

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

BY
DEBRA L. DONAHUE*

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

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I. INTRODUCTION

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

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

¹ See *infra* Part III.

² See *infra* Part IV.

³ See *infra* Part V.

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

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

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

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

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

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

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

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

According to the Department of the Interior, BLM riparian areas are in their worst condition ever; the dry uplands have not improved under BLM management, and “[w]atershed and water quality conditions would improve to their maximum potential” if livestock were removed from public lands.⁹ Similarly, the Forest Service concluded that livestock grazing is the primary cause of species endangerment in arid regions of the West, such as the Colorado Plateau and Arizona Basin.¹⁰ Others have suggested that “livestock grazing may be the major factor negatively affecting wildlife in the 11 western states.”¹¹ Grazing has also been identified as the number one cause of nonpoint source pollution of surface waters in the western states¹² and the principal cause of desertification in North America.¹³ Ungrazed

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

⁹ See RANGELAND REFORM ‘94, *supra* note 8, at 45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁶ *See* DONAHUE, *supra* note 4, at 34–35, 194–99.

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

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

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

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

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

³¹ BLM, BLM and Forest Service Announce 2005 Federal Grazing Fee, http://www.blm.gov/nhp/news/releases/pages/2005/pr050207_grazing.htm (last visited Nov. 20, 2005).

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

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

Nor have the agencies reasonably justified livestock grazing under the planning or management criteria of their principal land management statutes, the Federal Land Policy and Management Act (FLPMA)³⁵ and National Forest Management Act (NFMA),³⁶ both passed in 1976.³⁷ Instead, grazing is rationalized as a means of sustaining small communities, maintaining open spaces on private lands, and preserving an important western way of life and culture.³⁸ The governing statutes, however, confer on the BLM and Forest Service no authority, much less a mandate, to promote local economic or lifestyle concerns or to regulate development on private lands.³⁹

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

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

³⁴ RANGELAND REFORM ‘94, *supra* note 8, at 45; POWER, *supra* note 33, at 184–86.

³⁵ Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000).

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

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

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

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

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

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

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

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

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

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

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

⁴⁵ *See supra* notes 8–20 and accompanying text.

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

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

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

III. THE RULE OF CAPTURE

A. Background

The rule of capture, though of ancient origins, is a property law concept familiar to all first-year law students⁵⁰ and of continuing fascination to legal scholars.⁵¹ A "first-in-time allocation scheme,"⁵² the rule is based on the maxim that "first possession is the root of title."⁵³ Thus, a person acquires possession—a property interest—of a common-pool or fugitive resource⁵⁴ by capturing and holding it. At common law, one who captured a wild animal, for example, thereby acquired "occupation" or possession of it (though not

⁴⁶ See DONAHUE, *supra* note 4, at 276.

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

⁴⁸ *Id.* at 263–64.

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

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

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

⁵² *Id.* at 119.

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

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

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

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

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

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

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

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

⁵⁸ *Pierson*, 3 Cai. at 178.

⁵⁹ *Id.*

⁶⁰ *Id.* at 179.

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

⁶² Rose, *supra* note 53, at 77.

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

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

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

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

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

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

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

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

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

⁶⁷ See *supra* notes 8–20 and accompanying text.

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

⁶⁹ *Id.* at 1043.

⁷⁰ GOBLE & FREYFOGLE, *supra* note 51, at 124.

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

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

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

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

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

⁷³ *Id.* at 1244.

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

⁷⁵ See DONAHUE, *supra* note 4, at 29, 31 and sources cited therein. “[O]vergrazing of ranges has been the besetting sin of stockmen since Biblical times,” asserted A.P. Atkins, past president of the American Society of Range Management. A.P. Atkins, *Report of the President, 1955*, 9 *J. RANGE MGMT.* 63, 63 (1956). Of course, ranchers also have long believed that the early settlers converted “barren wasteland into productive farms and ranches.” Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 *IDAHO L. REV.* 505, 518 (1993–94). Attorneys Falen and Budd-Falen are both from ranching families.

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

⁷⁷ Hardin, *supra* note 72, at 1245.

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

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

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

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

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

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

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

⁸¹ CRONON, *supra* note 79, at 161.

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

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

As suggested by the question “first in time to do what?,”⁸⁴ the particular formulation of the rule of capture varies by resource or activity and by jurisdiction.⁸⁵ Applied to public-land grazing, the rule fits somewhat awkwardly. First, vegetation, which is rooted in the soil, is not exactly “fugitive” in the sense of wild animals or mobile oil and gas deposits. Nevertheless, early cattlemen and sheepmen understandably desired to make use of the forage before someone else did. The forage was fleeting in another sense: it was seasonal. Production in the next year might be poor, and whatever might remain of the prior year’s forage would be less palatable and nutritious. Second—and ironically—while current grazing on federal lands can be traced to the historical “capture” of forage on those lands, neither that capture nor the future exercise of “rights” by the initial captors’ successors resulted in the acquisition of a property interest in the forage or the land.⁸⁶ In other words, the self-help customs by which stock producers acquired privileges to use public forage⁸⁷ failed to achieve the rule’s object—“possession” or ownership. Still, ranchers have not been ousted from public lands. They define their “ranch” in terms of both their private holdings and the federal allotments on which their stock is permitted to graze. Their grazing permits have value, which is capitalized into the value of the ranch.⁸⁸ Finally, this tenure has immense physical ramifications for the land and other land uses.⁸⁹

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

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

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

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

⁸⁷ See *infra* notes 115–35 and accompanying text.

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

⁸⁹ See *supra* discussion at notes 6–22.

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

*B. Public Domain Grazing*⁹⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹⁸ See *id.* at 15-16.

⁹⁹ *Id.* at 3.

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.* at 4.

Range livestock production was widely considered an industry; indeed, the large cattle operations smacked of monopolism.¹⁰² Stockmen, moreover, were merely a “temporary first wave of settlement.”¹⁰³ In contrast, agriculture *was* the settlement vision of national policy—the peopling of the West by Jefferson’s yeoman farmers.¹⁰⁴ The distinction was prominent in federal land policies. Until 1862 the public domain was open to all, free to use, if not actually take. In that year the Homestead Act¹⁰⁵ made lands free for the taking as well, but only by small farmers and with certain preconditions. Despite early and persistent lobbying by stockgrowers for some form of federal protection or largesse,¹⁰⁶ Congress did not pass homestead legislation for stockraising purposes until 1904, and this law (the Kincaid Act¹⁰⁷) applied only to Nebraska. Not until 1916 did a general law authorize homesteads for ranching, rather than farming, purposes.¹⁰⁸ Even then claims were limited to 640 acres, far less than the thousands of acres required by many ranches.¹⁰⁹ Stockmen had to wait for a general leasing law until 1934.¹¹⁰

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

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

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

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

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

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

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

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

¹⁰⁸ Stockraising Homestead Act, 39 Stat. 862, 862–65 (1916).

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

¹¹⁰ Taylor Grazing Act, 48 Stat. 1269, 1269–75 (1934).

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

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

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

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

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

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

¹¹⁴ *Id.* at 162–63.

¹¹⁵ Rose, *supra* note 53, at 77.

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

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

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

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

¹²⁰ Scott, *supra* note 74, at 156.

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

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

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

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

¹²² Scott, *supra* note 74, at 181–82.

¹²³ *Id.* at 182.

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

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

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

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

¹²⁸ *Id.* at 171.

¹²⁹ *Id.* at 172–73.

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

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

land, or they passed illegal regulations declaring a range “closed.”¹³² One association required that anyone wishing to run cattle in an area must post a \$3,000 deposit, thus preventing entrance by homesteaders and small operators.¹³³ More subtle tactics included the exclusion of newcomers from membership in stockmen associations and sharing in benefits, such as use of corrals.¹³⁴ Large operators built hundreds of miles of barbed-wire fence, obstructing access to millions of federal acres, even after Congress banned the practice in 1885.¹³⁵ By simply keeping livestock on the lands he claimed, a rancher could maintain “possession” of the land. Indeed, by buying a herd *in situ*, one acquired possession and “ownership” of both the stock and the land on which they grazed.

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

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

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

¹³³ See Anderson & Hill, *supra* note 85, at 500–01.

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

¹³⁵ See Unlawful Inclosures Act, 23 Stat. 321, 43 U.S.C. §§ 1061–1066 (2000).

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

¹³⁷ Healy, 83 P. at 587.

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

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

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

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

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

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

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

¹⁴⁰ See Rose, *supra* note 53, at 85.

¹⁴¹ *Id.*

¹⁴² *Id.* at 88.

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

¹⁴⁴ Rose, *supra* note 53, at 87.

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

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

Overstocking and deteriorating range conditions became increasingly apparent. While free grazing was halted on forest reserves by the turn of the century, a laissez-faire regime prevailed on the public domain until 1934.¹⁴⁷ When Congress finally passed the Taylor Grazing Act (TGA),¹⁴⁸ it had long been aware that portions of the West were becoming deserts as a result of grazing and drought.¹⁴⁹ Numerous factors had forestalled efforts to correct the situation.¹⁵⁰ Members of Congress and stockgrowers disagreed as to appropriate solutions. Some groups favored disposal of public domain lands either to the states, which presumably would sell them to private interests, or to livestock operators directly. Others favored retention of federal title, with grazing authorized by lease or permit, as in the forest reserves. Which camp one was in depended, of course, on the perceived benefits or disadvantages. Many stockmen preferred a leasing system that would allow them to avoid property taxes, but views and interests varied between landed and itinerant stockgrowers, and between farmers and ranchers. Some states preferred privatization for the potential tax revenues, but they uniformly rejected a proposal by the Hoover Commission to transfer the public domain lands, *sans* minerals, to states. General economic conditions and a rivalry between the Departments of Agriculture and Interior also played roles.¹⁵¹

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

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

¹⁴⁸ 48 Stat. 1269–75, 43 U.S.C. §§ 315–315r.

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

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

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

¹⁵² Taylor Grazing Act, 43 U.S.C. § 315 (2000).

¹⁵³ Taylor Grazing Act, 48 Stat. 1269 (1934). “The phrase ‘stabilize the livestock industry dependent upon the public range’ is ‘almost synonymous with ‘maintain the status quo on the public range.’” FOSS, *supra* note 103, at 204.

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

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

IV. THE CAPTURE THESIS

A. Background and Criticisms

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

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

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

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

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

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

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

The notion that industry can “capture” or co-opt Congress or an agency—specifically, an agency that Congress establishes, nominally to regulate the industry’s activities, but actually to perpetuate the capture¹⁶⁰—has waxed, waned, and evolved since its origins in the 1950s.¹⁶¹ Initially applied to business lobbies and independent regulatory agencies, interest-group theory was extended by public choice scholars¹⁶² to other interest groups and to all political institutions.¹⁶³ The logic has since been extended by some scholars to courts and to the market.¹⁶⁴ Common wisdom seems to be that the influence of capture theory has waned.¹⁶⁵ Nevertheless, it has “had a pronounced influence on public law”¹⁶⁶ and continues to be popular especially among law and economics scholars, as well as the public.¹⁶⁷ I believe that the basic theory illuminates the mechanisms by which public-land ranchers dominate federal policies affecting their operations.

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

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

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

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

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

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

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

¹⁶⁶ Erlanger & Merrill, *supra* note 158, at 961.

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

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

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

¹⁶⁸ See generally Spence & Cross, *supra* note 160.

¹⁶⁹ *Id.* at 116–23 (emphasis added).

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

¹⁷¹ See Spence & Cross, *supra* note 160, at 117.

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

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

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

¹⁷⁵ *Id.* at 115.

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

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

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

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

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

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

B. Capture Theory Expanded to Fit Public Land Ranching

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

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

¹⁷⁸ *See id.* at 114.

¹⁷⁹ *See id.* at 122–23.

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

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

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

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

¹⁸⁴ MARION CLAWSON, THE WESTERN RANGE LIVESTOCK INDUSTRY 381 (1950).

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

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

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

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

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

¹⁸⁷ See *supra* text accompanying note 183.

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

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

¹⁹⁰ See *supra* text accompanying note 183.

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

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

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

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

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

the “Bureau of Livestock and Mining”).

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

¹⁹³ *See infra* note 485 and accompanying text.

¹⁹⁴ *See supra* text accompanying note 183.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰³ *See* CALEF, *supra* note 149, at 130.

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

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

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

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

²⁰⁶ FOSS, *supra* note 103, at 137.

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

²⁰⁸ FOSS, *supra* note 103, at 198.

²⁰⁹ CULHANE, *supra* note 165, at 91.

²¹⁰ GRANT MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 209 (1967).

²¹¹ *Id.*

²¹² *Id.*

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

²¹⁴ *Id.* at 115.

²¹⁵ *Id.* at 115–16 (emphasis added).

²¹⁶ CALEF, *supra* note 149, at 133.

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

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

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

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

²¹⁸ FOSS, *supra* note 103, at 198.

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

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

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

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

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

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

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

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

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

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

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

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

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

²²⁹ LIBECAP, *supra* note 223, at 53.

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

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

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

²³⁰ *Id.* at 46.

²³¹ CULHANE, *supra* note 165, at 89.

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

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

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

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

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

²³⁷ CALEF, *supra* note 149, at 135.

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

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

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

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

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

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

²⁴¹ *Id.*

²⁴² *Id.* at 212.

²⁴³ *Id.*

²⁴⁴ See MUHN & STUART, *supra* note 76, at 81, 136.

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

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

²⁴⁷ CALEF, *supra* note 149, at 141.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁵⁷ *Id.* at 250.

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

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

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

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

2. Capture in the Modern Era: FLPMA and PRIA

“Political pressure from the livestock industry from 1934 to 1976 effectively hamstrung implementation of the [Taylor Grazing Act].”²⁶¹ Negative reactions to this overt political influence and to continued overgrazing, along with increasing interest in other public land resources, led politicians and other public land users and interest groups to call for reforms. Between 1964 and 1980—the heyday of the environmental movement²⁶²—Congress enacted several pieces of relevant legislation.²⁶³ While all of these acts affect livestock interests directly or (more often) indirectly, most significant for our purposes are the National Environmental Policy Act (NEPA) and BLM’s organic act, FLPMA. This section considers whether these “environmental” laws and other events of this period enhanced or undermined either the degree to which the BLM remained captured by public land ranchers or the legitimacy of ranchers’ claims to public rangelands. It demonstrates that the range livestock industry’s political clout—and the agencies’ concomitant subservience—have persisted both because and in spite of FLPMA.²⁶⁴

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

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

Id.

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

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

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

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

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

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

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

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

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

²⁶⁶ CULHANE, *supra* note 165, at 247–48.

²⁶⁷ *Id.* at 180.

²⁶⁸ *Id.* *Cf. supra* text at notes 191–92 (noting ranchers’ role in Sagebrush Rebellion and Wise Use and county movements and the association of ranching and the minerals industries).

²⁶⁹ CULHANE, *supra* note 165, at 228.

²⁷⁰ *Id.* at 229.

²⁷¹ *Id.* at 334.

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

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

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

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

The PLLRC report led to passage of FLPMA in 1976, although few of the Commission’s grazing-related recommendations were enacted in the legislation.²⁷⁸ On the other hand, the Commission’s pointed criticism of district grazing boards²⁷⁹ helped prompt passage of the Federal Advisory Committee Act (FACA) in 1972,²⁸⁰ which in turn led to significant changes in the BLM advisory board system.²⁸¹ District grazing boards were terminated at the end of 1974, and new multiple-use advisory boards were set up administratively.²⁸² Livestock interests unsuccessfully challenged these changes in court.²⁸³ In 1976 Congress authorized multiple use “advisory councils” in FLPMA;²⁸⁴ two years later it made consultation with the councils mandatory in the Public Rangelands Improvement Act of 1978 (PRIA).²⁸⁵ FLPMA also reauthorized district grazing boards (renamed district advisory

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

²⁷⁵ See DONAHUE, *supra* note 4, at 240 (citing PLLRC REPORT, *supra* note 272, at 48, 115–16).

²⁷⁶ *Id.* at 240–41.

²⁷⁷ See *id.* (citing PLLRC REPORT, *supra* note 272, at 38, 42, 45–56).

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

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

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

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

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

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

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

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

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

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

FLPMA, which passed in October 1976, seemed to bear out Clawson’s explanation of ranchers’ political influence as “greatest . . . in [the] prevention of the measures it opposes.”²⁹¹ Referring to the livestock industry, Klyza opined that FLPMA “represented cracks in the privilege of interest-group liberalism. But not severe ones.”²⁹² The statute neither curtails grazing on any lands nor directs any specific changes in grazing management practices—despite the recommendations of the PLLRC²⁹³ and some environmental groups, and Congress’s express acknowledgement in the Act that “a substantial amount of the Federal range land is deteriorating in quality.”²⁹⁴ On the other hand, the Act does nothing to change the nature of the interest in a grazing permit; it reiterates the Taylor Act pronouncement that a permit creates no right, title, interest, or estate in or to the lands.²⁹⁵ In essence, FLPMA’s grazing provisions, which apply to both BLM and the Forest Service, clarify the TGA.²⁹⁶ FLPMA specifies general permit terms and conditions and provides further that grazing permits may be cancelled,

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

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

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

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

²⁹⁰ *Id.* at 122–23.

²⁹¹ CLAWSON, *supra* note 184, at 381.

²⁹² KLYZA, *supra* note 32, at 140.

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

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

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

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

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

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

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

²⁹⁷ See *id.* § 1752 (regarding grazing leases and permits).

²⁹⁸ *Id.* § 1752(d).

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

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

³⁰¹ *Id.* § 1712(c)(7).

³⁰² *Id.* § 1712(c)(6).

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

³⁰⁴ *Id.* § 1732(b).

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

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

Recognizing that “vast segments of the public rangelands [were] producing less than their potential for livestock, wildlife habitat, recreation, forage, and water and soil conservation benefits,”³⁰⁷ and perhaps realizing that FLPMA would be ineffectual in reversing these trends Congress took action again just two years later. In PRIA³⁰⁸ it declared that “*the goal of [public rangeland] management shall be to improve the range conditions so that they become as productive as feasible [for all rangeland values].*”³⁰⁹ But

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

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

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

³⁰⁸ *Id.* §§ 1901–1908.

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

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

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

On the other hand, stockmen did succeed in PRIA in convincing Congress to rely even more heavily on “range improvements.”³¹⁴ PRIA authorized the appropriation of federal funds for these improvements, providing that such funds would be in addition to the fifty percent of grazing fee revenues, which FLPMA had directed be devoted to such purposes.³¹⁵ Despite the statute’s broad definitions of “range condition” and “range improvement,”³¹⁶ the lion’s share of funds (by one account, 96.5% of accounted funds³¹⁷) has gone, not to improve overall range conditions, but to enhance livestock forage production or otherwise improve conditions for livestock.³¹⁸

43 U.S.C. § 1902(d).

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

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

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

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

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

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

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

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

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

PRIA and its aftermath further reflect the industry's stranglehold on the national government with respect to grazing fees. Recall that in FLPMA Congress had frozen grazing fees, pending completion of a study of the value of federal-land grazing.³¹⁹ The resulting report was ineffectual, concluding only: "The fee system should collect fair market value for use of the forage resource."³²⁰ It documented the "many other users of the Federal lands in addition to grazing permittees," noting that these "segments of the general public are also concerned about grazing fee levels."³²¹ The BLM and Forest Service then proposed raising the grazing fee to \$1.89, with annual increases thereafter of no more than \$0.12 per AUM until a level of \$2.38 was reached.³²² National stockgrower associations objected that the proposed increases were "unfair and unrealistic," even though the agencies countered that rates the next year would be even higher if the then-current formula were left in place.³²³ In PRIA Congress passed another one-year moratorium on fees and ordered a new study.³²⁴ The study confirmed that federal grazing fees remained "far below rental rates for comparable western private rangelands."³²⁵ PRIA also established a new, experimental grazing fee formula, effective through 1985.³²⁶ This formula—based on cattle prices, permittees' costs of production, and ability to pay—resulted in the first grazing fee increase for BLM lands since 1976. But the fee was still low (\$1.89) and dropped each year from 1981–85.³²⁷ By comparison, fees on state lands ranged from \$1.43 to \$14.00 per AUM in 1985; fees on private lands averaged \$6.87; and fees on other federal lands averaged \$6.53.³²⁸

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

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

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

³²¹ STUDY OF FEES, *supra* note 320, at 3-3.

³²² KLYZA, *supra* note 32, at 131–33.

³²³ *Id.* at 130–31.

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

³²⁵ GRAZING FEES HEARING, *supra* note 259, at 254.

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

³²⁷ GAO, SLOW, COSTLY PROCESS, *supra* note 20, at 33–34.

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

³²⁹ KLYZA, *supra* note 32, at 136.

³³⁰ *Id.* at 137.

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

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

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

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

³³³ KLYZA, *supra* note 32, at 136.

³³⁴ *Id.* at 138.

³³⁵ *Id.* at 138 (quoting OMB Director James Miller).

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

³³⁷ KLYZA, *supra* note 32, at 138.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 85–86.

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

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

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

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

³⁵⁴ S. Res. 85, 109th Cong. (2005).

³⁵⁵ H.R. Res. 411, 109th Cong. (2005). The bill’s findings include:

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

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

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

. . . .

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

. . . .

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

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

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

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

A. Cowboys in the White House

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

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

³⁵⁶ H.R. Res. 411 § 6.

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

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

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

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

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

³⁶² Davis, *supra* note 191, at 83.

³⁶³ *Id.*

³⁶⁴ *Id.*

regulations imposed by the Carter Administration.”³⁶⁵ As described above, Reagan also preserved the grazing fee formula favored by stockmen.³⁶⁶ But his administration’s most blatantly pro-rancher measure was promulgation of rules implementing a cooperative management agreement (CMA) policy, under which the BLM entered into range management agreements to “reward” grazing permittees who were considered good land stewards.³⁶⁷ A former BLM director described the agreements as “a give-away of the public lands to private interests.”³⁶⁸ A federal district court ruled that the program violated FLPMA by essentially abdicating to livestock operators the BLM’s statutory land management responsibilities.³⁶⁹ Unconvinced by the Administration’s and the ranchers’ “trust us” assurances, the judge struck down the rules, observing: “Permittees must be kept under a sufficiently real threat of cancellation or modification in order to adequately protect the public lands from overgrazing or other forms of mismanagement.”³⁷⁰

Reagan’s policies fit well within what was by then a long-standing political tradition of protecting public-land ranchers from change, but they were more overtly pro-grazing than those of his predecessors. For the first time, Americans were told that they could and should trust *cowboys* to take care of public lands belonging to all Americans. This has become the mantra of Reagan’s philosophical successor, George W. Bush.

The years of the Clinton Administration will be seen by some as an aberration in this picture, if not a serious flaw in my thesis. The ranching community will scoff, but in my view, even the Clinton-Babbitt “range reform” regulations³⁷¹ reflect that administration’s inability to escape the livestock industry’s loop. The Interior Department’s *Rangeland Reform ‘94 DEIS* documented the degraded range and identified livestock grazing as the principal cause.³⁷² The study concluded that, under the “No Grazing” alternative, “[e]cological conditions would improve the most,” “watershed and water quality conditions would improve to their maximum potential,” the “diversity and abundance of wildlife” would increase, and recreationists

³⁶⁵ SHORT, *supra* note 361, at 37. The interior secretaries were James Watt, Donald Hodel, and William Clark. *Id.*

³⁶⁶ See *supra* notes 337–40 and accompanying text (discussing Reagan’s Executive Order No. 12,548 (Feb. 14, 1986)).

³⁶⁷ See Bernard D. Zaleha, *The Rise and Fall of BLM’s “Cooperative Management Agreements”: A Livestock Management Tool Succumbs to Judicial Scrutiny*, 17 ENVTL. L. 125, 139–40 (1986) (characterizing the purpose of the CMA program as a reward to livestock operators). See also KLYZA, *supra* note 32, at 125 (noting the necessity of rancher cooperation in implementing BLM’s programs).

³⁶⁸ See DONAHUE, *supra* note 4, at 77 (quoting former BLM Director Frank Gregg).

³⁶⁹ Natural Res. Def. Council v. Hodel, 618 F. Supp. 848, 853 (E.D. Cal. 1985).

³⁷⁰ *Id.* at 871.

³⁷¹ 43 C.F.R. §§ 1784.0-1–1784.6-2, 4100.0-1 to 4180.2 (2004). Most notable, the rules established fundamentals of rangeland health, which required “appropriate” (i.e., corrective) action “as soon as practicable but not later than the start of the next grazing year” (i.e., within one year of determining that range conditions did not meet standards). 43 C.F.R. § 4180.1. The Bush Administration’s revised rules more than double the period within which action must be taken. See *infra* note 463 and accompanying text.

³⁷² See generally RANGELAND REFORM ‘94, *supra* note 8.

and others would benefit thereby.³⁷³ It further found that grazing on public lands produced marginal economic benefits.³⁷⁴ Nevertheless, the agency did not propose to eliminate grazing. Instead, it justified continued grazing, apparently on the basis of lifestyle and social or cultural concerns.³⁷⁵

The industry did suffer a setback (temporary, as it turned out³⁷⁶) when the U.S. Supreme Court in *Public Lands Council v. Babbitt*³⁷⁷ upheld the BLM's range reform regulations.³⁷⁸ According to the Court, the TGA "make[s] clear that the ranchers' interest in permit stability cannot be absolute; and that the Secretary is free reasonably to determine just how, and the extent to which, 'grazing privileges' shall be safeguarded, in light of the Act's basic purposes."³⁷⁹ Would the Supreme Court have upheld an agency decision to end grazing on all or a large portion of BLM rangelands? The answer to that (highly hypothetical) question is less certain. A divided Tenth Circuit panel stated that, under the TGA, the Secretary of the Interior is "free to consider" the minor contribution of BLM lands to livestock production when "balancing the need for industry stability against the need to protect the land from deterioration."³⁸⁰ Presumably, that balance could tilt toward removal of livestock to protect other resources.³⁸¹ Whether such a policy choice will ever be made depends on the political will of Congress and/or the land management agencies. That in turn will depend on demystifying the cowboy—highly unlikely under the current administration.

In the George W. Bush era, cowboy politics have been rejuvenated.³⁸² It is increasingly fashionable to tout the admirable traits of cowboys and the need to keep ranchers on the land, and to deny or ignore the ecological impacts and economics of public-land grazing.³⁸³ President George W. Bush, a self-proclaimed rancher,³⁸⁴ sets the tone. Forest Service and BLM line

³⁷³ *Id.* at 44–45.

³⁷⁴ *See id.* at 45, 3–56 to 3–70.

³⁷⁵ *Cf. id.* at 5, 46, 3–55 to 3–56, 3–75 to 3–76, 4–122.

³⁷⁶ *See infra* discussion of the Bush grazing rules, notes 436–71 and accompanying text.

³⁷⁷ 529 U.S. 728 (2000).

³⁷⁸ *Id.* at 731.

³⁷⁹ *Id.* at 742.

³⁸⁰ *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1172 n.5 (10th Cir. 1998). The notion of industry stability appears solely in the TGA preamble, as one of three purposes of the legislation. 48 Stat. 1269. It was not codified. *Cf. FOSS, supra* note 103, at 204 (commenting on the Taylor Grazing Act).

³⁸¹ I have argued—based on the law, economics, ecology, and history—that a policy choice to eliminate grazing on a majority of BLM lands *could* be justified. *See DONAHUE, supra* note 4, at 284–90.

³⁸² *Cf.* Karen Dodwell, From the Center: The Cowboy Myth, George W. Bush, and the War with Iraq, http://www.americanpopularculture.com/archive/politics/cowboy_myth.htm (last visited Nov. 20, 2005) (describing how Bush has frequently been described "in terms of a variety of cowboy images," and that "the term 'cowboy' [is] lodged securely in the national and international consciousness as a means of delineating positions").

³⁸³ Consider for instance the Thomas bill, promoting the culture and history of grazing while suggesting compensation for ranchers impacted by environmental regulations. S. Res. 85, 109th Cong. (2005). *See also infra* notes 481, 489–509 (discussing how scientists and range consultants have been co-opted by the myths).

³⁸⁴ *See, e.g.*, Press Release, Office of the Press Secretary, President Gives Tour of Crawford Ranch (Aug. 25, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/08/20010825->

officers “have been told to accommodate for ranchers’ needs.”³⁸⁵ Numerous Bush appointees are westerners (or claim to be) and “play cowboy.”³⁸⁶ Indeed, the Bush Administration is unabashedly reclaiming the BLM moniker, “Bureau of Livestock and Mining.”³⁸⁷

Perhaps the consummate Bush cowboy is former Interior Solicitor William G. Myers III.³⁸⁸ An entire article could be written about his connections with and advocacy for the livestock industry.³⁸⁹ In a speech to

2.html. Bush purchased the former Engelbrecht ranch in 1999 while he was a candidate for the presidency, and a house was built on it the next year. Engelbrecht’s cattle continue to graze on the property. *Id.*; see also Steven R. Weisman, *Meanwhile Back at the Ranch, and Other Vacation Tales*, N.Y. TIMES, Jan. 2, 2002, at A14, available at 2002 WLNR 4019505 (comparing the ranching activities of past presidents with those of President Bush).

³⁸⁵ Paul Koberstein, *The Big Dry: Cows Plus Drought Equals Misery for Rivers in the West*, CASCADIA TIMES, Summer 2002 (quoting “government sources,” and noting further that “[t]here is extra pressure now under Bush for managers to look out for the ranching community”) (copy, received by e-mail, Jan. 19, 2005, on file with author). Ranchers attending a public meeting in the Malad, Idaho, BLM field office in early 2001 informed BLM personnel that “now that the Bush administration is in power [the permittees] will not agree to any cuts in [livestock] numbers and will not need to!” E-mail from attendee at meeting to author (Feb. 16, 2001) (on file with author).

³⁸⁶ For instance, Mike Leavitt, Utah, insurance executive, and former Utah governor, now Secretary of Health and Human Services, enjoyed donning cowboy attire and riding a horse in parades while he was governor. Tom Sansonetti, former Assistant Attorney General for Environment and Natural Resources, came to Wyoming in 1978 after growing up in the East and being educated in Virginia, and now refers to Campbell County, Wyoming, as “my home neck of the woods.” He once remarked that his division at the Department of Justice needed more people from the West because current employees “don’t understand the importance of our ranching industry” and “don’t understand why coyotes are bad for sheep.” Tom Sansonetti, Address at University of Wyoming College of Law (Mar. 5, 2004) (notes of speech on file with author). Kathleen Clarke, BLM director and a Utah native, in an address to the Society for Range Management (SRM) said that “for too long, there’s been an attitude that the only way to address range that is challenged is to remove the cattle.” Michelle Nijhuis, *Change Comes Slowly to Escalante Country*, HIGH COUNTRY NEWS, Apr. 14, 2003. See also *Telling Truth Behind the Curtains*, Sept./Oct. 2003 (on file with author) (describing Clarke’s reference to her agency as the “Bureau of Livestock and Mining”). Jim Magagna, vice-president of the Wyoming Stockgrowers Association and a “third-generation sheep rancher,” was identified by *Outside* magazine as one of twenty “power brokers driving the [Bush] counter-enviro juggernaut.” See *Earth Shakers: The Counter-Enviro Power List*, *supra* note 5, at 112, 118. Magagna, whose goals include “reform[ing] policies so that ranchers have more say over federal land decisions,” is “the man to watch in the fight to roll back wolf recovery.” *Id.* See also *infra* notes 388–92, 397–99 and accompanying text (discussing former Interior Solicitor William Myers).

³⁸⁷ The term reportedly was coined by Interior Secretary Cecil Andrus not long after enactment of FLPMA. See KLYZA, *supra* note 32, at 124–25. BLM Director Clarke ingratiated an SRM audience by suggesting that “her mission” was to transform the current “Bureau of Landscapes and Monuments” into the “Bureau of Livestock and Mining” of the good old days. See *Telling Truth Behind the Curtain*, *supra* note 386 (noting that Clarke’s motivation for coming to BLM was to promote a pro-grazing agenda).

³⁸⁸ Myers served as Interior Solicitor from 2001–03. He resigned while under investigation for possible ethics violations and after being nominated by President Bush to a seat on the Ninth Circuit Court of Appeals. *Telling Truth Behind the Curtain*, *supra* note 386.

³⁸⁹ From 1997 to 2001, Myers was of counsel with Holland & Hart, LLP (a firm to which he returned following his resignation as solicitor). During that period, he served as president of the Public Lands Council and represented it in litigation against the Department of Interior, challenging the 1995 Clinton range reform regulations. The litigation was unsuccessful. See *Public Lands Council v. Babbitt*, 929 F. Supp. 1436 (D. Wyo. 1996); *rev’d in part & aff’d in part*,

cattlemen, Solicitor Myers asserted: “The biggest disaster now facing ranchers is not nature, but a flood of federal regulations designed to turn the West into little more than a theme park.”³⁹⁰ He assured his audience that Interior intended “to make it easier to exempt from environmental reviews any activities that it sees as having insignificant effects on public lands,” and to “reverse some of the changes in livestock-grazing regulations adopted under” the Clinton Administration.³⁹¹ Myers also was implicated in an unparalleled settlement with BLM permittee Frank Robbins.³⁹² Robbins holds BLM grazing permits in connection with two ranches in Wyoming. Shortly after Robbins purchased the ranches in 1994 and 1998,³⁹³ BLM had charged him with numerous violations, including: trespassing on private and BLM lands; grazing too early, too late, and too many cattle; blocking a neighbor’s use of a cattle driveway; refusing to obtain permits for his dude ranch trail drives over BLM lands; and ignoring BLM directives to modify his grazing practices to accommodate drought conditions.³⁹⁴ The BLM proposed to resolve its dispute with Robbins in a lopsided settlement agreement that included “forgiveness for . . . 16 grazing violations,” a “new grazing allotment with extensive management control,” “rights of way across federal lands without reciprocal easements for the BLM” across Robbins’s private lands, a “special recreation permit to run his dude ranch,” and a “[u]nique status whereby only the director of the BLM could cite Robbins for future violations.”³⁹⁵ The agreement also allowed Robbins to pursue his ongoing RICO suit against BLM employees.³⁹⁶

154 F.3d 1160 (10th Cir. 1998); *amended on reh'g*, 167 F.3d 1287 (1999), *aff'd*, 529 U.S. 728 (2000). The livestock industry, however, ultimately prevailed in undoing the reform regulations by means of the recently completed BLM rulemaking proposal, initiated while Myers was solicitor. Notice of Availability of the Final Environmental Impact Statement for Regulatory Amendments of Grazing Regulation for the Public Lands. 70 Fed. Reg. 35,299 (June 17, 2005). In late 2002, Solicitor Myers opined that “the BLM could not completely exclude cattle from an allotment within a federal grazing district,” despite statutory provisions plainly providing otherwise. Nijhuis, *supra* note 386, at 11; Taylor Grazing Act, 43 U.S.C. §§ 315b, 315f (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1712(e), 1752 (2000).

³⁹⁰ *Telling Truth Behind the Curtains*, *supra* note 386.

³⁹¹ Valentine D. Sworts & Alan C. Schroeder, *Pegasus, Workhorse, or Trojan Horse? A Case Study of the Use of the NEPA Process in Grazing Use Decisions on Bureau of Land Management Lands in Wyoming*, 3 WYO. L. REV. 3, 102 (2003) (quoting Scott Sonner, *Interior's Top Lawyer Wants to Put Brakes on Environmental Reviews*, SALT LAKE TRIB., Nov. 18, 2002).

³⁹² See *infra* text at notes 397–99. Even if Myers did not know the full details of the settlement offer, his failures to know and to take responsibility for his deputies’ actions reflect either gross mismanagement or an indirect means of promoting Robbins’s interests at the expense of the BLM and the public land.

³⁹³ See Mike Stark, *Thermopolis Rancher Seeks Probe of BLM Office*, BILLINGS GAZETTE, Sept. 13, 2003, available at <http://www.billingsgazette.com/index.php?id=1&display=rednews/2003/09/13/build/wyoming/40-blmprobe.inc>. Robbins is from Alabama. Brodie Farquhar, *Interior Report Slams Grazing Deal*, CASPER STAR TRIB., Feb. 17, 2005, available at <http://www.casperstartribune.net/articles/2005/02/17/news/wyoming/24aac8d667d0a5b387256faa00714fb0.txt>.

³⁹⁴ Farquhar, *supra* note 393. According to Stark: “Between February 1996 and March 2003, the [BLM] issued 29 ‘adverse grazing decisions’ [i.e., “alleged grazing violations”] against Robbins.” Stark, *supra* note 393.

³⁹⁵ Farquhar, *supra* note 393.

³⁹⁶ Robbins had sued BLM employees for harassment under the Racketeer Influenced and

An investigation by the Department of Interior Inspector General (IG) resulted in a report harshly critical of the settlement and events leading to it. Among other findings, the IG reported that “normal processes [were] circumvented,” negotiations were conducted by the Interior Solicitor’s Office (SOL), without involving BLM, concerns of the Department of Justice and the BLM field office were ignored by SOL and not conveyed to the BLM decision-maker, and the interests of BLM were not adequately protected by the settlement.³⁹⁷ But the IG concluded that Solicitor Myers was a victim of his own staff; that is, he “was given a distorted explanation” of the deal.³⁹⁸ Frank Robbins’s attorney Karen Budd-Falen disagreed: “Myers had ‘full knowledge of the [Robbins] settlement agreement and all of its terms’ before the deal was finalized,” she claims.³⁹⁹ Ultimately, the BLM reneged on the deal after Robbins committed trespass yet again.⁴⁰⁰

B. Cowboys in the Agencies

The livestock industry’s elevated status in the Bush Administration is evident in other ways: Agency officials who go against livestock interests have been dismissed or transferred. BLM Idaho State Director Martha Hahn is a prominent example. Hahn’s grazing cuts in Owyhee County, implemented under the 1995 grazing regulations, reportedly riled stockmen as well as Senator Larry Craig, and resulted in her forced transfer, which led

Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2004). See Farquhar, *supra* note 393.

³⁹⁷ Memorandum from Earl E. Devaney, Inspector General, to Sue Ellen Woodridge, Solicitor (Oct. 13, 2004), available at <http://www.oig.doi.gov/upload/BLM-Robbins%20Report%20REDACTED1.pdf> (redacted report). Devaney wrote that the “conduct chronicled in this report cries out for administrative action.” *Id.* The Deputy Solicitor upon whom the bulk of the blame was placed referred to the BLM and DOJ officials who were concerned about the settlement as “part of the posse . . . against Mr. Robbins.” *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Rancher’s Attorney Challenges Report*, CASPER STAR-TRIB., Apr. 14, 2005, available at <http://www.casperstartribune.net/articles/2005/04/14/news/wyoming/e947098d18ea362a87256fe30001fffb.txt>.

⁴⁰⁰ See Farquhar, *supra* note 393.

her to resign.⁴⁰¹ Other reported cases involved agency personnel in California⁴⁰² and Utah.⁴⁰³

Many land management decisions are blatantly pro-ranching—or inexplicable, apart from a livestock bias.⁴⁰⁴ For example, the U.S. Forest Service has reneged on drought provisions in livestock management plans designed to protect the land,⁴⁰⁵ and has undertaken expensive monitoring

⁴⁰¹ See, e.g., Tom Kenworthy, *Land Agency Accused of Personnel "Purge,"* USA TODAY, Mar. 11, 2002, available at <http://www.usatoday.com/news/washington/2002/03/11/usat-blm.htm>; Koberstein, *supra* note 385 (noting that Craig called the Owyhee grazing decision "an affront"); Press Release, Public Employees for Environmental Responsibility, BLM Idaho Director Forced to Resign (Mar. 6, 2002), available at http://www.peer.org/news/news_id.php?row_id=133; *NOW with Bill Moyers: Environmental Dissenters—Three Career Public Officials Resign* (PBS television broadcast, Aug. 23, 2002) [hereinafter *Moyers Interview*] (noting that it may have been only one or a few disgruntled grazing permittees whose contacts with members of the Idaho congressional delegation led to Hahn's forced resignation), available at http://www.pbs.org/now/transcript/transcript131_full.html. Hahn, a career BLM employee with 21 years of service, was given a choice: transfer to the New York Harbor office of the National Park Service or resign. See *id.* Hahn was replaced by a retired BLM employee and former Idaho rancher, K. Lynn Bennett. Bennett allegedly was one of two BLM state directors who, at the last minute, called for the administrative review copy (ARC) of the Draft Environmental Impact Statement on the proposed grazing rules to be revised because of certain statements therein about the ecological impacts of livestock grazing. E-mail from Larry Walker, retired BLM conservationist, to author (Jan. 3, 2004) (on file with author). See *infra* note 466 and accompanying text. A curious thing about Bennett: in news releases about his selection he was credited, variously, with 21, 32, and 40 years of prior service with BLM. See Press Release, Sen. Larry Craig, Delegation Applauds Choice for BLM State Director (Oct. 29, 2002) (claiming 21 years), available at <http://craig.senate.gov/releases/pr102902.htm> (last visited Nov. 19, 2005); David Wilkins, *Cattlemen Welcome New BLM Director*, Capital Press Agriculture Weekly, Nov. 25, 2002 (claiming 32 years), available at <http://www.capitalpress.info/main.asp?FromHome=1&TypeID=1&ArticleID=464&SectionID=46&SubSectionID=438>; Patricia R. McCoy, *BLM Chief Plans for Cooperation—Wants Staff Out On the Land Instead of In Their Offices, Talking to People*, Capital Press Agriculture Weekly, Jan. 7, 2003, available at http://www.citizenreviewonline.org/jan_2003/blm_chief.htm (reporting "40 years of agency experience"). In 1997, Senator Craig had attempted to interfere with a hiring decision by Hahn. He was officially reprimanded by then Interior Solicitor John Leshy, citing the "Hatch Act, which prohibits members of Congress from making recommendations about career personnel decisions." *Cop Off the Beat; Another Craig Victim*, GREEN EARTH J., Apr. 8, 2002, http://www.greenjournal.com/articles.asp?article_key=405 (last visited Nov. 19, 2005).

⁴⁰² BLM employee Tim Salt was transferred after limits he imposed on grazing and roads in the California Desert upset grazing, mining, and outdoor recreational vehicle interests. See Nijhuis, *supra* note 386, at 10; Kenworthy, *supra* note 401.

⁴⁰³ Director Kate Cannon made repeated attempts to protect Grand Staircase-Escalante National Monument from grazing and trespassing cattle during the third year of drought. See Nijhuis, *supra* note 386; Kenworthy, *supra* note 401. She was subsequently directed to take a job in BLM's Washington office or as deputy superintendent at Grand Canyon National Park. See Kenworthy, *supra* note 401.

⁴⁰⁴ The websites of environmental organizations give an idea of the extent of decisions that those groups believe improperly favor livestock interests. See, e.g., Western Watersheds Project, <http://www.westernwatersheds.org/default.htm> (last visited Nov. 19, 2005); Forest Guardians, <http://www.fguardians.org/> (last visited Nov. 19, 2005); Center for Biodiversity, <http://www.sw-center.org/swcbd/> (last visited Nov. 19, 2005); Natural Resources Defense Council, <http://www.nrdc.org/> (last visited Nov. 19, 2005).

⁴⁰⁵ Cattle were removed from the Tonto National Forest in 2002 because of an "extended and severe drought." The Forest's own management "guidance advises waiting one full growing season after the resumption of normal precipitation before restocking cattle," or "up to two

efforts rather than remove domestic sheep from ranges where they pose a serious threat to endangered bighorn.⁴⁰⁶ The Service's top officials teamed up with stockgrowers to convince Congress to exempt national forest grazing permit reauthorizations from NEPA compliance during fiscal years 2005-07.⁴⁰⁷ A more obscure, but revealing, example involves a technical report published by the Forest Service's Rocky Mountain Research Station. Co-authored by an agency scientist, the report examined studies allegedly supporting several "axioms" of range management, used to justify a fifty-year-long "war against big sagebrush."⁴⁰⁸ Contrary to the axioms, the authors concluded that "most, if not all, of the sins attributed to big sagebrush by the range management community are the *result of livestock grazing*."⁴⁰⁹ Four months later the Research Station director rescinded the report and re-published it with the disclaimer: "This would normally not have passed peer

years of rest" after "severe or extended drought," but cattle were allowed to return in June 2005 after less than three months of "normal" precipitation. Press Release, Center for Biological Diversity, Tonto National Forest Managers Jeopardize Desert by Resuming Ranching Without Thoroughly Evaluating Drought Impacts (June 15, 2005), *available at* <http://www.biologicaldiversity.org/swcbd/press/grazing6-15-05.html>.

⁴⁰⁶ The Inyo National Forest in California allows sheep grazing on 175,000 acres despite concerns that domestic sheep will transmit fatal diseases to endangered Sierra Nevada bighorn sheep. See Tim Reiterman, *Plan to Kill Endangered Is Protested*, L.A. TIMES, June 8, 2005, at B3, *available at* 2005 WLNR 9094642. According to the federal recovery plan for the sheep, disease from domestic sheep "probably played a major role in the decline of the bighorn population." *Id.* Instead of simply removing the domestic sheep, the Forest Service is proposing to equip both domestic and wild sheep with radio collars and then hire seasonal employees to track the sheep. "If the two populations make contact, . . . the state Department of Fish and Game will be called in." *Id.* The California Fish and Game Department is proposing to kill infected endangered bighorn to prevent transmission to the rest of the herd. *Id.* Cf. Greg Stahl, *Sheep Grazing Plan for Sawtooths Challenged*, IDAHO MTN. EXPRESS, May 18, 2005 (stating that a Forest Service EIS's "beginning baseline" was that "[g]razing remains a legitimate use of the Sawtooth National Forest and the SNRA [Sawtooth National Recreation Area]," even though the area had suffered severe damage from grazing in the past and "desired vegetative conditions have not been maintained through the current level of grazing"), *available at* http://www.mtexpress.com/story_printer.php?ID=2005103114.

⁴⁰⁷ FY 2005 Consolidated Appropriations Act, Pub. L. No. 108-447 § 339 (2004). See *Senators Would Exempt Grazing Permits from NEPA Review*, PUBLIC LANDS NEWS, Oct. 1, 2004, at 7 (reporting that the Senate Appropriations Committee approved a rider that would exempt 900 Forest grazing allotments from environmental review). See also Koberstein, *supra* note 385 (reporting that "the largest allotment in the Southwest—a 110,000-acre area in the Gila River headwaters" was exempted from NEPA review, "even though the agency admits that the area is one of the most severely overgrazed places in New Mexico and Arizona").

⁴⁰⁸ BRUCE L. WELCH & CRAIG CRIDDLE, COUNTERING MISINFORMATION CONCERNING BIG SAGEBRUSH 1 (2003). Welch is a plant physiologist with the Forest Service.

⁴⁰⁹ *Id.* (emphasis added).

and policy review⁴¹⁰ The notice, however, identified no flaws in the report's scientific analysis.

Even the National Park Service (NPS) and the U.S. Fish & Wildlife Service (FWS) are not immune from the livestock industry's influence. For instance, a joint federal/state (NPS/Montana) plan for management of the Yellowstone National Park (YNP) bison herd—the only naturally occurring, (ostensibly) free-ranging bison herd in the United States⁴¹¹—seems designed primarily to assuage cattle producers outside the park.⁴¹² This is so despite congressional mandates to “conserve . . . wildlife” in the parks⁴¹³ and “provide against . . . their capture or destruction.”⁴¹⁴ Bison that cross YNP's northern border are treated like livestock, not wild animals: they are trapped, impounded, and tested for brucellosis. Those that test positive are shipped to slaughter. Those testing negative are ear-tagged, calves and non-pregnant yearlings are vaccinated against brucellosis, and all bison are held until spring for release—provided room in the holding pens remains available.⁴¹⁵ In 2004, 182 bison had been shipped to slaughter by mid-March.⁴¹⁶ No case of transmission of brucellosis “from bison to cattle in the wild has ever been documented. Still, avoiding the disease is important to ranchers.”⁴¹⁷

The FWS is charged with conserving threatened and endangered species, many of which are at risk because of livestock grazing practices.⁴¹⁸ In written responses to a recent survey conducted by the Union of

⁴¹⁰ Marcia Patton-Mallory, *Untitled Opening Statement*, in BRUCE L. WELCH & CRAIG CRIDDLE, COUNTERING MISINFORMATION CONCERNING BIG SAGEBRUSH 1 (2003), available at http://www.fs.fed.us/rm/pubs/rmrs_rp040.pdf. The statement could be described as an apology or a disclaimer. This is the first USFS technical report ever rescinded, then reissued, with such a disclaimer. Personal communication between author and Bruce Welch (who further stated that the report had gone through all normal review processes prior to publication). Since then, Dr. Welch has published a book-length treatise on the natural history of big sagebrush (also published by USFS), portions of which cite the same studies and reach the same conclusions as the earlier, controversial report. See WELCH, *supra* note 16. Welch concluded, *inter alia*, that the axiom which holds that overgrazing has induced increases in big sagebrush density or canopy cover is invalid. *Id.* at 13.

⁴¹¹ The free-ranging bison in the Henry Mountains of Utah were introduced there. See Utah Official State Tourism Site, Utah! Travel and Adventure, http://www.utah.com/playgrounds/henry_mtns.htm (last visited Nov. 19, 2005) (describing the origins of the free-ranging bison).

⁴¹² See, e.g., Scott McMillion, *Bison Capture Facility Filling Up*, BOZEMAN CHRONICLE, Mar. 17, 2004, available at <http://bozemandailychronicle.com/articles/2004/03/17/news/01bisonbzbig.txt>.

⁴¹³ National Park Service Organic Act, 16 U.S.C. § 1 (2000).

⁴¹⁴ Yellowstone Park Act of 1872 § 2, 17 Stat. 32.

⁴¹⁵ See McMillion, *supra* note 412.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ Approximately ninety species of animals are listed as threatened or endangered due, at least in part, to livestock grazing; 19% to 22% of all listed species are harmed by grazing. Natural Resources Defense Council, *Grazing Facts*, <http://www.nrdc.org/land/use/fgrazef.asp> (last visited Nov. 19, 2005); see HORNING, *supra* note 8, at 1 (stating that, as of 1994, livestock grazing was a “significant factor in the decline of 76 listed and candidate species” and “likely to be a factor in the decline of another 270 candidate and listed” species). Horning also reported that livestock graze on 45 million acres of listed species' habitat, including designated critical habitat of the Lahontan and Paiute cutthroat trouts. *Id.*

Concerned Scientists (UCS) and Public Employees for Environmental Responsibility (PEER),⁴¹⁹ some FWS “scientists complained that agency chiefs are overly friendly with ranchers who are hostile to science and whose cattle graze on public lands.”⁴²⁰ Two hundred agency scientists responding to this survey reported that they had been directed to “alter official findings to lessen protections for plants and animals.”⁴²¹ The Bush Administration’s record under the Endangered Species Act (ESA)⁴²² is widely considered abysmal,⁴²³ and several of its decisions have been strongly endorsed by ranchers. For example, the FWS removed from the list of ESA candidate species the black-tailed prairie dog⁴²⁴ and has proposed to delist

⁴¹⁹ Dan Vergano, *Survey: Science, Politics at Odds*, USA TODAY, Feb. 9, 2005, at 9D, available at http://www.usatoday.com/tech/science/2005-02-09-fish-game_x.htm (also reporting that 71% of USFWS scientists responding to the survey said that “the agency cannot be trusted to save endangered species”). Of the 1410 scientists who received the survey questionnaire, 414, or 30%, responded. See *id.* “[N]early nine out of ten scientist managers (89%) knew of cases ‘where U.S. Department of Interior political appointees have injected themselves into Ecological Services determinations.’” UCS & PEER, U.S. FISH & WILDLIFE SERVICE SURVEY SUMMARY, Feb. 2005 at http://www.ucusa.org/scientific_integrity/interference/us-fish-wildlife-service-survey.html. See also Press Release, PEER, Politics Trumps Science (Feb. 9, 2005), available at http://www.peer.org/news/news_id.php?row_id=474.

⁴²⁰ Vergano, *supra* note 419. The uncomfortable relationship some ranchers have with science was suggested by a livestock industry representative’s comment about my book, *The Western Range Revisited*: “Olin Sims said that if Donahue’s book presents a strong argument supported by scientific data, people unfamiliar with ranching could read her book and assume that she is correct.” Nate Green, LARAMIE DAILY BOOMERANG, May 5, 2000, at 1.

⁴²¹ Julie Cart, *U.S. Scientists Say They Are Told to Alter Findings*, L.A. TIMES, Feb. 10, 2005, at A13.

⁴²² Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

⁴²³ Not only environmentalists are critical. More than 100 economists from western states signed a letter to George Bush, dated December 3, 2003, in which they addressed the economic importance of the West’s natural environment and offered policy criticisms and recommendations. Among other things, the letter charged that “federal agencies have dragged their feet when called upon to conserve threatened and endangered species. These actions jeopardize the economic outlook for western communities by increasing the risks to species with high economic value, *protecting inefficient and often subsidized activities harmful to both the species and the economy*, and raising the ultimate costs of conserving the species.” Letter from Bonnie G. Colby, Univ. of Ariz., et al, to George W. Bush (Dec. 3, 2003) (emphasis added) (on file with author). The authors identified public land grazing as one of several subsidized, “resource-intensive activities,” whose “full costs” are being hidden from consumers. *Id.*

⁴²⁴ Endangered and Threatened Wildlife and Plants; Finding for the Resubmitted Petition to List the Black-Tailed Prairie Dog as Threatened, 69 Fed. Reg. 51,217 (Aug. 18, 2004). The FWS had determined in 2000 that a “threatened” listing was “warranted” for the species, whose range had declined by 99% since historical times, but that listing was financially “precluded” by higher priority concerns. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the Black-Tailed Prairie Dog as Threatened, 65 Fed. Reg. 5,476, 5,487 (Feb. 4, 2000). The primary opponents of listing were ranchers—who claim that prairie dogs compete with their livestock for feed and that their burrows are nuisances—and land developers. Immediately after removal from the candidate list in 2004 and at the behest of ranchers, South Dakota began allowing the poisoning of prairie dogs on private land and the Forest Service began poisoning prairie dogs in the Buffalo Gap National Grassland in South Dakota. Buffalo Gap is the location of the only successfully reintroduced population of the highly endangered black-footed ferret, over ninety percent of whose diet consists of prairie dogs. See Chet Brokaw, *S.D. Senate Panel Rejects Plan to Declare Prairie Dogs as Pests*, CASPER STAR TRIB., Jan. 18, 2005, available at <http://www.casperstartribune.net/articles/2005/01/18/news/regional/bde599a09fbbb36187256f8d0073e142.txt>; see also Biodiversity Conservation Alliance, *Your*

the Preble's meadow jumping mouse.⁴²⁵ And the agency declined to list as threatened either the Rio Grande cutthroat trout⁴²⁶ or the sage grouse,⁴²⁷ both of which occur on public lands and are impacted by grazing. The case of the sage grouse reflects the political power of ranchers and the oil-and-gas industry, both of whom actively opposed listing the bird.⁴²⁸ It was widely

*Voice Needed to Protect Imperiled Prairie Dog, Endangered Black-footed Ferret, available at <http://www.voiceforthewild.org/wildspecies/alerts/a31aug04.html>. Ranchers "say hordes of prairie dogs have ruined federal grasslands where they lease pastures for their cattle." Steve Miller, *USFS Works on Prairie Dog Plan*, RAPID CITY J., Mar. 5, 2005, available at <http://www.rapidcityjournal.com/articles/2005/03/05/news/local/news02.prt>. A South Dakota legislator attempted unsuccessfully to designate the species a "state pest." Brokaw, *supra*.*

⁴²⁵ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to Delist the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) and Proposed Delisting of the Preble's Meadow Jumping Mouse, 70 Fed. Reg. 5404 (Feb. 2, 2005) (announcing that "review of all available data . . . indicate that Preble's is not a discrete taxonomic entity, does not meet the definition of a subspecies, and was listed in error"). Agricultural interests, including ranchers, had opposed the listing in 1998, because the species' preference for willow habitats meant that its listing would impede ranchers' ditch maintenance and haying activities. See NATIONAL RESEARCH COUNCIL COMMITTEE ON RIPARIAN AREA FUNCTIONS AND STRATEGIES FOR MANAGEMENT, RIPARIAN AREAS: FUNCTIONS AND STRATEGIES FOR MANAGEMENT 232 (2002) [hereinafter NRC, RIPARIAN AREAS].

⁴²⁶ The agency cited "improved habitat conditions" and "cattle grazing practices [which] now provide better habitat protection." See Koberstein, *supra* note 385. Later the same month (June 2002), however, on a field tour of the Santa Fe National Forest, the regional director for range management for the Forest Service in Albuquerque discovered that "prolonged drought and overgrazing had severely damaged habitat" of the cutthroat, and "improvements had *not* been made." *Id.* (emphasis added).

⁴²⁷ Listing of sage grouse was opposed by oil and gas companies as well as public land ranchers, as listing would significantly affect the operations of both in several states. Although still widespread, sage grouse have been reduced in numbers by up to 80%. See NRC, RIPARIAN AREAS, *supra* note 425, at 116 (reporting that distribution of the species has decreased by about half and abundance by 45 to 80% (citing Clait E. Braun, *Sage Grouse Declines in Western North America: What Are the Problems?*, 78 PROC. WESTERN ASS'N FISH & WILDLIFE AGENCIES 139 (1998))). According to the BLM, "the West's sage grouse population has fallen 90% over the past century, including 35% since 1985." *Grouching About Sage Grouse*, GREENLINES #2077, Mar. 31, 2004 (on file with author). Evidence is mounting that sagebrush steppe landscapes have been widely altered and degraded. See, e.g., DAVID S. DOBKIN & JOEL D. SAUDER, SHRUBSTEPPE LANDSCAPES IN JEOPARDY: DISTRIBUTIONS, ABUNDANCES, AND THE UNCERTAIN FUTURE OF BIRDS AND SMALL MAMMALS IN THE INTERMOUNTAIN WEST 28 (2004) (citing a report by High Desert Ecological Research Institute finding "no basis for optimism about the future prospects" of any of 61 bird species examined), available at http://www.onda.org/library/papers/Shrubsteppe_Sections.pdf; NOSS, LAROE & SCOTT, *supra* note 14, at 62 (reporting that ungrazed Intermountain sagebrush steppe is among the most "critically endangered ecosystems"); Cole, Henderson & Shafer, *supra* note 15, at 315 (attributing the most severe vegetation changes of the last 5400 years on the Colorado Plateau to grazing occurring in the last 200 years); HEALING THE LAND, *supra* note 24, at 1 (asserting that a "large part of the Great Basin [sagebrush being the most widespread community] lies on the brink of ecological collapse"). Livestock grazing is one of the major causes of the degradation of sagebrush habitats and the decline of sage grouse populations. See, e.g., Jeffrey L. Beck & Dean L. Mitchell, *Influences of Livestock Grazing on Sage Grouse Habitat*, 28 WILDLIFE SOC'Y BULL. 993 (2000); WELCH & CRIDDLE, *supra* note 408, at 1; Thomas L. Thurow et al., *The Role of Drought in Range Management*, 52 J. RANGE MGMT. 413, 415-16 (1999) (noting that drought exacerbates erosion and loss of vegetative cover, resulting in greater competition between sage grouse and livestock for forage and cover).

⁴²⁸ See, e.g., Felicity Barringer, *Plan May Keep Bird Off Endangered List: Designation Might Be Bad for Business*, N.Y. TIMES, Nov. 10, 2004, at A21, available at 2004 WLNR 6729524 (noting that sage grouse "range overlaps with oil and gas deposits and grazing lands"); *Grouching About*

reported that the scientific findings of FWS biologists concerning sage grouse and sagebrush habitat were criticized and heavily edited by a Deputy Assistant Secretary of the Interior, a political appointee with “no background in wildlife biology,” a “strong property rights background,” and “deference to industry views.”⁴²⁹

Of all federal agencies, however, the BLM best epitomizes rancher capture. Its bias is frequently apparent in management decisions that disregard available science and policy guidance. For instance, a BLM study of the ecological condition of the Great Basin revealed that 25 million acres are “dominated by exotic annual grasses,” particularly cheatgrass, and concluded that restoration is urgently needed.⁴³⁰ The agency established a “guiding principle” that the “Great Basin must be managed for *no net loss* of sagebrush habitat.”⁴³¹ Just a few years later, however, the BLM proposed to apply herbicide to *kill* sagebrush to increase cattle forage on a huge grazing allotment in Elko County, Nevada.⁴³² More recently, the BLM’s Pinedale field office proposed to “treat” up to 23,000 acres of “mature and decedent [sic]

Sage Grouse, *supra* note 427 (citing Associated Press, Mar. 26, 2004, report that Kathleen Clarke, BLM director, found receptive audiences among livestock and oil and gas operators when she toured “several western states to muster opposition to [ESA] listing for sage grouse”).

⁴²⁹ See, e.g., Felicity Barringer, *Interior Aide and Biologists Clashed Over Protecting Bird*, N.Y. TIMES, Dec. 5, 2004, at 138, available at 2004 WLNR 13102691 (reporting that the official, Julie MacDonald—an engineer—suggested, for instance, that sage grouse “will eat other stuff if it is available,” despite biologists’ unanimous agreement that the bird is seasonally dependent—up to 100 percent—on sagebrush). MacDonald’s edits were forwarded to a panel of FWS biologists and managers, who later recommended against listing. *Id.*

⁴³⁰ See HEALING THE LAND, *supra* note 24, at 1–2, 11 (explaining the ecological problems of the Great Basin). The BLM concluded: “Several factors are behind the changes. Certainly, changes in wildland fire are one cause. Another element is *grazing* . . . [and] the two are related.” *Id.* at 12 (emphasis added). But on the next page it backtracked: “[A]ctivities, “such as grazing, which is widespread, also need to be assessed to determine *if* they detract from conditions that sustain healthy rangelands. *If* livestock is shown to contribute to loss of perennial vegetation, then regulations provide a process to modify grazing practices.” *Id.* at 13 (emphasis added). This is typical agency waffling—despite the evidence, the agency does not concede a livestock grazing causal connection. Instead, the agency pushes for further study. Ironically, the “regulations” to which the quotation ostensibly refers have since been revised by the Bush Administration in ways that weaken the BLM’s ability to take action when grazing damage is identified. See *generally infra* text accompanying notes 436–64.

⁴³¹ HEALING THE LAND, *supra* note 24, at 19 (emphasis added). This management prescription seems well advised in view of scientific assessments of the extent and condition of sagebrush in the Intermountain Region. See *supra* note 427.

⁴³² See Adella Harding, *BLM Loses Grazing Appeals*, ELKO DAILY FREE PRESS, Sept. 26, 2004 (further noting that the proposed project allegedly involved “more than 100 miles of new fencing, mostly at taxpayer expense”), available at <http://www.elkodaily.com/articles/2004/09/26/news/local/news2.prt>; Press Release, Western Watershed Project, Judge Halts Massive Elko BLM Fencing and Spraying Scheme Designed to Benefit Barrick Gold Mine Cattle Grazing, (Sept. 16, 2004) (describing an Office of Hearings and Appeals decision that stayed implementation of the project, which would affect habitat of sage grouse and pygmy rabbits, both proposed for listing as threatened species) (on file with author). The Barrick-Goldstrike Mines ranch covers 300,000 acres, 200,000 of which are public land. Harding, *supra*. Cf. WELCH & CRIDDLE, *supra* note 408, at 8–11 (concluding that sites “with big sagebrush are . . . more productive,” and “[d]ifferences in perennial grass production in big sagebrush stands [have] less to do with shrub cover than . . . with soils, moisture (wet or dry years), and especially grazing history”).

sagebrush, using herbicides, prescribed fire, mowing, and other mechanical means.⁴³³ Although the project purported to “enhance” sagebrush age-class diversity, it was likely to reduce sagebrush cover at the expense of species that depend on it.⁴³⁴ It seemed plain that the project was designed to enhance livestock forage.⁴³⁵

The prime example of this Administration’s obeisance to public-land ranchers is evident in recently finalized revisions to the BLM’s grazing regulations.⁴³⁶ (The rules also exemplify the agency’s reliance on specious western myths in its public-land policy making.) In proposing the rules,⁴³⁷

⁴³³ BLM Pinedale Field Office, Mesa Sagebrush Enhancement 1, Environmental Assessment WY-100-EA05-253 (n.d.) (copy on file with the author) [hereinafter BLM Pinedale].

⁴³⁴ See WELCH & CRIDDLE, *supra* note 408, at 11 (explaining the ecological importance of sagebrush). The EA cited one study to support the finding that herbaceous understory is reduced by increasing sagebrush cover. BLM Pinedale, *supra* note 433, at 2. Welch and Criddle refuted this notion, which they discussed under axioms 2 and 3. See WELCH & CRIDDLE, *supra* note 408, at 4–8 (finding “no significant relationship between big sagebrush cover and [increased] bare ground”).

⁴³⁵ The EA predicted that all proposed treatments “should enhance livestock grazing by . . . reducing competition with sagebrush.” See BLM Pinedale, *supra* note 433, at 15; see also *id.* at 20 (“Improved forage for livestock will not occur under the No Action Alternative.”). Yet the EA did not list livestock forage enhancement among project objectives, see *id.* at 1, nor did it consider removing livestock to achieve vegetative and wildlife habitat objectives. In its response to public comments on this issue, the Pinedale BLM office denied a livestock-related purpose, stating repeatedly: “There is no change in grazing numbers or season of use associated with this project. . . . [A]ny increase in forage would be available for wildlife since the AUM’s allotted for cattle are being under utilized.” BLM, Pinedale Office, Comments and Responses to the Mesa Sagebrush Enhancement EA, EA Number: WY-100-EA05-253, Case Number: TC55 (n.d.) (copy received by e-mail from Curtis R. Yanish, Pinedale BLM, Aug. 22, 2005; on file with author). In any event, the office later scaled back the proposed action to a much more modest “study.” BLM, Pinedale Field Office, Record of Decision, Mesa Sagebrush Enhancement 1 (n.d.) (“Specifically, this decision will result in approximately 300 acres (ten 30 acre plots) to be established as study sights [sic]. . . . Results from the study sites will be used to determine the most effective treatment type to be used in the future.”) (copy received by e-mail from Curtis R. Yanish, Pinedale BLM, Aug. 22, 2005; on file with author). Cf. BLM Pinedale, *supra* note 433, at 1 (describing the proposed action as treating “[u]p to 23,000 acres of sagebrush . . . over 20 years”).

⁴³⁶ The Final EIS was released on June 17, 2005, more than nine months after the BLM’s scheduled date. See Notice of Availability of the Final Environmental Impact Statement for Regulation Amendments of Grazing Regulations for the Public Lands, 70 Fed. Reg. 35,299 (June 17, 2005) (providing final EIS to support amendments to the regulations governing grazing administration); Press Release, BLM, BLM Publishes Final Environmental Impact Study on Changes to Grazing Regulations (June 16, 2005) available at http://www.blm.gov/nhp/news/releases/pages/2005/pr050616_grazing.htm. While the timing of the FES and final rules’ issuance (when this article was in editing) prevented a careful review of those documents, a quick look suggested that the agency made few, and, perhaps, no substantive changes as a result of the 18,000 public comments it received. See *BLM to Issue Grazing EIS that Anticipates Big Policy Changes*, 30 PUBLIC LANDS NEWS 1, 7 (2005) (reporting that the “upcoming final regulation . . . will closely track proposed regulations”).

⁴³⁷ The proposed rule changes were announced in late 2003. See 68 Fed. Reg. 68,452 (Dec. 8, 2003) (to be codified at 43 C.F.R. Part 4100). See also DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., PROPOSED REVISIONS TO GRAZING REGULATIONS FOR THE PUBLIC LANDS, DRAFT ENVIRONMENTAL IMPACT STATEMENT, DES 03-62 (2003) [hereinafter GRAZING REGULATIONS DES]. At that time the BLM predicted that the final EIS and grazing rules would be issued in September 2004. See RangeNet.org, RangeNet: Insider Trading, <http://www.rangenet.org/trader/grazingdeis/100703timeline.pdf> (last visited Nov. 19, 2005) (providing a link to BLM’s proposed

the BLM claimed that they would “improve working relationships with permittees and lessees, protect the health of the rangelands, and increase administrative effectiveness and efficiency.”⁴³⁸ Interior Secretary Gale Norton also said that the rules would “help public lands ranchers stay on the land.”⁴³⁹ Even a cursory review of the rule changes confirms that, in fact, they will “serv[e] the most special interest”—ranchers⁴⁴⁰—but at great expense to the interests of the public and the land’s health.

The regulations reverse three rules issued by the Clinton Administration and approved by the Supreme Court. Permittees will be allowed to own water rights and to share title to permanent structural range improvements on public lands,⁴⁴¹ and “grazing preference” is redefined to mean the total

timeline, Revision #2, dated Oct. 3, 2003). But the Final EIS was not released until June 17, 2005, with expected publication of the rules in July 2005. See Press Release, BLM, *supra* note 436. According to the agency, the FES was printed in October 2004, but “[d]ue to delay in final clearance, the EIS was not cleared for release until June, 2005.” BLM, REVISIONS AND ERRATA (2005) (twelve-page document accompanying GRAZING REGULATIONS FES). Apparently, the BLM had “been unable to clear the final regs with the Office of Management and Budget (OMB) and, perhaps, the Council on Environmental Quality.” *BLM Still Working on Grazing Regs; Ranchers Fault ESA*, PUBLIC LANDS NEWS, Apr. 22, 2005, at 8 (citing “sources close to the situation” and noting that the rules “offer lots of targets”).

⁴³⁸ See GRAZING REGULATIONS DES, *supra* note 437 (cover letter by Kathleen Clarke). The agency also asserted that the proposed rule changes were intended to “clarify” existing regulations. For instance, an agency spokesman at a public hearing in Cheyenne, Wyoming, on Feb. 2, 2004 (which the author attended), said that the proposed rules were “a routine update and adjustment of the ‘95 regulations.” Notes on file with the author. Similarly, upon the release of the Final EIS, the BLM Washington office rangeland resources manager stated: “We don’t look at this as a significant change from the current regulations This is fine-tuning and making adjustment in existing rules.” Julie Cart, *Land Study on Grazing Denounced: Two Retired Specialists Say Interior Excised Their Warnings on the Effects on Wildlife and Water*, L.A. TIMES, June 18, 2005 at A1 (quoting Bud Cribley). Such statements are belied by the actual changes, summarized *infra* in the text, and by the agency’s expenditure of considerable resources in preparing an EIS.

⁴³⁹ N.S. Nokkentved, *Ranching Proposal Faces Criticism*, THE DAILY HERALD, Dec. 15, 2003. “[R]anchers and the Bush administration say changes are needed . . . to keep ranchers in business.” Faith Bremner, *Conservationists, Ranchers Disagree Over Grazing in the West*, GANNETT NEWS SERVICE, Mar. 11, 2004, available at <http://www.rgi.com/news/stories/html/2004/03/11/65904.php>.

⁴⁴⁰ See Joseph M. Feller, *The BLM’s Proposed New Grazing Regulations: Serving the Most Special Interest*, 24 J. LAND RESOURCES & ENVTL. L. 241 (2004) (arguing the proposed regulations will return ranchers to an exclusive role in public lands); see also Joseph M. Feller, *Ride ‘em Cowboy: A Critical Look at BLM’s Proposed New Grazing Regulations*, 34 ENVTL. L. 1123 (2004) (describing the proposed rules changes as “a virtual wish list for ranchers seeking liberation from environmental restraints and restoration of their historic position as dominant users of the western public lands”). Agency comments in the press concerning the new rules also reveal the BLM’s bias. See, e.g., Julie Cart, *Federal Officials Echoed Grazing-Rule Warnings*, L.A. TIMES, July 16, 2005 at A14 (reporting that BLM “officials . . . said the new grazing rules . . . more fairly balanced the needs of plants, wildlife, water and other resources with the *rights* of ranchers to use public land”) (emphasis added). See *supra* note 86 and accompanying text (explaining that ranchers have no legal “right” to use public lands).

⁴⁴¹ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-22 (proposed final revision to 43 C.F.R. § 4120.3-9, deleting the former provision that water rights would be acquired in the United States’ name), A-20 (proposed final revision to 43 C.F.R. § 4120.3-2(b), providing that the U.S. will share title to range improvements with “cooperators”).

number of AUMs attached to base property.⁴⁴² These provisions undermine statutory authority denying holders of grazing permits any private right or interest in the public lands.⁴⁴³ In so doing, they jeopardize the agency's ability to avoid property-rights-based challenges and to manage use of rangelands in the public interest. For our purposes, these rules changes also illustrate nicely the capture metaphor: By this instance of *agency capture*, stockmen can be seen as compensating for their failure to employ the *rule of capture* to secure a property interest in grazing permits.

The new rules also require ill-defined "monitoring"⁴⁴⁴ before the BLM can take action to correct grazing practices that are causing range conditions to run afoul of rangeland health Standards and Guidelines (S&G).⁴⁴⁵ The BLM and permittees, with no public input, would decide what to monitor, how, and how often, and how to interpret the findings. This requirement, on its face, would delay corrective action that would protect the lands. Delays would be exacerbated by BLM shortages of money and personnel for monitoring. In fact, the agency lacks monitoring data for about half of all allotments.⁴⁴⁶

⁴⁴² See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-9 (proposed final revision to 43 C.F.R. § 4100.0-5 definition of "grazing preference"). The 1995 rule, which the Supreme Court approved, defined preference consistently with the TGA's use of the term. See Taylor Grazing Act, 43 U.S.C. § 315b (2000).

⁴⁴³ 43 U.S.C. §§ 315b, 1752(h) (2000).

⁴⁴⁴ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposed final revisions to 43 C.F.R. 4100.0-5); *id.* at A-46 (proposed final revision to 43 C.F.R. § 4180.2). Reliance on "monitoring" is a familiar ploy of rancher-friendly administrations. Under President Ronald Reagan and Interior Secretary James Watt, the BLM "revamp[ed] its methodology for setting grazing levels," resorting to "continued monitoring over longer periods of time." See Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045, 1061 (D. Nev. 1985). See also SHORT, *supra* note 361, at 37 (noting "Watt's efforts to minimize enforcement of grazing regulations imposed by the Carter administration"). Monitoring is simply unnecessary to justify many management actions. Where it is appropriate, it should be used, not to track the status quo, but to measure ecological responses to grazing management *changes* implemented to improve land health.

⁴⁴⁵ See 43 C.F.R. § 4180.2.

⁴⁴⁶ Inadequate resources have plagued BLM since the agency's inception. Today, BLM "has 480 range conservationists looking out for nearly 160 million acres of public rangelands. Ten years ago, it had 590 . . ." Bremner, *supra* note 439 (citing Dick Mayberry, a BLM range management specialist). See also GAO, HOT DESERTS, *supra* note 25, at 55-56 (documenting inadequate resources for monitoring in most BLM offices in Southwest in 1991, including a declining number of range conservationists). The GAO in 1991 found that, despite then-existing requirements that monitoring data be collected and evaluated "to determine whether management objectives are being met and whether changes are needed," many BLM allotments either had no data or had not completed evaluations. *Id.* at 54. In one specific case, GAO:

found that preliminary monitoring data collected for an allotment in Arizona indicated in 1983 that the number of livestock grazing exceeded the level that available forage could support. BLM decided to monitor the allotment for 3 years and issue a final decision on the basis of data collected. Monitoring data continued to be collected, but no evaluation of the data was completed until 1991, despite the belief of the range staff and the wildlife biologist that the allotment was being damaged.

Id. at 55. See also GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: INTERIOR'S MONITORING HAS FALLEN SHORT OF AGENCY REQUIREMENTS, GAO/RCED-92-51, at 3 (February 1992) (reporting that BLM had "performed the required monitoring . . . for only about 20 percent of the 14,500

The new rules delete prior regulatory requirements to involve the public in all on-the-ground grazing decisions, while retaining requirements to involve permittees and states.⁴⁴⁷ The public effectively would no longer have input to decisions to issue, renew, or modify grazing permits; changes to allotment boundaries; issuance of temporary nonrenewable use permits; reductions in permitted use; or emergency closures. These changes arguably violate FLPMA,⁴⁴⁸ and they are plainly inconsistent with the *national, public* nature of rangeland resources. The BLM claims that NEPA processes will afford public comment opportunities.⁴⁴⁹ But most grazing decisions do not require preparation of an EIS,⁴⁵⁰ and since 1999 Congress has authorized BLM grazing permits to be renewed without NEPA compliance.⁴⁵¹

At the same time, the rules require a *new layer* of consultation—with local, county, state, and tribal “grazing boards”—for the very decisions from which the public would be excluded.⁴⁵² This requirement arguably violates

allotments covered by [DEISs] issued more than 5 years ago. It has not monitored about 7,200 allotments at all.”)

⁴⁴⁷ See GRAZING REGULATIONS FEIS, *supra* note 19, app. A at A-25, A-28 to A-29, A-31 (proposed final revisions to 43 C.F.R. §§ 4130.2(b), 4130.3-3, and 4130.6-2); *id.* at A-14, A-16, A-25, A-28 to A-29, A-31 (retaining 43 C.F.R. §§ 4110.2-4, 4110.3-3, 4130.2(b), 4130.3-3, 4130.6-2).

⁴⁴⁸ See Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(f) (requiring regulations to “establish procedures . . . to give . . . the public[] adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands”).

⁴⁴⁹ See Bureau of Land Management, Grazing Administration—Exclusive of Alaska, Proposed Rule, 68 Fed. Reg. 68,452, 68,461 (Dec. 8, 2003).

⁴⁵⁰ BLM itself acknowledges that “[a]n environmental assessment [EA, not an EIS] is prepared for most grazing decisions.” GRAZING REGULATIONS DES, *supra* note 437, § 2.1.1; see also Sworts & Schroeder, *supra* note 391, at 103 (reporting that BLM in Wyoming “relied exclusively on EAs” in “processing over 900 grazing decisions” between 1999 and 2001). But only an EIS triggers NEPA’s public participation requirement. Agencies are not required to involve the public when they prepare EAs. See 40 C.F.R. § 1501.4(e)(2) (requiring public review of an EA only when the action “is, or is closely similar to” one normally requiring an EIS or is one “without precedent”); see also Feller, *Ride ‘em Cowboy*, *supra* note 440, at 1131 n.49 (explaining that public involvement is generally not required, and often not allowed, in the preparation of an EA).

⁴⁵¹ This has been accomplished by riders to annual Interior appropriation bills, see, e.g., Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 116, 114 Stat. 943 (2000), even though the first such legislation used open-ended language stating that the exemption would continue “until such time as the Secretary of the Interior completes processing” of permit renewals “in compliance with all applicable laws and regulations.” Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 123, 113 Stat. 1501, 1501A-159–160 (1999). Moreover, House Republicans have initiated a broad review of NEPA and its implementation, apparently motivated by concerns that NEPA hinders economic development and national security. See House Resource Committee, Task Force on Improving the National Environmental Policy Act Created, <http://resourcescommittee.house.gov/nepataskforce/press/0406taskforce.htm> (last visited Nov. 19, 2005) (announcing the establishment of a taskforce to review implementation of NEPA).

⁴⁵² See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing final revisions to 43 C.F.R. § 4120.5-2(c)). The agency admitted that grazing boards do not currently exist in all locales, but it stated that the “specific requirement to coordinate with grazing boards should stimulate the development of additional grazing boards throughout the west [sic].” See GRAZING REGULATIONS DES, *supra* note 437, § 4.3.14. A spokesman for the Public Lands Council and the National Cattlemen’s Beef Association called the “creation and use of these boards” a “very innovative and useful approach to implementing Secretary Norton’s four C’s concept to

FLPMA and the Federal Advisory Committee Act.⁴⁵³ It also seriously undermines BLM's claim that the new rules will "enhance administrative efficiency."⁴⁵⁴

The rules further require BLM offices to consider the economic, social, and cultural impacts of grazing decisions.⁴⁵⁵ Indeed, concerns about these impacts seemed to be a chief motivation for revising the rules.⁴⁵⁶ The BLM suggests that NEPA requires this analysis.⁴⁵⁷ In fact, however, the Council on Environmental Quality (CEQ) regulations specify that economic, social, and cultural impacts are to be considered *only if* anticipated impacts to the physical/natural environment are significant—and thus only when an EIS will be prepared. They are not meant to be the *reason* for doing an EIS.⁴⁵⁸

resource management." Bureau of Land Mgmt., Public Hearing to Receive Comments on the Draft Environmental Impact Statement on the Proposed Grazing Rule, Feb. 5, 2004, Washington, D.C. (statement of Stacey Katseanes) (emphasis added), *available at* http://www.blm.gov/grazing/transcripts/DC_Public_Meeting_020504.txt.

⁴⁵³ See *supra* discussion at notes 279–86.

⁴⁵⁴ See *supra* text at note 438.

⁴⁵⁵ GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing final revisions to 43 C.F.R. § 4110.3).

⁴⁵⁶ The prominence of this concern, and its role in motivating the rules changes, has been widely evident. For instance, in announcing the availability of the DES on the proposed rules changes, BLM's website stated: "The proposed rule, announced by Interior Secretary Gale Norton in a speech in New Mexico, recognizes the economic and social benefits of public lands ranching, as well as its preservation of open space in the rapidly growing West." U.S. Bureau of Land Mgmt., Grazing Information, <http://www.blm.gov/grazing> (last visited Nov. 19, 2005). See also GRAZING REGULATIONS FEIS, *supra* note 19, at ES-2 (listing "Improving Working Relations with Grazing Permittees" as the first of three "categories" of proposed revisions, and the NEPA documentation of social, economic, and cultural effects on permittees first among those proposed revisions), 2–5 (listing "Social, Economic, and Cultural Considerations" as the first of several "key issues"), 2–19 (noting that the proposed amendment to 43 C.F.R. § 4110.3 "would require the BLM to analyze and, if appropriate document, the relevant social, economic, and cultural effects of . . . chang[ing] grazing preference"). See also Press Release, BLM, Fact Sheet, (Dec. 5, 2003), *available at* http://www.blm.gov/nhp/news/releases/pages/2003/pr031205_grazing.htm#factsheet (listing "Improving Working Relationships with Grazing Permittees and Lessees" as the first category of proposed rules changes, and stating: "[i]n this category, the proposed rule would: ensure that BLM managers consider and document the social, cultural, and economic consequences of decisions affecting grazing, consistent with the requirements of the National Environmental Policy Act (NEPA) of 1969."); Transcript of DEIS public meeting in Washington, D.C., Feb. 5, 2004, http://www.blm.gov/grazing/transcripts/DC_Public_Meeting_020504.txt (last visited Nov. 19, 2005) (statements of Bud Cribley and Ken Visser).

⁴⁵⁷ See, e.g., Department of the Interior, Bureau of Land Management, Grazing Administration—Exclusive of Alaska, 68 Fed. Reg. 68,452, 68,459 (proposed Dec. 8, 2003) (to be codified at 43 C.F.R. pt. 4100) ("BLM is proposing the change [to § 4110.3] to ensure that our managers document their consideration of relevant social, economic, and cultural factors when they comply with NEPA."); GRAZING REGULATIONS FEIS, *supra* note 19, at 5–49 ("BLM is obligated under 40 C.F.R. § 1508.8(b) to assess the consequences of BLM actions . . . on . . . historic, cultural, economic, [and] social . . . aspects of the human environment."). The agency's responses to comments (in Chapter 5 of the FEIS) failed to address the specific issue raised in the text, which this author raised in her comments on the proposed rules.

⁴⁵⁸ See 40 C.F.R. § 1508.14 (providing "economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an [EIS] is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment"); see also *Metropolitan Edison Co. v. People Against Nuclear Energy*, 40 U.S. 766,

The BLM itself says that most grazing decisions do not require an EIS.⁴⁵⁹ Moreover, nothing in FLPMA allows, much less requires, the BLM to make grazing decisions on the basis of economic, social, or cultural impacts of grazing decisions, at the local level or otherwise.⁴⁶⁰ The BLM seems to believe that by using NEPA to shoehorn social and cultural concerns into grazing decisions it can avoid complying with (or at least dilute) environmental protection mandates in its governing laws and regulations. But NEPA rejects this view, as well.⁴⁶¹

The BLM claims that the rules do not change the Fundamentals of Rangeland Health (FRH) rules,⁴⁶² promulgated by the Clinton Administration, but in fact they weaken those rules—by requiring monitoring before BLM may take action to correct rangeland conditions, by doubling the time within which corrective action must be started,⁴⁶³ and by making the FRH unenforceable once the S&G are implemented.⁴⁶⁴

As disturbing as the *substance* of the new rules was, the *procedures* leading to their promulgation were worse. The timing of the Draft Environmental Statement's (DES) release (after the proposed rules were published), and recent disclosures by two BLM scientists,⁴⁶⁵ strongly suggest that the DES was a *post hoc* rationalization of a rulemaking choice already made—and thus a violation of the spirit if not the letter of NEPA.⁴⁶⁶ The

772 (1983) (finding that NEPA requires assessment only of the impact on the physical environment).

⁴⁵⁹ See *supra* note 450.

⁴⁶⁰ See, e.g., *supra* note 300 and accompanying text (noting that FLPMA policies refer to “national,” not local, interests in the public land). Cf. DONAHUE, *supra* note 4, at 203–13 (arguing that a decision to remove livestock from public lands could readily be justified in terms of FLPMA’s provisions).

⁴⁶¹ See National Environmental Policy Act of 1969, 42 U.S.C. § 4334 (“Nothing in section 4332 [requiring an EIS] . . . shall in any way affect the specific statutory obligations of any Federal agency . . . to comply with criteria or standards of environmental quality . . .”).

⁴⁶² 43 C.F.R. § 4180.1.

⁴⁶³ In fact, the new rules could delay corrective on-the-ground action by up to ten years; i.e., at least two to three years for monitoring, sufficient time to complete all required consultation, two years to decide on management action (before action could begin the *following* year), and time for protests and appeals. See GRAZING REGULATIONS FEIS, *supra* note 19, app. A (proposing changes to § 4180.2(f)).

⁴⁶⁴ See *id.* Cf. Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 607 (1997) (explaining that “[d]epending on how rigorously—and for how long—the [1995] standards and guidelines are implemented, they could lead to dramatic changes in livestock grazing over a vast portion of the West. . . . They should . . . improve the ecological health of BLM rangelands.”).

⁴⁶⁵ Cart, *supra* note 438, at A1. See also Tony Davis, *New Grazing Rules Ride on Doctored Science: Veteran Scientists Leave the BLM in Frustration*, HIGH COUNTRY NEWS, July 25, 2005 (discussing assertions of two BLM scientists that their work was rewritten).

⁴⁶⁶ These disclosures seemed to confirm earlier allegations that agency scientists’ conclusions had been removed from the preliminary DEIS, known as the administrative review copy (ARC). The BLM’s Assistant Director for Renewable Resources and Planning distributed the ARC for comment on November 17, 2003, to all Washington office officials and western state directors. Instruction Memorandum No. 2004-044 from United States Department of the Interior, Bureau of Land Management, Request for Comments on Administrative Review Copy of Revisions to Grazing Regulations Draft Environmental Impact Statement (DEIS) (2003) (on file with author). The memorandum gave recipients nine days—until November 26—to submit

scientists, who participated in drafting the DEIS and have since retired, reported that their conclusions concerning adverse impacts on water quality and wildlife, including endangered species, “were excised and replaced with language justifying less stringent regulations favored by cattle ranchers.”⁴⁶⁷ Remarkably, their prediction of a “significant adverse impact’ on wildlife” was removed, and the rewritten DEIS concluded that the proposed rules would be “beneficial to animals.”⁴⁶⁸ The scientists charged the BLM Washington office with rewriting the DEIS so that it would support rules that had already been written.⁴⁶⁹ The Washington office rangeland resources manager acknowledged: “There were definitely changes made in the area of impact analysis.” His only explanation: “When [the DEIS] was finished in November 2003, the agency believed it ‘needed a lot of work . . . We adjusted it.’”⁴⁷⁰ The agency’s “adjustment” was used to support regulations that will further entrench the private interests of perhaps 18,000 public-land ranchers, while jeopardizing the ecological health of 160 million acres of public lands belonging to all Americans. As one of the overruled BLM scientists put it, “[The] bottom line is that there’s no way we will ever effect changes in livestock grazing . . . The cowboys will not allow it.”⁴⁷¹

“detailed review comments.” *Id.* The memo’s author “apologize[d] for the quick turnaround,” but explained, “we are under a very tight deadline for issuing this DEIS in a timely manner following the release of the Proposed Rule.” *Id.* It was reported that two BLM state directors (including the new Idaho director, former rancher K. Lynn Bennett) at the last minute called for the ARC to be revised because of certain statements therein about the ecological impacts of livestock grazing. (Personal communication on file with author). *See also supra* note 401 (describing replacement of Martha Hahn with Bennett as Idaho state director). In general, a draft EIS is expected to be submitted at the same time as a proposed rule, since the analysis is intended to inform the agency’s proposed action. *See* 42 U.S.C. § 4332(2)(C) (directing agencies to “include in [their] recommendation or report on proposals for . . . major Federal actions” an EIS); 40 C.F.R. § 1502.5 (forbidding an agency from using an EIS to justify a decision already made). These facts strongly suggest that the agency had decided on a proposed course of action, notwithstanding the potential impacts of implementing that decision, and that the published DES was fabricated in part to support that course of action. *See, e.g.,* Joe Feller, *In Bush Grazing Decision, Politics, Secrecy Win Again*, http://www.publiclandsranching.org/htmlres/press_americanprogress_feller.htm (last visited Nov. 19, 2005). But according to the BLM, the “analysis of environmental effects was completed prior to the publication of the proposed rule,” and it is “not aware of any absolute requirement to publish the DEIS and proposed rule simultaneously.” *See* GRAZING REGULATIONS FEIS, *supra* note 19, at 5–17 to –18. (The FEIS was not released until June 2005.)

⁴⁶⁷ Cart, *supra* note 438, at A1; *see also Science Fiction: The Altering of Reports to Fit Policies is Dismaying*, LOS ANGELES TIMES, July 5, 2005, at B10 (asserting that “recast[ing] [scientific reports] for the sake of political expediency . . . has been happening regularly throughout President Bush’s tenure”). The scientists, Erick Campbell and Bill Brookes, who had thirty and twenty-five years, respectively, with the agency, resigned out of frustration not only with the BLM but with the Bush Administration’s overall handling of environmental issues. *See* Davis, *supra* note 465 (citing Campbell and Brookes).

⁴⁶⁸ Cart, *supra* note 438, at A1 (quoting DES). These allegations are corroborated by comparison of a leaked copy of the ARC (on file with author) to the published DES. Numerous examples of diluted or qualified language can be found in the DES. *See* Feller, *supra* note 466.

⁴⁶⁹ *See* Cart, *supra* note 438, at A1. In fact, the proposed rules were released nearly a month before the DES was available. *See supra* notes 465–66. *See also* Feller, *supra* note 466.

⁴⁷⁰ Cart, *supra* note 438, at A1 (quoting Bud Cribley).

⁴⁷¹ Davis, *supra* note 465.

C. Cowboy Myths—and the Realities

The foregoing discussion should leave little doubt that public-land ranchers' capture of politicians and land management agencies continues at a gallop. This section takes a brief look at the influence of cowboys in other areas of American life,⁴⁷² followed by an examination of the role of myths in the capture metaphor.⁴⁷³

Subscribers to cowboy mythology include a wide range of persons trying to preserve the West as they imagine it to be.⁴⁷⁴ The myths are perpetuated for profit or to support other interests by magazines, filmmakers, "poets," artists, manufacturers of consumer goods ranging from clothing to furniture, and the media (to name a few).⁴⁷⁵ Public-land ranchers enjoy preferential treatment by Congress,⁴⁷⁶ by state legislatures, governors, and boards;⁴⁷⁷ and by local officials.⁴⁷⁸ Chambers of commerce, tourism

⁴⁷² This review is necessarily anecdotal.

⁴⁷³ See *infra* notes 510–44 and accompanying text.

⁴⁷⁴ Cf. *supra* notes 349–56 and accompanying text.

⁴⁷⁵ If these myth-mongers are not familiar to readers, a few minutes of web browsing will yield hundreds of examples. See *infra* note 480. A prime example of media capture is the bi-weekly regional newspaper *High Country News* (*HCN*). Regular readers of this paper (including the author) believe that in recent years it has come to dispense an uncritical and unrealistically positive image of ranchers and ranching. (Readers might get a sense of this perspective by reviewing past *HCN* articles. See *HCN*, <http://www.hcn.org/archives.jsp>.) Ten years after describing land-grant-university agriculture colleges and the range science discipline as "the obedient handmaidens of traditional ranching," see *infra* note 481, *HCN* publisher Ed Marston introduced a May 2000 conference with the proclamation: "The first thing we do is declare ourselves for ranching. Then we invite all those we think can help ranching and disinvite all those who we think could hurt ranching." See Ed Marston, *Why This Book Matters*, in *RANCHING WEST OF THE 100TH MERIDIAN*, *supra* note 91, at 237.

⁴⁷⁶ In addition to the numerous examples in the text heretofore, grazing, along with the rest of agriculture, enjoys relative immunity from Clean Water Act regulation. See generally J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263 (2000) (stating that farms are generally unregulated by environmental law but are a major source of pollution). Even though FLPMA and the Clean Water Act require that federal activities comply with applicable state water quality requirements (notably water quality standards), those requirements are difficult to police and are rarely enforced against ranchers or their stock. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(c)(8) (2000); Federal Water Pollution Control Act, 33 U.S.C. § 1323 (2000).

⁴⁷⁷ Consider, for example, the Wyoming and Idaho statutes ensuring that preference in issuing state land leases be given to ranchers, despite financial losses to the trust beneficiaries, state schools. See, e.g., Erik Ryberg, *Comedy of Errors or Confederacy of Dunces? The Idaho Constitution, State Politics, and the Idaho Watershed Projects Litigation*, 40 *IDAHO L. REV.* 187, 188 (2003) (describing the Idaho "political establishment" as "unabashedly rancher friendly," and further describing Idaho State Land Board of Commissioners' and Idaho Legislature's repeated attempts to keep state land leases in the hands of ranchers, despite dramatically lower revenues to the state schools); Delissa Hayano, Note: *State School Lands—Disinterest in the Public Interest: The Wyoming Supreme Court's Failure to Define "The Great Public Interest" in State School Lands in Riedel v. Anderson*, 70 P.3d 223 (Wyo. 2003), 5 *WYO. L. REV.* 59, 62 (2005) (discussing Wyoming's statutory right-to-renew preference for grazing leases, and concluding that it "conflicts with the great public interest").

Wyoming—the Cowboy State—provides many other examples. In 2000 the state senate president drafted legislation to close the University of Wyoming College of Law, the state's only law school, in order to "send a message" to the author (me) of a book that recommended ending grazing on arid public lands. See Dierdre Stoelzle, *Twiford Drops UW Law School Threat*,

bureaus⁴⁷⁹ and real estate agents,⁴⁸⁰ as well as range scientists⁴⁸¹ and university administrators,⁴⁸² tout the virtues of ranching. Other groups and

CASPER STAR-TRIB., Feb. 16, 2000, at A1, A10. Wyoming maintains twenty-three feed grounds for elk to assuage cattle ranchers who object to elk eating hay or other winter forage used by their herds, even though the concentrations of animals at feed grounds increase the likelihood for transmission of brucellosis (and possibly other diseases, such as chronic wasting disease) among elk and possibly to cattle. *See generally* Associated Press, *Wasting Disease Plan Insufficient, Federal Official Says*, CASPER STAR TRIB., Mar. 23, 2005, available at <http://www.casperstartribune.net/articles/2005/03/24/news/wyoming/c9430cfdc7b6dbf987256fcb004c4657.txt> (discussing chronic wasting disease considerations for the management of elk feeding grounds). No one ever points out that brucellosis was not native to native Wyoming ungulates; rather, elk and bison were initially infected by cattle. When one cow in northwest Wyoming (near a Game & Fish-managed elk feedground) tested positive for brucellosis in 2003, the decision was made to test the entire herd—at the federal government's expense. Cat Urbigkit, *Wyoming Herd Infected with Brucellosis*, CASPER STAR TRIB., Dec. 5, 2003 (received by e-mail, and on file with the author).

⁴⁷⁸ Ranchers and farmers have typically dominated county commissions and been over-represented on western state legislatures. *See, e.g., supra*, text at note 267; DONAHUE, *supra* note 4, at 81–82, 303 n.37 (“Ample anecdotal and experimental evidence support a coincidence of interest between western county commissioners and livestock business.”). Ranchers and livestock associations, notably the National Cattlemen's Association, were founding members of the county supremacy movement. *See* Reed, *supra* note 347, at 525–30 (detailing the county supremacy movement). The movement seeks to maintain continued commodity uses of federal public lands, in part by asserting a greater county role in planning and management activities. *See generally id.* Attorneys Karen Budd-Falen and Frank Falen, who hail from public land ranching families in Wyoming and Nevada, respectively, marketed to counties around the West a standard-form ordinance, to be used as a basis for individual county efforts. *Id.* at 548–51. Reed described the “custom and culture” mantra, on which the county movement is based, as “claptrap.” *Id.* at 530, 548. *See also* Julie Cart, *Grazing Rights Trigger Showdown Between Ranchers, BLM*, ENVTL. NEWS (Mar. 1, 2001) (reporting that a local sheriff “defied federal orders and allowed [BLM-impounded] cattle to be taken” by ranchers), available at <http://www.heartland.org/Article.cfm?artId=9375> (last visited July 7, 2005); Nijhuis, *supra* note 386.

⁴⁷⁹ *See, e.g.,* DONAHUE, *supra* note 4, at 96–97 (evaluating tourists' attraction to the western cowboy myth). Pick up any travel magazine for further examples.

⁴⁸⁰ We have all seen the billboards and real estate signs. A quick search of the internet produced several hits, including “Cowboys.com,” a website with links to real estate as well as (among others) “western malls,” “western wear, gifts, and collectibles,” books and magazines, décor, software, museums, historical attractions, and even “Native Americans.” *See Cowboys.com*, at <http://www.cowboys.com> (last visited Nov. 19, 2005) (advertising guest ranches, “dream ranches,” “luxury mountain ranches,” etc., in “cowboy country”). *See also* Betsy Schiffman, *The Most Expensive Ranches*, http://www.forbes.com/lifestyle/realestate/2004/03/05/cx_bs_0305home.html (last visited Nov. 19, 2005) (noting that “ranches are becoming increasingly popular with many high net worth individuals”; that many wealthy people, including Michael Jackson, receive sizeable property tax credits by leasing part of their land for cattle grazing and not developing the rest; and that “for an individual looking for a little privacy, beautiful views, and a way to offset capital gains, ranch life may be ideal”).

⁴⁸¹ *See, e.g.,* DONAHUE, *supra* note 4, at 81–83, 258, 277, 304 n.46; Box, *supra* note 23. *High Country News* publisher Ed Marston aptly “captured” this relationship, describing land-grant-university agriculture colleges and the range science discipline as “the obedient handmaidens of traditional ranching.” Ann Vileisis & Ed Marston, *What Did the Land Look Like? What Should the Land Look Like?*, HIGH COUNTRY NEWS, Mar. 23, 1992, at 14. *See also* Davis, *supra* note 191, at 85 (noting that industry supporters include certain natural resource economists at western state universities); *supra* note 423 (citing letter signed by over 100 economists from western states to George W. Bush criticizing federal grazing policies).

⁴⁸² For instance, after my book *The Western Range Revisited* attracted criticism and concern

industries, such as mineral developers and motorized recreationists, frequently join forces with public-land ranchers or espouse their cause.⁴⁸³ Writers and academics wax eloquent about the ranching culture and lifestyle,⁴⁸⁴ while a growing number of environmental groups clamber aboard the “sustainable ranching” bandwagon.⁴⁸⁵ Indeed, increasing numbers of

by livestock producers, former University of Wyoming president Phillip Dubois faxed a letter to the editor of a livestock trade publication, in which he wrote: “Readers of the Wyoming Livestock Roundup should know that the official position of the University of Wyoming is, has been, and will continue to be, support for those industries including production agriculture – that have brought this state from its status as a territory in 1886 to its promise in the new millennium.” Phillip Dubois, Letter to the Editor, *UW Supports Ag*, WYO. LIVESTOCK ROUNDUP, Jan. 24, 2000, at 2. Pointing to my book, certain University trustees and university staff (particularly those associated with the booster group, “The Cowboy Joe Club”) also questioned my continued employment. A president of New Mexico State University may have been fired “as punishment for offending the state’s traditional ranching interests.” Peter Chilson, *Did Ranchers Fire a University President?*, HIGH COUNTRY NEWS, June 23, 1997, at 5 (noting that the member of the Board of Regents who complained about the offending remark was a rancher).

⁴⁸³ These groups, which generally favor public-land access, development of public lands, and protection of private rights, often join forces or espouse similar positions on public-land issues. See, e.g., Idaho State Snowmobile Ass’n, *2002 Update*, Dec. 2002 (on file with author) (declaring that the appointment of former rancher K. Lynn Bennett as BLM state director was “well worth the wait”). The author noted approvingly that Bennett had left the agency in 1993, which “shows he has good judgment,” and that ranching “was his life-long goal.” *Id.* Ranchers and motorized recreationists share an affinity for off-road, or all-terrain, vehicles (ORVs and ATVs). See, e.g., National Cattlemen’s Beef Association (NCBA) website, <http://www.beefusa.org/news/memberupdate-may19200521919.aspx> (last visited Nov. 19, 2005) (reporting that the NCBA has chosen as its “official utility vehicle” the Gator, a six-wheeled ATV); WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST (George Wuerthner & Mollie Matteson eds., 2002) (showing an ORV-mounted “cowboy” herding cattle on the jacket of the book); Press Release, White House, <http://www.whitehouse.gov/news/releases/2001/08/20010825-2.html> (reporting that President Bush uses a Gator to help clear trails through “jungly” vegetation at his ranch near Crawford, Texas).

⁴⁸⁴ See, e.g., RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at xiii–iv (presenting poems and essays on ranching and promoting dialogue about ranching culture); PAUL F. STARRS, LET THE COWBOY RIDE: CATTLE RANCHING IN THE AMERICAN WEST 31–34 (1998).

⁴⁸⁵ Examples include The Nature Conservancy, Quivira Coalition, Malpai Borderlands, and even local Sierra Club groups. See, e.g., P. Lynn Scarlett, *A New Approach to Conservation: The Case for the Four C’s*, 17 NAT. RESOURCES & ENV’T 73, 74–75 (Fall 2002) (describing conservation strategies of the Malpai Borderlands Group); Bob Budd, *Colors and Words*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 44 (offering perspective of manager of ranch owned by Nature Conservancy); Kelly Cash, *Malpai Borderlands: The Searchers for Common Ground*, in ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST 112–21 (Philip Brick et al. eds., 2001) (recounting the story of the Malpai Borderlands Group). In Idaho local environmental groups joined forces with ranching interests (with the blessing of a Senator Mike Crapo (R-ID)) to secure wilderness designation for the Owyhee Canyon in southwest Idaho and part of the Boulder-White Cloud Roadless Area in central Idaho. In the process, they made significant compromises regarding grazing, thus drawing criticism from other conservation interests. See, e.g., JANINE BLAELOCH & KATIE FITE, QUID PRO QUO WILDERNESS—A NEW THREAT TO PUBLIC LANDS (2005), <http://www.westernwatersheds.org/reports/quidpro/quid-pro-quo.pdf> (also reviewing other compromises). The final agreement, known as the Owyhee Initiative, was released in November 2004 and is available at <http://www.owyheeinitiative.org>.

Another critic of these collaborative efforts is ecologist George Wuerthner. He reports that The Nature Conservancy (TNC) is advising ranchers to include a clause in conservation easements that “automatically gives back to the rancher development rights if public lands grazing allotments are canceled or there are reductions in livestock use that ‘destroys the

environmentalists opposed to public-land ranching are lobbying for generous payments to ranchers who are willing to permanently retire their grazing permits⁴⁸⁶—an outcome that Congress or the agencies could achieve legally without providing any compensation at all.⁴⁸⁷ Even some courts have rendered judgments that are inexplicable unless one accepts that they, too, are vulnerable to the cowboy myth and ranchers' political clout.⁴⁸⁸

economic viability' of the ranch. This would permit ranchers to subdivide their property" E-mail from George Wuerthner, freelance writer and ecologist, to author (Feb. 12, 2000) (on file with author) (citing *Owyhee Cattlemen Discuss Conservation Easements*, CAP. PRESS, Feb. 11, 2000, at 29). Wuerthner continues: "TNC is apparently explicit in explaining to the ranchers that such a clause can be used as a 'hammer' . . . over 'state and federal agencies' heads." *Id.*

⁴⁸⁶ See, e.g., National Public Lands Grazing Campaign, Voluntary Grazing Permit Buyout Endorsements, <http://www.publiclandsranching.org> (last visited Nov. 19, 2005) (describing voluntary buyout efforts and endorsements, including Congressman Grijalva's bill, Multiple-Use Conflict Resolution Act, H.R. 3166). See also Tania Soussan, *Buyout Plan Targets Ranchers, Grazing Permits Would Be Retired*, ALBUQUERQUE J., Jan. 23, 2005, at B1, available at 2005 WLNR 1049109 (describing state and federal proposals for grazing-buyout programs). Private buyout programs include that of the Grand Canyon Trust, which for several years has been buying private land in the Southwest and then attempting to retire the attached federal grazing privileges. The Trust has been sued by persons opposed to the program, and Interior Department officials claim that grazing cannot be stopped on federal lands that have been determined to be "chiefly valuable for grazing," simply by buying out the current permittees. See, e.g., John Tierney, *The Sagebrush Solution*, N.Y. TIMES, July 26, 2005, available at 2005 WLNR 11680935 (describing a ranch buyout near Escalante, Utah). As noted earlier, however, federal lands in fact have *never* been determined chiefly valuable for grazing. See *supra* note 29 and accompanying text.

⁴⁸⁷ See *supra* text accompanying notes 148, 295 (describing the TGA and FLPMA provisions, which dictate that a grazing permit is not a property interest).

⁴⁸⁸ See, e.g., *Public Lands Council v. U.S. Dep't of Interior Sec'y*, 929 F. Supp. 1436, 1450–51 (D. Wyo. 1996), *aff'd in part and rev'd in part sub nom. Public Lands Council v. Babbitt*, 154 F.3d 1160, 1182 (10th Cir. 1998), *amended on reh'g*, 167 F.3d 1287, 1309 (1999), *aff'd*, 529 U.S. 728, 750 (2000). Federal District Court Judge Clarence Brimmer repeatedly referred (erroneously) to ranchers' "rights" in his opinion striking down several challenged provisions of the 1995 Clinton-Babbitt grazing regulations. *Id.* at 1441. See also Jim Stanford, *Wyo. Judge Has Green Heart*, CASPER STAR TRIB., Mar. 8, 2004, at A3 (reporting that Brimmer "believes Western courts are the proper venue for deciding Western issues" and quoting him as saying, "I don't think an Eastern judge is really in a position to assess fairly the interests that are involved" in some public-land issues); *id.* (also quoting Brimmer as saying: "I'm a Westerner, born and bred' [and] . . . I favor Western interests"). As reported by the Idaho Watersheds Project (now Western Watersheds Project), on May 31, 2000, Federal District Court Judge Edward Lodge "issued a Temporary Restraining Order stopping the implementation of a [BLM] decision to cut grazing [in an Idaho] Allotment by 53%." E-mail from Idaho Watersheds Project to author (June 1, 2000) (on file with author). Lodge, who has been on the bench since 1989 and was "until recently, a [BLM] grazing permittee himself . . . acted without any court hearing . . . and . . . solely on the basis of information provided by three public land ranching permittees provided three days before the Order." *Id.* See also DONAHUE, *supra* note 4, at 83–87, 305 n.54 (describing other specific examples of judicial "deference" to ranching interests). A recent study by the Environmental Law Institute revealed that judges' party affiliation was a decisive factor in the outcomes of NEPA cases. See ENVTL. LAW INST., *JUDGING NEPA: A HARD LOOK AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 13*, available at <http://www.endangeredlaws.org/downloads/JudgingNEPA.pdf>. But see Spence & Cross, *supra* note 160, at 122–23 (debunking agency capture as a valid descriptive theory of bureaucratic behavior). Cf. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310–11 (1976) ("The premise of 'capture' does not apply in anything like the same degree, however, in the contemporary judicial setting," and various factors "operate to insulate the judge from the

Among the most influential—and thus potentially damaging—proponents of cowboy mythology are range and wildlife scientists. Former Society for Range Management president Thad Box acknowledges that the range science profession has “lost credibility because we have been too close to the livestock industry.”⁴⁸⁹ Box posed some tough questions to his colleagues: “Are we really captive of cattlemen? Are we letting the myth of the cowboy limit our effectiveness? . . . Do our gods get in the way of our science?”⁴⁹⁰ I am not alone in suggesting that the answer to these questions is “yes.”⁴⁹¹ Some of these scientists are associated with universities, serve as government consultants, contribute to environmental assessments and other studies, and participate in “collaborative” public-land planning and management efforts. In these contexts, their casual, misleading, and/or unsupported statements can significantly retard the development of sound public-land grazing policy and a better understanding of range ecology.

Wayne Burkhardt, associate professor emeritus, University of Nevada-Reno, and frequent range consultant, serves as an example. A 1991 article by Burkhardt in *Range* magazine is rife with platitudes and inaccuracies about grazing ecology, history, and the law.⁴⁹² Three years later Burkhardt

cruder forms of ‘capture’”).

⁴⁸⁹ Box, *supra* note 23, at 30. Box conceded the truth of my charge that the results of range science studies “may be portrayed carelessly or even misrepresented, intentionally or otherwise, by the investigators or others.” *See id.* at 28 (referring to DONAHUE, *supra* note 4, at 61).

⁴⁹⁰ Box, *supra* note 23, at 28, 29.

⁴⁹¹ *See* WELCH & CRIDDLE, *supra* note 408, at 1 (characterizing the “range or vegetative management axioms” about destroying sagebrush as “rationalizations”). Welch and Criddle explain that their report “analyze[s] whether [each axiom] is based on science or [is] a reflection of Box’s . . . question to the range management community: ‘Do our gods get in the way of our science?’”; and they conclude that “[i]n short, most, if not all, of the sins attributed to big sagebrush by the range management community are the result of livestock grazing.” *Id.*; *see also* DONAHUE, *supra* note 4, at 61.

⁴⁹² *See* J. Wayne Burkhardt, *Renewal on the Western Range: Mother Nature’s Balance Is Not Always Harmonious*, RANGE, Spring 1991, available at <http://www.rangemagazine.com/archives/stories/spring00/renewal.htm> (presenting grazing as a natural process and asserting improving health of public rangelands). Among other assertions, Burkhardt states: “Grazing is extensive, low fossil energy consumptive, a natural process Natural grazing damages little and is based on a renewable resource that can be harvested in no other way.” *Id.* Some rebuttal: Cattle grazing in the American West is not “natural.” *See supra* notes 8–20 and accompanying text (describing the environmental effects of grazing and citing numerous scientific sources). Cattle are not native to this continent. Nor is their diet or foraging behavior similar to that of any historically abundant large native ungulate. *Id.* All cattle raised on public rangelands are “finished” elsewhere, usually on feedlots. *See* DONAHUE *supra* note 4, at 251 (noting that few animals spent an entire year on federal land). Grazing causes significant ecological damage, including to soil, water, and native species. *See supra* note 8 and accompanying text. In his article, Burkhardt also cites the beneficial role of livestock in releasing “nutrients that need to go back into the soil [but which] are tied up in litter,” and he queries: “Doesn’t a lawn look better when it is mowed?” Burkhardt, *supra* note 492. Grazing does reduce litter, but the effects on arid rangelands are *not* beneficial. Reduced litter and vegetative cover alter fire regimes, result in greater erosion and more runoff, and negatively affect soil temperatures, soil texture, and microorganisms. *See* RANGELAND REFORM ‘94, *supra* note 8, at 3–35 (“Natural litter is an important element of cover,” which “intercepts precipitation, reducing raindrop impact, restricting overland flow, and allowing more infiltration and less runoff and erosion.” Litter “improve[s] soil structure, thus improving the ability of the soil to absorb water . . . [and]

contributed to two grazing-related reports contracted by the federal inter-agency Interior Columbia Basin Ecosystem Management Project (ICBEMP).⁴⁹³ Apparently, these reports were similarly unscientific. An agency-solicited peer review of these reports⁴⁹⁴ was highly critical, finding a “number of serious flaws,” including:

faulty conceptualization of processes of natural selection and evolution, reliance on unsubstantiated or weakly substantiated assumptions, arguments built on scientifically unsupported premises, a failure to present all alternatives concerning controversial issues, a propensity to present a single alternative as

supplies nutrients to the soil.”); *id.* at 4-113 (predicting, *inter alia*, that if all livestock were removed, plant and litter cover would “considerably increase,” thereby “improv[ing] physical soil properties” over the long term). Moreover, scientists have recently discovered that “a long-term decrease in litter cover [such as results from extended grazing] is the most evident sign when an area begins to change to desert.” Press Release, EurekAlert!, Desertification Alters Regional Ecosystem Climate Interaction (Jan. 18, 2005), available at http://www.eurekalert.org/pub_releases/2005-01/bpl-dar011805.php. One scientist has noted that greater mulch (litter) accumulation in *moist* climates might be related to decreased infiltration and increased sediment yield. Farrel A. Branson, *Evaluation of “Impacts of Grazing Intensity and Specialized Grazing Systems on Watershed Characteristics and Responses,”* in DEVELOPING STRATEGIES, *supra* note 219, at 985–1000. Burkhardt’s comparison to lawns is highly inapt: Lawns are monocultures of non-native grasses; public rangelands should neither be monocultures nor comprise significant numbers of non-native species. See RANGELAND REFORM ‘94, *supra* note 8, at 27 (attributing declines in native animal and plant species to degraded vegetative communities and disrupted natural processes). Burkhardt further asserts, citing no supporting data: “Near barren landscapes and gutted stream courses of the early 1900s are today [1991] proven and productive stable rangelands.” Burkhardt, *supra*. *But cf.* RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (reporting that in 1994 riparian areas were in their worst condition in history, that “[p]lant communities palatable to livestock or maintained by fire . . . have diminished,” and that uplands in areas receiving less than 12 inches annual precipitation have not improved under BLM management).

⁴⁹³ E-mail from Dr. Elizabeth Painter to author (Dec. 14, 2003, and Apr. 21, 2004) (on file with author). See also STEPHEN G. LEONARD & MICHAEL G. KARL, REVIEW DRAFT—HERBIVORY IN THE INTERIOR COLUMBIA RIVER BASIN: IMPLICATIONS OF DEVELOPMENTAL HISTORY FOR PRESENT AND FUTURE MANAGEMENT (1995) (summarizing the “divergent views” in the Burkhardt reports and Painter’s peer-review evaluation), available at www.icbemp.gov/science/leonard1.pdf. The ICBEMP, which was initiated in the early 1990s, was described this way by U.S. Forest Service Chief Michael Dombeck:

As directed by the President, the Forest Service, and BLM are developing a scientifically sound and ecosystem-based strategy for the management of the “East Side forests.” We are responding to several broad scale issues, including forest and rangeland ecosystem health . . . and potential listings under the Endangered Species Act, economies of rural communities[,] and treaty and trust responsibilities to Native American Tribes in the Project.

Hearings on the Interior Columbia Basin Ecosystem Management Project: Hearings Before the Subcomm. on Forest and Forest Health of the H. Comm. on Resources, 105th Cong., 2d Sess., 4 (1998) (statement of Michael Dombeck, Chief, U.S. Forest Service).

⁴⁹⁴ Elizabeth L. Painter, *Review: Herbivory in the Intermountain West* (1995) [hereinafter Painter, *Review*] (review of J. WAYNE BURKHARDT, HERBIVORY IN THE INTERMOUNTAIN WEST: AN OVERVIEW OF EVOLUTIONARY HISTORY, HISTORIC CULTURAL IMPACTS, AND LESSONS FROM THE PAST (1994), contract report on file with ICBEMP, 112 E. Poplar, Walla Walla, WA 99362, 208-885-6673) (on file with author). E-mail from Dr. Elizabeth Painter to author (Dec. 14, 2003, Apr. 21, 2004, and July 27, 2005) (on file with author). See also LEONARD & KARL, *supra* note 493 (outlining the “divergent views” in the Burkhardt and Painter reports).

if it were the only point of view found in scientific literature, presentation of scientifically unsubstantiated opinions as if they were scientifically tested and accepted, and inconcise or unconventional uses of scientific terminology.⁴⁹⁵

The reviewer concluded: “Current versions of the reports are scientifically invalid, and should not be considered for use as a framework on which to base management decisions without almost complete revision.”⁴⁹⁶ She rejected Burkhardt’s assertions that “most rangelands remain productive and stable after more than a century of livestock grazing,” that “bison were abundant and widespread” and thus important selection forces in the Intermountain Region, and that domestic livestock serve as “replacements” for “extinct Pleistocene megafauna”⁴⁹⁷—all of which are commonly heard pronouncements of grazing apologists.⁴⁹⁸

More recently, *Range* magazine published a remarkable piece of drivel by another range consultant, Steven H. Rich, president of the Rangeland Restoration Academy.⁴⁹⁹ In this article, Rich (who apparently is *not* a scientist, but who nevertheless advertises himself as a “successful Natural Resource Management Consultant”⁵⁰⁰), wrote: “Buffalo chips and cow pies are indispensable, integral parts of the West.”⁵⁰¹ This piece reflects two spurious views, widely held among ranchers and range managers: (1) that livestock benefit rangelands by cycling nutrients,⁵⁰² and (2) that cattle

⁴⁹⁵ Painter, *Review*, *supra* note 494, at 1.

⁴⁹⁶ *Id.*

⁴⁹⁷ See, e.g., Painter, *Review*, *supra* note 494, at 1 (quoting Burkhardt, *supra* note 494).

⁴⁹⁸ See *infra* notes 501–505 and accompanying text.

⁴⁹⁹ Steven H. Rich, *The Humble But Important Cow Pie: The Tao and Ecology of Poo and the Key Role of Endangered Feces*, RANGE, Winter 2005, available at <http://www.rangemagazine.com/features/winter-05/cowpie.shtml> (last visited Nov. 19, 2005).

⁵⁰⁰ Rangeland Restoration Academy website, <http://www.rangelandrestoration.org/rangelandacademy/Steven%20Resume.htm> (last visited Nov. 19, 2005) (further stating that Rich is a “successful businessman,” primarily in the hospitality and food service industries). Elsewhere, the organization’s website reports: “Everything we [the Rangeland Restoration Academy] do is based on real, peer reviewed, solid, published science.” Rangeland Restoration Academy, Welcome to Rangeland Restoration Academy!, <http://www.rangelandrestoration.org/rangelandacademy> (last visited Nov. 19, 2005).

⁵⁰¹ Rich, *supra* note 499. “Cow pies are part of . . . the ‘grazing lawn’ phenomenon. An enriched soil grows extra nutritious plants with increased grazing tolerance and a much longer green, active period. Wildlife needs these grazing lawn communities. Livestock form and maintain them.” *Id.* (citing “Dr. Samuel McNaughten of Syracuse University”). This is typical pro-livestock propaganda, which fails to account for evolutionary history or cite differences in climate, soils, precipitation regime, or other relevant factors. Aridity, combined with a dearth of coprophagous (dung) beetles in the West (compared to east of the Continental Divide where bison and dung beetles had been plentiful), result in cattle dung persisting for years. See J.R. Anderson, R.W. Merritt & E.C. Loomis, *The Insect-Free Cattle Dropping and Its Relationship to Increased Dung Fouling of Rangeland Pastures*, 77 J. ECON. ENTOMOLOGY 133, 133 (1984) (explaining that insecticides given to cattle prevent micro-organisms from breaking down cattle dung). See also *infra* note 505 and accompanying text.

⁵⁰² See, e.g., Knight, *supra* note 91, at 128 (asserting that “grass and shrubs need . . . the dung and urine incorporated by hoof action facilitating more efficient nutrient cycling”). Most ecologists have rejected these “hoof action” theories, whose chief promoter is Zimbabwean scientist Alan Savory). See DONAHUE, *supra* note 4, at 141–42 (describing scant empirical evidence that hoof action enhances seed establishment); see also *id.* at 167–68 (citing other examples of the nutrient-cycling view, as well as evidence of the deleterious impacts of cattle

“substitute” (are ecological replacements) for bison.⁵⁰³ As noted above, however, the long-term result of cattle “cycling nutrients” (by consuming vegetation and reducing litter cover) can be desertification.⁵⁰⁴ This is so in part because native plant species in the arid and semi-arid West did not evolve in association with large ungulate grazers. Neither these plants nor western soils are adapted to coexisting with cattle. Bison—contrary to the second view—were sparse or absent over most lands that are now public grazing lands (west of the Continental Divide), and no other native ungulates are similar to cattle in size, diet, foraging behavior, or ecological impacts.⁵⁰⁵

Many examples of the misuse or subversion of science are more subtle. Consider, for example, an article entitled “Influences of livestock grazing on sage grouse habitat.”⁵⁰⁶ Its authors concluded that “rest-rotation cattle grazing” had a “direct *positive* impact” on sage grouse because grouse food forbs increased *during the rest period* (i.e., the period of no grazing).⁵⁰⁷ Ranchers and grazing apologists commonly claim credit for “improvements” in the land which, in fact, occur as the result of *discontinuing* some damaging grazing practice, such as removing cattle from riparian areas.⁵⁰⁸

To borrow a phrase from Dr. Box, as long as range professionals allow their “gods [to] get in the way of [their] science,”⁵⁰⁹ the public and politicians can hardly be expected to see the truth. There seem to be two principal reasons for the seriousness with which these “gods” or myths are embraced

dung); *supra* note 501 (concerning the persistence of cattle dung in the West). Cattle actually retard nutrient cycling by damaging biological soil crusts. DONAHUE, *supra* note 4, at 124–25.

⁵⁰³ DONAHUE, *supra* note 4, at 133–39.

⁵⁰⁴ See *supra* note 492 (explaining that reducing litter cover can alter fire regimes and erosion, signaling a change to a desert environment).

⁵⁰⁵ See generally George Wuerthner, *Just a Domestic Bison?: Cows Are No Substitute for Buffalo*, in WELFARE RANCHING, *supra* note 483, at 295–97; DONAHUE, *supra* note 4, at 133–38; Painter, *Review*, *supra* note 494, at 1–2 (explaining that, by definition, there “were ‘no ‘vacant’ or ‘empty’ niches for livestock to fill, and “[b]est available science provides evidence that alien domestic livestock are not and cannot be ‘replacements’ for extinct Pleistocene ‘mega-fauna’ or contemporary native large herbivores”).

⁵⁰⁶ Beck & Mitchell, *supra* note 427, at 993.

⁵⁰⁷ *Id.* at 994, 997 (emphasis added).

⁵⁰⁸ See, e.g., Scott E. Cotton & Ann C. Cotton, *Wyoming CRM: Enhancing Our Environment* (n.d.) (discussed in DONAHUE, *supra* note 4, at 281); cf. W. William Weeks, *Cloudy Sky over the Range: Whose Home and Why It Matters*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 219, 224 (claiming that “ranchers have always fought invasive species” and asserting that, without “this kind of active management, much of our western range will follow a course of succession that cannot be called natural”). Such statements ignore that livestock grazing bears perhaps primary responsibility for invasion by weeds. See *supra* note 8 and accompanying text; *supra* note 16 (noting that the loss of sixty-five percent of the shrublands on the Snake River plain in southwest Idaho and conversion to cheatgrass is due in part to livestock grazing); and *supra* note 79. Most “improvements” are manipulations undertaken for the benefit of livestock with little or no consideration of the effects on the environment or on native species. See, e.g., FERGUSON & FERGUSON, *supra* note 132, at 147–56; DONAHUE, *supra* note 4, at 127–32, 216, 220, 276–80.

⁵⁰⁹ Box, *supra* note 23, at 29. Dr. Box also suggested that the fact that most range professionals “have [their] roots in the ranching culture” often leads them to “defend[] a use that is dear to [their] hearts rather than land [they] have pledged to preserve.” See *id.* at 28. “Pledged” refers to the Society for Range Management objectives, subscribed to by all SRM members. See *id.* at 27.

today: First, the longer ranching persists as a land use, the more plausibly (and sympathetically) ranchers can argue that theirs is a culture worth preserving. This is so even though public-land ranching holds on largely because of government subsidies and ranchers' attachment to their chosen lifestyle. Second, a growing number of persons attracted to the West for its wide open spaces, but concerned at the rate they are dwindling, grasp at solutions that link preservation of those open spaces to keeping ranchers on the land.

Webster's defines myth as "a belief given uncritical acceptance by the members of a group especially in support of existing or traditional practices and institutions; a belief or concept that embodies a visionary ideal."⁵¹⁰ Mythical means "fabricated, invented, or imagined in a consciously arbitrary way . . . or ignorantly and willfully without facts or in defiance of facts."⁵¹¹ Even a cursory look at some of the most prominent rationalizations of current public-land grazing policies⁵¹² shows that each indeed "embodies a visionary ideal" and is "ignorantly and willfully without facts or in defiance of facts":

- Ranchers are "cowboys."⁵¹³
- Cowboys are romantic figures.⁵¹⁴

The notion that ranchers and cowboys live lives of freedom and adventure in the open air on the open range is a mere fiction.⁵¹⁵ Ranchers are

⁵¹⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1497 (1986).

⁵¹¹ *Id.*

⁵¹² See DONAHUE, *supra* note 4, at 268–82 (reviewing and rebutting the asserted justifications for public-land grazing).

⁵¹³ A corollary myth is that cowboys are *men*. This facet of the myth has been addressed elsewhere. See DONAHUE, *supra* note 4, at 88–90 (and sources cited therein). Despite the longstanding existence of cowgirls and women ranchers (such as Mary Bulloch, *infra* note 514), the myth persists, cropping up in odd places, like National Public Radio stories. *E.g.*, "Male-Female Wage Gap in Cowboy Country," <http://www.npr.org/templates/story/story.php?storyId=4486560> (last visited Nov. 19, 2005). Senator Thomas's "National Day of the Cowboy" resolution begins by noting that "pioneering men *and women*, recognized as *cowboys*, helped establish the American West." S. Res. 85, 109th Cong. (2005) (emphasis added).

⁵¹⁴ See S. Res. 85, 109th Cong. (2005) (touting the admirable qualities of cowboys); see also *supra* notes 353–54 and accompanying text. Consider also the second definition of cowboy offered by an on-line dictionary: "An adventurous hero." Dictionary.com, cowboy, <http://dictionary.reference.com/search?q=cowboy>. See also WEBB, *supra* note 92, at 245–47; DONAHUE, *supra* note 4, at 88–91. See Nijhuis *supra* note 386, at 10 and accompanying text (reporting rancher Mary Bulloch's comment: "Yep, there's nothing like being a cowboy in the middle of society, is there?"). An aside: according to an elder member of the W.R. Cross family, who operated a western wear store in Ogden, Utah, for 127 years, *non-cowboys* are called "civilians." *Profile: Cross Western Wear, Established in 1878 in Utah, Prepares to Close After 127 Years of Continuous Operation by Cross Family*, (National Public Radio broadcast Mar. 18, 2005).

⁵¹⁵ See, *e.g.*, RANGELAND REFORM '94, *supra* note 8, at 3-76 ("Some of the personal traits and lifestyle patterns of cowboys/ranchers have been romanticized and may tend to exist less in reality than in the minds of ranchers and other Americans.").

(sometimes absentee) land owners and businesspersons. Cowboys are hired hands.⁵¹⁶ Indeed, cowboys are among the lowest paid workers in the West.⁵¹⁷

- Cowboys (hence, according to the myth, ranchers) are independent, self-reliant, honest, hard-working, respectful, etc. They “have integrity and courage in the face of danger.”⁵¹⁸

Any stereotype has its limits and flaws, but these notions seem especially unfounded. Of the alternative definitions of cowboy offered by *Webster’s*, “outlaw or gangster in the early days of the western U.S.” precedes “one who tends and drives herds of cattle.”⁵¹⁹ Early cowboys were not generally liked or admired.⁵²⁰ They were often disorderly, prone to violence and drinking, and considered “uncivilized.”⁵²¹ Most were illiterate.⁵²² Ranchers (or ranch managers) work hard, but so do people in many other occupations and professions. Ranchers may be “rugged individualists” and *philosophically* independent,⁵²³ but public-land ranching has long been heavily dependent on government subsidies and is still referred to as a “pocket of socialism” in our capitalist economy.⁵²⁴

- Public land ranching is crucial to local rural western economies.⁵²⁵

⁵¹⁶ As Ed Abbey put it: “A cowboy is a hired hand on the middle of a horse contemplating the hind end of a cow.” Edward Abbey, *Free Speech: The Cowboy and His Cow*, in WELFARE RANCHING, *supra* note 483, at 57, 60.

⁵¹⁷ See, e.g., POWER, *supra* note 33, at 190 (documenting cowboys’ meager wages). Even so, the expense of those wages may deter a rancher from hiring a range rider (cowboy) to ensure that cattle remain within designated pastures or out of sensitive riparian areas. See Brodie Farquhar, *Forest Throws Out Grazing Plan*, CASPER STAR-TRIB., July 15, 2005 (citing Wyoming Stockgrowers official Jim Magagna on the cost of retaining cowboys to watch herds), available at <http://www.casperstartribune.net/articles/2005/07/17/news/wyoming/1812262862f679f98725703e008261d1.txt> (last visited Nov. 19, 2005). Magagna is considered one of the “power brokers” in the Bush Administration’s counter-environmental revolution. See *Earth Shakers*, *supra* note 5.

⁵¹⁸ See, e.g., Press Release, Office of Senator Craig Thomas, Thomas Sponsors “National Day of the Cowboy” Legislation (proclaiming that “the cowboy embodies honesty, courage, integrity, compassion, respect, a strong work ethic, and patriotism”), available at http://thomas.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=386&Month=3&Year=2005 (last visited Nov. 19, 2005); Marston, *supra* note 475, at 237, 240 (calling ranchers “proud, self-reliant, inward people”).

⁵¹⁹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 526 (1986).

⁵²⁰ WEBB, *supra* note 92, at 244–251; BARNS, *supra* note 96, at 38 (listing cowboys among the “ills” and “evils” to which settlers were subjected).

⁵²¹ WEBB, *supra* note 92, at 244–251; BARNS, *supra* note 96, at 38.

⁵²² See, e.g., LARSON, *supra* note 118, at 121–22; WEBB, *supra* note 92, at 498; BARNS, *supra* note 96, at 38. “Wyoming newspaperman Bill Nye quipped that one cowboy in twenty was brave when armed.” DONAHUE, *supra* note 4, at 91.

⁵²³ See *supra* notes 118–20, 360, and accompanying text (suggesting the individuality and moral independence of cowboys, at least in stories).

⁵²⁴ See Nelson, *supra* note 30, at 287 (referring to government intervention in forage production as “a virtual pocket of socialism”); see also generally POWER, *supra* note 33, at 171–200; DONAHUE, *supra* note 4, at 94–96.

⁵²⁵ See, e.g., Ben Alexander & Luther Propst, *Saving the Family Ranch*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 203–04 (characterizing the agricultural economy as the

This myth was addressed briefly in the introduction.⁵²⁶ According to a study by agricultural economists thirty years ago, ranchers depend more on the availability of jobs in the local community than communities depend on ranching.⁵²⁷ The General Accounting Office later failed to find any supporting documentation for this claim in the Southwest.⁵²⁸ In the early 1990s the Department of Interior and a University of Montana economist both concluded that *eliminating all* public-land grazing would have minor economic effects.⁵²⁹

- Public-land ranching is crucial to maintaining a valuable culture and way of life.⁵³⁰

In truth, there is no single ranching “way of life.” “Ranching” and ranchers vary widely, historically and presently.⁵³¹ Ranchers have included sheep and cattle producers, landed and itinerant operators, cattle “barons,”

lifeblood of many rural communities in the West); Press Release, National Cattlemen’s Beef Association (NCBA), NCBA Remains Firm in Opposition to Grazing Permit Buyouts (Feb. 17, 2005) (asserting that “rural communities benefit from public land grazing” and grazing “sustains [their] economies”), *available at* <http://hill.beef.org/newview.asp?DocumentID=14424> (last visited Nov. 20, 2005); S. Res. 85, 109th Cong. (2005) (asserting that “the cowboy continues to play a significant role in America’s culture and economy” and ranchers “are contributing to the economic well being of nearly every county”); H.R. Res. 411, 109th Cong. (2005) (“Ranching is an important part of the culture and economies of many rural communities throughout the American West, and the rural West depends on a healthy and thriving ranching industry.”); RANGELAND REFORM ‘94, *supra* note 8, at 3–77 (“Ranchers believe that livestock grazing on federal land is vital to the economic stability of rural communities.”). Data to support such claims, however, are few or nonexistent.

⁵²⁶ See *supra* notes 40–43 and accompanying text.

⁵²⁷ Smith & Martin, *supra* note 41, at 224.

⁵²⁸ GAO, HOT DESERTS, *supra* note 25, at 48 (reporting that, while livestock operators in the Southwest “believe that livestock grazing provides a large portion of the tax base to many local communities,” those “operators and cattlemen’s associations did not supply any quantitative data to GAO to support this view”); see also *id.* at 46–47 (reporting that twelve EISs reviewed by the GAO showed that “sales of livestock products and sales from ranching contribute little to the local economies”). Some politicians and industry proponents even claim regional or national economic significance for public land ranching, but such claims are even more plainly belied by the facts.

⁵²⁹ See RANGELAND REFORM ‘94, *supra* note 8, at 4-118 to 4-121 (describing the impact of ranching on western economies as minor); POWER, *supra* note 33, at 181–86 (analyzing the economic benefit of public land grazing).

⁵³⁰ See generally RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91 (presenting a collection of essays and poems glorifying the ranching way of life); S. 1459, 104th Cong. § 101(a)(9) (1996) (Domenici bill) (characterizing the importance of grazing on federal land in terms of “preserving the social, economic, and cultural base of rural communities in the Western States”), *quoted in* DONAHUE, *supra* note 4, at 71. See also Davis, *supra* note 191, at 90 (citing testimony offered by range program supporters during hearings on range reform bills); RANGELAND REFORM ‘94, *supra* note 8, at 3-55–3-56 (referring to ranchers’ traditional way life); Reed, *supra* note 347, at 528 n.11 (noting that Wyoming Senator Alan Simpson “characterized [a] filibuster [by Western senators against a grazing fee increase] as ‘defending a Western life style’”).

⁵³¹ See RANGELAND REFORM ‘94, *supra* note 8, at 3-75 (noting the variety of ranching characteristics based on “location, type of livestock, management, distance from nearest community, and financial structure”); DONAHUE, *supra* note 4, at 88, 90, 93, 268–73 (contrasting the idealized cowboy with facts).

Eastern and foreign capitalists, family operations, hobby ranchers, “rustlers,” absentee owners, etc. Even so, very few livestock producers, even in the West (fewer than 23,000, or six percent), use federal public lands; thus, ranching would continue absent federal grazing privileges. The chief objection to this myth, however, is that nothing in the law authorizes, much less mandates, federal land management agencies to take lifestyles or self-described “culture” into account in making grazing decisions.⁵³²

- Keeping public-land ranchers in business maintains open spaces,⁵³³ a.k.a., the “cows versus condos” issue.⁵³⁴

As with the community-dependence myth, proponents of this argument have failed to marshal supporting evidence. The reality is otherwise.⁵³⁵ First, sprawl development occurs on private (not on public) lands, where there is a *demand* for the development. No development pressure exists in many public-land areas. Second, nothing in existing federal law prevents public land ranchers from subdividing or selling their private lands to developers. The real estate market and individual economic choices, not federal grazing rights, dictate which lands will be developed.⁵³⁶ Third, most ranchers are in

⁵³² See, e.g., *supra* notes 300–06 and accompanying text (discussing relevant provisions of FLPMA).

⁵³³ This myth is the newest and most broadly subscribed to. See, e.g., BLM, Proposed Grazing Rule Announced, at <http://www.blm.gov/grazing> (last visited Nov. 20, 2005) (“The proposed rule, announced by Interior Secretary Gale Norton in a speech in New Mexico, recognizes the economic and social benefits of public lands ranching, as well as its preservation of open space in the rapidly growing West.”); GRAZING REGULATIONS FEIS, *supra* note 19, at 5-18 (“The rule is designed to enable succeeding generations of ranchers to stay on their land, a crucial element of rural landscapes . . .”). See also RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, *passim*; S. 1459, 104th Cong. § 101(a)(9) (1996) (Domenici bill), *quoted in* DONAHUE, *supra* note 4, at 71, 274; David Wilkins, *Cattlemen Welcome New Director*, CAPITAL PRESS AGRIC. WEEKLY (Salem, OR), Dec. 2, 2002, *available at* http://www.citizenreviewonline.org/nov_2002/cattlemen.htm, (last visited Nov. 20, 2005) (quoting former rancher and new Idaho state director for BLM as saying that the way to “maintain open spaces . . . is to keep producers on the ground”); NCBA, *supra* note 525 (asserting that grazing “helps to preserve open space”); Nokkentved, *supra* note 439 (quoting Kathleen Clarke as calling public ranch lands “crucial for open space and wildlife habitat”). See also Davis, *supra* note 191, at 90.

⁵³⁴ George Wuerthner may have coined the expression “cows or condos.” See George Wuerthner, *Cows or Condos: A False Choice between Public Lands Ranching and Sprawl*, in WELFARE RANCHING, *supra* note 483, at 299–302.

⁵³⁵ *Id.*; DONAHUE, *supra* note 4, at 273–76.

⁵³⁶ Star Valley on the Wyoming-Idaho border south of Jackson Hole is a classic example. See Victoria Simpson, *Boom Time in Star Valley: Time is Running Out for Small-town Lifestyle of Yore*, PLANET JACKSON HOLE, July 20, 2005, at 11–12 (describing how the “once quaint, sleepy, scenic ranching community has exploded into a developer’s paradise”), *available at* http://www.planetjh.com/stories/story_2005_07_20_cover.html. Simpson reports that the number of full-time dairies in the valley has declined from 300 to 400 in the 1960s to 20, “and more dairies are closing each year,” according to the local U.S. Department of Agriculture office. *Id.* at 11. The population has increased from 4500 in 1960 to 11,600 today, “with more people moving in each day.” *Id.* “In 2004, 105 homes were built in Star Valley . . . ; as of June 30, 2005, there have been 105 homes built, and additional homes are ready to get underway.” *Id.* at 12. While many ranchers have sold out and left the valley or changed professions (e.g., to selling real estate), some say they “will simply move to where [they] can have a more conducive ranching lifestyle.” *Id.* The story has nothing to say about federal grazing policies, which are

the business for the lifestyle, not the money, and recent surveys reveal that at least half of public-land ranchers would continue to operate if they lost federal grazing privileges.⁵³⁷

- Ranchers are “good stewards of the land and all its creatures.”⁵³⁸
- Grazing improves the land.⁵³⁹
- Ranching provides clean air and water, wildlife habitat, etc.⁵⁴⁰

undoubtedly unrelated to the boom. (*Planet Jackson Hole* is a free weekly paper in Jackson, WY.)

⁵³⁷ See DONAHUE, *supra* note 4, at 263–67 (citing results of several surveys and studies from 1972–93).

⁵³⁸ See, e.g., Press Release, Office of Senator Craig Thomas, Thomas Sponsors “National Day of the Cowboy” Legislation (Mar. 18, 2005) (proclaiming that the cowboy is an excellent steward of the environment), available at http://thomas.senate.gov/index.cfm?FuseAction=PressRelease.Detail&PressRelease_id=386&Month=3&Year=2005 (last visited Nov. 19, 2005); GRAZING FEES HEARING, *supra* note 259, at 426 (containing repeated assertions as to ranchers’ stewardship); *Norton Calls for Incentive-Based Species Programs*, ENDANGERED SPECIES & WETLANDS REP., Mar. 2001, at 3 (quoting Interior Secretary Gale Norton as stating that “farmers and ranchers are often the best stewards of the land”); Michael Doyle, *Grazing Rules Put Ranchers in the Saddle*, SACRAMENTO BEE, Dec. 12, 2003, at D3 (quoting Steve McDonald, treasurer of the California Rangeland Trust, as saying: “we think the cattlemen themselves are the best stewards of the land”). See also, NCBA, *supra* note 525 (“Cattlemen are the original stewards of the land, having worked . . . the land for the past century . . .”). The NCBA, like livestock producers in general, seems oblivious of the irony in statements like this, which ignore the original stewards of the land, Native Americans, whom ranchers and other settlers and profit-seekers forced off lands the tribes had occupied for centuries. Ranching was the chief impediment to reintroduction of wolves in the Greater Yellowstone Ecosystem and other parts of the West, and remains the biggest threat to their future viability. Most predator and pest control is conducted at the behest of stockgrowers. Nevertheless, a bumper sticker is occasionally seen in the West, which proclaims: “On the eighth day, God created ranchers to care for all his other creatures.”

⁵³⁹ This assertion can refer to so-called range improvements, undertaken almost exclusively for the benefit of livestock, see *supra* notes 314–18 and accompanying text, or to the notion that grazing animals actually enhance the environment, e.g., by fertilizing or aerating the soil, by increasing infiltration, by stimulating plant growth, etc. See, e.g., *supra* notes 492, 501–02 and text accompanying notes 502, 504. There is no ecological evidence for arid lands for any of the latter claims, as I have discussed elsewhere. See DONAHUE, *supra* note 4, at 139–42 (discussing aridity and grazing optimization). See also generally WELFARE RANCHING, *supra* note 483, at 162–253, 286–306 (discussing ecological impacts of livestock production in the arid West and presenting counterarguments to these and other claims); E-mail from Dr. Elizabeth Painter to author (Apr. 21, 2004) (on file with the author) (informing on grazing related issues and listing numerous sources).

⁵⁴⁰ See, e.g., Paul F. Starrs, *Ranching: An Old Way of Life in the New West*, in RANCHING WEST OF THE 100TH MERIDIAN, *supra* note 91, at 20 (“Ranches are open lands, biodiversity niches, watersheds, archeological reserves, archives of settlement history, endangered species habitat, diverse ecosystem pools, biodiversity banks, and, just incidentally, vessels for livestock feed.”); Budd, *supra* note 485, at 41 (referring to the “pride” ranchers should feel at “the habitat they provide”); *Invasive Species and the National Cattlemen’s Beef Association—What a Difference Four Years Make* (testimony of Myra Bradford Hyde, National Cattlemen’s Beef Ass’n, Apr. 29, 2003, before the Joint Subcomm. on Fisheries Conservation, Wildlife, and Oceans and National, Parks, Recreation, and Public Lands), available at http://www.propertyrightsresearch.org/articles/invasive_species_and_the_nationa.htm (arguing that non-native species are not

A massive literature contradicts these assertions, some examples of which have been cited in this article. The productivity of western lands, private and public, has declined under ranching practices.⁵⁴¹ Cowboys and ranchers historically have been oblivious or careless of, if not actually cruel to, their own livestock.⁵⁴² Many are intentionally destructive of predators and “pests” and intolerant of many other native species.⁵⁴³ Perhaps the most compelling rebuttal to this myth, however, is the condition of the public lands today.⁵⁴⁴

VI. CONCLUSION

The more things change . . . The western range livestock industry was born of opportunity and lawless entrepreneurialism. By the early 1900s, the free-spirited cowboy had captured Americans’ imagination, if not Congress’s solicitude. For most of the next century, the larger operators continued to get, or take, pretty much what they wanted—the use of hundreds of millions of acres of land, tax free and for minimal rent, with predator control, fencing, and various other services provided; the respect (or fear) and envy of their neighbors; the fascination of an ill-informed public; the ready patronage of politicians; and an infinitesimal regulatory burden. Still, ranges were depleted and conflicts simmered. From my vantage point, the status quo in 2005 looks a lot like 1934.

The capture metaphor provides a means of understanding, or at least dissecting, an otherwise nearly inexplicable phenomenon—that ranchers have maintained their hold on the public range. It would seem that no industry could sustain itself indefinitely in the face of *any*, much less *all*, of

necessarily harmful, and native species are not necessarily good).

⁵⁴¹ See, e.g., USDA-FOREST SERVICE, THE WESTERN RANGE: A REPORT ON THE WESTERN RANGE—A GREAT BUT NEGLECTED RESOURCE. S. Doc. No. 199, 74th Cong., 2d Sess., 1936 (reprinted by Arno Press, 1979) (documenting and commenting on range and watershed conditions on private and public rangelands); RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (summarizing the depleted conditions of uplands and riparian areas and the prominent causal role of livestock grazing).

⁵⁴² See, e.g., KAREN R. MERRILL, PRIVATE SPACES ON PUBLIC LANDS; CONSTRUCTING STATE SOVEREIGNTY ON THE WESTERN RANGE, Ph.D. Dissertation, Univ. of Michigan 31–32 (1994); WEBB, *supra* note 92, at 239–40 (discussing treatment of longhorns).

⁵⁴³ See, e.g., WILLIAM D. ROWLEY, U.S. FOREST SERVICE GRAZING AND RANGELANDS: A HISTORY 3 (1985) (discussing lethal control of predators); STEPHEN R. KELLERT, ACTIVITIES OF THE AMERICAN PUBLIC RELATING TO ANIMALS, PHASE II 20–21 (1980) (describing cattle and sheep producers’ “lack of objection to human exploitation of animals” and their higher “utilitarian” and lower “moralistic” attitudinal scores toward animals than any other group); GAO, ANIMAL DAMAGE CONTROL PROGRAM, *supra* note 8, at 13 (reporting that from 1991–94 the federal government killed nearly a half-million “livestock predators” nationwide). The federal agency charged with “controlling” animals considered destructive to farm and livestock operations is euphemistically named “Wildlife Services.” See Animal & Plant Health Inspection Service website, <http://www.aphis.usda.gov/ws/introreportsindex.html> (last visited Nov. 20, 2005) (providing links to reports about predator control).

⁵⁴⁴ See, e.g., RANGELAND REFORM ‘94, *supra* note 8, at 24–25 (reporting that in 1994 riparian areas were in their worst condition in history, that “[p]lant communities palatable to livestock or maintained by fire . . . have diminished,” and that uplands in areas receiving less than twelve inches annual precipitation have not improved under BLM management).

the following factors: a paucity of persons engaged in the business, the devastating ecological consequences of the enterprise, low profitability and a miniscule collective economic contribution, significant unrecovered administrative costs, increasing competition, and serious legal challenges. But as the capture metaphor illustrates, this industry has the cowboy as its icon. Therein lies the difference.

Ranchers no doubt believe that things have changed considerably in the New West. Their way of life is in jeopardy. They are beset by urbanites, recreationists, and developers, beleaguered by environmental laws (especially the Endangered Species Act) and “reform regulations,” and generally unrecognized for their historical and cultural contributions. They are captives of global markets and the meatpacking industry. Clearly, one difference between the Old West and the New West is that nearly all who ranch today say they do it for the lifestyle, not the money. In that sense, perhaps they *are* more like the cowboys than the ranchers of days gone by. However, today’s ranch managers and hired hands spend more time in a pickup or four-wheeler than on a horse, and more time using a cell-phone or computer than riding the open range. They supplement their income by driving a school bus, selling insurance, or guiding dudes. Still, these pesky facts seem to matter not: our infatuation persists.

A few years ago, *High Country News* reported yet another clash between the environmental values of the New West and the entrenched dogmas of the Old West. The tale had all the elements of classic western drama: good guys and bad guys, cowboys and the law, man versus nature, and counties’ and states’ rights versus those of the federal government. It was the “summer of 2000 [and] the third summer of severe drought in Escalante Country”:

[In Grand Staircase-Escalante National Monument], even the sagebrush was dying. [Manager] Kate Cannon . . . took the advice of her range staff and warned all the ranchers on the monument that they might have to pull their cows off early. By mid-August, 80 to 90 percent of the forage was gone, and most ranchers had taken their cows off the land. Cannon ordered the remaining three ranchers to remove their cows by Sept. 1.

Ranchers Gene Griffin, Quinn Griffin, and Mary Bulloch refused to budge. In October, Cannon sent agency wranglers and a helicopter to find and impound the mostly wild cattle, and the ranchers became immediate heroes of the wise-use movement. Followed by a crew of supporters, the trio traveled to Salina, Utah, where the BLM had taken the cattle for sale. It’s not clear what happened next, but by the end of the day the local county [officials] had allowed . . . Bulloch to open the sale-lot gate, load the animals into trucks, and take off down the freeway for Arizona.

Mary Bulloch . . . remembers the showdown fondly. “It was real Western around here for a while,” she says with a smile. “I got calls from all over the

place, telling me congratulations, and I said, “Yep, there’s nothing like being a cowboy in the middle of society, is there?”⁵⁴⁵

Patricia Nelson Limerick might have had such a scene in mind when she wrote:

Western history has been an ongoing competition for legitimacy—for the right to claim for oneself and sometimes for one’s group the status of legitimate beneficiary of Western resources. . . . The contest for property and profit has been accompanied by a contest for cultural dominance. Conquest also involved a struggle over languages, cultures, and religions; the pursuit of legitimacy in property overlapped with the pursuit of legitimacy in a way of life and point of view.⁵⁴⁶

Ranchers’ claim to legitimacy rests largely on their “landedness.”⁵⁴⁷ When environmentalists or urbanites protest the subsidized destruction of public lands wrought by grazing, ranchers are both insulted and mystified. They, and their advocates in government, cleave to two bedrock notions. First, ranchers know and understand the land best because they live on it, love it, and have held it longest.⁵⁴⁸ Second, because ranchers depend on the land for their survival, they will be good stewards. But ranchers seem not content with mere legitimacy. Economist Sam Western coined the term “agriculturalism” to refer to the “‘way-of life’ mindset” possessed by so many Western ranchers and farmers. He describes it as “an intrinsic sense of superiority to all other professions and an entrenched sense of entitlement, specifically expecting financial and political protection.”⁵⁴⁹

I have argued that prevailing notions of ranching as a sustainable land use and ranchers as good stewards are mythical and anachronistic. Biologist E. Fraser Darling recognized fifty years ago that “[p]astoralism for commercial ends . . . cannot continue without progressive deterioration of the habitat.”⁵⁵⁰ Range ecologists have known for at least fifteen years that

⁵⁴⁵ Nijhuis, *supra* note 386.

⁵⁴⁶ PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* 27 (1987).

⁵⁴⁷ See generally *supra* notes 146, 202–03, 215–16, 219, 222, 227 and accompanying text. Ironically, two of the three hold-outs in the clash over grazing in Grand Staircase-Escalante National Monument, described in the text accompanying note 545 *supra*, owned no private base property to which they could remove their livestock. See Nijhuis, *supra* note 386. This circumstance seems plainly inconsistent with the Taylor Grazing Act’s provision that permits be awarded preferentially to “those within or near a [grazing] district who are landowners.” See Taylor Grazing Act, 43 U.S.C. § 315b.

⁵⁴⁸ See, e.g., *Norton Calls for Incentive-Based Species Program*, *supra* note 538, at 3 (quoting Interior Secretary Gale Norton as stating: “We can achieve more by working with [farmers and ranchers]—and capitalizing on their intimate knowledge of the land they depend on—and the land they love.”) As we have seen, the earlier, longer tenure of Native Americans does not “count,” as they did not possess and use the land profitably. See *supra* text accompanying note 145. See also *supra* note 538 (reporting NCBA’s claim that “[c]attlemen are the original stewards of the land”).

⁵⁴⁹ WESTERN, *supra* note 42, at 15.

⁵⁵⁰ See CRONON, *supra* note 79, at 141 (quoting E. Fraser Darling, *Man’s Ecological Dominance through Domesticated Animals on Wild Lands*, in *MAN’S ROLE IN CHANGING THE FACE*

livestock grazing in arid environments can lead and has led to irreversible ecological changes. Yet the agencies continue to omit that science from their environmental analyses, and ranchers deny that grazing in the arid West is problematic, even though their own experience should tell them that something is not working. We can no longer afford to indulge these myths and self-delusion. In fact, we have delayed too long to return some landscapes to ecologically healthy, pre-livestock conditions.

Nearly a century ago, President Theodore Roosevelt admonished Western governors: "In the past we have admitted the right of the individual to injure the future of the Republic for his own present profit. The time has come for a change."⁵⁵¹ The public domain has withered as a result of 135 years of captivity in the hands of a tiny fraction of the livestock industry. The capture metaphor helps us understand why and how this happened. But understanding is only the first step toward changing the state of things on the ground—a change that is long overdue on the Western range.

OF THE EARTH 781 (William L. Thomas ed., 1956)).

⁵⁵¹ Theodore R. Roosevelt, Address at Governors' Conference on the Conservation of Natural Resources (May 13 1908) (quoted in Paul Smyth, *Conservation and Preservation of Federal Public Resources: A History*, 17 NAT. RESOURCES & ENV'T 77, 77 (Fall 2002)).