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James M. Jackson\*

## Grazing Rights: Time for a New Outlook

An analysis of the history of the West clearly shows one recurring problem. The United States government has never figured out what to do with its western lands. The United States is embroiled in a bloody war of conflicting visions for the future of the western states and the nation. The battlefields are in the courts, the halls of Congress, and in the minds of the public. As in all wars, a tremendous amount of resources will be wasted with the victor either retaining the status quo or a tremendous buffalo commons. Are we to repeat the struggle for dominance with the same social and economic upheaval to the existing population that occurred with the displacement of the native Indians to reservations? Is the new manifest destiny to form giant preserves or parks out of the one third of the nation owned by the federal government?

To understand the modern range wars you have to understand the past. When New Mexico became a territory, Congress wanted to encourage development. The main laws at that time to stimulate settlement were Thomas Hart Benton's Log Cabin Preemption law of 1841, which allowed squatters on the public domain to purchase 160 acres on which they lived; the Homestead Act of 1862 which let settlers acquire 160 acres of surveyed lands; and the Desert Land Act of 1877, which tried to recognize the problems of arid regions and vast distances by authorizing claims of 640 acres on federal lands. During this period livestock grazing on the federal lands was becoming a viable industry. However, in a region where it took 64 acres or more to run one cow, in order to run enough animals to make a living, more land was needed than could be acquired by the various acts. Gaining control of water allowed control of the surrounding federal lands.

Congress, by not recognizing the differences of climate in the west, created a situation that encouraged overgrazing. The anarchy of the tragedy of the commons is: if I reduce my animal numbers because of poor range conditions, I will lose some of my claim to that range as well as per-

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mitting my neighbor to increase his numbers. There was a continual battle for control of federal lands by the rich and poor, big and little. All rivers and streams became thin strips of private lands because they were the only place to dependably grow crops and water the livestock on the contiguous areas.

The laws, and lack of understanding of the unique western environment, made it impossible for many settlers to build sensible operations. In 1885 congress made it against the law to build fences on public lands and by "1890 the Commissioner to the General Land Office reported that there were no enclosures of major importance."<sup>1</sup> The government even had to send in federal troops to take some fences down. As a result, poor public policy created a situation that encouraged overgrazing. Any efforts for sound management were either discouraged by the government or the tragedy of the commons.

In 1897 the Organic Act gave birth to the forest reserves and around 1905 Theodore Roosevelt with the advice of Gifford Pinchot began to regulate grazing and charge fees on the national forests. These permits were given to ranchers who controlled the water, had historically run cattle, or had some land based on the preemption and homestead acts.

In the 1930s the Taylor Grazing Act basically did the same things for areas now under the jurisdiction of the Bureau of Land Management. It is commonly agreed that livestock overgrazed the range in many areas of the west before individual ranchers became responsible for specific areas. Both agencies realized that only by creating a sense of ownership and individual control could they encourage better stewardship and responsibility towards the natural resources.

Often the earlier settlers, particularly on BLM lands, created ranching units from a mix of state, federal, and private lands (which usually controlled water). They installed capital improvements such as houses, roads, windmills, fences, and corrals. Allen Torrell, an economist from New Mexico State University, has estimated that in New Mexico about 85 to 90 percent of the federal land ranches have changed hands from the first owners.<sup>2</sup> The prices of these ranches since the 1970s has averaged from \$1,000 to \$1,500 per animal unit year (AUY is the amount of forage to support one cow for a year). For example, a federal land ranch that could run 100 head of cows at \$1,000 AUY would sell for \$100,000. The federal and state leases have historically gone along with the sale of the deeded or commensurate property. By letting the right or privilege to graze the government lands to be sold as a unit with the commensurate land or property, the federal agencies could have some continuity in man-

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1. I. Clark, *Water in New Mexico*, University of New Mexico Press, 1987. p. 54.

2. T. Allen, J. Fowler, *Grazing Fees: How Much is Fair?* Range Improvement Task Force, NMSU, Las Cruces, NM pp. 1,20.

agement as well as encouraging the rancher to improve his federal range in his own self interest. As a result of the agency policies of granting private individuals a financial interest in federal lands, "the trend for rangelands, on the average, has been upwards over a number of decades and that the range is in the best condition of this century."<sup>3</sup>

A consequence of the history of the west is that the bundle of rights that usually come with a parcel of land have been scattered. Geographically, BLM lands are intermixed with state and private lands. The Forest Service is broken up by areas of deeded property. In recognition of state law some people own the water on federal land, others have the federal mineral rights. Many of the range improvements are owned by the rancher on federal land along with others owning various easements. Many people believe federal property in the west belongs totally to the government, when in reality that property has been cut into a split estate with parts belonging to different identities.

Western ownership of rights to federal property are often confused and contradictory. For example both the Forest Service and BLM claim that grazing permits are a privilege and have no value. Wayne Hage in his book *Storm Over Rangelands* mentions some of the anomalies.

1. If a joint private/federal rancher decides to sell, the federal range which his private ranch controls is validly transferred by the same deed that transfers the private land and improvements.
2. Range rights on the federal range can only be purchased from the rancher who owns them, not from the federal government.
3. If the military takes a rancher's federal range for military use, then military administrators are required by law to enter civil condemnation proceedings in open court and pay for the rancher's interests in the federal range.
4. When a rancher dies, the Internal Revenue Service is entitled to levy an estate tax on the rancher's ownership in the federal lands.<sup>4</sup>

An analogy of the situation of the federal land livestock producer and his lack of ability to compromise can be drawn from the recent Savings and Loan debacle. If groups were to insist that all bank depositors directly donate a large percentage of their bank savings to help the banks in the interest of public welfare, depositors would object and tend not to agree. The government prints and owns the money, so there is no reason not to compromise. (Actual ownership of money can be argued but

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3. T. Box, *Rangelands, Nat. Res. for the 21st Cent. Am. Forest. Ass'n. Island Press, p.101-121.*

4. H. Wayne. *Storm Over Rangelands, National Federal Lands Conference, Free Enterprise Press, p.4.*

beware if you try to print some.) Similar to the Federal lands debate, a solution would have to be found that acknowledges the ownership of the deposits or money.

Over the past few decades the environmental community and other interest groups have placed new demands on the historic usage of the federal lands. They have insisted on a greater emphasis on recreation, wilderness, wildlife, and preservation. The cumulative effect for livestock producers on federal lands is to weaken their historic control of the range as federal agencies respond to the new preservation lobbies. The danger is that the same political battle for control that created the tragedy of the commons in an earlier period will repeat itself. For example, on the Gila Forest the elk herd has dramatically increased. The New Mexico Game & Fish Department, hunters, and environmental groups want to encourage elk herd growth. The livestock producers want to retain their cattle numbers, because if the Forest Service reduces their animals, they suffer an automatic loss of equity or wealth along with a loss of potential income.

The result is a tremendous possibility of once again destroying the rangeland by overgrazing of livestock and elk combined. The United States Government must come up with a rational system to allocate its resources. Massive amounts of national wealth are being wasted in attempts to influence public policy. Emotions and half truths are the weapons, and as the various interest groups struggle for ascendancy the western lands will lose.

Tom Wolfe, a writer from Santa Fe, in a recent article in an environmental newspaper "The High Country News"<sup>5</sup> suggests that the answer to the conflicting interests and ownership rights is to offer most Federal land for sale. Those who claim rights or have interests would buy land, and any areas left would be exclusively owned by the government and could be devoted to whatever purposes the public demanded. His approach would work to settle much of the battle over federal lands, but would probably not be politically realistic.

Another approach is to recognize grazing rights on the basis of prior appropriation similar to water law as it exists in the state of New Mexico. Water is ultimately owned by the state of New Mexico for the people. The state has allowed water if beneficially used to be recognized and owned as property. If it is not used or is wasted the government can take the property away.

If grazing rights were recognized in the same manner, all it would do is mirror and legalize the system that already exists. The government would ultimately be responsible for the range. Grazing rights would allow the market place to allocate resources. If groups wanted livestock off a wilderness area it would have the option of either purchasing the rights

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5. T. Wolfe, guest essay *High Country News*, Colo. 1991.

themselves or having the government purchase them from a willing seller. The market would allocate the resource, and money would be kept in the rural areas to allow for alternative investments and range improvements. The rights as property would be taxable which would also protect local governments from a loss of tax base and leave them revenues to handle problems such as waste management.

For example, the county taxes livestock to maintain its infrastructure. If the BLM or Forest Service reduces those livestock numbers, the wealth of the livestock owner and the county simply evaporates.

Instead of the tremendous amount of money and effort wasted by lobbying groups to influence public policy in Washington, those resources will be used in the areas directly involved. Environmental organizations have become big business. The Environmental Defense Fund has a budget of \$15 million; National Audubon \$35 million; Greenpeace \$50 million; Clean Water Action \$12.5 million; National Wildlife Federation \$87 million; Sierra Club \$35 million; Natural Resources Defense Council \$16 million; Wilderness Society \$11 million; Friends of the Earth \$2.5 million and the Nature Conservancy has a revolving fund of \$168 million.

These are only a few of many environmental organizations concerned about our rangelands, and yet control half a billion dollars to enter the market in range rights. If a group is concerned about the impact of a large amount of livestock on a riparian area, it could simply buy some of the grazing rights.

The environmental organizations have matured and grown as an industry to be on a par with the livestock, timber, and other natural resource based industries. As a mature co-equal, environmental organizations should be encouraged to take their place in the market to decide allocation of resources. By entering the market place, environmental organizations would be encouraged to prioritize, to take site specific actions, instead of promoting legislation and regulation that hurts the good land managers to protect against an abusive minority.

The United States government agencies would still be responsible for the ecological health of the range based on range monitoring. If management agencies can scientifically prove that the forage is being damaged based on trend data, it could take away grazing rights, or increase them if the range is improved (similar to New Mexico law). The recent history of environmental devastation in Eastern Europe and the U.S.S.R. have shown the danger of bureaucratic micro-management of natural resources. The BLM and Forest Service are enmeshed in mountains of paper consisting of appeals; NEPA with its public input and meetings; allotment management plans; and regulatory requirements that prevent them from being effective. Instead of being concerned about whether a cow is moved on a certain date, they should be freed to accomplish their

primary responsibility of protecting the land by being out in the field collecting information. The irony is that in attempting to respond to environmental lobbying pressure for sound management the federal agencies have been forced to allocate more funds away from monitoring and inventory of the range resources concerned.

For example, the Gila Forest cannot get enough money to do a thorough survey of elk range utilization and movement that effects forage in combination with livestock. Some districts only have data on allotments gathered from 1976 or before, when it is recognized that to understand the trend of range conditions, range analyses must be done at least at five and ten year intervals.

In the past the answer has been to increase the budget and size of the agencies. Grazing rights would free existing funds within the organizations, place more emphasis on the resources themselves, and still give land agencies ultimate control by their power to document degrading areas.

The land agencies with grazing rights could notify the individual or agency responsible of downward trends and volunteer technical assistance. Those areas of concern could be closely monitored, and if after a scientifically acceptable period of time there is no improvement, grazing rights would be taken from the identity responsible. Similar to the system today, except the individual involved is held responsible and land agencies are freed of trying to manage for every ranch. The Federal land management agencies have tried to retain ownership of the grazing rights because they fear the lack of control. However recognition of grazing rights as private property similar to water would allow agencies ultimate control and yet encourage greater stewardship from the livestock industry. Allowing a market in grazing rights, would create a mechanism to allocate forage to their highest and best use.

Government agencies such as the United States Forest Service and BLM exist only through the political appropriation process. An agency must create new crises or never admit completion of its task to survive. The rationale for increased bureaucratic growth requires national constituencies and a proof of need often created by pitting one group against another. The only identity to resolve the conflict is the agency itself.

It is also the innate nature of any public bureaucracy to expand its mandate to "protect" the people from themselves in the interest of the public welfare; and to extend its mandate until it is micromanaging to ecological and economic inefficiency. The federal agency or national solution to an issue may represent disaster to a specific rural area or the specific natural resource.

There is also the problem that constituencies that influence public policy (such as the environmental groups) are not directly affected and do

not directly bear the cost of the public policy. (It is the reverse of the argument that there is a hidden societal cost of pollution to the nation.)

There is a hidden as well as a measurable cost and cumulative effect of Federal regulation to the environment and economy of rural areas. Grazing rights would alleviate and minimize some of the negative consequences of actions take by land management agencies.

Range management must be as fluid as the rain that falls on it. A government agency may have the best grazing plan possible, but it cannot reasonably foresee rainfall in one pasture and drought in another. A bureaucracy does not lend itself to quick variation in an accepted plan, and to the risk of a change that is necessary for the protection of the resource. Another problem is the lack of accountability of actions taken by individuals employed by the land agencies. An individual federal employee might take an action in an area with the best of intentions. However, the employee does not incur any of the direct cost of the decision of micromanagement and often transfers before the consequences of their actions, whether negative or positive, materializes. A Federal employee will become familiar to the ecology of an area only to be transferred to a higher position if they are good, or simply transferred if they are doing a poor job. Meanwhile, they leave the area and intelligent administration of the areas' natural resources lose.

A further example of how agency micromanagement is counter-productive is United States Forest Service requirements that all livestock on their allotments must be owned by the permittee. The reasoning for the regulation is to help the small family rancher. The reality is that the regulation has the opposite effect. The capital, operating expense, and debt load for owning cattle is tremendous. In hard financial times if ranchers on Forest Service lands have to sell their cattle they may not be able to buy some back later. Since they cannot pasture animals for other people, there is no income and no family ranch. This regulation can also easily hurt the range. If an area is hurt by drought ranchers tend not to reduce numbers of livestock to an optimum number because regulation restricts their management alternatives. Once again they do not know if they can afford to buy livestock, or if the Forest Service may use the reduction of livestock to allow for more wildlife. Micromanagement by land agencies spells environmental disaster by restricting options to respond to changing economic and climatic conditions.

Another benefit to owning grazing rights is that it could allow the owner to be more flexible and give more business alternatives on federal lands. In the United States and Africa there have been attempts to raise native game animals. The result is that some of the native animals are more efficient in utilizing the forage and the commercial value of the meat and by-products are equivalent or better than livestock. Grazing rights



could permit this type of production alternative and would satisfy those groups that want more emphasis on management for native species.

If elk move onto a ranchers permit he can transfer his grazing rights to those animals. He then has the option of selling those animals to hunters or to harvest them himself. The state Game and Fish Department would still be responsible for wild animals and receive license income and set harvest numbers. The increased license income could be used to purchase grazing rights to maintain or increase herds if that is the public will. Meanwhile the rancher would be encouraged to allocate more grazing rights to wildlife because he is receiving an economic incentive.

Grazing rights would encourage greater privately funded range improvements and livestock management since the cattleman would be secure of his tenure on federal lands as well as his ownership of those improvements. By creating individual responsibility for specific federal grazing allotments, there has been a documented improvement in the range since those grazing allotments were created.<sup>6</sup> Most people are willing to put more money in houses in which they live and own, rather than in houses they rent from someone else. Federal land management is slowly evolving away from individual stewardship when that is exactly what had proven to be successful. The federal government would still own the land if grazing rights were recognized.

Public access and recreation opportunities would still be guaranteed. The ultimate irony is that land management agencies would increase their influence and control of range conditions by giving away their range rights than by keeping them. Their new role would emphasize scientific monitoring and trend data of range conditions, and the factual information that gives the power to increase or decrease grazing rights on every grazing allotment would be a formidable threat. As a result, the livestock producer would be forced to pay even greater attention to the ecological status of his land because he would have more to forfeit.

With the introduction of grazing rights as property on federal lands there will obviously still be some conflict and a need to change laws to adopt to the new system. However, recognition of grazing rights are very similar to the *de facto* situation that exists now. It would permit the market to allocate resources and allow the market to decide public priorities. Federal land management agencies would be able to divert monies freed up within the agency by grazing rights, to actually know the status of the land for which they are responsible.

Grazing rights would free the livestock industry of micromanagement and place all priority of livestock producers and governments agencies on improving rangelands. Grazing rights, by creating a potential for

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6. Long-Term Trend: True Measure of Management Success. State of the Public Rangelands 1990. U.S. Dept. of the Interior, Bureau of Land Management.

monetary reward for emphasizing wildlife, encourage livestock producers that are involved daily in decisions that impact wildlife habitat to make sound environmental decisions.

### **Recommended Books**

Storm Over Rangelands by Wayne Hage. A Project of National Federal Lands Conference. Free Enterprise Press, 12500 N.E. Tenth Place, Bellevue, Wash. 98005.

Locking Up the Range by Gary D. Libecap.