, 1981).

including the Northern Pacific's, and the hundreds of judicial opinions interpreting them failed to provide an answer to the legal questions presented. However, she also concluded that Congress could exercise its power to amend or even repeal laws to clarify the legal uncertainties on its own. Additionally, she advised that Congress could file a lawsuit against the Burlington Northern and allow the judiciary to resolve legal ambiguities. The trouble with this approach, she surmised, was that courts were unpredictable. "A court could determine," she wrote, "either that any obligation on the part of the railroad grantees had already been discharged, or that none existed, or that there is no breach until the company seeks to abandon one of the lines specified in the grants."<sup>2</sup> With this one run-on sentence, Baldwin perfectly encapsulated the indeterminacy of law.

Baldwin assumed either Congress or the judiciary had the power to clarify, for one last time, the serious legal issues relating to the Burlington Northern's land estate. For support, she cited to Congress' 1908 legislation calling for a federal lawsuit to revest the Oregon & California's land grant and its condemnation of that company's land in 1916. However, though Congress resolved certain issues relating to the Oregon & California's land grant with its 1916 legislation, it did so only while raising new questions. Indeed, the "O&C Lands," as locals still call them, have never stopped being at the center of controversy.

From the perspective of these lands, the twentieth century ended much as it began. In January 1987, Greenworld, an environmental advocacy group, fired the first shot in what some have called the "Forest Wars" when it petitioned the Fish and Wildlife

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<sup>2</sup> Baldwin, *Legal Analysis of the Land Grants of the Northern Pacific Railroad*.

Service (FWS) to list the northern spotted owl as endangered under the Endangered Species Act of 1973 (ESA).<sup>3</sup> Passed with the purpose of conserving the ecosystems on which imperiled species depend, the ESA provided for the listing of such species, upon which the FWS was obligated to develop recovery plans for the species, in consultation with the relevant states, and to ensure that no federal action would jeopardize the success of that plan.<sup>4</sup> Importantly, the statute required listing decisions to be made solely based on scientific and commercial evidence of species viability, without any consideration of economic consequences. In July of that year, the FWS acted on the petition and began a status review of the subspecies' viability. As part of that review, Dr. Mark Shaffer, the agency's expert on population viability, concluded that "continued old growth harvesting is likely to lead to the extinction of the subspecies in the foreseeable future," a finding he thought "argue[d] strongly for listing the subspecies as threatened or endangered at this time."<sup>5</sup> The FWS solicited peer reviews of Shaffer's study, and all agreed with his ultimate prognosis. Despite these findings, in December 1987, the FWS issued its decision that listing the spotted owl was not warranted.

Conservation groups, including Greenworld, challenged the FWS' decision in a federal court in Seattle, Washington. Like the vast majority of judicial reviews of administrative actions over the past several decades, the Administrative Procedure Act

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<sup>3</sup> See e.g., Julie Newman, *Green Ethics and Philosophy: An A-to-Z Guide* (Sage, 2011); .Jim Furnish and Dan Chu, "Twenty years of the Northwest Forest Plan: Guest opinion," [http://www.oregonlive.com/opinion/index.ssf/2014/04/twenty\\_years\\_of\\_the\\_northwest.html](http://www.oregonlive.com/opinion/index.ssf/2014/04/twenty_years_of_the_northwest.html); Susan Palmer, "Oregon State students develop new plan for forests," <http://www.deseretnews.com/article/700053023/Oregon-State-students-develop-new-plan-for-forests.html?pg=all>;

<sup>4</sup> Endangered Species Act, 87 *U.S. Statutes at Large* 892 (1973).

<sup>5</sup> Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 481 (9th Cir. 1988).



governed the court's review. Congress passed that law in 1946 to answer the dilemma that baffled jurists and administrators alike through the late-nineteenth century, namely the relative roles of the executive bureaucracy and the judiciary in implementing and enforcing statutory law (and hence in establishing new legal precedents).<sup>6</sup> Congress sided heavily with the bureaucracy in providing for courts to review administrative factual findings and policy preferences only as to whether they were "arbitrary and capricious."<sup>7</sup> Even with its narrow field of vision, however, the court saw enough to overturn the FWS' decision. Particularly, Judge Thomas Zilly, writing for the court, criticized the FWS for ignoring expert opinions, including that of its own expert, on the spotted owl's population viability, and for failing to provide any factual or scientific basis for its own conclusions. He thus ordered the agency to provide additional analysis and to reconsider the petition in light of the court's opinion.<sup>8</sup>

Less than two years after its initial decision not to list the spotted owl, the FWS reversed itself in concluding that listing was indeed warranted, but that was not the end of controversy. With its listing, finalized in June of 1990, the FWS declined to designate any "critical habitat" for the species, deeming it "not determinable."<sup>9</sup> This sparked another round of litigation before the same court and judge as before. Again, Judge Zilly was limited in his inquiry to whether the agency's decision was adequately supported—whether it provided legitimate reasons and considered all relevant data. And again, he

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<sup>6</sup> Administrative Procedure Act, 60 *U.S. Statutes at Large* 237 (June 11, 1946).

<sup>7</sup> 60 *U.S. Statutes at Large* 237.

<sup>8</sup> *Hodel*, 716 F.Supp. at 483.

<sup>9</sup> *Northern Spotted Owl v. Lujan*, 758 F.Supp. 621 (W.D. Wash. 1991).

found the agency's determination to be lacking. He found that the FWS "fail[ed] to direct this Court to any portion of the administrative record which adequately explains or justifies the decision not to designate critical habitat for the northern spotted owl."<sup>10</sup> He thus ordered the agency to reconsider designating critical habitat for the spotted owl and to issue a final rule by the end of April 1991.<sup>11</sup>

As the deadline for the FWS's critical habitat designation neared, the Bureau of Land Management (BLM)<sup>12</sup> adopted a management plan for protecting northern spotted owl populations, while also providing for logging in their habitat.<sup>13</sup> Called the "Jamison Strategy," this plan authorized timber sales totaling roughly 750 million board feet of timber over the next two fiscal years. The BLM promulgated the plan without consulting with the FWS to ensure it was "not likely to jeopardize the continued existence of [the northern spotted owl] or result in the destruction or adverse modification of [its critical] habitat," as the ESA required for all federal "agency actions" likely to affect the owl.<sup>14</sup> The BLM contended that the plan did not itself constitute an "action" and instead consulted with the FWS as to each individual timber sale. The problem with such an approach, according to environmentalists, is that the tendency in reviewing each site-specific action separately is to minimize or ignore the cumulative impacts of all the

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<sup>10</sup> Lujan, 758 F.Supp. at 627-28.

<sup>11</sup> Lujan, 758 F.Supp. at 630.

<sup>12</sup> The BLM was formed in 1946 by combining the General Land Office and the Grazing Service and charged with managing unreserved federal public lands.

<sup>13</sup> Victor M. Sher, "Travels with Strix: The Spotted Owl's Journey through the Federal Courts," *Public Land Law Review* 14: 49.

<sup>14</sup> ESA § 7(a)(2)-(3), 87 *U.S. Statutes at Large* 892.

actions taken together. Thus, environmental groups once again sued to protect the northern spotted owl, this time suing the BLM in federal court in Oregon for its failure to consult with the FWS as to its Jamison Strategy. After district court Judge Robert Jones found the BLM indeed violated the ESA and issued an injunction preventing implementation of the plan, the BLM appealed to the Ninth Circuit Court of Appeals, which agreed with Jones. The Ninth Circuit, in March 1992, enjoined the BLM from entering into any of the 1991 timber sales until it completed the ESA's formal consultation process.<sup>15</sup> The following January, Jones permanently enjoined all sales that may affect the endangered owl.<sup>16</sup>

An agency is surely desperate when it is compelled to appeal to something called the "God Squad" to undertake its desired action. That is where the BLM found itself even before the Ninth Circuit's upholding of Judge Jones' opinion in 1992 and the subsequent permanent injunction against *all* sales. In September 1991, the BLM petitioned the secretary of interior to call together the "God Squad" (officially the Endangered Species Committee (ESC)) to consider whether thirteen of its proposed sales (covering over four-thousand acres) should be exempted from the ESA's otherwise strict mandates not to jeopardize listed species and the resulting harsh economic impacts.<sup>17</sup> Congress established the ESC in 1978 largely at the behest of the Tennessee

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<sup>15</sup> Lane County Audubon Society v. Jamison, No. 91-36019 (9th Cir. 1992).

<sup>16</sup> Lane County Audubon Society v. Jamison, No. 91-6123-JO (D. Or. 1993).

<sup>17</sup> The committee is to be composed of seven members, including the standing secretaries of agriculture, of the army, and of the interior, the acting chairman of the council of economic advisors, the acting administrators of the environmental protection agency and the national oceanic and atmospheric administration, and one individual from an affected state. ESA, § 7(e)(3), 87 *U.S. Statutes at Large* 892.

Valley Authority, which sought to finish constructing a dam on the Little Tennessee River, despite the FWS's conclusion that it would jeopardize the viability of the endangered snail darter.<sup>18</sup>

Once called to duty, the ESC's task was simple. To grant an exemption, five of seven members had to find the following conditions to be met: (1) that there are "no reasonable and prudent alternatives" to the proposed action; (2) that the benefits "clearly outweigh" those of alternative actions consistent with conserving the species at question; (3) that the action is of "regional or national significance"; and (4) that neither the agency nor the applicant has "made any irreversible or irretrievable commitment of resources."<sup>19</sup> In this case, the ESC found such conditions satisfied and exempted thirteen of the BLM's proposed sales from the ESA.<sup>20</sup>

The ESC's decision did not end the controversy, however. Environmental groups challenged the granting of the exemption based on the BLM having allegedly failed to comply with all the statutory requirements in availing itself of the exemption. First, they contended that the BLM did not adequately consult with the FWS in the first place, as Judge Jones and the Ninth Circuit had found. Second, they argued that the BLM did not "previously prepare" an environmental impact statement assessing the impacts upon endangered species and their critical habitats prior to seeking the

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<sup>18</sup> For a fun and informative recounting of the legal and political battles to save the snail darter and block the dam's completion, see Zygmunt Jan Broel Plater, *The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* (New Haven, CT: Yale University Press, 2013).

<sup>19</sup> ESA, § 7(h)(1)(A), 87 *U.S. Statutes at Large* 892.

<sup>20</sup> *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993).

exemption, as required. Third, they alleged numerous procedural defects in the ESC's consideration of the BLM's petition, including the treatment of the proceedings as rulemaking rather than as a more trial-like adjudication, thereby allowing for unofficial contacts among committee members, interested parties, and others—including members of the White House staff—throughout the decision-making process. Moreover, environmental groups pointed to a conflict of interest (actually multiple conflicts of interest) for Solicitor General Thomas Sansonetti, who was concurrently representing the BLM in related litigation while also serving as counsel for the ESC and chief counsel for the FWS.<sup>21</sup> These irregularities led the *Oregonian* editorial board to observe that President George H. W. Bush's administration was “manipulating the input before a federal hearings judge so the output will be favorable to the timber industry, irrespective of the facts of the matter.”<sup>22</sup> Shortly after a federal court granted the environmentalists' request for an evidentiary hearing and, in so doing, agreed that the ESC's decisions were adjudicatory in nature, the BLM—by this time under the direction of President Bill Clinton's administration—withdraw its proposal to pursue the thirteen sales for which it had sought the ESC exemptions in the first place. The agency also pledged not to sell timber in the future except in strict accordance with the ESA.<sup>23</sup>

The Clinton administration then established an inter-agency task force to develop a plan for managing all federal forests—including national forests and parks in

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<sup>21</sup> Portland Audubon v. ESC, 984 F.2d at 1538-39.

<sup>22</sup> Quoted in Sher, “Travels with Strix,” 56.

<sup>23</sup> Michael C. Blumm and Tim Wigington, “The Oregon & California Railroad Grant Lands' Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict,” *Boston College Environmental Affairs Law Review* 40: 29-30.

addition to BLM lands—within the northern spotted owl’s range. Its work culminated in the Northwest Forest Plan, which amended existing management plans for nineteen national forests and seven BLM districts from northern California to Washington, in all covering twenty-four million acres of federal land.<sup>24</sup> Its goal was to protect the spotted owl’s old-growth habitat while still allowing for a stable and sustainable timber industry in the region. To protect the spotted owl and other species, it set aside over seven million acres of old-growth forest as “late successional reserves” and over two million acres of riparian areas as “riparian reserves.” To preserve the timber industry, it recognized about four million acres of “matrix” lands where most of the timber harvests would occur. Though this may seem to be a middle-ground compromise between environmental protection and extractive uses, the conditions placed upon harvests even in the “matrix” lands placed a substantial burden on the timber industry. Timber production plummeted as a result. While in the late 1980s, the O&C Lands produced over four billion board feet per year, in 2004, they produced less than 300 million, a ninety-three percent drop.<sup>25</sup> Although the plan has been attacked since its inception, it for the most part remains intact.<sup>26</sup>

Beyond the impacts on the regional timber industry, implementation of the Northwest Forest Plan devastated county governments, including the eighteen counties

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<sup>24</sup> Blumm, “Sordid Past,” 31-32.

<sup>25</sup> Daniel Green and Charles McKetta, “Secure Rural Schools Payments Termination,” Report to the Association of O&C Counties (2007), [http://www.oregon.gov/odf/board/docs/ffac\\_sra\\_termination\\_impacts.pdf](http://www.oregon.gov/odf/board/docs/ffac_sra_termination_impacts.pdf) (last accessed April 12, 2015).

<sup>26</sup> Blumm, “Sordid Past,” 31-50.

encompassing the O&C Lands (“O&C Counties”). Since the federal government revested the O&C Lands in 1916, these counties have been dependent upon federal aid to make up for lost tax revenues. When the Chamberlain-Ferris Act of 1916 failed to provide sufficient funds to protect the counties, Congress, in 1926, provided for a loan to the counties from the general treasury to compensate them for the property taxes the counties would have received had the federal government not revested the lands. Congress also adjusted the formula for allocating revenues from timber sales to protect the counties and local economies going forward.<sup>27</sup> However, like its predecessor, Congress’ new formula presumed timber revenues would ultimately be sufficient to make up for lost taxes. It too proved unworkable. Congress, in 1937, replaced the scheme with one that called for management of the lands for sustained yield and for the protection of local communities and industries. It directed the BLM to allocate seventy-five percent of timber revenues to the O&C Counties, with the remaining twenty-five percent going towards management of the lands.<sup>28</sup> That formula worked well for the counties, particularly as timber harvests increased drastically in the last half of the twentieth century.

That all changed with the listing of the spotted owl and with the Northwest Forest Plan. Counties lost not only in terms of the drastically reduced annual payments from the federal government, but also in job and income losses due to the contraction in the regional timber industry as well as others dependent upon the timber resource. In

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<sup>27</sup> Stanfield Act of 1926, 44 *U.S. Statutes at Large* 915. Chamberlain-Ferris Act of 1916, 39 *U.S. Statutes at Large* 218 (June 6, 1916).

<sup>28</sup> Oregon & California Lands Act, 50 *U.S. Statutes at Large* 874 (August 28, 1937).

2000, Congress attempted to aid the O&C Counties by providing for annual payments to the counties in an amount equal to the average of the three highest paying years between 1986 and 1999.<sup>29</sup> This program was not designed to be permanent but was rather intended to give the counties an opportunity to diversify and to develop other sources of revenue other than the federal government. It was thus set to expire after six years of payments. However, Congress passed an emergency four-year extension in 2008 and another one-year extension in 2012.

Most of the O&C Counties remain desperately dependent upon federal land revenue sharing and other payments in lieu of taxes. In early 2012, Members of Congress Peter DeFazio, Greg Walden, and Kurt Schrader, all from Oregon, proposed a new approach to managing the O&C Lands. They proposed dividing the lands into a number of timber and conservation trusts. Conservation trust lands would be transferred to the jurisdiction of the U.S. Forest Service and be managed pursuant to the Northwest Forest Plan. Timber trust lands, on the other hand, while still being owned by the federal government, would be managed by private boards of trustees for the benefit of the counties and local economies. Their management directive would be to produce “maximum sustained revenues in perpetuity for the O&C [C]ounties.” Some experts have projected the proposed legislation would triple the amount of timber harvests from O&C Lands, while also exempting them from federal environmental protections, including the ESA’s consultation requirement.<sup>30</sup>

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<sup>29</sup> Secure Rural School Act, 114 *U.S. Statutes at Large* 1607 (2000).

<sup>30</sup> Blumm, “Sordid Past,” 50-51. While policymakers and stakeholders continue to debate the merits of DeFazio, Walden, and Schrader’s proposal, Congress in March 2015 restored the aid to O&C Counties that had previously expired. Jeff Mapes, “Aid to timber-dependent Oregon counties is revived by House leaders,” *Oregonian*, March 24, 2015,



For now, finding a management scheme consistent with the web of correlative rights, expectations, and duties that have attached to the O&C Lands seems impossible.

Alas, it is a tangled web that law weaves. It remains inseparable from the land.

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