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Bruce R. Huber
Notre Dame Law School, bhuber@nd.edu

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The Durability of Private Claims to Public Property

BRUCE R. HUBER*

Property rights and resource use are closely related. Scholarly inquiry about their relation, however, tends to emphasize private property arrangements while ignoring public property—property formally owned by government. The well-known tragedies of the commons and anticommons, for example, are generally analyzed with reference to the optimal form and degree of private ownership. But what about property owned by the state? The federal government alone owns nearly one-third of the land area of the United States. One could well ask: is there a tragedy associated with public property, too?

If there is, here is what it might look like: private claims to public property are remarkably durable. Consider private claims to the lands and resources owned and managed by the federal government. Once established, these claims—of which there are hundreds of thousands—seem, in many instances, to take on a life of their own. Mining claims, leases for the development of coal or oil and gas, grazing permits, hydropower licenses, ski resort leases, even residential leases—claims such as these are often extended, expanded, renewed, and protected by law and by bureaucratic practices in ways that shape, and often trump, other policy objectives with respect to federal land. Newer claimants, and policies that would favor new land uses or alter the mix of uses, tend to be disfavored. These tendencies create a set of managerial and policymaking difficulties that constrain lawmakers and land managers and that ultimately disserve the interests of the citizens in whose interest state property ostensibly is managed.

This Article examines the durability of private claims to public property, first, by providing a set of examples, and second, by explaining how the American historical experience and legal system combine to give public property this character. Third, it suggests implications for both theory and practice, in particular cautioning that lawmakers should take into account the phenomenon described here before granting new forms of access to various public resources.

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INTRODUCTION

The strength, structure, and allocation of property rights in land and natural resources affect, sometimes profoundly, whether and how those resources will be used. For example, a great deal of property scholarship in recent decades has been animated by "the tragedy of the commons"—the idea that open-access resources will inevitably be destroyed by overuse. Others have described, conversely, the so-called anticommons tragedy that arises when property is...

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2. See, e.g., Carol M. Rose, Rethinking Environmental Controls: Management Strategies for Common Resources, 1991 Duke L.J. 1 (1991) (examining resource management strategies within a commons framework). The label was made famous by Garrett Hardin, The Tragedy of the Commons, 162 Science 1243, 1243 (1968). Some of the most important developments are those of Nobel Prize recipient Elinor Ostrom. See generally Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action (1990) (exploring alternative theoretical models of the commons and examining case studies of different approaches to pooled community resources).
fragmented to a degree that impedes its efficient use. The problems of the commons and anticommons tend to be framed primarily with respect to private property: commons problems arise when there is too little of it, roughly speaking, while anticommons problems arise when there is too much. The trick, it would seem, is to find the golden mean—or, better, to match ownership institutions with resources in a way that optimally balances private and public interests in natural resources.

But those concerned with ownership and its relation to resource use might well ask: what about public property—property formally owned by the state? There is an abundance of such property. Our federal government alone owns nearly one-third of the land area of the United States, and it is land that is disproportionately rich in a host of natural resources and that encompasses unique and fragile ecosystems. Yet this category of property has been somewhat neglected amidst scholarly fascination with privatization. Is there a "tragedy" associated with public property, too?


5. See Cole, supra note 1, at 178 ("The notion that a single, sociolegal institution—private property—is both necessary and sufficient to resolve all environmental problems is not just highly improbable but fantastic. . . . What is required, instead, is a pragmatic, case-by-case approach with a large toolbox."). *See generally Property in Land and Other Resources* (Daniel H. Cole & Elinor Ostrom eds., 2012) (collecting articles on property-rights systems for various resources).

6. By "the state" I mean government generally, and throughout this Article, I use the term "state property" to refer to property that is owned by any level of government, whether federal, state, or local.


8. See Heller, supra note 4, at 420–21 (arguing that property theorists today have reduced the conventional trilogy of property forms—private, commons, and state—to a dichotomy between private and commons property, such that "all theoretical work takes place in the interplay of these two regimes"); Dean Lueck & Thomas J. Miceli, *Property Law*, in *1 Handbook of Law and Economics* 183, 196–98 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (noting that state property has not been "systematically analyzed" and describing the applicable literature as "limited"). Even Harold Demsetz's pioneering work on the origins of property rights largely ignored state property. *See Harold Demsetz, Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347, 354 (1967) ("I shall not examine in detail the alternative of state ownership.").

To be sure, one could never say that the state itself has been forgotten by property scholars, who have always envisioned a sizeable role for government in the definition and enforcement of property rights, the regulation of private property, and the regulation of access to commons. Relatively little comparative analysis, however, has examined systematically the character of state-property ownership or given much consideration to property theory in light of widespread governmental ownership.
If there is, here is what it might look like, at least in the United States. Where public property is made available for private use—and the lion’s share of such land is—the legal and regulatory regimes that govern the use of that property tend to protect existing use claims to a striking degree. Private claims to state-owned resources, in other words, are remarkably durable. Newer claimants, and policies that would favor new land uses or alter the mix of uses, tend to be disfavored. These tendencies create a set of managerial and policymaking difficulties that constrain lawmakers and land managers and ultimately disserve the interests of the citizens in whose interest state property ostensibly is managed.

This Article explores this cluster of phenomena within an important, if not the most important, subset of the category of public property: the land and natural resources owned by the United States. Federal law has long allowed private parties to make commercial use of publicly owned natural resources. The federal public lands of the western United States, for example, have supported profitable enterprises in mining, ranching, energy and water resource development, fisheries, recreation, and much else. When federal lawmakers seek to change resource policy—for example, to shift from resource development towards resource conservation, or to address environmental concerns or climate change—they must decide how to deal with existing users of the public lands. In many instances, a coherent policy transition would seem to require the termination, phaseout, or relocation of land uses inconsistent with new policy goals. In actuality, however, existing land-use patterns on federal lands have proven to be surprisingly durable. Once established, private claims to public lands—of which there are hundreds of thousands—seem, in many instances, to take on a life of their own. Mining claims, leases for the development of coal or oil and gas, grazing permits, hydropower licenses, ski resort leases, even residential leases: claims such as these are often extended, expanded, renewed, and protected by law and by agency managerial practices in ways that shape,
and often trump, other policy objectives with respect to federal land.\textsuperscript{12}

By “durable,” I mean more than simply “of long duration.” Many private rights to public property are quite long-lasting—such as permits to build dams on federal land, which may be issued for a term of fifty years\textsuperscript{13}—but that fact alone does not make them durable under my definition.\textsuperscript{14} The concept of durability implies something more: it suggests resilience and robustness in the face of strain or pressure or opposition. Thus, in speaking of the durability of private claims, I refer to claims that may, as a matter of law, be terminated or limited or allowed to expire, yet are not terminated or limited or allowed to expire—despite circumstances that would seem to suggest that the survival of such claims is contrary to prevailing public policy.\textsuperscript{15}

One might suspect that this durability is the consequence of legal protections for private property rights, and indeed, such protections are undeniably relevant. But this Article is principally concerned with claims that fall short of full-fledged property rights.\textsuperscript{16} Public land law creates land-use rights of varying legal resilience—some land uses are protected by vested property rights; others are creatures of contract; and still other uses are simply permissive and termi-
nable at any time\footnote{17}{For a classification of private interests on public lands, see Jan G. Laitos & Richard A. Westfall, \textit{Government Interference with Private Interests in Public Resources}, 11 \textsc{Harv. Envtl. L. Rev.} 1, 9–19 (1987).}—yet even weak or limited entitlements often remain intact much longer than would seem appropriate according to the letter of the law. Whatever the legal basis of their access to public resources, existing users of land have been extraordinarily successful in persuading federal land managers and policymakers to allow their uses to continue, even in spite of facially incompatible policy changes. Indeed, longstanding private claims constrain policy change—or, to be more precise, their existence makes it likely that legislative and administrative decision-making processes will bend in their favor and away from changes that might disfavor existing land uses.\footnote{18}{And even when change occurs, provision is generally made for existing uses. \textit{See Coggins et al.}, \textit{supra} note 11, at 343 (noting that statutes making land policy changes often create exceptions for “valid existing rights”—language that is “extremely handy and is exceedingly common in federal law”). This mirrors the typical local government land-use regulatory environment. \textit{See} Christopher Serkin, \textit{Existing Uses and the Limits of Land Use Regulations}, 84 \textsc{N.Y.U. L. Rev.} 1222, 1223–24 (2009).}

There are other consequences associated with the durability of private claims to public property.\footnote{19}{\textit{See infra} Part III.} Plainly, questions of fairness and propriety arise to the extent that federal policy affords preferential treatment to certain claimants to public resources. Furthermore, when such claims are sustained by undue administrative lenience or the underenforcement of existing law,\footnote{20}{This includes circumstances in which claims are renewed without the satisfaction of legal requirements for renewal or are not actually terminated upon expiration.} the possibility of coherent resource policy is diminished, the task of resource management is complicated, and federal agencies face reputational damage. Even occasional departures from legal requirements may not only establish undesirable precedents for subsequent managers, but also create uncertainty for private claimants themselves. More broadly, federal lenience acts as an implicit subsidy for business entities conducting activities on public—as opposed to private—land, possibly distorting market signals that would otherwise serve to constrain and regulate commercial activity.

Why are private claims to state-owned resources so durable? The “stickiness” of existing claims is in part attributable to the solicitude historically afforded to traditional extractive industries by natural resources law.\footnote{21}{\textit{See infra} Part II. Throughout the nineteenth century and well into the twentieth century, the law of public natural resources facilitated resource extraction with very few limitations. The modern trend has been towards greater protection of environmental values, but natural resources law is still dominated by what Charles Wilkinson has called the “lords of yesterday”—nineteenth century laws and norms that are increasingly outmoded, yet enduring. \textit{See} Charles F. Wilkinson, \textit{Crossing the Next Meridian: Land, Water, and the Future of the West} 17 (1992).} Especially during the nineteenth century, Congress incentivized settlement and resource development on the public lands by keeping them open to access and guaranteeing claimants a degree of long-term stability. For example, the General Mining Law of 1872 (still in effect) not only makes unreserved federal lands open to prospecting, but
also grants prospectors a property interest in their mining claims upon discovery of valuable minerals—a property interest which may be sustained almost indefinitely.22 The principal objective of early public land policy was the settlement and development of the western frontier, and privatization of the public domain was regarded as necessary to the accomplishment of this goal. Indeed, long-term federal ownership of vast areas of land was unthinkable until the early part of the twentieth century and even then was only made politically acceptable by creating broad private rights of access to federal resources.

This historic model of public land management—we may call it the “open-access model”—is still evident even today; many would argue that most public lands ought to be held open for use by citizens with a minimum of government interference. Yet modern reforms to public land and resource law often reflect a different model—a “proprietary model”—in which the public interest in federal land is given effect not by offering open access, but by securing fair compensation for public resources extracted by private enterprise.23 In this view, the federal land management agencies are conceptualized as trustees or asset managers whose stewardship of the public lands is compromised when private entities capture rents in land transactions. As one can easily imagine, it is this vision of public land ownership that is most acutely at odds with the untoward expansion and extension of private claims.

Despite its prominence in reform legislation, the proprietary model has been implemented only haltingly. So although legislators have gone some distance towards demanding fair market value for private uses of public lands, the actual boundaries (both temporal and physical) of private claims are defined by administrative practice. Though most conventional private property rights are

22. 30 U.S.C. § 22 (2012). Until quite recently, mining claims could be patented, passing fee title to the claimant. Since the early 1990s, however, Congress has imposed a de facto moratorium on the issuance of additional patents. MARC HUMPHRIES, CONG. RESEARCH SERV., RL33908, MINING ON FEDERAL LANDS: HARDROCK MINERALS 3 (2008). Nonetheless, the 140-year-old statute has given rise to millions of mining claims over the years. Most claims remain unpatented, leaving paramount title with the federal government. Id. By the 1960s, the accumulation of mining claims had created such serious difficulties for federal land managers that Congress approved a recording process intended to clear away abandoned claims. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2006). Implementation of the law successfully culled the over 6 million unpatented mining claims down to just over 300,000. See United States v. Locke, 471 U.S. 84, 86-89 (1985) (describing the background of the Act and upholding several of its provisions related to forfeiture of abandoned mining claims); JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION 264-65 (1987). Today, in order to preserve a mining claim, a claimant must pay an annual fee and complete certain paperwork. See 43 C.F.R. § 3861 (2012) (describing paperwork requirements).

With respect to the durability of mining rights, what is perhaps most noteworthy is the remarkable durability of the legal regime itself—a regime that creates generous private entitlements to federal lands while nonetheless retaining paramount title for the federal government, at least as regards unpatented claims. See WILKINSON, supra note 21, at 28–74 (discussing in detail the endurance of the Mining Law in the face of opposing trends).

23. See infra section II.B. To be clear, the ideas of open access and proprietorship do not remotely capture all of the many objectives of public land management. Conservation, for example, is a crucial objective that is somewhat tangent to the distinction I have made, which focuses principally on the manner of the public’s access to and use of public lands.
cabined by adjacent rights, claims to public resources generally must be confined and contained, if at all, by a federal administrator. Yet historically, the federal government has had a difficult time enforcing public land laws, if only because the public lands are so expansive. Thus, many private claims endure even though their survival violates governing law or applicable regulations. Moreover, in those instances in which Congress has given broad discretion to land management agencies, officials often have little reason to disrupt established permissive uses, and they have local, visible, and immediate reasons not to disrupt them. Such uses are generally given a great deal of deference even when sustaining these uses appears contrary to broader policy developments and when termination would be well within the bounds of agency authority. It bears mention that Congress has a long history of ratifying what had previously been unlawful encroachment on federal land, so private claimants are perhaps not unwise to imagine that even claims of dubious merit might one day ripen into lawful possession.

The historical and institutional causes just described suggest that the attributes of public property are not random but systemic. Durable and long-lived private claims to public property, far from being anomalous, are likely to characterize such property in the United States for some time to come. Several implications follow from this. First, as regards theories of property, the tendency of private claims on public property to expand beyond their initial parameters may go some distance towards explaining the degree of public land ownership in the United States. That the federal government owns such a sizable fraction of American land is, to some, an irony of the first order in a country in which private rights of property and individual economic rights are so lionized and in which public ownership and socialism so commonly reviled. It has been assumed that businesses dependent on natural resources would prefer that such resources were entirely in private ownership, but durable private access to state-owned resources may be preferable to outright private ownership to many commercial actors. Indeed, there is some evidence that, at crucial moments in the development of modern natural resource policy, industrialists joined with conservationists in calling for just such a regime.

Next, this Article adds a new strand to the decades-old dialog about the role of public property in environmental protection. Environmentalists and conserva-

24. Even today, it is a herculean task to monitor the many activities—legal and illegal—that take place on public lands. See, e.g., Warren Eth, Note, Up In Smoke: Wholesale Marijuana Cultivation Within the National Parks and Forests, and the Accompanying Extensive Environmental Damage, 16 PENN ST. ENVTL. L. REV. 451 (2008); Felicity Barringer, Marijuana Crops in California Threaten Forests and Wildlife, N.Y. TIMES, June 21, 2013, at A1; see also JOHN ISL, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY 112 (1961) (noting the staying power of illegal occupants of national park land).


26. See infra section II.A.

27. See infra section II.B.
tionists generally favor public over private ownership—at least with respect to the historic public lands—and seldom explore the character of publicly owned lands from a systemic perspective. It may well be true that public land ownership, on balance, better secures a certain set of environmental policy objectives, but state property may be more susceptible to private influence and control than previously appreciated and, perhaps more importantly, may be more resistant to land-use reform.

Finally, if the durability phenomenon described here is a systemic effect that derives from American history and the structure of American political institutions, then policymakers would, at times, do better to design around this pathology than to attempt to cure it—for example, by thinking twice before creating new forms or categories of private claims to public resources. Recent years have seen many efforts to create new private markets for natural resources and new modes of private access to public property. Renewable energy production on federal lands, for example, is on the rise, as are emissions-trading programs based on tradable private emissions entitlements. Although environmentalists tend to support such programs at present, care should be taken lest entitlements outgrow their initial purposes. At a minimum, lawmakers should redouble their efforts to delimit carefully those claims, or "hardware" limitations directly into them, lest they give rise to the same difficulties already apparent elsewhere in public resource management.

This Article will proceed as follows. Part I develops the descriptive premise of this Article—that private claims to state property are remarkably durable. Part II discusses the historical and institutional roots of this phenomenon, and Part III suggests the implications of the preceding analysis, including implications for current resource policy.

I. THE DURABILITY OF PRIVATE CLAIMS TO PUBLIC PROPERTY

Let us begin with a very brief overview of federal land ownership and the sorts of private claims that may be asserted on public lands. The federal government has owned a great deal of land since almost the nation’s founding. But for many years, the central goal of federal land policy was disposal: placing land into the hands of private landowners for purposes of settlement and

28. For enduring academic arguments along these lines, see, for example, Paul W. Gates, The Federal Lands—Why We Retained Them, in RETHINKING THE FEDERAL LANDS 35 (Sterling Brubaker ed., 1984), and Joseph L. Sax, The Claim for Retention of the Public Lands, in RETHINKING THE FEDERAL LANDS, supra, at 125.

29. Some have noted that public and private ownership may not be as distinct as commonly thought. See, e.g., FREYFogle, supra note 16; Sax, supra note 28, at 128–29 ("stating that ownership ... is, in fact, a poor measure of the real relationship that exists between government control and private market decision making on the public lands"). It is certainly true that, over the course of roughly the last century, government’s regulatory authority over private land-use decisions has expanded enormously. Yet private and public landowners behave differently, and one objective of this Article is to illuminate some of these differences.

30. See generally CURRINS ET AL., supra note 11 (providing an overview of applicable law).

31. The history of federal land ownership will be recounted in greater detail in section II.A, infra.
national expansion. Active land management would have required a bureaucratic capacity not then enjoyed by the federal government.\textsuperscript{32} Towards the end of the nineteenth century, however, federal policy shifted towards land retention and management in response to emerging ideas and concerns about resource scarcity, land fraud, and efficient resource management.\textsuperscript{33} By the mid-to-late twentieth century, Congress had created, piecemeal, an enormous administrative infrastructure to oversee the roughly 650 million acres of public lands. Since 1976, federal law has more or less explicitly required the retention of this land by terminating the legal mechanisms by which private individuals had been able to acquire it.\textsuperscript{34}

The public lands have been classified and divided among various agencies; there are national parks and monuments, national forests, wildlife refuges, military training areas, and so forth, under the care of specialized agencies such as the National Park Service and the Fish and Wildlife Service. The "leftover" lands—those not earlier reserved for some particular purpose—are managed by the Bureau of Land Management, which manages more acreage than any other federal agency.\textsuperscript{35} Private entities are allowed to use nearly all federal land in various ways that depend on the land's classification.\textsuperscript{36} National parks are typically devoted almost entirely to recreational purposes; within national forests, by contrast, hiking, hunting, and other recreational activities coexist with timber harvesting, hardrock mining, commercial livestock grazing,

\begin{itemize}
\item \textsuperscript{32} Until the early 1900s, Congress neither required such management nor provided resources to build the necessary capacity. During this time, the primary administrative institutions associated with the federal public lands were the General Land Office and, later, the various land surveys. \textit{See generally Paul W. Gates, History of Public Land Law Development} (1968) (providing a comprehensive legal history of public land law).
\item \textsuperscript{33} This is the classic account, as presented by, for example, Roy M. Robbins, \textit{Our Landed Heritage: The Public Domain} 1776–1936, at 301–426 (1942). An important corrective is found in Leigh Raymond & Sally K. Fairfax, \textit{Fragmentation of Public Domain Law and Policy: An Alternative to the "Shift-to-Retention" Thesis}, 39 Nat. Resources J. 649 (1999), which focuses instead on the fragmentation of federal land policies.
\item \textsuperscript{34} The last disposal laws were abrogated by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–1785). Of course, Congress can and does still authorize land sales or swaps, but such transactions involve a miniscule fraction of the total acreage in federal ownership. \textit{See generally Carol Hardy Vincent et al., Cong. Research Serv., RL 34273, Federal Land Ownership: Current Acquisition and Disposal Authorities} (2012) (outlining the current authorities governing the acquisition and disposal of public land).
\item \textsuperscript{36} Some lands—such as those set apart for military purposes and the like—are not available for any form of public use. Historically, however, unrestricted private access to public land was the norm. The Supreme Court in 1890 stated:
\begin{quote}
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 . . . shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use.
\end{quote}
\end{itemize}
and other commercial activities. Some land-use management decisions are made by legislation; others are delegated by Congress to the management agencies themselves, either as a matter of system-wide policy or of unit-by-unit decision making.

The central descriptive claim of this Article is that private claims to public resources are durable. The italicized words require some clarification and expansion. By “claim,” I refer to formal rights of use, specified by law, that fall short of permanent property interests recognized by law. As noted earlier, this distinction is not as clear as one might expect. Private entities may acquire interests on public lands that fall short of complete fee-simple ownership but are nonetheless protectable property interests.\(^3\) It is black letter law that a valid mining claim, for example, is a property interest good against even the government, yet the holder of a mining claim may not fully exclude others from the claimed land.\(^3\) No mineral lawyer would be surprised to learn that mining claims are “durable,” given their status as property rights.\(^3\) What is somewhat more surprising, however, is that even claims that lack the formal status of property are roughly as durable as those interests that are denominated as property.\(^4\) Thus, one aspect of this Article’s descriptive claim is that various private claims on public lands are treated more or less as though they were protectable property interests, even when they are not so in the formal nomenclature of the law.

As noted, durability connotes more than simply long duration; it refers also to claims’ resilience and robustness in the face of pressure or opposition—the survival of claims despite circumstances that would seem to suggest their incompatibility with prevailing public policy.\(^4\) One way of restating the basic claim is as follows: when the federal government retains legal authority to terminate or limit private claims or to allow them to expire, it exercises this

37. Jan Laitos and Richard Westfall distinguish between six classes of private interests that may arise on federal lands: vested rights, nonvested protectable property rights, protected possessory interests, nondiscretionary entitlements, rights of possession, and applications. Laitos & Westfall, supra note 17, at 9–19.

38. The claimant has the right to extract the minerals, but as the paramount owner, the United States retains the right to use the land for all purposes not inconsistent with the right to mine. 4 GEORGE CAMELON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 42:2 (2d ed. 2013).

39. Of course, in one respect, to say that mining claims are durable because they are property only begs the question: why does the federal government essentially give away property interests in minerals? This is an important and contested question and one not totally unrelated to my inquiry; however, my interest is primarily in exposing and explaining the nature of property formally owned by the state, rather than discussing further the durability of private property interests in American law, which is well-known.

40. Even recreational users of public lands, such as hikers, mountain bikers, and snowmobilers, whose use of public lands is entirely at the discretion of the managing agency, often behave as if—and are treated as if—they were entitled to the use of such lands. See generally Jan G. Laitos & Thomas A. Carr, The Transformation on Public Lands, 26 ECOLOGY L.Q. 140 (1999) (describing the rise of recreational use of federal lands and the increase in conflict between recreational users, other users, and land managers).

41. See supra note 15.
authority less frequently than would seem appropriate given current policy objectives. This is a second aspect of this Article's descriptive claim.\textsuperscript{42}

The remainder of this section will offer a number of examples. First, it will examine the common legislative practice of grandfathering existing private claims to survive changes in the classification of public lands. It will then describe a set of instances in which private claims are extended or renewed in circumstances that would seem to militate against such treatment.

A. GRANDFATHERING

Perhaps the most common and straightforward example of the durability of private claims to public property can be found in the numerous instances in which private claims are grandfathered to survive a change in land classification. Congress and the federal land management agencies regularly tinker with the legal status of various federal landholdings. Historically, the majority of changes in land status impose, rather than remove, restrictions on land use. This occurs, for example, when public domain land is declared a national park or monument or is "withdrawn" from certain uses.\textsuperscript{43} It is quite common, however, for such changes in land-use policy to apply only prospectively, exempting claimants who initiated the now-disfavored land use before the change in status—just as changes in municipal land-use regulation generally provide for the continuation of nonconforming uses.\textsuperscript{44}

To get a sense for the extent of this practice, one need only thumb through public-lands law. Take, for example, the most extensive public-lands bill enacted in recent years: the Omnibus Public Land Management Act of 2009.\textsuperscript{45}

This bill established a number of new wilderness areas, three new national parks, and a national monument; it also added to the National Wild and Scenic Rivers System.\textsuperscript{46} Browsing the legislation, one can readily discern that Congress assiduously avoided the disruption of present land uses. The wilderness designations, for example, carefully carve out pre-existing activities—allowing, for example, "the grazing of livestock . . . if established before the date of enactment of this Act."\textsuperscript{47} One provision explicitly authorizes the continuation of a "competitive running event" that had occurred in each of the five years

\textsuperscript{42} The descriptive claim can easily slide into the normative claim that private claims endure too long—but "too long," of course, is largely in the eye of the beholder. To be clear, then, the principal goal of this section is descriptive; Part III will explore the normative implications of the claims developed here.

\textsuperscript{43} "Withdrawal" is a term of art in the public-lands context; as the text suggests, it refers to statutes or agency directives according to which land is made unavailable for certain types of use. See 2 GEORGE CARMACK COCQUINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 14:1 (2d ed. 2013).

\textsuperscript{44} See, e.g., Serkin, supra note 18.


\textsuperscript{46} Id.; see also Noelle Straub & Eric Bontrager, Obama Signs Natural Resources Omnibus into Law, E&E NEWS PM (Mar. 30, 2009), http://www.eenews.net/eenewspm/stories/76198.

\textsuperscript{47} See, e.g., Omnibus Public Land Management Act of 2009 § 1405(c)(3). For similar provisions, see id. §§ 1503(b)(3)(A), 1602(c)(3), 1702(c)(3), 1752(b)(3), 1803(h).
preceding the bill’s passage.48 Nearly every change in land status is declared to be “subject to valid existing rights”—indeed, the phrase is used sixty-three times in the legislation.49

These “valid existing rights” provisions have become boilerplate in natural resources law. It is seldom clear exactly which rights would otherwise be implicated by a particular law, regulation, or executive order.50 But in any event, one would be hard-pressed to find instances in which land withdrawals have extinguished pre-existing private claims.51 Most debates over withdrawals presuppose the survival of existing rights and focus instead on prospective limitations on the entry of new claims.52 Even the law dictating the management of wilderness, the most restrictive public land classification, reveals Congress’s desire to leave many existing private activities undisturbed by subsequent changes in land status.53

48. Id. § 1001(c).

49. Several other provisions accomplish the same end with different wording, for example, “subject to valid rights in existence on the date of enactment of this Act.” Id. § 1803(d).

50. See Coughins et al., supra note 11, at 343 (noting that it is unclear whether lawmakers wish to do more than merely protect themselves from unwittingly extinguishing property rights that would require the payment of compensation). For recent examples of “valid existing rights” provisions in executive withdrawals, one can consult the most recently created national monuments. See, e.g., Proclamation No. 8944, 78 Fed. Reg. 18769 (Mar. 25, 2013) ("The establishment of the monument is subject to valid existing rights."). These provisions may prove useful in part because many interests on the federal lands have never been recorded. Most notable (and troublesome) in this regard are the thousands of municipal rights-of-way created under a Civil War-era statute known as R.S. 2477, 43 U.S.C. § 932 (repealed 1976). “[T]he establishment of R.S. 2477 rights of way required no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side; no formal act of public acceptance on the part of the states or localities in whom the right was vested.” S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 741 (10th Cir. 2005).

51. There is one noteworthy exception to this generalization. Many land withdrawals and reservations in U.S. history, dating back at least to the creation of Yellowstone National Park, have extinguished and granted no legal force to pre-existing claims that might arise on account of Native Americans’ occupation of the lands at issue. As Karl Jacoby put it in his important account, “[t]he vision of nature that [Yellowstone’s] backers sought to enact . . . was predicated on eliminating any Indian presence from the Yellowstone landscape.” Karl Jacoby, Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservation 87 (2001). See also Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005) (providing a comprehensive historical explanation of how time, place, and the balance of power between the Native Americans and settlers led to the Native Americans’ loss of their land); Lindsay G. Robertson, Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands (2005) (investigating the historical origins of the Johnson v. M’Intosh decision leading to the massive displacement of Native Americans).

52. For example, in an ongoing squabble over the Obama administration’s withdrawal of land near the Grand Canyon from uranium mining, all parties acknowledge that existing mines and valid pre-existing claims are unaffected. See, e.g., Manuel Quinones, Controversial Uranium Projects Proceed Near Grand Canyon, ‘Sacred’ Mountain, ReMike CLEARINGHOUSE: (May 13, 2013), http://www.rich.org/news/controversial-uranium-projects-proceed-near-grand-canyon-sacred-mountain.

53. See Wilderness Act, Pub. L. No. 88-577, § 4(d)(1), 78 Stat. 890, 894 (1964) (stating that “the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary . . . deems desirable”); see also Federal Land Policy and Management Act of 1976 § 603(c), 43 U.S.C. § 1782(c) (2006) (requiring wilderness management of Bureau of Land Management (BLM) land “subject, however, to the continuation of
It is obvious, yet worth making explicit, that these claims survive in spite of prima facie evidence that Congress would prefer a different policy to obtain with respect to the designated land. It seems clear from the regularity of the pattern—a prospective ban on particular land uses combined with a carve-out for existing users—that, at least as a matter of modern practice, federal land management prioritizes deference to existing users above uniformity in land use. This sort of grandfathering is not unique to public-lands law; indeed, grandfathering is commonplace across many areas of regulation.\(^5\) It may be common because it is the political price of achieving legal change; it also may reflect a preference among policymakers for liberal transition relief. Or perhaps there are normative justifications for grandfathering, grounded in fairness or the promotion of legal and economic stability.\(^5\) But let us set aside for now the question of why grandfathering occurs and move on to other examples of the durability of private claims to public property.

**B. CLAIM EXTENSION, RENEWAL, AND NONTERMINATION**

Another set of examples may be drawn from resource regimes in which the law provides for the limitation or expiration of private claims, but as a matter of actual administration, such limitation or expiration does not occur when it might be expected on the basis of relevant circumstances. We might think of this, in some respects, as a softer form of grandfathering—an informal, uncodified policy of deference to existing claimants when policy change is otherwise adverse to the claimant.

Observers of western land management, for example, often note the remarkable staying power of ranching operations on the public lands in the western states.\(^5\) The practice of grazing enormous cattle herds on the western range grew exponentially in the latter half of the 1800s—so rapidly, in fact, that before the turn of the century, millions of acres of public land had been ravaged existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976”)

5. See Huber, supra note 25, at 94 n.15 (“By no means is this phenomenon limited to environmental policy; pressure for transition relief can arise whenever existing interests are threatened. Relief has been provided, for example, in connection with . . . .”).

55. Id. at 107–14; see also Serkin, supra note 18, at 1261–81 (considering potential justifications for protection of existing uses). Grandfathering also reflects an implicit decision to treat the present as the baseline for future assessments of land use; for an analysis of the issues attendant to the use of historic baselines, see, for example, J.B. Ruhl & James Salzman, Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State, 64 Vand. L. Rev. 1 (2011).

56. For colorful and fascinating accounts of public-lands grazing see, for example, Wesley Calef, Private Grazing and Public Lands: Studies of the Local Management of the Taylor Grazing Act (1960); Phillip O. Foss, Politics and Grass: The Administration of Grazing on the Public Domain (1960); Mike Hudak, Western Turf Wars: The Politics of Public Lands Ranching (2007); Karen R. Merrill, Public Lands and Political Meaning: Ranchers, the Government, and the Property Between Them (2002); Wilkinson, supra note 21, at 75–113.
by overgrazing.\textsuperscript{57} After decades of political wrangling, the range came under federal regulation.\textsuperscript{58} Ranchers were required to obtain grazing permits and to pay a grazing fee, and federal land managers were authorized to reduce grazing allotments should range conditions require it.\textsuperscript{59} Thus ranchers' rights of use on the public lands appear on paper to be far less durable than, say, mining claims. As a matter of hard law, this is indisputably true; courts have repeatedly confirmed that a grazing permit does not constitute a property right.\textsuperscript{60} But as a matter of administrative practice, federal grazing permits have been and are renewed so reliably that banks customarily capitalize the permits' value into the ranches to which they are adjacent.\textsuperscript{61} Yes, you read that right: banks are willing to lend against the value of a \textit{terminable} grazing permit. One must assume that the banks have realized that such grazing rights, though insecure on paper, are, in actuality, quite stable. This remains true in spite of myriad analyses suggesting that public lands are overgrazed and numerous calls for reductions in public-lands grazing.\textsuperscript{62}

Another example may be found among the nation's largest ski resorts, most of which operate, at least partially, on land owned by the federal government and managed by the U.S. Forest Service.\textsuperscript{63} The private resort managers must obtain use and occupancy agreements from the Forest Service, which must in turn satisfy a host of administrative requirements before granting permission to use federal land. The terms of the use and occupancy agreements need not concern us here; what is most relevant for our purposes is that once resorts have been constructed and established, licenses are renewed as a matter of course.


\textsuperscript{58} The seminal legislation was the Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (2006)).

\textsuperscript{59} 43 U.S.C. §§ 1732(c), 1752(a) (2006).

\textsuperscript{60} See, \textit{e.g.}, United States v. Fuller, 409 U.S. 488, 490 (1973); \textit{see also} 3 George Cameron Coggins & Robert L. Glucksman, \textit{Public Natural Resources Law} § 33:4 (2d ed. 2013).

\textsuperscript{61} See, \textit{e.g.}, CalJEF, supra note 56, 64 at 135-36; Foss, supra note 56, 64. \textit{But see} Fuller, 409 U.S. at 493 (giving no compensation for an Arizona rancher for the increment of value of condemned land that was associated with a grazing permit).

\textsuperscript{62} See, \textit{e.g.}, Debra L. Donahue, \textit{The Western Range Revisited: Removing Livestock from Public Lands to Conserve Native Biodiversity} (1999); Curtis H. Flather \textit{et al.}, U.S. Dep't of Agric., Forest Serv., \textit{Species Endangerment Patterns in the United States} (1994); Welfare Ranching: The Subsidized Destruction of the American West (George Waetner & Mollie Matteson eds., 2002); Thomas L. Fleischner, \textit{Ecological Costs of Livestock Grazing in Western North America}, 8 Conservation Biology 629 (1994). A number of advocacy groups are committed to reducing or eliminating public-lands grazing, including the National Public Lands Grazing Campaign, the Western Watersheds Project, WildEarth Guardians, and the Sierra Club.

\textsuperscript{63} At least 121 ski resorts in thirteen states include land leased from the federal government, representing some 60% of the total annual skier and snowboarder visits in the United States. \textit{Federal Impediments to Water Rights, Job Creation and Recreation: A Local Perspective: Hearing Before the H. Subcomm. on Water & Power, 113th Cong. 1-3} (2013) (statement of Geraldine Link, Director of Public Policy, National Ski Areas Association).
Not a single ski resort has closed its doors for want of a renewed use and occupancy agreement.\(^\text{64}\)

Of course, this outcome is in many ways unremarkable. The construction of a ski resort is no small economic proposition. Ski resorts bring enormous public benefits, and if the Forest Service decided those benefits justified the initial construction of a resort, then what reason might there be for tearing it down later? At the same time, it is intriguing to note that, though the Forest Service has reliably renewed use and occupancy agreements, it has also ceased to grant permission for the development of new ski resorts.\(^\text{65}\) We seem to have arrived at a situation in which existing ski resort developers are more or less grandfathered in to the use of federal land for such purposes, while other would-be developers are, as it were, left out in the cold.\(^\text{66}\)

A similar story could be told regarding the construction of hydropower facilities on federal lands. Roughly three-quarters of all federally licensed dams are in private ownership.\(^\text{67}\) Many of these facilities occupy federal land; all require a permit from the Federal Energy Regulatory Commission (FERC) and, in some sense, encumber a public resource.\(^\text{68}\) Dams, of course, in many instances represent an even larger capital outlay than ski resorts, and for this reason developers have historically demanded (and received) a lengthy and secure operating license.\(^\text{69}\) FERC generally issues licenses for a thirty- to fifty-year term.\(^\text{70}\) These, too, are renewed regularly, even though the federal courts have ordered agencies to think of relicensing as "more akin to an

\(^{64}\) In fact, not only are renewals a matter of course, but requests to expand operations into additional Forest Service acreage are nearly always granted as well. A recent denial of an expansion plan was one of the first ever and was met with consternation from resort owners. Colorado Ski Resorts Worried by Forest Service Ruling, USA Today (Dec. 14, 2009, 5:00 AM), http://usatoday30.usatoday.com/travel/destinations/ski/2009-12-14-crested-butte-expansion_N.htm.

\(^{65}\) This is true as a matter of its decisional record; there is no formal Forest Service policy to this effect. See, e.g., April Reese, Proposal for North America's Biggest Ski Resort Raises Ruckus in Montana, Land Letter (June 14, 2007), http://www.eenews.net/landletter/2007/06/14/stories/55066. The most recent resort to open on Forest Service land in Colorado, for example, was in 1980. See James Brooke, Environmentalists Battle Growth of Ski Resorts, N.Y. Times, Jan. 19, 1999, http://www.nytimes.com/1999/01/19/us/environmentalists-battle-growth-of-ski-resorts.html.


\(^{67}\) Douglas G. Hall & Kelly S. Reeves, A Study of United States Hydropower Plant Ownership 2 (2006), available at http://www1.eere.energy.gov/water/pdfs/doewater-11519.pdf. Privately owned dams, however, generate only about a quarter of the hydropower generated domestically. The difference owes to the fact that the largest dams in America are all publicly owned. Id. at 2–4.

\(^{68}\) See generally 4 George Cameron Coginski & Robert L. Glicksman, Public Natural Resources Law § 37 (2d ed. 2013) (describing the process by which permits are acquired from the FERC); Christopher Scoones, Let the River Run: Strategies to Remove Obsolete Dams and Defeat Resulting Fifth Amendment Taking Claims, 2 Seattle J. Envtl. L. 1, 19–24 (2012) (describing FERC's hydropower relicensing procedure as one of three legal ways to remove dams whose existence no longer benefits the public because of environmental, safety, or economic concerns).

\(^{69}\) See, e.g., Hays, supra note 14, at 73–81 (discussing power companies' battle with lawmakers in the early twentieth century to achieve favorable water-power policies).

\(^{70}\) 4 Coginski & Glicksman, supra note 38, § 37:11.
irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo.” This is a somewhat ironic formulation, given that FERC consistently renews existing licenses but has not authorized the construction of a new large dam in several decades, and regularly denies applications even for smaller facilities.

So why should anyone be surprised when agencies renew the occupancy rights of ski resorts or dams? What sense could it make to refuse to renew such rights? For now, suffice it to say that there are, in the minds of many, a number of reasons to rethink federal resource policy with respect to dams and ski resorts, and—much more to the point—that federal policy has in fact been changed, either expressly or in fact, to reflect this change in attitudes. No new major facilities have been constructed in either category in recent years. Existing lease or permit holders find themselves in a special and privileged category. They have, in essence, a priority right to the continued use of public property, and it is a position from which they are not easily dislodged. These parties are more or less grandfathered out of the new era in which their uses are disfavored and need not fear that the new policy will sweep away their existing uses—at least not in the vast majority of instances.

These cases—grazing, ski resorts, hydropower—are relatively straightforward, and are ones in which the durability of existing claims has been oft-noted and criticized. The remainder of this section examines in greater detail several more subtle examples in which claim durability has not been commonly noted. The first two cases are especially important, as they bear on some of the most economically substantial activities carried out on public lands: oil and gas leasing, and coal production. The third case, examining private residential claims within national parks, is not nearly as significant from an economic perspective, but it helps to demonstrate the pervasiveness of the pattern described in this section.

1. Oil and Gas Leasing

In order to examine the oil and gas context, some general background is necessary. Oil and gas development is seldom conducted directly by a landowner. Rather, landowners (or, in the context of split estates, owners of the

71. See Yakima Indian Nation v. FERC, 746 F.2d 466, 476 (9th Cir. 1984).
subsurface resource) enter into lease arrangements with specialized oil and gas companies. Two of the most important provisions of an oil and gas lease are its term and its payment structure. The term is more accurately thought of as an option: if oil or gas has not been produced by the end of the stated period, then the lease expires automatically; whereas if production has occurred, the lease continues indefinitely until production ceases. Therefore, although it may appear that the interests of the oil company and the landowner are aligned according to their common desire to get oil out of the ground, there are important respects in which their interests are deeply at odds. The producer will prefer as long a term as possible in order to preserve the option of production (and to lock up the property from other producers), while the landowner will prefer as short a term as possible in order to expedite her royalty payments.

Royalties, which are dependent on production, are only one component of the payment structure; the other is the bonus payment, a one-time lump-sum payment to secure the lease. The bonus is paid at the signing of the lease and is retained by the landowner even if no production ever occurs. A rational and profit-seeking landowner, therefore, will hasten to pursue a new lease arrangement if no production has taken place by the time of the initial lease’s expiration because a new lease means a second bonus payment. Conversely, oil and gas firms seek to maintain portfolios of property rights that extend as far into the future as possible to allow them to maximize their flexibility and their ability to respond to changing market conditions. Oil or gas plays that may be unprofitable now may become highly desirable just a few years hence. And so, unsurprisingly, it is quite common for legal disputes to arise over the question of whether a lease has in fact terminated under its own provisions. A great deal of case law explores the issue of lease termination, analyzing the myriad form contracts that circulate through oil and gas transactions.

At first glance, the law governing oil and gas leasing on federal lands appears

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74. A split estate arises when the rights to the mineral or subsurface estate (or some portion thereof) lying beneath a parcel of land are severed from the rights to the surface. An ordinary purchase and sale of real estate conveys both surface and subsurface rights, but split estates are quite common in oil and gas-rich locales and can raise a host of thorny legal and practical problems. For ease, I will simply use “landowner” to include both owners of undivided estates as well as owners of subsurface resources.

75. As is often noted, the term “lease” is a bit of a misnomer, because an oil or gas lease grants the lessee ownership of the produced commodity. Furthermore, a typical oil or gas lease remains in effect until production ceases, making it a determinable estate rather than a term-of-years lease.

76. This sort of conflict has been occurring with increasing frequency during the current natural gas boom. Landowners who leased their land before they became aware of the magnitude of the boom often received much smaller payments than their neighbors who held on longer. The early sellers are therefore eager to exit their leases and negotiate new leases on better terms. See, e.g., Saqib Rahim, N.Y. Reaches Deal with Chesapeake on Lease Renewals, ENERGYWIRE (June 15, 2012), http://www.eenews.net/energywire/stories/1059965946 (discussing recent dispute over the termination date of leases in New York); see also Aukema v. Chesapeake Appalachia, LLC, 904 F. Supp. 2d 199, 210–12 (N.D.N.Y. 2012); Beardslee v. Inflection Energy, LLC, 904 F. Supp. 2d 213, 220–21 (N.D.N.Y. 2012). In these two federal suits, the courts found that leases that expired at the end of their primary term were not extended under terms of force majeure based on the state of New York’s moratorium on hydraulic fracturing at the time.
to track the contractual arrangements that are typical of private lease transactions. Upon further inspection, however, one can see that the Mineral Leasing Act—the statute that governs federal oil and gas leasing—is quite a bit more generous towards lessees than the conventional private oil and gas lease. And if we look beyond the letter of the law to its implementation, most of the resemblance to the private oil and gas scene all but disappears. In the words of leading commentators, "[u]nlike private lessors, the United States sometimes tries harder to keep leases in force than to terminate them." These writers go on to note the "seemingly absurd lengths" of "federal leniency."

Like most private oil and gas leasing deals, the Mineral Leasing Act framework grants lessees a primary term, which acts as an option; if the option is taken, the term will extend until production ceases. The primary term for onshore leases is set by statute at ten years, which is considerably longer than terms offered by many private leases. The Bureau of Land Management (BLM)—the entity primarily responsible for managing mineral development on federal onshore lands—has no discretion under the statute to choose a shorter term to incentivize more rapid production, a fact pointed out by the Government Accountability Office (GAO) in a critical 2008 report. More recently, opponents of federal leasing policy have charged that the ten-year term is unreasonably favorable to lessees, allowing them to tie up land in ways unintended by the statute.

Not only is the federal statutory lease term longer than most privately negotiated leases, but federal law also allows leases to be extended much more readily than is the case in typical private transactions. Most private leases automatically terminate if production has not commenced before the end of the primary term, but federal law grants an automatic two-year extension merely for

77. See 4 COGGINS & GLICKSMAN, supra note 38, § 39:28 ("Federal oil and gas leasing is more similar to the parallel private market than the other federal commodity disposition programs . . . . Private oil and gas leases are structured to force the lessee to drill or forfeit the lease, a diligence requirement mostly, but not entirely, duplicated in the federal context.").
79. Id. § 39:1.
80. Id. § 39:26.
82. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-74, OIL AND GAS LEASING: INTERIOR COULD DO MORE TO ENCOURAGE DILIGENT DEVELOPMENT 8 (2008) [hereinafter GAO 2008 REPORT].
83. Id.
84. There have been recent battles, including in the 2012 presidential campaign, over "use it or lose it" legislation that would incentivize action on existing leases by disallowing new leases to entities that are not producing or diligently developing existing leases. See Ben Geman, Pelosi Eyes Changes to 'Use It or Lose It' Bill, ENV'T & ENERGY DAILY (July 16, 2008), http://www.eenews.net/eedaily/stories/66941. The GAO report argued that the Department of the Interior could better incentivize rapid development. See GAO 2008 REPORT, supra note 82, at 29.
the commencement of drilling during the primary term. The GAO report found that oil and gas firms regularly use these extensions, and scholars have suggested that the unitization extension in particular is abused precisely to secure lease extensions.

Furthermore, federal law deviates from private transactional norms in its approach to the termination of a producing lease. The typical private lease terminates automatically when paying production ceases and does not recommence within a period specified in the contract, generally sixty or ninety days. No action is required by the lessor to effect this termination. Under federal law, however, the federal government is first required to give notice to the lessee, after which the lessee has sixty days to place a well back into production. Thus, an oil and gas company with relative ease may extend a lease for an additional two years beyond the lease’s primary term, and once production has commenced, the lessee can continue to hold the lease even when production ceases, knowing that the government must provide notice before the lease will terminate. In practice, the BLM sometimes waits years before giving notice, or it offers more than one notice of termination. More generally, the BLM has acknowledged that it sometimes allows lessees multiple opportunities to cure legal problems rather than seeking termination of a lease. Again, such a
practice bears little resemblance to the world of private oil and gas transactions; here, perhaps, we see the aforementioned "seemingly absurd lengths" of "federal leniency."93

Although federal oil and gas leasing practices differ from standard practices among private entities, this fact is not necessarily problematic in and of itself. Federal lawmakers may have good reasons for departing from private norms (although it is somewhat more difficult to justify practices that essentially forfeit additional bonus payments). Nonetheless, it is noteworthy that both standardized federal leasing terms and standard administrative practice result in leases that are both lengthy and difficult to terminate.

Offshore oil and gas development, though governed by a different federal agency and a different portion of the U.S. Code, is similar in many respects. Lease terms are fixed by statute at eight years for shallow water drills and ten for deepwater.94 Ostensibly because of the expenses associated with offshore drilling and its highly speculative nature, firms seek to keep these leases alive for as long as possible. And just as with onshore leases, offshore leases are often extended beyond their initial term pursuant to an extension provision in federal law.95 In the offshore context, however, there is one additional tool, seldom invoked for onshore leases, that allows the federal government to extend leases: lease suspension.96 Suspended leases are extended by law to compensate for the period of suspension.97 Because suspension is authorized for a wide range of circumstances, federal officials have broad discretion in this area and sometimes

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93. See 4 COOKS & GLICKSMAN, supra note 38, § 39:1 n.10.
95. See 30 C.F.R. § 250.180 (2012) (granting offshore extensions). In a lawsuit, Exxon appears to claim that federal lease extensions were also routine. See Exxon Fights to Keep One of Largest-Ever Gulf of Mexico Discoveries, GREENWIRE (Aug. 18, 2011), http://www.eenews.net/greenwire/stories/1059952936 (noting that "[i]n its lawsuit, Exxon says that the government has granted ‘thousands’ of lease extensions before and that a denial of extensions ‘had never before applied and had never before articulated’ by the government").
96. The Mineral Leasing Act also provides that the Interior Secretary may suspend onshore drilling operations for a variety of reasons. See 30 U.S.C. § 209 (2012); see also 43 C.F.R. § 3103.4-1 (2012) (giving the Secretary the authority to waive, suspend, or reduce leasehold royalties); 4 COOKS & GLICKSMAN, supra note 38, § 39:10 (describing the lengthening of lease terms by suspension). For example, the BLM has suspended leases in Utah on account of endangered species issues. See, e.g., Dan Berman, Endangered Ferret Forces Suspension of BLM Leases in Utah, GREENWIRE (Dec. 19, 2006), http://www.eenews.net/greenwire/stories/50187.
97. According to statute, leases may be suspended when it is "in the national interest," or "to facilitate proper development of a lease," or when there is a "threat of serious ... harm" to property or the environment. 43 U.S.C. § 1334(a)(1) (2006). Lease suspension may also be granted when other legal requirements have been imposed that would interfere with timely production. For example, the Department of the Interior suspended many deepwater leases following the Deepwater Horizon disaster because a moratorium prevented activity on those leases in any event. See Phil Taylor, Interior Honors 98% of Requested Deepwater Lease Extensions, E&E NEWS PM (Oct. 31, 2011), http://www.eenews.net/eenewspm/stories/1059955733. See generally ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE
use suspension as a tool precisely for the purpose of extending a lease for the benefit of oil and gas exploration and development. 98 This occurs, to some degree, because of the highly politicized atmosphere surrounding offshore oil production. Famous oil spills like those near Santa Barbara, California; Prince William Sound in Alaska; and the Deepwater Horizon event off the Louisiana coast have led to lengthy moratoria in offshore oil production. 99 Many California politicians have steadfastly opposed additional drilling off the coast of the Golden State; oil companies, therefore, have fought long and hard to keep alive the few outstanding leases to waters off the California coast. Most notably, the oil industry succeeded in extending thirty-six leases, originally acquired during the early 1980s, by requesting and receiving repeated suspensions from successive administrations. 100

Of course, in the offshore context, there is no comparison to be made with private transactions; private entities cannot own the Outer Continental Shelf. Furthermore, even if the government’s sole objective was to maximize revenue (as we might assume of a rational private landowner), it could be argued that extending existing leases is preferable to obtaining new ones. The start-up time in offshore drilling is long, and delays in development defer royalty income. 101 And the Department of the Interior does, at times, allow leases to expire. 102 But all the same, federal oil and gas leasing terms provide opportunities for private claimants to extend rights to public resources beyond what would generally be available on private lands, or even what would appear to be allowable on the face of federal law.

2. Coal Leasing

In the early days of the modern coal industry, coal mining took place primarily on private land in the eastern half of the country. In roughly the past half century, however, coal mining has moved west and onto federal land. 103 Of

98. See generally MARC HUMPHRIES, CONG. RESEARCH SERV., RS22928, OIL DEVELOPMENT ON FEDERAL LANDS AND THE OUTER CONTINENTAL SHELF (2008) (discussing circumstances under which the Secretary of the Interior may suspend or cancel leases).
100. FRED BOSSelman ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 315 (3d ed. 2010). At the end of the day, these leases did not result in production; a number of related disputes were eventually resolved in the federal courts. See, e.g., Noble Energy, Inc. v. Salazar, 671 F.3d 1241 (D.C. Cir. 2012); Amber Res. v. United States, 538 F.3d 1358 (Fed. Cir. 2008).
101. Royalty income from offshore production is substantial. Since 2000, the federal government has received between $10 and $20 billion in annual revenues from Outer Continental Shelf oil production. See HAGERTY, supra note 99, at 13 n.50.
particular note is the Powder River Basin in northern Wyoming and southern Montana, which is perhaps the largest coal production region in the world.\textsuperscript{104} The bulk of this region’s coal mining takes place on federal public lands. Private rights to federally owned coal are secured pursuant to a leasing system, just as with oil and gas.\textsuperscript{105} And like oil and gas leases on federal lands, private coal leases are remarkable for their durability. This durability has taken two forms over time: the first relates to the durability of specific leases, whereas the second relates to the durability of actual coal mining operations through their ability to secure successive, neighboring leases. The first form is now a historical artifact, and the second form has supplanted the first.

The durability of private claims to federal coal first became problematic over a period stretching from roughly 1945 to 1970. During these years, energy markets regarded coal and oil as substitutes; oil prices were remarkably stable (largely due to state limitations on production on the basis of market demand),\textsuperscript{106} but many energy firms nonetheless sought to buy up coal leases in order to maintain inventories as a hedge against a rise in the price of oil.\textsuperscript{107} Thus, western coal reserves were essentially speculative investments; actual development occurred only haltingly.\textsuperscript{108} Federal coal leasing practices served these purposes well. First, leases were relatively long-term—as long as twenty years, with the possibility of renewal. But perhaps more importantly, the Department of the Interior rarely enforced lease termination provisions.\textsuperscript{109} The Department routinely suspended the Mineral Leasing Act’s requirement that leases be diligently developed and renewed leases on which no mining had occurred.\textsuperscript{110}

In the years leading up to 1970, then, the acreage subject to coal leases


\textsuperscript{105} See generally 4 COGGINS & GLICKSMAN, supra note 38, § 38 (describing coal leasing practices before and after adoption of the Federal Coal Leasing Amendments Act).

\textsuperscript{106} See BUSSELMAN ET AL., supra note 100, at 240, 269 (depicting crude oil prices as stable during the mid-1900s and postulating that market-demand prorationing was responsible for this stability).

\textsuperscript{107} As was also evident in the discussion of oil and gas leasing, see supra section 1.B.1, a fundamental dynamic in the energy sector is that energy firms seek to hold rights to various energy resources for strategic purposes, even without actual development. Such rights preserve firms’ flexibility in the face of changes in economic conditions, activity by competitors, and the availability of substitutes.

\textsuperscript{108} See 4 COGGINS & GLICKSMAN, supra note 38, § 38:1 (noting that energy companies held reserves “as hedges against petroleum depletion”). In the pages that follow, the authors note that total federal acreage under lease soared in the 1950s and postulating that market-demand prorationing was responsible for this stability).

\textsuperscript{109} Leases were terminable with notice if not diligently developed, but apparently the Interior Secretary never once canceled a lease for failure to comply with this condition. See id. § 38:1.

\textsuperscript{110} Id. §§ 38:1, :12; see also Mark Squillace, The Tragic Story of the Federal Coal Leasing Program, 27 NAT. RESOURCES & ENV’T 29, 50 (2013) (noting that “the diligent development requirement of the [Mineral Leasing Act] was largely ignored on most coal leases”).
increased, while production of coal from federal land actually declined. Only a small minority of outstanding federal coal leases were in actual production—and this was as the energy crisis of the 1970s loomed. The Department of the Interior reacted by commencing an informal moratorium on new coal leases in 1971, which was formalized by Congress with the passage of the Federal Coal Leasing Amendments Act (FCLAA) in 1976. The FCLAA grandfathered in the pre-1971 leases but stiffened the law with respect to lease extension by requiring the termination of any lease not in production after ten years. By disallowing the gratuitous extension of specific leases, the Act effectively ended the industry practice of amassing coal leases on a speculative basis.

In the wake of the FCLAA, the durability of coal leases took a different form. Coal mining firms discovered that their ongoing operations could be extended by way of the process for selecting tracts available for lease. Although the FCLAA requires competitive bidding for coal leases, the law also allows coal firms to nominate to the BLM the tracts of land that they would like to develop in a process known as “lease by application.” This provision undermines the competitive bidding requirement because it is a simple matter for firms to select tracts that are unlikely to attract the attention of competitors. In the Powder River Basin, for example, the overwhelming majority of the “competitive” lease sales have only one bidder: the same company that suggested the tract in the

111. See, e.g., Natural Res. Def. Council v. Hughes, 437 F. Supp. 981, 984 (D.D.C. 1977) (“From 1945 to 1970, the number of acres of federal land leased for coal development increased from about 80,000 to approximately 778,000, almost a ten-fold increase. In the same period, annual coal production from these federal lands declined from about 10 million tons in 1945 to approximately 7.4 million tons in 1970.”).
112. In 1976, only about 60 of 533 outstanding coal leases on federal land were in actual production. 4 COOKINS & GLICKSMAN, supra note 38, § 38:1 n.20 (citing Solicitor’s Opinion, M-36951 (Feb. 12, 1985)).
114. 4 COOKINS & GLICKSMAN, supra note 38, §§ 38:1, :12. The FCLAA also brought other important changes, such as increasing the minimum royalty paid to the federal government to 12.5%. 30 U.S.C. § 207(a) (2006).
115. There are two ways that the BLM can initiate coal lease sales. First, the BLM may designate a region as a “coal production region”; in such a region, lease sales would take place on tracts designated by the BLM and selected for their marketability. See 43 C.F.R. § 3400 (2012). Second, outside of designated coal production regions, the BLM may accept leases by application. The lease by application process was to be initiated by the coal mining company, which could nominate to the BLM a tract for auction. See 43 C.F.R. § 3425 (2012); 64 Fed. Reg. 52,240 (Sept. 28, 1999). At its discretion, the BLM could place such a tract up for auction after completing the requisite market and environmental analyses. In both cases, lease sales were expected to generate competitive bidding and thus to maximize the revenue flowing to the federal government. In theory, the coal production region process would govern lease sales in coal-rich areas and allow the BLM to design sales on terms favorable to the federal landlord. In practice, however, this process was abandoned by the BLM in 1990 for reasons that are still not entirely clear. The lease by application process has been used exclusively since then. See Letter from Edward J. Markey, Ranking Member, House Comm. on Natural Res., to Gene Dodaro, Comptroller Gen., U.S. Gov’t Accountability Office (Apr. 24, 2012) (on file with author) (requesting that the GAO create a report on federal coal leasing practices and providing further background); see also Squillace, supra note 110, at 30–35.
The tracts that are proposed and ultimately bid upon are tracts immediately adjacent to existing mines. The start-up costs associated with mining such tracts are minimal for adjacent mines, such that other companies generally have no incentive even to submit a bid. And because the application process allows the applicant to specify the size of the proposed tract, applicants may select tracts that are small enough not to attract competition. The only recent cases in which multiple bids have been entered in a Powder River Basin sale have involved tracts between two existing mines, in which cases both of the adjacent mines have submitted bids.

In this way, an existing coal mine can leverage its competitive advantage (attributable to its favorable location) to more or less guarantee that it will secure a proposed lease. The federal leasing process itself, then, allows these mining firms to develop expansion strategies that are relatively immune from competitive pressure. Once a foot is in the door, subsequent lease offerings can be proposed and conducted on terms designed to be most favorable to the existing firm. The system is virtually tailor-made to enhance the durability of existing coal mining operations.

3. Personal Occupancies on Public Lands

Coal mining companies and oil giants are not the only entities to benefit from durable claims to public natural resources. As a historical matter, the paradigmatic private claimants to the public lands were settlers, homesteaders, ranchers, and farmers—and although the era of settlement is long over, there are still several ways that federal land management practices continue to extend land claims made by individuals.

One might think that America’s national park lands, representing the gems of the public lands, would be protected from private claimants—and as a prospective matter, that is true. Yet within the borders of nearly every land unit managed by the National Park Service, there are a number of pre-existing private claims, and the federal government’s management of these claims

116. Squillace, supra note 110, at 35 (noting that twenty-two of the last twenty-seven lease sales in the Powder River Basin have attracted only one bidder).
117. Id.
118. Id.
120. National parks, along with most of the other properties managed by the National Park Service (such as national seashores, lakeshores, monuments, etc.), are generally closed to mineral prospecting, livestock grazing, and other activities commonly allowed on other federal public lands. See generally 3 CRAWFORD & GLICKSMAN, supra note 60, § 23 (covering preservation in the National Park System).
reflects the same durability dynamic described elsewhere in this Article. As some scholars have put it:

The federal government's policy has been to ease the political pain of federal [protected area] designations by granting to existing rights holders a stunning variety of leaseback, life estate, heritable partial title and similar arrangements that are and will continue to be an important part of the federal ownership story for many decades to come.\textsuperscript{122}

The best examples of durable private claims within national parks can be found within the more recent additions to the national park system. Unlike the older parks,\textsuperscript{123} which were generally withdrawn from the existing public domain and on which there were few prior existing private claims, many of the newer park units are comprised of lands purchased out of private ownership by the federal government. For various reasons, federal land acquisition efforts did not always or even usually result in a single, happy, contiguous unit, owned free and clear by the federal government. What maps depict simplistically as national park lands are generally areas of intermixed ownership.\textsuperscript{124} In some instances, acquisition funds ran out before all the desired land could be purchased; in other cases, lands remained in private hands because the existing land use was benign and entirely compatible with park purposes. Federal land assembly efforts, despite a general threshold level of local support (without which the movement to create a park was unlikely to arise), were often long, drawn-out battles between park advocates and groups of private landowners, conducted against the backdrop of the government's possible exercise of its eminent domain power.\textsuperscript{125}

\textsuperscript{issues/124/3946; Nat'l Parks Conservation Ass'n, America's Heritage for Sale: A Lack of Federal Funds Threatens Loss of Significant National Parklands (2009). Many are surprised to learn, in fact, that 4.3 million of the 84 million acres encompassed by the boundaries of the national parks are in actual private ownership. Id. Congress was historically reluctant to buy out pre-existing settlers. Historian John Ise writes: Congress usually showed a deep sympathy for the 'poor settlers' who had initiated claims in the national parks and forests, or perhaps had only squatted on public land, and had not got patents... [They] were the object of solicitude from the very time of the establishment of the park, because they had votes, and also because it was always proper and decorous for a senator or representative to sympathize with the misfortunes of his constituents. Ise, supra note 24, at 66–67. Lands that remain in full private ownership, however, are outside the scope of this analysis; as discussed earlier, the durability of formal property rights is expected in the American legal system.}


\textsuperscript{123. July 1959 is the date that the National Park Service uses to distinguish between older and newer parks, a distinction that has several implications for internal NPS policy. See Joseph L. Sax, Buying Scenery: Land Acquisitions for the National Park Service, 1980 Duke L.J. 709, 714 (1980).}

\textsuperscript{124. See Fairfax et al., supra note 122, at 634.}

\textsuperscript{125. The National Park Service maintains a remarkable collection of historical materials, including a number of rich historiographical accounts of the creation and administration of many of the parks. See}
Although the great majority of targeted landowners eventually settled on a sales price with federal buyers, it was not uncommon for special deals to be struck with those landowners who wished to remain on their property for some amount of time. In most such deals, the Park Service acquired fee title to the parcel but leased it back to the occupants for ten to twenty-five years or perhaps for the life of the occupant. The leaseback, of course, would reduce the purchase price paid by the Park Service. The Service's policy in this regard was driven by financial and practical considerations in addition to political ones, but the end result was a large number of residual private claims on many of the recently created units of the national park system.

Of course, leasebacks are designed as a transitional arrangement—a way of softening the blow to those who will be compelled to leave their homes and move elsewhere while a new national park is created. Yet the National Park Service has discovered that when the period of transition ends, the leaseholder does not always leave willingly. Sometimes litigation is necessary to eject lingering tenants. Not infrequently, however, the Park Service is more lenient, simply allowing tenants to remain past the expiration of the leaseback agreement. This is property that the federal government has already purchased; it goes without saying that the Park Service would never allow a newcomer to lease land within a national park in order to build a private home.

A similar situation exists on National Forest lands, on which can be found thousands of private summer cabins. These cabins are the legacy of the Recreation Residence Program, which was launched by the Forest Service in the early

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126. See, e.g., PAUL SADIN, MANAGING A LAND IN MOTION: AN ADMINISTRATIVE HISTORY OF POINT REYES NATIONAL SEASHORE 81 (2007) (describing a congressional plan to offer residents retained rights for the life of the occupant, the occupant's spouse, or until the occupant's youngest child reached the age of thirty).

127. As a rule of thumb, the purchase price was reduced by 1% for each year of the leaseback. Conversation with Denis Garvin, former Deputy Director, National Park Service (Mar. 14, 2013).


130. There are countless examples in the archives of the National Park Service. See, e.g., JOAN ZENZEN, BRIDGING THE PAST: AN ADMINISTRATIVE HISTORY OF MINUTE MAN NATIONAL HISTORICAL PARK 224 (2010) (describing how, at Minute Man, one notable acquisition resulted in a use and occupancy permit for a popular local eatery; upon its expiration, the permit was extended by two successive park superintendents until the owner eventually elected to shut down the restaurant in 1998).
The Program invited citizens to build seasonal cabins within the National Forests to facilitate recreation and increase the public's use of forest land. The permits issued by the Service were not leases; were terminable by the Service under a broad range of circumstances; and required the permit holder, upon expiration of the permit, to restore the land to its original condition or, alternatively, to convey title to any permanent improvements to the United States. In other words, the Program was premised on the understanding that claimants were not acquiring any sort of permanent interest in National Forest land.

By the mid-1900s, it had become clear that private residences were occupying some of the choicest spots within the National Forests and thus depriving the general public of the enjoyment of these places. In 1968, the Forest Service stopped issuing new permits; in 1970, the Public Land Law Review Commission recommended that even existing cabins should be eliminated. The Forest Service never adopted the Commission's recommendation even though, as a legal matter, it could easily have done so. The Service's own study of over 5,000 residences revealed that noncompliance was widespread: a majority of the sampled units had unauthorized improvements (some "cabins" were now found to be in excess of 3,000 square feet, and many others were being used as permanent residences, which is explicitly disallowed). Other violations included nonpayment of use fees, substandard upkeep, and maintenance. To combat these compliance issues, the Service could have simply phased out the cabins by allowing existing permits to expire without renewal. More aggressively, it could have terminated thousands of permits for noncompliance with permit conditions.

Yet the Forest Service has taken neither of these courses, in part because the cabin users have had great success in winning congressional sympathy. Indeed, the most pressing issue about these cabins in recent years has not been whether to allow them to remain, but whether their permit fees are too high.

132. Id. at 1002-05.
133. Id. at 1000-01.
134. Id.
136. Gildor, supra note 131, at 1006.
137. Id.
138. Id. at 1004-07; see also 36 C.F.R. § 251.60(a)(1)(I)(B) (2013).
139. Gildor, supra note 131, at 1009-13. The permitholders' interest group, National Forest Homeowners (NFH), is formally committed to the durability of their private claims, espousing a policy of "no net loss" of forest cabins. NFH, Position Statement 1, NATIONAL FOREST HOMEOWNERS (Sept. 1, 2005), http://www.nationalforesthomeowners.org/?page=NFH_Position_1.
140. See Phil Taylor, Tester Seeks Fee Relief for National Forest Cabin Owners, LAND LETTER (Oct. 7, 2010), http://www.eenews.net/landletter/stories/1059940809; Hannah Northey, House Panel
removing existing cabins. No new cabins may now be built, but those fortunate enough to hold permits already will, in all likelihood, retain them for many years to come.

The foregoing collection of examples, drawn from various domains of public natural resource management, demonstrate a recurrent pattern: private claims on public property, once established, are remarkably long-lived and frequently come to outgrow their original legal parameters. The pattern holds regardless of which federal agency is involved, regardless of whether the claimant is a mighty corporation or merely an individual, and regardless of whether the activity involved is economically substantial or trivial. What accounts for this phenomenon? Why is it that, in this important category of state property, private use rights are so durable? The following pages turn towards an examination of these questions.

II. EXPLAINING THE NATURE OF PUBLIC PROPERTY

Private property is, without doubt, a cornerstone of American law, and a great deal of theoretical attention has been devoted to understanding and justifying the doctrines that underlie private ownership. Public property, on the other hand, has not been so closely examined, and one interested in its study immediately confronts a number of obstacles. The interests and behaviors of public bodies, for example, are considerably more difficult to understand and to model than those of private entities. A great deal of insight into the rules of private property can be gained by assuming, per the standard law-and-economics approach, the rationality of private actors in maximizing the utility of property ownership. But it is less clear how best to apply a microeconomic or rational-choice framework to the analysis of public institutions. This is especially true of democratic institutions for which collective action problems


141. The literature is too voluminous to reference adequately, but a newcomer to the field can acquire a good sense for its contours by consulting Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman, PERSPECTIVES ON PROPERTY LAW (3d ed. 2002).

142. The seminal work in the difficulties of social choice analysis remains Kenneth J. Arrow, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); see also Donald P. Green & Ian Shapiro, Pathologies of Rational Choice: Theory: A Critique of Applications in Political Science (1994).


144. This is not to say that heroic efforts have not been made; indeed, a great deal of contemporary political science is committed to the development of parsimonious economic models of politics. See, e.g., David R. Mayhew, CONGRESS: THE ELECTORAL CONNECTION (1974); George Tsibelas, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK (2002). This literature has been decades in the making, however, and my point is simply that the economic analysis of public institutions is far more complex than a comparable analysis of private actors.
are endemic. What are the interests of a democratic body? How are competing objectives reconciled? Moreover, the character of state-owned property is likely to depend on the character of the state and the institutions by which it owns and manages its property.

Nevertheless, some perspective can be gained on the analysis of public property by glancing at debates about the origins of private property. There has been some disagreement over the appropriate starting point for theorizing about the origins of the rules of property. One venerable line of work, following a pathbreaking essay by Harold Demsetz, begins its analysis by looking towards a society's transactional environment. In this view, property rights will emerge when the costs of establishing them are exceeded by the gains. Property is thus a device that emerges more or less spontaneously and pre-politically, from the “bottom up,” to serve societal needs. But another line of theoretical development regards the bottom-up account as “naïve” for failing to take into account the social and political institutions that formalize property rights in “top-down” fashion. Here, property is primarily representative of legal entitlements rather than social expectations, and the theorist’s attention must be focused on the decision rules employed by the institutions empowered to create or enforce property—and thus, of course, on whose agreement is required to change the rules of property.

Implicit in the first view is that political institutions will roughly or eventually reproduce or sanction private ordering; implicit in the second is that all property rules worthy of the name are ultimately political creations.

The analysis of public property invites a similar two-front inquiry. On one hand, the category by definition demands attention to the state and presupposes governmental rules for its establishment. On the other, the account presented in this Article clearly emphasizes the demands, interests, and behaviors of private


147. The costs are usually conceived of in terms of definition, monitoring, and enforcement of property rights; the benefits include reductions in transaction costs and externalities. See, e.g., Terry L. Anderson & P. J. Hill, The Evolution of Property Rights: A Study of the American West, 18 J.L. & ECON. 163 (1975).


149. As Jeremy Bentham famously wrote, “Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.” Jeremy Bentham, The Theory of Legislation 111–13 (C. K. Ogden ed., Richard Hildreth trans., Harcourt, Brace & Co. 1931) (1802); see also Katrina Miriam Wyman, From Fur to Fish: Reconsidering the Evolution of Private Property, 80 N.Y.U. L. REV. 117, 117 (2005) (arguing that the Demsetzian-inspired accounts of the evolution of private property tend to neglect the role of the state in property rights formation).

claimants. The final product—the phenomenon to be explained—is the consequence of the interaction between legal rules, private behavior, and official behavior. In order to capture this interaction, this Part begins with a historical account of public land ownership in the United States. This background is crucial to understanding the peculiar patterns that have arisen in American public resource management. Following this, the discussion turns to summarize the interests, ideas, and institutions that presently shape the governance of public property. Interests and ideas are the bottom-up raw materials of the democratic process, but the final shape of public policy is dictated by how those materials are filtered through top-down political and bureaucratic institutions.

A. SOME HISTORICAL CONTEXT

The durability of private claims to public natural resources is in part the ongoing legacy of early developments in American history. Unlike modern environmental law, which is of relatively recent vintage, much of public land and resource law is old. Until roughly the early 1900s, Congress’s primary objectives with respect to the public domain had much more to do with nation building than with conservation or environmental protection. Federal policy encouraged settlement and resource extraction on the public lands, and various land disposal laws like the Homestead Act transferred public lands into private ownership nearly as fast as possible. Where the law wasn’t fast enough, lawlessness was faster; squatters, timber thieves, and countless others took advantage of the near-total absence of government oversight of the frontier. The public domain had the character of a vast commons that was rapidly being appropriated into private ownership.

Slowly, the law changed in response to increasing demands that land be protected or conserved. Congress sought to keep reserves of oil and coal, to protect iconic landscapes, and to prevent settlement within western forests and other noteworthy areas. But it was impossible to extinguish the powerful idea that most public lands should remain open to virtually unrestricted public use. So even as federal officials moved to retain land and to slow the transfer of land


152. See generally Gates, supra note 32; Benjamin Horace Hibbard, A History of the Public Land Policies (1939).


154. See generally Jacoby, supra note 51.

155. See Coggins et al., supra note 11, at 123–45. Executive withdrawal authority with respect to forests arose out of the 1891 General Revision Act, which authorized the President to “set apart and reserve . . . any part of the public lands wholly or in part covered with timber or undergrowth.” 16 U.S.C. § 471 (1970) (repealed 1976). The lion’s share of our current national forests and national parks are comprised of lands reserved by turn-of-the-century presidents under this statute. The Antiquities Act of 1906, 16 U.S.C. §§ 431–433 (2012), has served as the basis of many presidential reservations of national monuments and other protected areas.
into private hands, they still permitted all manner of public access to lands, and in quite a durable form. Many of the access rights created in this period survive today. In some instances, it appears that lawmakers never even gave serious consideration to how various land uses might come to an end. The assumption appears to have been that some land uses would be extended in perpetuity. The pages that follow describe this development in greater detail.

1. Early History

The federal government has always stood in awkward relation to the bulk ownership of land. As a matter of political philosophy, large-scale public ownership of any class of productive asset is in some tension with American political ideals;\(^\text{156}\) as a matter of constitutional law, the limited powers assigned to the federal government do not obviously suggest its present role as the nation’s largest land manager.\(^\text{157}\) Yet as this section will explain, it became politically and practically expedient at the very earliest stages for the federal government to hold title to vast areas of land.

Centralized land ownership, in the first instance, was a useful instrument for resolving disputes between the colonies over their awkward imbalance with respect to land claims on the western frontier.\(^\text{158}\) As colonies, Virginia, New York, Connecticut, Massachusetts, and Georgia had asserted claims to portions of the immense inner wilderness that lay to the west of the Alleghenies. The remaining colonies saw these claims as a threat to their status as political equals in a new confederation. They agreed to set aside their concerns if the western claims were ceded to the new federal government for the benefit of the new nation. Thus, Virginia famously agreed to cede its massive land claims to the federal government in order to induce Maryland to accept the Articles of Confederation;\(^\text{159}\) the others, under similar pressure, eventually ceded their claims as well.

\(^{156}\) The tension is twofold. First, public ownership is generally disfavored in American political culture. Second, the federal government in particular was to be a government of strictly limited powers, and federal land ownership conflicted with understandings of state sovereignty. As historian Paul Gates notes, “Sovereignty was associated with the ownership of ungranted lands within a state’s boundaries . . . .” Paul W. Gates, An Overview of American Land Policy, 50 AGRIC. HIST. 213, 215 (1976).

\(^{157}\) Of course, neither does the Constitution preclude such a role. It simply does not address in any great detail the authority of the federal government over lands that it owns, perhaps because its authors did not foresee the massive land acquisitions that would take place only shortly after its ratification. The only clauses to speak to the matter are the Enclave Clause and the Property Clause. U.S. CONST. art. I, § 8, cl. 17 (“The Congress shall have Power To . . . exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . .”); U.S. CONST. art. IV, § 3 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .”). Both clauses, however, have been given relatively broad readings by the Supreme Court. See, e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976); Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885).

\(^{158}\) Gates, supra note 156, at 214–18.

\(^{159}\) Id. at 214; AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 271 (2005).
Partially on account of these early cessions, it was the federal government, and not the states, that negotiated additional land acquisitions in the West, most prominently the Louisiana Purchase in 1804. When Napoleon offered to sell the entire Louisiana Territory for a pittance, Thomas Jefferson had little time to dwell on whatever doubts he had about his constitutional authority to purchase foreign territory. In the words of historian Richard White, the federal government “settled [this] question about the extent of its powers simply by exercising them.”

Although the federal government wasted no time in acquiring land, most were under the assumption that this land would be sold quickly. Alexander Hamilton and others successfully advocated for a policy of land disposal for purposes of repaying the infant nation’s war debt, and land sales became a large and reliable source of federal revenue. Land sales, it was hoped, would also serve the nation’s defense of its western border by attracting settlers who would “by their very presence comprise an invincible American army.”

Public land law was structured to facilitate the commodification of land. The Land Act of 1796, building on the earlier Land Ordinance of 1785, established the land survey system, which required public lands to be surveyed “without delay” and divided into square townships that could be subdivided into equally sized square tracts. These tracts were then auctioned off at a minimum price of two dollars per acre. A great deal of land was simply handed to states for

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160. See generally Everett Somerville Brown, The Constitutional History of the Louisiana Purchase 1803–1812 (1920); Peter J. Kantor, The Nation’s Crucible: The Louisiana Purchase and the Creation of America (2004). Both of these leading historical accounts of the Louisiana Purchase discuss how issues of federalism shaped and were shaped by the acquisition.


162. The early cessions by the colonies to the federal government had specified that the ceded lands were to be “considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the confederation or federal alliance of the said States, . . . and shall be . . . disposed of for that purpose, and for no other purpose whatsoever.” Gates, supra note 156, at 214 (emphasis omitted) (internal quotation marks omitted). In Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845), the Court was called up to interpret this language and stated:

The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Id. at 224. The Court’s confident statement of federal objectives has given great encouragement over the years to various legal challenges against the federal government’s ongoing land management, notwithstanding the fact that subsequent cases underscored the constitutional authority of the federal government to retain public domain lands in perpetuity.


164. Land sales represented 7% of federal income in 1811 but fully 48% by 1836. See Gates, supra note 28, at 37. Land was also granted as payment in kind, for example, military service. See Cukins et al., supra note 11, at 102.

165. Amar, supra note 159, at 272.


167. The minimum price was later reduced to $1.25. Id. at 170.
schools, for colleges and seminaries, and later for railroads. Nonetheless, "[o]nce land was surveyed, the idea was to dispose of it," and more particularly "to privatize it, as soon as was humanly possible." The policy of disposal accelerated through the nineteenth century as westward expansion and settlement became national fixations. The Homestead Act of 1862 is easily the best-known symbol of disposal, but many other laws, now mostly forgotten, had the same end. There were occasional efforts to withhold lands for federal purposes, or at least to distinguish between mundane farmland and land rich in timber, coal, or minerals. But given the almost nonexistent federal presence on the frontier, these laws were difficult if not impossible to enforce.

In fact, although the land survey system suggests an orderly process, the actual disposition of the public domain was chaotic. The mechanisms that federal law employed for land disposal were flouted in countless ways. Squatters abounded. So well-known were the numerous ways of circumventing the terms of the Homestead Act that they reached even the pages of The Little House on the Prairie. Coal and timber lands, ostensibly protected by federal law, were snatched up by fraud or simply denuded by theft. Sawmills operated on federal land in Minnesota for eleven years before even a single acre of timberland was properly sold. Virtually the entire California Gold Rush played out on federal lands without any interference by the federal government—no attempt was made to enforce public land law, or to capture royalties from gold production. The army colonel nearest the gold fields, tasked with evaluating how the federal government might assert its rights, wisely declared, "[U]pon considering the large extent of the country, the character of the people engaged, and the small scattered force at my command... I resolved not to

168. Such grants drew loud objections from the eastern states, which saw in them a violation of the "common fund" principle. See Pollard v. Hagan, 44 U.S. (3. How.) 212, 221 (1845); see also Gates, supra note 156, at 221–22.

169. Friedman, supra note 166, at 168.

170. See Gates, supra note 156, at 463–530.

171. Id.

172. Id. at 463–94. Gates' account gives the distinct impression that frontier life was a land scramble, and one in which law played a decidedly limited role.

173. Id.

174. See Laura Ingalls Wilder, By the Shores of Silver Lake 224–32 (1939) (this book is the fifth volume in Wilder's Little House series; the passage noted describes attempts at homestead fraud).

175. Coal lands, for example, were to be sold for a higher price than other lands, but the determination of which lands bore coal was made by the claimant. The Department of the Interior simply did not have the resources to make an independent assessment, and thus the system saw widespread abuse. Parts of this story are told in Amoco Prod. Co. v. S. Ute Indian Tribe, 526 U.S. 865, 868–71 (1999).

176. Cokins et al., supra note 11, at 109–15 (noting also the success of transcontinental railroads in frustrating the federal requirement that granted lands be sold within three years by selling to affiliates).
interfere." Many federal troops simply deserted to join the gold hunt themselves. Later, vast rangeland in the public domain was fenced in by ranchers for their exclusive use.

Arguably, however, federal policy succeeded even if federal law did not. The West was settled. New states were formed. The national economy grew exponentially. Rather than invest in to-the-letter enforcement of its public land laws, Congress generally chose to ratify questionable land-grabbing behaviors. Thus preemption laws were passed from time to time to shore up squatters' title to federal land, and eventually a prospective law of preemption was passed that essentially legitimized future squatting. Mining laws not only ratified the claims of previous miners, but also created a prospective “right to mine” on federal land whereby prospectors could acquire, merely by the barest effort at development, a property-right good against the federal government. Some might see in these ratification efforts only a recognition that the federal government was impotent to regulate frontier settlement, but more likely lawmakers saw that, by and large, national objectives were being accomplished. The only significant objections to land disposal efforts came from eastern states, which continually and predictably sought greater remuneration from western land sales. But despite such objections, a sizeable share of the vast domain of land that had fallen into federal possession was transferred into private possession in a relatively short amount of time.

It is important to note that, as a matter of law, there was no doubt about the strength or validity of the federal government’s title to the public domain. Courts repeatedly underscored that it was federal government’s “forbearance” that allowed miners to mine, ranchers to graze, and settlers to settle apart from the processes required by law. Squatting or other illegal appropriation could only be converted into valid title by an action of Congress. The strongest claim that could be made apart from congressional action was that the United States had granted an “implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them.” And an implied license, of course, may be revoked at will.

Yet time after time in the nineteenth century, rather than revoke the license to the public lands, the federal government deliberately converted possession into full-fledged ownership. Private usage matured into private title as Congress

177. Id. at 112 (alteration in original) (quoting THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS 312–17 (1884)) (internal quotation marks omitted).
181. See Gates, supra note 156.
allowed. Occupants of the public lands had little reason to fear ejectment, whether because of hard law, administrative lenience, or simple ignorance on the part of the federal landlord as to their occupancy. Public property, at least as regards the public domain, was simply and powerfully regarded as belonging, in a very immediate and direct sense, to those who needed it, depended on it, and made use of it. Uninterrupted occupancy was treated as private acquisition by settlers and eventually by lawmakers as well.

2. The Transition Towards Land Retention

Towards the end of the nineteenth century, federal land law began a long evolution away from disposal and towards retention of the public domain. A number of forces were at work, but all derived from the simple fact that the nation’s successful settlement of the West translated directly and inevitably into resource scarcity. The frontier era was coming to a close.184 There was increasing frustration that federal policies were being thwarted on the public lands, especially those policies intended to limit speculation in land and concentration of land ownership. There was increasing recognition that certain lands were worthy of protection from development. And finally, there was increasing consensus that certain minerals and commodities should be reserved for federal purposes.185 It became more difficult to gain outright title to federal lands. Instead, as this section will demonstrate, a new pattern emerged. In coal or mineral lands, settlers could acquire title only to the surface, not the mineral estate. Other resource users could not obtain title at all, but instead received permits or licenses to graze sheep or cattle, build and operate hydropower facilities, or construct summer cabins. Such permits or licenses were generally long-term; little if any consideration was given to what might happen should these resource uses one day be deemed inappropriate. The expectation seemed to be that, although the United States retained the paramount title in public lands, private uses and occupancies could remain indefinitely.

To be clear, federal land disposal processes continued apace well into the twentieth century. Homestead claims carried on and vast areas of federal land remained fully open to entry. New legislation allowed for different settlement terms as circumstances dictated and tried to incentivize beneficial practices. The Timber Culture Act,186 for example, allowed homesteaders to acquire more acreage if they planted trees in the treeless plains. The Desert Lands Act

184. See FREDERICK JACKSON TURNER, The Significance of the Frontier in American History, in THE FRONTIER IN AMERICAN HISTORY 1, 1 (1920). Turner begins his famous essay by noting that in 1890, the Superintendent of the U.S. Census Bureau declared that a frontier line could no longer be said to exist by virtue of numerous pockets of settlement throughout the West. Id.

185. For books describing these developments, see, for example, HORACE M. ALBRIGHT & MARIAN ALBRIGHT SCHNECK, CREATING THE NATIONAL PARK SERVICE: THE MISSING YEARS (1999); FOSS, supra note 56; HAYS, supra note 14; ISE, supra note 24; CHRISTOPHER McGrory KLYZA, WHO CONTROLS PUBLIC LANDS? MINING, FORESTRY, AND GRAZING POLICIES, 1870–1990 (1996); PEHLE, supra note 57; see also Gates, supra note 28.

allowed claimants to acquire 640 acres (rather than the 160 allowed under the Homestead Act) in lands too arid to farm, on the condition that the claimants would irrigate the land. The Stock-Raising Homestead Act granted 640 acres of surface estate to bona fide ranchers, and the Timber and Stone Act allowed entry into lands unfit for farming.

All these laws were intended to sow in the West the seeds of agrarianism on the model of the small, family-owned farm. But the laws were terribly abused, and fraudulent land claims came to vastly outnumber legitimate ones. Slowly but surely, Congress learned that, despite its efforts, western land was being bought up by speculators and commercial interests. The Desert Lands Act and the Timber and Stone Act, wrote Marc Reisner, "could not have promoted land monopoly and corruption more efficiently if they had been expressly designed for that purpose." Perhaps 95% of the claims submitted under the Desert Lands Act were fraudulent.

As these abuses were coming to light, so too was the fact that the scenic treasures of the West were falling into private hands just as quickly as the more mundane lands. Already in the 1860s, Congress began to debate whether areas such as Yellowstone and Yosemite should be withdrawn from the public domain. John Ise wrote of the creation of Yellowstone National Park in 1872 that:

The reservation of this large tract of over 2 million acres of land—larger than a couple of the smallest eastern states—with its wealth of timber, game, grass, water power, and possible minerals barred from all private use, was so dramatic a departure from the general public land policy of Congress that it seems almost a miracle.

Yet not long after the first parks, others followed at places like Mesa Verde, Mount Rainier, and Crater Lake.

Aside from such singular landscapes, the federal government recognized also that certain natural resources, such as coal and timber, were being rapidly

191. See id. at 44.
192. Ise, supra note 24, at 17. Although Yellowstone was the first national park, eight years earlier Congress had transferred the Yosemite area to the state of California "upon the express conditions that the premises shall be held for public use, resort and recreation [and] shall be inalienable for all time." Act of June 30, 1864, ch. CLXXXIV, 13 Stat. 325 (1864). In a speech to his chamber during the debate, Senator Trumbull of Illinois had commented that "one or two persons are now claiming [Yosemite] by virtue of a preemption"; with respect to the as-yet untouched Yellowstone, he continued, "it is possible that some person may go there and plant himself right across the only path that leads to these wonders, and charge every man that passes along between the gorges of these mountains a fee of a dollar or five dollars." See Ise, supra note 24, at 16–17. The national park model had not yet been established, of course, and it was certainly not obvious that federal retention of property was the answer.
depleted. There was talk of “timber famine”\textsuperscript{193} and “coal famine.”\textsuperscript{194} Salmon harvests in the Columbia River were a fraction of what they had been just a few decades before, when Lewis and Clark had written of a river so dense with fish that one could imagine walking across the mile-wide river on their backs.\textsuperscript{195} Resource depletion was in some measure a tragedy of the commons, but it also reflected the problems inherent in the subsidization of resource extraction that was implicit in federal land policy. Unregulated access to federal land led directly to overproduction and ravaging competition.\textsuperscript{196} Low prices in timber caused by this implicit subsidy meant that lumber mills could only profit when “driven to their utmost capacity of production,”\textsuperscript{197} and the timber industry itself began to seek restrictions on public-lands access for timbering.

The combined effect of these developments was to create an impetus for federal retention of land and regulation of land access.\textsuperscript{198} Aside from the national parks, the first serious move to withdraw lands from homestead entry came in a little noticed provision of an 1891 law. The provision authorized the President to set apart “any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests.”\textsuperscript{199} A series of presidents, over the next sixteen years, used that authority to set aside land that today constitutes roughly 80\% of the United States’ national forests and a number of national parks.\textsuperscript{200} President Teddy Roosevelt, for whom land and resource issues became a high priority, in 1903 appointed a Public Lands Commission to assess the difficulties vexing public-lands administration.\textsuperscript{201} The Commission’s report in 1905 urged the repeal of a number of existing laws and advocated public ownership of much of the public domain, not to stop development, but rather to make it more efficient in the face of

\textsuperscript{193} William G. Robbins, American Forestry: A History of National, State, & Private Cooperation 1 (1985); see also United States v. New Mexico, 438 U.S. 696, 705 (1978) (Justice Rehnquist noting that “[i]n the mid and late 1800’s, many of the forests on the public domain were ravaged and the fear arose that the forest lands might soon disappear, leaving the United States with a shortage both of timber and of watersheds with which to encourage stream flows while preventing floods.”).


\textsuperscript{195} Wilkinson, supra note 21, at 184.

\textsuperscript{196} See White, supra note 161, at 494.

\textsuperscript{197} Robbins, supra note 193, at 6 (quoting 1886 Division Forestry Ann. Rep. 149).

\textsuperscript{198} Former Representative Esch once stated:

Already we have largely lost our heritage as a Nation in the coal, gas, oil, timber and mineral lands with which we were so bountifully blessed. These are already in private ownership . . . We have no right to rob the next generation of its rightful inheritance. We have no right to transmit to it a natural resource whose ownership in private lands may prove burdensome and oppressive.


\textsuperscript{200} CERBERUS ET AL., supra note 11, at 124.

\textsuperscript{201} Perry, supra note 57, at 45–53.
The report met with disapproval from various political camps, but Roosevelt pressed on, relying, for example, on authority provided by the new 1906 Antiquities Act to reserve a number of national monuments.

In addition to withdrawing lands from outright settlement, federal law in the early 1900s began to regulate access to particular resources. Congress implemented a leasing system for oil, natural gas, and coal, always retaining title to land, and reserving a royalty based on actual production. In 1906, Gifford Pinchot, the nation’s forester in chief, for the first time required a permit and a fee for grazing on public lands. Although these requirements applied only within the national forest reserves, and it would be nearly thirty years before they applied to nonforest lands, this was a major development and a thorn in the side of the ranching industry, which had long since developed a sense of entitlement to the rangelands.

By retaining the ultimate ownership of its land in a great many instances, the federal government was creating a new pattern in which resource users did not acquire land outright but instead arranged for permission to use public lands for extended periods. Leases and permits had long terms on their face, but just as important was the fact that they were commonly renewed. Grazing permits, for example, were generally issued for a term of ten years and were virtually always renewed. Furthermore, in the allocation of initial grazing allotments, the federal government gave some preference to those who had already been using the land to be allotted. Interestingly, the allocation of grazing rights also took into account private land ownership, favoring those who owned “base ranch” land adjacent to federally owned range. This policy fueled the private claimants’ sense of proprietorship over the grazing resource; the renewal of federal grazing rights attached to base lands was taken to be so nearly certain that banks, when offering mortgages for ranches, began to collateralize the added value attributable to federal grazing permits. Thus, despite assiduous efforts to refrain from granting formal property rights to grazing, federal law created an allocation scheme to a federal resource that did not easily lend itself to a reduction in or termination of resource use. As we have already seen in Part I, grazing rights have been exceedingly durable across the West right up

202. Id.; see also White, supra note 161, at 400.
203. Peffer, supra note 57, at 53.
204. Wilkinson, supra note 21, at 91.
205. Id. at 93.
206. Id. at 82-94.
207. Peffer, supra note 57, at 229; see also Foss, supra note 56, at 61-72.
209. Raymond, supra note 208, at 109-52; see also Calef, supra note 56, at 62-70.
210. See supra text accompanying note 61; Wilkinson, supra note 21, at 107-08.
211. See Pub. Land Law Rev. Comm’n, supra note 7, at 106 (“[T]he pattern of livestock ranching, which was dependent upon public land grazing when the [Taylor Grazing] Act was passed, has been held constant. . . . Forest Service policies have [also] resulted broadly in the continuation of ranching patterns that existed at the time permits for grazing in national forests were first issued in 1905.”).
until the present day, despite decades of data suggesting that the bulk of federal rangeland has been dangerously overgrazed.\textsuperscript{212}

A similar point could be made about other uses of the public lands, such as hydroelectric dams. Although hydropower came into its own in an era in which private power providers were competing with municipalities, what became evident in any event was that the private right to public lands for dam purposes was a very long-term one. "[T]he present licensee," wrote several commentators, "has the equivalent of a perpetual grant if it wants one."\textsuperscript{213} Of course, a dam is a permanent structure, and no commercial entity would build one without a secure long-term arrangement for the use of land. Nonetheless, from the vantage point of the twenty-first century, when many dams are being removed, it is intriguing to note that lawmakers did not appear to consider the possibility of dam removal.\textsuperscript{214} The clear assumption was that dams would remain in virtual perpetuity.

Thus, although federal law tilted towards retention of the western public domain lands, the dominant ideas concerning the appropriate use of public lands still clearly favored private users, who succeeded in acquiring long-term access rights to public lands. Already this subcategory of public property—that is, the federally owned lands and resources of the West—was taking on a particular character: private rights to such property, it was clear, would be fixtures not easily removed.

\section*{B. THE MODERN ERA}

The model of public-lands management that came into focus during the late 1800s and early 1900s was one animated primarily by the idea of open access. In this model, public property is kept open for use by private parties as much as practically possible; the right to use public land is allocated roughly on a first-come, first-served basis, in accordance with the principle of prior appropriation.\textsuperscript{215} The role envisioned for government is quite limited, and consists primarily of zoning public lands for particular uses and overseeing the prior appropriation process.\textsuperscript{216} The open-access model, or something quite near it,

\begin{itemize}
\item \textsuperscript{212} See Wilkins\textsuperscript{on}, supra note 21, at 75–82.
\item \textsuperscript{213} Poirier & Hardin, supra note 198, at 476.
\item \textsuperscript{214} The seminal legislation for federal hydropower regulation, the Federal Power Act of 1920, does not discuss dam removal at all. The only provisions in the vicinity, in fact, are those that deal with the federal government’s authority to take over a licensee’s hydropower facility. See 4 Coggin\textsuperscript{s} & Glucksman, supra note 38, § 37:15.
\item \textsuperscript{215} Although the prior appropriation principle is most often associated with water law in the western states, it is much more pervasive than that; it is a "foundational principle of property law." A. Dan Tarlock, Prior Appropriation: Rule, Principle, or Rhetoric?, 76 N.D. L. Rev. 881, 885 (2000). As we have already seen, the laws of western settlement, from mining to land preemption, presupposed the applicability of prior appropriation.
\item \textsuperscript{216} Thus government designates certain lands as off-limits for certain activities (as with the process of land withdrawal) and establishes rules and modes of dispute resolution to serve the appropriative process. See, e.g., The General Mining Law of 1872, 30 U.S.C. §§ 22–49 (2012) (defining, for example, lands open for purchase, locators’ rights, succession, and delinquency).
\end{itemize}
very much survives today; its key elements are evident in the management of most public parks (including the national parks) and other public lands as well.\textsuperscript{217} For proponents of this model, breach of the government's duties with respect to the management of public property would be epitomized by unjustified land closure, restriction, or withdrawal, because the land belongs to the people and ought to be held open for public use as much as possible.\textsuperscript{218} The last half-century, however, has brought a number of important changes to public-lands management. The environmental and conservation movements have grown exponentially and now represent important and enduring political constituencies, along with the burgeoning number of recreational users of federal lands.\textsuperscript{219} There have been dramatic revisions to federal law in service of environmental and conservationist goals, including in the area of public land management.\textsuperscript{220} Virtually every major natural resource law has been the subject of a serious reform effort,\textsuperscript{221} and federal land management agencies today are large, thoroughly professionalized operations.

This broad transition has brought with it a new model of public-lands management. According to this model, government manages public property as might a proprietor: by protecting assets against deterioration, and by maximizing the revenue stream that may be obtained from the use of public resources. The elements of this proprietary model include highly professionalized and efficient resource management by a government agency, and access allocation on the basis of competition and under terms that ensure the long-term protection of state assets. Thus the model envisions quite a different relationship between federal agencies and commodity interests than has historically existed: resource production on federal land, though still substantial, is highly regulated; extractive industries still succeed in gaining access to public lands, but do so on far more restrictive terms. A number of federal laws require the payment of "fair market value" for various forms of resource access, imagining that federal land

\footnotesize{217. \textsc{George Cameron Coggin} \& \textsc{Robert L. Glickman}, \textit{Public Natural Resources Law} \S 1:23 (2d ed. 2013) (noting that "[s]ome public resources—such as recreation, hardrock minerals, and wildlife—essentially are free to those who pursue, locate, or capture them. Other resource benefits—such as admission to national parks and charges for grazing forage—are available for token fees").


can be compared with private land on the broader market.\textsuperscript{222} Many resources are sold only via competitive bidding, and only after the federal agency has undertaken a rigorous evaluation of the comparative value of other land uses.\textsuperscript{223} In many cases, the law clearly envisions arms-length transactions between agencies and businesses, and far from ratifying the illegal appropriation of federal property, the government now often punishes it—taking action against trespassers and invoking criminal law for theft of state property.\textsuperscript{224} The public interest in the land is vindicated not by open access, but by returns to the public coffers and the preservation and efficient management of important economic and ecological resources. Breaches of the state’s duties under the proprietary model are epitomized by below-value grants of access, agency capture by commercial interests, and resource degradation on account of corporate abuse, because in such instances the state fails in its obligation to steward the resource to maximize long-run benefits to the entire population.\textsuperscript{225}

Under the open-access model, the phenomenon at the heart of this Article—the durability of private claims to public property—is not particularly troubling. Within this paradigm, a claimant’s right to access a public resource generally turns on the priority of their appropriation of the resource, determined on a first-in-time basis; government limitations on the duration of private claims are generally disfavored.\textsuperscript{226} The proprietary model, on the other hand, is distinctly in tension with the durability phenomenon. This is not because grandfathering or the privileging of existing claimants is always improper on this view, but


Of course, the federal government is not a typical landowner, and it is difficult to forge policy demanding fair market value when resource markets are so distorted by massive state ownership. As George C. Coggins has written, “Fair market value seems largely a meaningless abstraction in the absence of a fair market. Where one owner has half of the land, market forces, such as they are, will not operate freely.” George Cameron Coggins & Margaret Lindeberg-Johnson, The Law of Public Range-land Management II: The Commons and the Taylor Act, 13 Env’t. L. 1, 75 (1982).

\textsuperscript{223} A number of federal environmental laws require the careful examination of alternatives, most notably NEPA (supra note 220); see 2 Coggins & Glicksman, supra note 43, § 17:44.

\textsuperscript{224} See, e.g., United States v. McPhilomy, 270 F.3d 1302 (10th Cir. 2001) (upholding a criminal conviction for theft of government property after defendants removed common varieties of stone from a mining claim).

\textsuperscript{225} Thus the class of beneficiaries here is perhaps broader than under the open-access model, which principally benefits those able to make physical use of public lands.

\textsuperscript{226} This is most visible in the right-to-mine approach of the General Mining Law, supra note 216, and the initial allocation of grazing rights under the Taylor Grazing Act, supra note 58, but as a background principle, it runs throughout a great deal of resource law and has historically been the default approach.
because the failure of public land managers to enforce limitations on claims may signal lost revenue opportunities, a failure to negotiate at arms length, or undesirable resource degradation.

Given the ascendance of the proprietary model, why do private claims remain so durable? There are several reasons. First, the proprietary model has only been partially implemented. In some areas of public resource policy, it has been avoided altogether;\textsuperscript{227} in others, it remains a work in progress.\textsuperscript{228} Even a cursory examination of the rhetoric of public-lands debates makes clear that the idea of free private access to public lands remains very prevalent indeed among a number of constituencies, from commodity producers to organized recreational interests.\textsuperscript{229} Moreover, many users of public lands derive a number of benefits from a scheme that combines public land ownership with durable private claims. For them, this arrangement is in many respects preferable to outright private resource ownership, because state ownership frees private users from some of the duties associated with permanent land ownership. Private claimants generally pay no property taxes (since the federal government retains land title)\textsuperscript{230} and often face less ongoing liability for the environmental effects of their projects than would be entailed by fee-simple ownership,\textsuperscript{231} and regulation of resource access can also help certain categories of users solidify their position as against other possible claimants.\textsuperscript{232} Thus, resource users themselves, we can be confident, exert pressure on legislators and agency personnel to adopt

\textsuperscript{227}. As noted earlier, some public-lands management patterns still follow the open-access model, especially as regards recreation, wildlife, and hardrock mineral development. See 1 COGGINS & GLICKSMAN, supra note 217, § 1:23.

\textsuperscript{228}. The fair market value policy declared in the Federal Land Policy and Management Act, for example, is one of several general statements of policy that “shall become effective only as specific statutory authority . . . is enacted.” 43 U.S.C. § 1701(b) (2006). It has not been implemented even in the BLM’s principal resource program, rangeland management. See Coggins & Lindeberg-Johnson, supra note 222, at 71–75.


\textsuperscript{230}. This is not because of federal immunity from state taxation; states may tax, for example, a mining claimant’s interest on federal land. Forbes v. Gracey, 94 U.S. 762, 765–66 (1876); see also COGGINS ET AL., supra note 11, at 158–59. But the valuation of less-than-fee interests poses enough of a practical challenge that states generally do not do so. LESHY, supra note 22, at 266.

\textsuperscript{231}. Under some environmental laws, however, liability for environmental damage can extend beyond the landowner to encompass a number of other parties. The obvious example is the Comprehensive Environmental Response, Contamination, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, but many other laws have the same effect. See, e.g., 4 COGGINS & GLICKSMAN, supra note 38, § 42:33 (describing federal mining regulations).

\textsuperscript{232}. More generally, scholars have pointed out that corporations sometimes seek regulation in order to erect barriers to entry that give them market power. This line of work is most commonly traced to George J. Stigler, The Theory of Economic Regulation, 2 BILL. J. ECON. & MGMT. SCI. 3 (1971); see also Sam Peltzman, Toward a More General Theory of Regulation, 19 J.L. & ECON. 211 (1976) (explaining how small interest groups, like business associations, can disproportionately wield their lobbying power to encourage government regulation protecting their established economic position).
and maintain policies and practices that protect existing claims.  

But perhaps the most important factor underlying the durability of private claims to public property has to do with the awkward fit between the task of public land management and the political institutions charged with doing so. Consider, in the abstract, the institutional setting in which private claims to public natural resources are administrated. Each of the federal land management agencies is responsible for millions of acres of land, yet is endowed with a limited budget that varies with changing political winds. Monitoring the activities of private land users is exceedingly costly. Each agency, to some degree, must rely on other claimants or the general public for notice of claim violations, and depending on the structure of agency oversight, agency officials may have little to no incentive to enforce the limits of private claims. It is no surprise, in such an environment, that many private claims come to exceed their original parameters or survive adverse changes in policy. For the sake of comparison, contrast this circumstance with a private landholder surrounded by other private landholders. Even without any legal action, each landholder’s claim is likely to be robustly contained by adjacent landowners, each of whom must monitor only his or her own property and has a direct incentive to do so in order to maintain his or her property interests.

There are, of course, actors within American society who would prefer that claims on public lands be kept within their legal parameters, just as a private landowner would prefer that neighbors remain within theirs. But the costs of activating the governmental mechanisms available to remedy a transgression are much higher in the former case than the latter. The costs of monitoring remote

233. In fact, for at least one generation of political scientists during the middle of the twentieth century, the federal land management agencies epitomized the phenomenon of agency “capture” by private interests. See Paul J. Culhane, Public Lands Politics: Interest Group Influence on the Forest Service and the Bureau of Land Management (1981); Foss, supra note 56; see also Michael C. Blumm, Public Choice Theory and the Public Lands: Why “Multiple Use” Failed, 18 Harv. Env’tl. L. Rev. 405, 407 (1994) (arguing that “congressional endorsement of multiple use has created the archetypal ‘special interest’ legislation,” leading to agency capitulation to demands from stockmen’s associations, timber mills, and other industry groups).

234. The House of Representatives’ proposed budget for the Department of the Interior for fiscal year 2014, for example, reduces spending on natural resources programs by 14%. With a Few Exceptions, Cupboard is Bare in House Money Bill, Pub. Lands News Bull. (Res. Publ’g Co., Arlington, Va.), July 29, 2013, at 1; see also Keyza, supra note 185, at 1, at 115 (detailing some of the staffing and funding limitations historically imposed on programs inside the Department of the Interior).

235. See Eric Biber, The Problem of Environmental Monitoring, 83 U. Colo. L. Rev. 1, 40 (2011). Although this article’s general focus is the monitoring of ambient conditions, similar dynamics—especially with respect to the cost of monitoring—arise in the context of public land use.


237. In conversations with national park officials, for example, I have learned that some park superintendents will allow private claimants to remain on public lands beyond the expiration of their claim, simply to avoid a confrontation. This is especially likely if their term of service is nearing its end, so that the problem can be pushed off to their successor. Interview records on file with author.
The durability of private claims to public property

Public lands are higher; the assertion of a legal claim must involve an intermediary (namely, the land management agency); and the legal doctrines involved in resolving the dispute are far less availing (standing, agency discretion, and so forth). Furthermore, these same legal channels and mechanisms are available to those who, like the claimholder herself, hold opposing ideas about the propriety of private use rights on public lands. And as the previous section made clear, there are widely shared ideas about public lands that would tend to lend support to the expansion or extension of private claims to public resources.

One can see many of these dynamics at work in a recent, highly publicized conflict involving the Point Reyes National Seashore near San Francisco, California. As the land for the Seashore was being assembled in the 1960s and 1970s, the National Park Service agreed in 1972 to allow an oyster farm to continue operating for forty more years in an area that was shortly thereafter designated by Congress as "potential wilderness." Congress apparently intended, upon the expiration of the nonconforming use, for the area to revert to formal wilderness status under the terms of the Wilderness Act. In 2004, eight years before the anticipated 2012 expiration of the farm's permit, the owner sold the farm to another operator who had full knowledge of the upcoming reversion. Undeterred, the new owner immediately began lobbying to extend the operating permit and managed to win the support of California Senator Dianne Feinstein, who persuaded Congress in 2009 to pass an appropriations rider allowing, but not requiring, the Interior Secretary to extend the farm's permit for an additional ten years. This legislation triggered a fierce public dispute between wilderness advocates, on the one hand, and small business proponents and other supporters of the oyster farm on the other. After a protracted and acrimonious review, the Secretary eventually declined to extend the permit, leading to even greater acrimony and a series of lawsuits that remain mired in appeals as of the time of this Article's publication.

238. These doctrines are canvassed in Coggin's et al., supra note 11, at 206-44.
239. Leigh Raymond has argued convincingly that many people hold a default preference in favor of the continuation of existing legal entitlements. See Raymond, supra note 208. Raymond has linked this widely held preference to the empirical fact that de facto possession of some common resources routinely translates into a claim for legal ownership likely to be honored by the state. See Leigh Raymond, The Emerging Revolution in Emissions Trading Policy, in Greenhouse Governance: Addressing Climate Change in America 101, 105 (Barry G. Rabe ed., 2010); see also Thomas Merrill, Accession and Original Ownership, 1 J. L. & POL. & ENV'T. ANALYSIS 459 (2009) (suggesting that accession may be a more efficient means of establishing original ownership of property than first possession).
243. Id.
Although in this case, land managers did in fact seek to allow a private claim to expire, note the tremendous obstacles they have encountered. They have faced political opposition strong enough to evoke congressional action, several legal challenges, and severe public criticism—to say nothing of the enormous expenditure of resources that has been required to justify the initial decision and defend against subsequent legal challenges. Notice also the apparent confidence of the farm’s purchaser that extension of the claim was possible, evident not only in the initial purchase of the farm, but also in the subsequent expenditure of time and money in lobbying efforts.

In sum, in the typical private-ownership situation, property claims are cabined and confined by other private rights, adjacent in place and/or time. This is not to say, of course, that private entities do not ever allow other property rights to spill over into their own, or that government officials never apply counter-pressure to private claimants; rather, it is simply to say that in the context of private ownership, invoking the legal system to maintain the integrity of one’s property right is cleaner, easier, and more straightforward than for those opposing the extension or expansion of private claims to public property. And the state itself, as the manager of property, is likely to lack the institutional capacity or incentive to protect against claim expansion with the same rigor as a typical private landowner.

The consequence is that private claims to state property are rendered quite durable on account of the situation of the institutions that administer them. Despite many important changes in natural resources law, and many discontinuities with the past, it is still the case that natural resource law protects and extends existing claims to a remarkable degree. The fundamental interests, ideas, and institutions that shaped the history of public land ownership in the United States still exert influence today, such that a motivated private claimant to federal public resources is remarkably well positioned as against newer claimants and stands a reasonably good chance of extending the claim beyond its strict legal parameters.

III. IMPLICATIONS

Thus far, this Article has described the durability of private claims to public property and established some possible reasons for it, both historical and institutional. It remains to discuss the significance of this phenomenon. There are important implications for property scholars as well as for public law and

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246. The common law tenancy-at-sufferance, for example, arises when a property owner allows a tenant to holdover after the expiration of a lease.

247. A famous example involves the first chief of the National Park Service, Stephen Mather, who required the destruction of a sawmill in Glacier National Park after it had served its purpose in providing timber needed for the construction of park facilities. See Coggins et al., supra note 11, at 133–34.
policy.

In recent years, scholars have devoted increasing attention to the emergence and development of private property rights. Even studies of property rights in the natural resources of the American West tend to emphasize the emergence of private rights rather than the oddity of widespread public land ownership in a political culture otherwise suspicious of public ownership.

The durability of private claims to public lands provides an important clue to the broad acceptance and stability of public land ownership. One might think that industries dependent on resource extraction would have energetically resisted federal land retention, unequivocally endorsing instead the continued transfer of the public domain into private hands. But these industries rapidly accommodated themselves to large-scale public land ownership. Over time, the federal government's management of public lands actually helped existing resource users to increase their control over the resources that remained in the public domain, rather than diminish it. This is because public regulation of land access erected barriers to entry that secured existing claimants' hold on their preferred resources, and public ownership spared these claimants the need for capital outlays for the purchase of property. Regulatory limitations on resource use brought to an end the cycles of destructive competition that periodically threatened to bring extractive industries to their knees. Federal management also helped put an end to bitter fights between different user groups, such as the fierce Range Wars that pitted ranchers against sheepherders across the Great Plains. But all of these benefits could only be realized if they rested atop a foundation of a durable legal claim to a publicly owned resource. Crucial commercial constituencies, we may be quite sure, would not have supported federal land control nearly as quickly without assurances of the

248. See, e.g., ELLICKSON, supra note 146; OSTROM, supra note 2; Anderson & Hill, supra note 147; Abraham Bell & Gideon Parchomovsky, The Evolution of Private and Open Access Property, 10 THEORETICAL INQ. 77 (2009); Demsetz supra note 8; James E. Krier, Evolutionary Theory and the Origin of Property Rights, 95 CORNELL L. REV. 139 (2009); Levmore, supra note 150; Rose, supra note 146; Wyman, supra note 149.

249. See supra note 8 and accompanying text.

250. E.g., Anderson & Hill, supra note 147.

251. The scheme of rangeland allocation adopted by the Taylor Grazing Act, for example, made it exceedingly unlikely that newcomers to ranching would succeed in obtaining access to public lands previously claimed by existing ranchers. See CALEF, supra note 56, at 62–66.

252. Overindebtedness was a perennial problem in the development of the West, and one that led to occasional regional crises. Many settlers had to mortgage land in order to purchase it, starting a cycle of fiscal instability. See, e.g., WHITI, supra note 161, at 260–63.

253. HAYS, supra note 14, at 49–55 (describing the deterioration of the public range that occurred as a result of free access and overgrazing); WHITI, supra note 161, at 408–99 (affirming that many large stock raisers "welcomed the chance to end unregulated competition for land and to gain some legally defensible rights," and then telling a similar story with respect to timber producers on the public forests, noting that federal timber restrictions "seemed to offer an opportunity to overcome the industry's problem of chronic overproduction").

254. WILKINSON, supra note 21, at 85–87.
long-term security of their claims, in both law and administration. As in so many other areas of regulation, then, the onset of bureaucratic management was undergirded by a coalition of strange bedfellows: resource users themselves were willing to join with conservationists and their ilk to support public resource ownership and management.

This pattern continues today. Although stakeholders complain unceasingly about deficiencies in the various resource laws, resource user groups generally have learned that it is possible to thrive under a scheme of private access to publicly managed lands—provided, again, that their claims are durable. Commodity interests are not generally among those calling for an end to federal land ownership. Most hardrock mining firms, for example, not only content themselves with a mining law that is over a century old, but do not even avail themselves of the opportunity to gain fee title to their mining claims. Coal mining companies acceded to legal reforms that theoretically exposed them to greater competition because the coal leasing process created by these reforms actually secured the stable expansion of their existing operations. The durability of private claims to public lands, therefore, helps explain the extent of public land ownership in the American system.

What are the implications for law and policy? In any given instance, of course, the legal and administrative decisions that render private claims to public resources so durable may be eminently justifiable. Grandfathering and renewing existing claims, aside from benefiting the claimants themselves, may help accomplish federal land-use goals, or may simply amount to a political concession necessary to the achievement of some overarching objective. Moreover, a recognized pattern of support for private claimants—a de facto rebuttable presumption in favor of claim renewal—may help encourage additional

255. Thus, for example, not only did the Taylor Grazing Act inscribe in law a preference for existing permittees, it also created Grazing Advisory Boards, comprised of ranchers themselves, which were responsible for managing the local range allocation process. See KIYZA, supra note 185, at 113–14.

256. Bruce Yandle calls such coalitions “bootleggers and Baptists” and depicts them as a crucial precursor to regulatory development. See BRUCE YANDLE, THE POLITICAL LIMITS OF ENVIRONMENTAL REGULATION: TRACKING THE UNICORN 24 (1989). In the natural-resources context, Richard White describes how Gifford Pinchot helped expand federal land management by “dividing potential opponents of regulation and winning over established economic interests.” WHITE, supra note 161, at 407–08. Large economic interests “tended to support the growing trend toward federal management.” Id.

257. The leading voices calling for an end to federal ownership do not generally promote privatization but rather a transfer of federal lands to state and local governments. See, e.g., Michelle Merlin, Utah Lawmaker Drives Modern Sagebrush Rebellion, GREENWIRE (June 17, 2013), http://www.eenews.net/greenwire/stories/1059982962.

258. The General Mining Law of 1872, supra note 22, allows mining claimants to patent their claims and acquire title to land. 30 U.S.C. § 29 (2012). Although a moratorium has now been imposed on patenting claims, see supra note 22, mining companies already had abandoned the practice in most circumstances, because the unpatented mining claim gave them everything they needed. See LESHY, supra note 22, at 266–67.

259. See supra section I.B.2.
private investment in public resource development.\textsuperscript{260} One suspects that more than a few conflicts between federal officials and local users of public lands are averted by federal officials’ respect for private claims, and that federal agencies would suffer reputational damage—and perhaps even legislative reprisals—if they were to make a practice of denying lease or permit renewals on questionable grounds.\textsuperscript{261}

These are deeply important considerations, especially in light of the economic importance of resource development on the public lands.\textsuperscript{262} But a legislative and administrative environment in which private claims frequently swell beyond their initial parameters can also yield some significant problems. First, many of the most hotly disputed private activities on federal lands are associated with serious environmental harms.\textsuperscript{263} Undue deference to existing claimants can therefore result in prolonged environmental degradation.\textsuperscript{264} This is not an insignificant point in light of the standard assumption among environmentalists that federal ownership of the public lands is superior, as a matter of environmental policy, to privatization of those lands. Of course, by the same token, the durability of environmentally beneficial activities would cut in the opposite direction, but unfortunately the lion’s share of private claims to public lands involve activities that tend to degrade the land rather than conserve

\textsuperscript{260} Firms dependent on natural resources often cite changes in federal policy as a leading investment risk. See, e.g., Opportunities and Challenges Associated with America’s Natural Gas Resources: Hearing Before the S. Comm. on Energy & Natural Res., 113th Cong. 6-10 (2013) (statement of Ross Eisenberg, Vice President of Energy and Resources Policy, National Association of Manufacturers), available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=c1283c8b-8732-4975-867e-e4dc73a0f672.


\textsuperscript{262} See generally U.S. DEPT OF THE INTERIOR, THE DEPARTMENT OF THE INTERIOR’S ECONOMIC CONTRIBUTIONS (2011), available at http://www.doi.gov/ppa/upload/DOI-Econ-Report-6-21-2011.pdf (summarizing the economic impacts of many public land activities by using economic contribution analysis to measure the impact of the Department of the Interior on the economy and finding that the Department supported over 2 million jobs and approximately $363 billion in economic activity in 2010). The total economic import of the federal public lands is larger than indicated by this report because it does not include the economic contributions of the national forests, which are managed by the Department of Agriculture.

\textsuperscript{263} This is not only true of resource extraction—mining, oil and gas drilling, grazing, and so forth—but also, increasingly, of recreational activities involving motorized vehicles.

\textsuperscript{264} Precisely this complaint is levied against federal land managers in scores of instances. Opponents of cattle grazing on the public lands, for example, argue that gratuitous extensions of grazing permits—extensions not required by law—have not only prevented the restoration of rangeland health, but exacerbated a bad situation. See DONAHUE, supra note 62.
environmental amenities and ecological assets.  

Second, the durability of private claims to public resources presents a problem of fair dealing. The federal government acts as the steward or trustee of the public lands on behalf of the American people, and most citizens would probably endorse some rough principle of equality in public resource allocation. Yet the analysis presented in this Article suggests that federal land managers tend to favor parties holding existing claims at the expense of those who might assert new ones. To be sure, any grant of access to a public resource, however allocated, necessarily bestows a priority right for the duration of the claim. But it need not carry with it an indefinite right to the renewal of that claim or to its preservation (via grandfathering) after new claims of the same type cease to be granted. The history of federal natural resource administration, with its recurrent episodes of resource domination by incumbents, implies that resource regimes tend to be mastered and manipulated by existing claimants and that vigilance is demanded of policymakers who would maintain even a weak form of equal access.  

Certainly, legacy interests will frequently have strong and meritorious claims to continued access to resources on which they have long relied, and it is not the job of resource gatekeepers to meddle with an industry’s competitive structure by favoring new entrants for their own sake. Nonetheless, scholars know all too well the capacity of market actors to capture regulatory agencies for the purposes of maintaining market power, and there is no reason to suppose that resource management agencies should be immune from such efforts.  

Finally, this analysis suggests that the federal government faces a systematic disadvantage in its bargaining with private claimants to natural resources. This manifests itself in several ways. As described in Part II, federal resource policy has shifted away from the open-access model and towards a proprietary model marked by competition among claimants and the recovery of fair market value for commodity resources. The durability phenomenon undermines this shift, because federal law generally does not take account of the benefits that a

265. It is, alas, not even close. The main categories of private claims all involve resource extraction and carry significant environmental burdens: mining claims, leases for energy resources, grazing claims, use and occupancy permits for built structures, and so forth. Even activities that may carry enormous social and even environmental benefits, such as renewable energy generation facilities, cause environmental harms to public land and wildlife. See John Copeland Nagle, Green Harms of Green Projects, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 59, 59–60 (2013).

266. This stewardship is perhaps most fully captured in law in the public trust doctrine. See generally Cougins et al., supra note 11, at 64–117.

267. See Blumm, supra note 233, at 407. This problem is certainly not unique to the natural-resources context. The rest of environmental law (not to mention entirely different spheres of public policy) is also characterized by, for example, grandfathering and other forms of transition relief in which incumbents are treated differently than new market entrants. See Huber, supra note 25, at 91–92.

268. See, e.g., Peltzman, supra note 232, at 212; Stigler, supra note 232, at 5–6; see also Daniel McCork., COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 5–11, 249–51 (1987) (describing how informal political coalitions between Congress, administrative agencies, and interest groups—“iron triangles”—influence policy in Indian water development issues).
resource claimant will derive simply from sustaining a claim, which in turn makes it difficult to recover fair market value. For example, as we have seen, federal oil and gas leasing practices make it nearly impossible to capture bonus payments beyond the initial one; coal leasing practices make it unlikely that lease sales will receive multiple bids; leasebacks on national parks were priced under the assumption that the claims would terminate upon expiration. In each case, claimants derive a benefit that, under the proprietary model, would properly be compensable. Furthermore, even occasional grants of unwarranted claim extension or renewal may become more broadly problematic by making it more difficult for federal officials to deny similar treatment to similarly situated claimants. Agencies may expose themselves to the threat of litigation by creating the appearance of arbitrary administration. Observable patterns of administrative behavior affect the calculus of other claimants, perhaps encouraging them to gamble that they too will be allowed to exceed the parameters of their legal entitlement.

Because these problems are rooted in part in the institutional realities of public land management, there may be unavoidable to some degree. That said, the examples and case studies presented earlier in the Article have hinted at steps that might alleviate some of the difficulties associated with durable private claims. Land management agencies could enforce more strictly the termination of expiring claims and publicize this new emphasis. Requests for the renewal of existing claims, whether for ski resorts, forest cabins, or hydro-power facilities, could be scrutinized more closely to confirm their ongoing consistency with current federal law and policy. Commodity sales could be reformed to maximize genuine competition and minimize the ability of legacy interests to structure resource sales to their own liking.

Although the current polarization within Congress makes it unlikely that we will see fundamental changes to resource management regimes in the near future, this Article does have an important forward-looking implication for federal lawmakers. The analysis presented here suggests that officials should be wary of creating new private rights in public resources, lest today's solutions become tomorrow's problems. New classes of claims are likely to be "stickier" than the letter of the law might suggest. There are several resource domains

269. *See supra* section I.B.
270. *See supra* section II.B.
271. *See generally* SEAN M. THERIAULT, PARTY POLARIZATION IN CONGRESS (2008) (a leading political science account of congressional polarization, maintaining that congressional polarization can be attributed to a corresponding polarization within the parties' constituencies and the increasing power of congressional leaders and their willingness to use certain legislative procedural maneuvers associated with polarization). Polarization has made it exceedingly difficult to pass any broad new legislation; there has been precious little significant legislation in the environmental sphere since the Clean Air Act Amendments of 1990. *See* CHRISTOPHER MCGRORY KLYZA & DAVID J. SOUSA, AMERICAN ENVIRONMENTAL POLICY, 1990–2006: BEYOND GRIDLOCK 285–96 (rev. ed. 2013).
272. J.B. Ruhl has articulated an analogous point with respect to "climate change winners," suggesting that lawmakers should take care to "ensure no property rights accrue in the future benefits of
in which new private rights are presently being created or contemplated. Emissions trading, for example, has been on the rise; in such programs, governments allocate to emitters the right to emit certain quantities of various pollutants, who may then trade such rights amongst themselves.\textsuperscript{273} Lawmakers generally try to stipulate that emissions credits or allowances do not constitute a property right,\textsuperscript{274} but it is far from clear that recipients see it the same way.\textsuperscript{275} In fact, some have suggested that such programs succeed and endure precisely because participants realize that emissions credits are valuable assets so long as the program continues.\textsuperscript{276} The termination of a cap-and-trade or other emissions trading program, or any other attempt to truncate emissions allowances, would likely incur substantial opposition from allowance holders. By contrast, alternative regulatory strategies, such as emissions taxes, do not create a property-like entitlement.

Renewable energy production on federal lands is also increasing substantially, and although environmentalists tend to support this, care should be taken lest even these private claims outgrow their initial purposes.\textsuperscript{277} At a minimum, lawmakers should redouble their efforts to delimit carefully such claims or "hardwire" limitations directly into them lest they give rise to the same difficulties already apparent elsewhere in public resource management.\textsuperscript{278} At present, the BLM's approach to the tenure of renewable energy claims is frustratingly vague, in sharp contrast to other features of its policies regarding renewable energy installations on federal lands. The BLM has articulated thorough and


\textsuperscript{274} Section 7651(f) of the Clean Air Act Amendments of 1990, for example, made explicit that sulfur dioxide emissions allowances in the law's Acid Rain Program are not property:

An allowance allocated under this subchapter is a limited authorization to emit sulfur dioxide... Such allowance does not constitute a property right. Nothing in this subchapter or in any other provision of law shall be construed to limit the authority of the United States to terminate or limit such authorization.


\textsuperscript{277} See John D. Leshy, Federal Lands in the Twenty-First Century, 50 NAT. RESOURCES J. 111, 119 (2010). The former Solicitor for the Department of the Interior here suggests that the government “experiment with different tenure provisions” when authorizing renewable energy development on federal lands, such as auctioning sites in “fee simple conditional with a reverter back into public ownership once the use ends and the land is reclaimed.” \textit{Id.} at 121.

\textsuperscript{278} One approach would be a reverter upon cessation of the stated use. \textit{See id.} Alternatively, agencies could grant nonrenewable fixed-length terms of sufficient duration to allow a return on capital, or create a default presumption in favor of nonrenewal, which could be overcome only upon individualized review.
stringent policies with respect to, among other things, diligent development, performance and reclamation bonding, and environmental review. But with respect to the tenure of renewable energy claimants, the BLM has simply said that it will issue rights-of-way for a term of thirty years, and that it “has the discretion to renew the grant if doing so is in the public interest.”

CONCLUSION

The rules of property law shape resource use in various ways. The patterns and pathologies that have attended the development of private property, in particular, have been studied closely and carefully. Scholars have brought to light aspects of American property law that have hastened the destruction of private wilderness, brought about American dependence on foreign oil, and even helped guarantee that hydraulic fracturing (“fracking”) would happen here, first. But in a country in which nearly one-third of the land is owned by government, law’s relation to resource use cannot be fully understood without examining the rules and institutions that deal with public property. Public property is a fundamentally different beast than private property, for decisions about its use are made by governmental entities whose actions derive from different premises than private property owners. Although the federal public lands are often thought of as enclaves of conservation and land protection, they have historically been made available for a wide array of uses by its citizens. Generous terms of access have given rise to a vast number of private claims on these lands. The durability of these claims is a defining characteristic of public property, and one that has important implications for its management, for areas of policy that are shaped by public land management, and for theoretical inquiries into the nature of public property.


280. See id.


282. See Instruction Memorandum No. 2011-003, supra note 279.

283. 43 C.F.R. § 2807.22. This is the standard renewal provision for all rights-of-way on the BLM’s land, and is made applicable to renewal energy installations by the Bureau’s Solar Energy Development Policy. Instruction Memorandum No. 2011-003, supra note 279.


