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**The Right to Graze Livestock on the Federal
Lands: The Historical Development
of Western Grazing Rights**

by

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THE RIGHT TO GRAZE LIVESTOCK ON THE FEDERAL LANDS: THE HISTORICAL DEVELOPMENT OF WESTERN GRAZING RIGHTS

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The Fifth and Fourteenth Amendments to the United States Constitution protect a property owner from deprivation of property for a public purpose without due process of law and payment of just compensation.¹ The term "property," as used by the Fifth and Fourteenth Amendments of the Constitution "embraces all valuable interests which man may possess outside of . . . his life and liberty."² Property includes not only all tangibles, but everything which may have an exchangeable value, such as a contract³ or a statutory entitlement.⁴ The Constitution also protects property which is defined and whose dimensions are created by existing rules or understandings that stem from an independent source, such as state law.⁵

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1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, § 1.

2. *Campbell v. Holt*, 115 U.S. 620, 632 (1885) (Bradley & Harlan, J.J., dissenting).

3. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

4. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

5. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)

Not only does the Constitution protect "property" itself, but it also protects rights within property such as easements, mineral rights,⁶ water rights⁷ and equitable estates. An equitable estate is a "right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will make notice, [and which] requires the aid of such court to take it available. These estates consist of uses, trusts, and powers."⁸ In cases of conflict between an equitable right or estate and a legal title, the courts will "decree that it [the legal title] shall be considered as held in trust for the benefit of the one having the equitable title. If equities are made out, the court will always require them to be satisfied before the legal title will be enforced."⁹

Given the above definitions and descriptions of property, the question to be answered by this article is whether a "grazing preference," as historically recognized by the United States Forest Service or Bureau of Land Management (BLM), is a type of property or property right which is protected by the United States Constitution. In recent years, according to both Forest Service and BLM policy, a grazing preference is a mere privilege and is revokable at will. On the other hand, many ranchers consider their preference to be an equitable estate, a type of property right. This article will explore the development and legal interpretations surrounding the federal land grazing preference to determine whether a preference is a type of property right. Specifically Part I of this article defines the term federal land preference; Part II explores the modern courts' view of the preference versus the right to compensation for the taking of a BLM or Forest Service grazing permit or lease; Part III recounts the historical development and recognition of the preference in federal lands; and Part IV concludes with the authors' opinion that a preference is a type of property right, protected by the Fifth Amendment of the United States Constitution.

I. PREFERENCE ON THE FEDERAL LANDS DEFINED

The Bureau of Land Management regulations define a grazing preference as "the total number of animal unit months of livestock

(stating that property is defined by an independent source).

6. See Mining Law of 1872, ch. 152 § 3, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. § 26 (1988)).

7. Fallini v. Hodel, 725 F. Supp. 1113, 1123 (D. Nev. 1989) *aff'd on other grounds*, 963 F.2d 275 (9th Cir. 1992).

8. BOUVIER'S LAW DICTIONARY 530 (1st ed. 1868).

9. 27 AM. JUR. 2D *Equity* § 64 (1966).

grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee."¹⁰ In other words, the preference is the amount of forage, calculated in animal unit months (AUMs), that can be used by the permittee or lessee on the federal lands during the grazing season.

According to the regulations quoted above, in order to acquire and retain a preference, the permittee or lessee must also own or control base property.¹¹ Base property is defined as:

(1) [l]and that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.¹²

There are numerous other qualities about the grazing preference and base property worth noting. First, without ownership or control of base property and livestock, a grazing permittee or lessee¹³ cannot acquire a grazing preference from the BLM or Forest Service to graze livestock on the federal lands.¹⁴ In conjunction, a preference is not, nor can it be, "created" by the BLM or Forest Service. Rather during the grazing adjudication process,¹⁵ which usually occurred when the federal lands were withdrawn from settlement, preferences were awarded to those livestock operators who met certain qualifications.¹⁶ Should a third party wish to acquire a preference and thus a term grazing permit on the federal lands today, that

10. 43 C.F.R. § 4100.0-5 (1993). Pursuant to Forest Service regulations, strict ownership, rather than "ownership or control," of the preference, base property and livestock is required. 36 C.F.R. § 222.3(c)(1)(vi)(A) (1993).

11. 43 C.F.R. § 4110.2-3; 36 C.F.R. § 222.3.

12. 43 C.F.R. § 4100.0-5.

13. Although there are technical differences between a "grazing permittee" and a "grazing lessee," for the purpose of this article, those terms will be used interchangeably.

14. See 43 C.F.R. § 4110.2-3; 36 C.F.R. § 222.3.

15. The adjudication of forage on the federal lands occurred much like the adjudication of western water rights. As will be explained *infra* Part III, once the public lands were withdrawn from settlement and were declared suitable for grazing purposes, a local livestock operator could gain a preference to use those lands if he could prove (1) that he had base property located in the area and (2) that he had previously used the public lands for livestock grazing. See Fredrick W. Obermiller, *Private Rights in Federal Grazing Permits? The Crux of the "Western Range Problem,"* Oregon State University (October 5, 1992).

16. See *infra* Part III; see also F.R. Carpenter, *Establishing Management Under the Taylor Grazing Act*, RANGELANDS, June 1981, at 107-10.

party would have to purchase the preference and the livestock or base property from an *existing* preference owner.¹⁷ Again, the preference on federal lands is not created by the federal government, but rather was acquired by the permittee because of, among other things, prior use of the federal lands.

Second, once a preference and grazing permit is acquired by the grazing permittee, the BLM and Forest Service have an affirmative duty to protect the use of that permit from competing third parties.¹⁸ Although there are numerous listed reasons that a valid grazing permit or preference can be reduced, cancelled or suspended by the federal agencies, those reasons can be placed in the category of either (1) the permittee's violation of the terms or conditions contained in his grazing permit, federal regulation or State or federal law or (2) damage or destruction to the forage resource.¹⁹ In either case, the permittee is entitled to due process through an administrative hearing before a reduction, suspension or cancellation of the preference or permit is completed.²⁰

II. THE MODERN COURTS' VIEW OF THE PREFERENCE ON THE FEDERAL LANDS

Although the modern courts have danced around the question of whether a compensable grazing right in the form of a preference exists on the federal lands,²¹ that question has not yet been fully

17. 43 C.F.R. § 4110.2-3; 36 C.F.R. § 222.3.

18. *Oman v. United States*, 179 F.2d 738, 742 (10th Cir. 1949).

19. Specifically, Forest Service regulations at 36 C.F.R. § 222.4 state that the grazing preference and permit may be cancelled, modified or suspended, in whole or in part, if the permittee (1) refuses to accept a modification of the terms and conditions of his permit, (2) waives his permit to the United States, (3) fails to comply with the eligibility requirements for permit ownership, (4) fails to restock the allotment after the full extent of non-use has been exhausted, (5) fails to pay grazing fees within established time limits, (6) fails to comply with applicable regulations, laws and statutes, or (7) knowingly makes a false statement on his permit or grazing application. BLM regulations at 43 C.F.R. §§ 4170.1-1 and 4170.1-2 allow modification, cancellation or suspension of the term grazing permit, in whole or in part, for (1) repeated trespass of livestock or (2) failure to make substantial use of the permit for two consecutive years. BLM regulations at 36 C.F.R. § 4140.1 also prohibit (1) violation of the terms and conditions of the permit, allotment management plan or cooperative agreements, (2) placing supplemental feed on the federal lands, (3) refusing to install and maintain range improvements or (4) for certain types of subleasing. Again, none of these regulations allow for the reduction, cancellation or suspension of a term grazing permit in favor of a third party, regardless of whether that third party is wildlife or another permittee.

20. See 36 C.F.R. §§ 251.80-102 (1993); 43 C.F.R. §§ 4.470 -.478 (1993).

21. Although there is a technical difference in the federal government's

addressed. For example, *United States v. Fuller*²² is the case most often cited for the proposition that a grazing permit is a mere privilege that can be taken without compensation.²³ This case involved a ranch in Arizona, of which 75 percent of the *private land* was condemned by the federal government.²⁴ In addition to compensation for his private lands, Fuller wanted the federal government to also compensate him for the value that was *added* to his fee land as a result of his federal, BLM, grazing permits that were used in conjunction with his private lands.²⁵ The Supreme Court ruled against Fuller in a five (5) to four (4) decision.²⁶

There are several reasons that is this case cannot be read so broadly as to eliminate the possibility that a grazing preference is not a property right. First, note the *Fuller* case did not address the question of whether stockmen who grazed livestock on federal lands *prior to the passage of the Taylor Grazing Act* had acquired a preference or property right in those lands.²⁷ Rather, the question as

duties in its management of "federal lands" versus "public lands," those differences do not affect this discussion. For the purposes of this article, the terms "federal lands" and "public lands" will be used interchangeably.

22. 409 U.S. 488 (1973).

23. *Id.* at 493.

24. *Id.* at 489.

25. *Id.* at 489.

26. *Id.* at 494.

27. The Taylor Grazing Act (TGA) of June 28, 1934, Pub. L. No. 482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (1988)), was passed to protect grazing rights acquired before January 1, 1934, and to stabilize the livestock industry. Although the TGA requires *existing rights* to be protected, 43 U.S.C. § 315, section III of the Act also states that the issuance of a permit does not create a right to or title in the federal lands. 43 U.S.C. § 315b. Compare this to the language in the regulations adopted pursuant to Federal Land Policy and Management Act (FLPMA) which states that no right, title or interest in the federal lands is created by the issuance of a grazing permit or lease. Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1782 (1988 & Supp. III 1991)). However, FLPMA also states that the issuance of a permit or lease does not modify any law, right, title or interest existing prior to the passage of the Act. 43 U.S.C. § 1752(h). FLPMA also states that nothing in this Act shall be construed to terminate any valid lease, permit, patent or other land use existing on the date of passage of the Act. 43 U.S.C. § 1701. The meaning of these statements are a source of debate. On one hand, some argue that 43 U.S.C. § 315b eliminates all grazing rights in federal lands. On the other hand, stockmen argue that preferences recognize the "existing rights" described in 43 U.S.C. §§ 315, 1701 and 1752(h) since they were adjudicated to stockmen with prior grazing rights. See *Red Sheep Canyon, Co. v. Ickes*, 98 F.2d 308, 313-14 (D.C. Cir. 1938). The argument is that the property right is not in the permit; rather, the property right is in the preference that gives the owner exclusive right to a permit. *Id.* at 314. For example, a permit to

framed by Fuller and accepted by the Court was can "the availability and accessibility of public lands . . . be considered in the evaluation of condemned lands *so long as consideration is also given the possibility that the grazing permits on the public land may be withdrawn without compensation.*"²⁸ Therefore, *Fuller* failed to even raise questions such as (1) whether a grazing preference, created *before the withdrawal of the public lands*, would be afforded a legal status different than that given to a mere grazing permit or (2) whether there is any difference between a grazing permit and a preference. Furthermore, Appellants and Respondents stipulated that the *grazing permit* could be taken without just compensation.²⁹ Therefore, the question of the legal status of the underlying preference was not addressed.

Second, because not all of Fuller's private land was condemned, he still owned an adjudicated preference which he could attach to his remaining base property.³⁰ Therefore, had the Court allowed Fuller to be paid, he would have been compensated for something he still possessed. As such, the Court made a correct decision in this case.

Third, although the courts have not ruled on the scope of rights that existed before the Taylor Grazing Act³¹ and the Organic Administration Act,³² prior rights or uses in the federal lands have been recognized.³³ With regard to BLM and Forest Service prefer-

build a house is not a property right, but the permit is based on a property right; a permit to divert water is not a property right but the permit is based on an adjudicated water right that is a property right; likewise, a permit to graze livestock is not a property right but, the permit is based on an adjudicated preference that is a property right.

28. Brief for Respondents at 7, *United States v. Fuller*, No. 71-599 (9th Cir. May 30, 1972) (emphasis added).

29. *Fuller*, 409 U.S. at 489.

30. Note the United States condemned only 920 fee acres of Fuller's total 1,280 fee acres. *Id.* Both BLM and Forest Service regulations provide the opportunity to attach the preference to different base property if the original base property is lost. See 36 C.F.R. § 222.3(v); 43 C.F.R. § 4110.2-1(d).

31. 43 U.S.C. §§ 315-315rr.

32. The Organic Administration Act of 1987, ch. 2, §1, 30 Stat. 34, 36 (June 4, 1987) (codified as amended at 16 U.S.C. §§ 473-475 (1988 & Supp. IV 1992)).

33. See *McNeil v. Seaton*, 281 F.2d 931, 933 (D.C. Cir. 1960) (stating that once a preference right is granted, the permittee is entitled to rely on it); *Chournos v. United States*, 193 F.2d 321 (10th Cir. 1951) (holding that the purpose of the Taylor Grazing Act is to "stabilize the industry and permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings"); *Red Canyon Sheep, Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938) (rejecting a proposed BLM exchange because it interfered with a permittee's adjudicated preference).

ences and permits, the only case to specifically determine whether a preference is a property right is *Shufflebarger v. Commissioner*.³⁴ The question in *Shufflebarger* was whether a preference was a property right for tax purposes.³⁵ In that case, the court stated:

[I]t seems to us abundantly clear that the statute and the regulations contemplate that once the right to a fair and just allotment of grazing lands has been acquired under the established procedures [the adjudication process], that right, subject to some adjustment if it should become necessary for protection of the range or for a more equitable distribution among preference holders, is to be regarded as an *indefinitely continuing right*.³⁶

In reaching its holding, the court recognized that the only way to acquire a preference (after the initial adjudication) is by purchase or inheritance.³⁷ Because the preference is not created by the federal government, but rather is bought and sold by private individuals, the Internal Revenue Service determined that the preference is, in fact, a property right.³⁸

III. THE HISTORICAL DEVELOPMENT AND RECOGNITION OF THE PREFERENCE IN FEDERAL LANDS

It is believed that the cattle industry was introduced by the Spanish conquistadors in the New Mexico Territories as early as 1598.³⁹ This was nearly twenty (20) years before the founding of Jamestown by the English and some one hundred seventy eight (178) years before the signing of the Declaration of Independence.⁴⁰ Santa Fe, New Mexico, being the oldest capital city in the "New World," was not only an area of government but also an area of commerce long before the conception of the original thirteen (13) colonies of the United States.⁴¹

Both Spain and Mexico ruled over the Southwest before it

34. 24 T.C. 980 (1955).

35. *Id.* at 980.

36. *Id.* at 992. (emphasis added).

37. *Id.* at 981 n.1.

38. *Id.* at 981-94.

39. SUMMARY OF, THE HISTORICAL ENCYCLOPEDIA OF NEW MEXICO, NEW MEXICO HISTORICAL ASSOCIATION, ALBUQUERQUE, NEW MEXICO (1945) (on file with author).

40. Dirk Manning, *New Mexico and the Guadalupe-Hidalgo Treaty*, 1-35 (1990) (on file with author).

41. *Id.*

became part of the United States. Under these governments, private citizens acquired lands through grants by the King of Spain or the Government of Mexico.⁴² However, because of harsh environmental conditions such as little rainfall, severe winter months and a short growing season, these land grants were normally not enough to sustain a herd of livestock.⁴³ Therefore, in addition to the use of his deeded or granted property, the custom⁴⁴ of the Spanish or Mexican citizen was to use the other unclaimed lands belonging to the government, in connection with his private deeded property, to sustain his livestock herd and his way of life.⁴⁵

The United States acquired the New Mexico Territories⁴⁶ as a result of the Mexican American War.⁴⁷ Following the outbreak of hostilities with Mexico, President Polk formulated a plan for the speedy military conquest and possession of these lands through Colonel Stephen Watts Kearny. Kearny, commander of the Western army, was ordered to seize Santa Fe and thereafter proceed to the coast to assist in the conquest of California.⁴⁸ Kearny was then instructed to establish temporary civil governments in New Mexico and California and to assure the local inhabitants that they would enjoy the same rights as the citizens of the other territories of the United States.⁴⁹ Furthermore, Kearny was ordered to ensure the local inhabitants that they would continue to enjoy all rights that they currently enjoyed pursuant to the laws, customs and usages of Spain and Mexico.⁵⁰

On August 18, 1846, the hostilities ended and the Mexican officials surrendered peacefully. Four (4) days later, Kearny issued a

42. *Id.* at 2.

43. *Id.*

44. The term "custom" is defined as action "by common consent and uniform practice has become the *law of the place*, or of the subject-matter to which it relates." BOUVIER'S LAW DICTIONARY 417 (1st ed. 1867). (emphasis added). *See also* United States v. Chaves, 159 U.S. 452, 457-59 (1895); Shufflebarger v. Commissioner, 24 T.C. 980, 981 n.1 (1955).

45. CATRON COUNTY, N.M., ORDINANCE 002-93, II, B, 2-2 to 2-6 (1993).

46. The California and New Mexico Territories include the present day states of California, New Mexico, Nevada and Utah, as well as parts of Arizona, Colorado and Wyoming. J.J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 468 (1973).

47. *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, February 2, 1848, U.S. - Mex., art. VIII, 9 Stat. 922 (1848) [hereinafter Guadalupe Hidalgo Treaty].

48. ANNIE HELOISE ABEL, WASHINGTON GOVERNMENT PRINTING OFFICE, THE OFFICIAL CORRESPONDENCE OF JAMES S. CALHOUN 1915.

49. Bowden, *supra* note 46, at 468.

50. Bowden, *supra* note 46, at 468.

proclamation, known as Kearny's Code, in which he promised to protect the "New Mexicans" in their "persons, lives and property."⁵¹ Kearny's Code remains part of the statutes of New Mexico today.⁵²

As it was hoped, the promises made through Kearny's Code, that the United States would protect the *property, rights of usage and customs* and insure prosperity to local inhabitants, gained the confidence of the people. This confidence was important because the United States traditionally used its citizenry to hold new territories from the invasion of foreign powers.⁵³ Additionally, since the United States did not have the military power to overcome a popular rebellion, the government wanted to ensure that local inhabitants would remain loyal to the United States.⁵⁴

As stated above, in 1848, the United States acquired the New Mexico Territories with the signing of the Guadalupe Hidalgo Treaty with New Mexico.⁵⁵ The Guadalupe Hidalgo Treaty made numerous promises to local inhabitants, including: (1) to honor the rights granted to them which were based in the Spanish and Mexican statutes and regulations; (2) the protection of their land grants; and (3) the protection of their rights which were created by the customs, usages and cultures of the area.⁵⁶

Once the New Mexico Territories were acquired, the development of livestock grazing under the American system paralleled, intertwined and emulated the Spanish and Mexican custom of using the unclaimed public domain.⁵⁷ Under the American system, although a settler could make a good living on 160 or 640 acres of homestead lands east of the 30th meridian, the same could not be said of the land in the New Mexico Territories. As the Spanish and Mexican citizens had discovered, the environment required that more land was necessary to sustain their livestock herds than could be granted under American law. As such, a parallel custom of using the "government's land" for livestock grazing, learned from the Spanish and Mexican settlers, became the American custom.

51. Bowden, *supra* note 46, at 468.

52. N.M. STAT. ANN. § 1-3-1 (Michie 1978).

53. James Polk, Third Annual Message, in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 532, 539-40 (James D. Richardson ed., 1908).

54. *Id.*

55. Guadalupe Hidalgo Treaty, *supra* note 47, at art. VII. The land acquired by the United States under the Guadalupe Hidalgo Treaty and the Gadson purchase was the second largest land acquisition made by the United States. Manning, *supra* note 40, at 2-3.

56. Guadalupe Hidalgo Treaty, *supra* note 46, at art. VII.

57. Manning, *supra* note 40, at 7.

Allowing livestock to graze on the unclaimed public domain became the norm.⁵⁸

Not only was the grazing of livestock on the unclaimed federal lands the custom in the Southwest, but the practice was encouraged by both the U.S. presidents and the Army who wished to quickly settle and occupy these lands. There were numerous reasons that American settlers and pioneers were desperately needed to quickly settle the New Mexico Territories. First, many American presidents were afraid that unless the New Mexico Territories were populated and settled by citizens loyal to the United States, a foreign power would take control of these lands by occupancy.⁵⁹ As explained by President Polk in 1847:

Mexico is too feeble a power to govern these Provinces, lying as they do at a distance of more than 1,000 miles from her capital, and if attempted to be retained by her they would constitute but for a short time even nominally a part of her dominions

The sagacity of powerful European nations has long since directed their attention to the commercial importance of that Province, and there can be little doubt that the moment the United States shall relinquish their present occupation of it and their claim to it as indemnity an effort would be made by some foreign power to possess it, either by conquest or by purchase. If no foreign government should acquire it in either of these modes, an independent revolutionary government would probably be established by the inhabitants and such foreigners as may remain in or remove to the country as soon as it shall be known that the United States have abandoned it. Such a government would be too feeble long to maintain its separate independent existence, and would finally become annexed to or be a dependent colony of some more powerful state . . . [N]o foreign power shall with our consent be permitted to plant or establish any new colony or dominion on any part of the North American continent

The Provinces of New Mexico and the Californias are contiguous to the territories of the United States, and if brought under the government of our laws their resources -

58. CATRON COUNTY, N.M., ORDINANCE 002-93, II, B (1993).

59. James K. Polk, Third Annual Message, *in supra* note 53, at 539-40.

mineral, agricultural, manufacturing, and commercial - would soon be developed.⁶⁰

In addition to the concern over the occupation by foreign powers, the Congress and the presidents also faced the problem of securing the land from hostile Indian tribes.⁶¹ When Millard Fillmore became President, he was faced with overcoming incursions of the Indian tribes. Of about 11,000 men of which the Army was composed, nearly 8,000 were employed in the defense of the newly acquired Territories.⁶² As stated by the President, "I am gratified to say that these efforts have been unusually successful. With the exception of some partial outbreaks in California and Oregon and occasional depredations on a portion of the Rio Grande, owing, it is believed, to the disturbed state of that border region, the inroads of the Indians have been effectually restrained."⁶³

President Fillmore was also concerned with losing the New Mexico Territories and continually reminded Congress that the Guadalupe Hidalgo Treaty required the United States to protect the Mexican frontier.⁶⁴ Although Fillmore was able to convince Congress to appropriate larger regimes of the cavalry to the Southwest, he also recognized that the best protection against hostile Indians was to increase permanent settlements.⁶⁵

A third reason that the government wanted to colonize the West as quickly as possible was for the protection of the general public traveling across the continent. As stated by President Polk:

For the protection of emigrants whilst on their way to Oregon against the attacks of the Indian tribes occupying the country through which they pass, I recommend that a suitable number of stockades and blockhouse forts be erected along the usual route between our frontier settlements on the Missouri and the Rocky Mountains, and that an adequate force of mounted riflemen be raised to guard and protect them on their journey.⁶⁶

60. *Id.*

61. Millard Fillmore, Third Annual Message, in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 163, 174 (James D. Richardson, ed. 1908).

62. *Id.*

63. *Id.*

64. Millard Fillmore, First Annual Message, in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 77, 87 (James D. Richardson, ed. 1908).

65. *Id.*

66. James K. Polk, First Annual Message, in 4 A COMPILATION OF THE

After recognizing the difficulties of life in the Southwest and the importance of keeping those lands for the United States, Congress also faced the problem of determining (1) how to protect the land granted to those already living in the Southwest and (2) how land would be transferred to those moving to the Southwest. With regard to those already occupying the land, Kearny's Code and the Guadalupe Hidalgo Treaty provided an answer. Because the Treaty of Guadalupe Hidalgo guaranteed to protect the customs, cultures and property rights of those already living in the New Mexico Territories,⁶⁷ the United States was bound to honor both private and community land grants as well as any customary land uses.⁶⁸

With regard to the people who were induced by the American government to go to the Southwest to make their fortune, Congress and the presidents promised "liberal grants" of land. As stated by President Taylor:

I also recommend . . . that provision be made for the establishment of offices of surveyor-general in New Mexico, California, and Oregon and for the surveying and bringing into market public lands in those Territories. Those lands, remote in position and difficult of access, ought to be disposed of on terms liberal to all, but especially favorable to the early emigrants.⁶⁹

In a separate address, President Polk stated:

That it will ultimately be wise and proper and make liberal grants of land to the patriotic pioneers who amidst privations and dangers lead the way through savage tribes inhabiting the vast wilderness intervening between our frontier settlements and Oregon, and who cultivate and are ever ready to defend the soil, I am fully satisfied. To doubt whether they will obtain such grants as soon as the convention between the United States and Great Britain shall have ceased to exist would be to doubt the justice of Congress⁷⁰

MESSAGES AND PAPERS OF THE PRESIDENTS, 385, 396 (James D. Richardson, ed. 1908).

67. Guadalupe Hidalgo Treaty, *supra* note 47, at art. VII.

68. See *United States v. Chaves*, 159 U.S. 452, 457-59 (1895).

69. Zachary Taylor, First Annual Message (Dec. 4, 1849), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 9, 20 (James D. Richardson ed., 1908) (emphasis added).

70. Polk, *supra* note 53, at 385.

Along that same line, President Taylor told Congress in 1849:

I also recommend that commissions be organized by Congress to examine and decide upon the validity of the present subsisting land titles in California and New Mexico, and that provision be made for the establishment of offices of surveyor-general in New Mexico, California, and Oregon and for the surveying and bringing into market public lands in those Territories. Those lands, remote in position and difficult of access, ought to be disposed of on terms liberal to all, but especially favorable to the early emigrants.⁷¹

President Fillmore also urged the Congress move swiftly to establish a commission to examine the validity of all the land claims in New Mexico and California, since he viewed the uncertainty of those claims as retarding the settlement of the country. In his annual address to Congress in 1851, he again stressed the need to encourage settlement of the new Territories:

The agricultural lands [of the newly acquired Territories] should, however, be surveyed and brought into market with as little delay as possible, that the titles may become settled and the inhabitants stimulated to make permanent improvements and enter on the ordinary pursuits of life.⁷²

Franklin Pierce followed President Fillmore to the White House. He also believed that agriculture development in the West and Southwest was of the utmost importance.⁷³ He urged that the lands be swiftly and inexpensively sold to those settlers who would develop the lands for agricultural purposes.⁷⁴

President Ulysses Grant continued to encourage the movement West with promises of the acquisition of property:

The opinion that the public lands should be regarded chiefly as a source of revenue is no longer maintained. The rapid settlement and successful cultivation of them are now justly considered of more importance to our well-being than is the

71. Zachory Taylor, *in supra* note 69, at 9, 20.

72. Millard Fillmore, Second Annual Message (Dec. 2, 1851), *in* 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS, 113, 127 (James D. Richardson ed., 1908).

73. Franklin Pierce, First Annual Message (Dec. 5, 1853), *in* 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 207, 220-22 (James D. Richardson ed., 1908).

74. *Id.*

fund which the sale of them would produce. The remarkable growth and prosperity of our new States and Territories attest the wisdom of the legislation which invites the tiller of the soil to secure a permanent home on terms within the reach of all. The pioneer who incurs the dangers and privations of a frontier life, and thus aids in laying the foundation of new commonwealths, renders a signal service to his country, and is entitled to its special favor and protection. These laws secure that object and largely promote the general welfare. They should therefore be cherished as a permanent feature of our land system.⁷⁵

While honest settlers and pioneers hastened West, turning barren wasteland into productive farms and ranches, other not so honest and productive citizens also ventured west to attempt to make a fast fortune. Such stories of the graft and corruption of land speculators who would move into an area to deplete the timber and other resources, then move on without purchasing or replenishing the land so that it would be suitable for use by permanent settlers, caused Congress, in 1891, to alter its policies in an attempt to ensure that the honest settler would continue to build the American West.⁷⁶ The first move by Congress to meet this goal was to repeal some of the acts allowing acquisition of unsurveyed land by individuals,⁷⁷ and second, to add an amendment to the appropriations bill allowing the President to set aside "natural forest lands" or forest reserves.

Even after the creation of the forest reserve system, the importance of the use of the unclaimed federal lands for livestock grazing was recognized and protected.⁷⁸ As stated in the official annual report of the Secretary of the Interior⁷⁹ in 1891, "[o]ne striking difficulty in establishing the [forest] reservations themselves may be found in the fact that much of that land that should be

75. Ulysses Grant, Second Annual Message, *in* 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 96, 110-11 (James D. Richardson ed., 1908).

76. WAYNE HAGE, STORM OVER RANGELANDS - PRIVATE RIGHTS IN FEDERAL LANDS 149, 155-56 (1989).

77. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1976).

78. DEPARTMENT OF AGRICULTURE, REPORT OF SECRETARY OF AGRICULTURE 226 (Washington D.C., Government Printing Office 1892) [hereinafter 1892 ANNUAL REPORT].

79. Originally the forest reserves fell under the jurisdiction of the U.S. Department of the Interior. Jurisdiction over the forest reserves was not transferred to the Department of Agriculture until 1905. HAGE, *supra* note 76, at 111.

reserved is as yet unsurveyed; other parts are subject to prior rights, or are expected to be included in railroad grants.⁸⁰

Although the creation of the forest reserves or National forests had a rocky start, livestock grazing was always part of the use of those lands.⁸¹ The federal government immediately began to adopt policies to protect the rights of livestock operators using the forest reserves. Those policies (1) encouraged the livestock owner or rancher to develop improvements to enhance the productivity of the forest reserves, (2) allowed title to remain with the federal government so that lands suitable for private settlement could be settled if such settlement did not interfere with the livestock owner's "grazing rights," (3) allowed the states to collect taxes from the use of the federal lands to be used for the development of water resources and (4) encouraged cooperative projects between the Department of the Interior and the individual livestock producer to better the land for livestock grazing.⁸²

The Secretary of the Interior also established rules and regulations to implement the will of Congress in creating the forest reserves and to protect the prior rights of those living within the borders of the reserves.⁸³ The first regulations provided for the continued use of the forest reserves and acknowledged the Spanish custom of allowing local ranchers to have first priority for use of the federal lands. As described by the Secretary in 1902:

Applicants for the grazing privilege are given *preference* in the following order:

- (a) Persons residing within the reserve.
- (b) Persons owning ranches within the reserve, but not residing thereon.
- (c) Persons living in the vicinity of the reserve owning what may be called neighboring stock.
- (d) Persons living at a distance from the reserve who have some *equitable* claim to use the reserve.

Class (b) under paragraph 16 should not be construed so as to allow large stock owners to obtain the *preference* therein given, by simply buying or obtaining small ranches inadequate for their business. This will not be tolerated.⁸⁴

80. 1892 ANNUAL REPORT, *supra* note 78, at 226.

81. HAGE, *supra* note 76, at 149, 155-56.

82. 1892 ANNUAL REPORT, *supra* note 78, at 224-25.

83. HAGE, *supra* note 76, at 155.

84. *Id.* (Emphasis added).

Although these regulations indicated a recognition of the prior rights on the federal lands, further progress in the recognition of these rights was made during the 1905 Denver meeting between the Forest Service and stockmen.⁸⁵ During this meeting, the following report was made:

The main points of agreement, worked out by the department and stock organizations, emphasized that those grazing in the forest ranges would be protected in their priority of use [by the Law of Occupancy and the Prior Appropriations Doctrine]: that reductions in the number of grazed stock would be imposed only after fair notice; that small owners would have preference over large; that only in rare circumstances would the department seek total exclusion of stock from the forest; and that the policy of use would be maintained wherever it was consistent with intelligent forest management. Finally, some attempt would be made to give stockmen a voice in making the rules and regulations for the management of stock on local ranges through the establishment of forest advisory boards.⁸⁶

In 1906, the above agreement was codified into regulation by the Forest Service in "The Use Book."⁸⁷ Those regulations *permanently* allocated grazing on the federal lands by recognition of the ranchers preference. The Use Book proclaimed:

Applicants for grazing permits will be given preference in the following order.

(a) Small near-by owners.

Persons living in or close to the reserve whose stock have regularly grazed upon the reserve range and who are dependent upon its use.

(b) All other regular occupants of the reserve range.

After class (a) applicants have been provided for, the larger near-by owners will be considered, but limited to a number which will not exclude regular occupants whose stock belong or are wintered at a greater

85. HAGE, *supra* note 76, at 161.

86. HAGE, *supra* note 76, at 161 (quoting Albert F. Potter, *Cooperation in Range Management*, AMERICAN NATIONAL CATTLEMAN'S ASSOCIATION PROCEEDINGS 1913, at 55.

87. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, THE USE BOOK: REGULATIONS AND INSTRUCTIONS FOR THE USE OF THE NATIONAL FOREST RESERVES 73-74 (1906).

distance from the reserve.

(c) Owners of transient stock.

The owners of stock which belong at a considerable distance from the reserve and have not regularly occupied the reserve range.

Priority in the occupancy and use of the range and the ownership of improved farming land in or near the reserves will be considered, and the preference will be given to those who have continuously used the range for the longest period.⁸⁸

Once a preference was granted, the stockman could then acquire a Forest Service term grazing permit pursuant to Forest Service regulations.⁸⁹

Livestock grazing system on the BLM lands developed in much the same manner, using the same principals as did grazing on Forest Service lands. The Taylor Grazing Act⁹⁰ was passed by Congress in 1934 at the urging of the Western stockman who wanted "local control" over the unclaimed federal lands.⁹¹ Pursuant to this Act, the Secretary of the Interior was directed to establish grazing districts consisting of lands suitable for livestock grazing on all unclaimed public lands.⁹² Once a district was established, the Secretary was authorized to:

[i]ssue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law *Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, . . .* Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion

88. *Id.*

89. See 36 C.F.R. § 222.3 (1993).

90. The Taylor Grazing Act created the Grazing Division within the Department of the Interior. The Grazing Division later became the Grazing Service which was later subsumed by the Bureau of Land Management. Malcolm Whatley, *Western Ranches, Midwestern Farms*, RANGE MAGAZINE Spring 1993, at 18.

91. HAGE, *supra* note 76, at 19.

92. 43 U.S.C. § 315.

of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use.⁹³

Based on this Act, the Secretary did, indeed recognize prior rights in granting a preference to use the BLM lands.⁹⁴

IV. CONCLUSION

There are numerous reasons that these authors believe that a grazing preference is a property right. First, it was by Spanish and Mexican custom that a person whose livestock was grazing on the unclaimed lands earned a preference, equitable estate or use in that land.⁹⁵ The extent or size of the equitable estate was determined by the amount of water owned. As recognized by the Federal Government in 1899:

It is recognized at last that where water sufficient for purposes of irrigation can not be had the land is useful only for grazing. It is a mistake for the Government to offer to citizens land of that character on condition that they will settle upon 160 acres of it and make a living. there can be but one of two results—either the settler must fail or he must become practically the tenant of the person or corporation furnishing water for his dry land.⁹⁶

Second, both Forest Service and BLM regulations, sanctioning livestock grazing on the federal lands, recognized and protected the grazer's right to use the federal lands.⁹⁷ As stated above, only those livestock operators who could prove a prior use of the unclaimed lands, who had adequate water rights or base property and who lived in or near the federal lands could acquire a preference. The fact that those preferences were originally taxed as private property further illustrates the federal government's original intent of protecting livestock grazing on the forest reserves.⁹⁸

Third, even today, the BLM, the Forest Service and even the U.S. Army recognize the monetary value of a grazing permit.⁹⁹ This is

93. *Id.* (emphasis added).

94. See F.R. Carpenter, *Establishing Management Under the Taylor Grazing Act*, RANGELANDS, June 1981 at 109, 112, 114.

95. See *supra* Part III.

96. SECRETARY OF AGRICULTURE, YEAR BOOK OF THE UNITED STATES, 603 (1899).

97. See *supra* Part III.

98. See *Sproul v. Gilbert*, 359 P.2d 543, 556-59 (Or. 1961).

99. SECRETARY OF THE AGRICULTURE & SECRETARY OF THE INTERIOR, STUDY

evidenced by the purchase of the Glenn livestock grazing allotment by the New Mexico Department of Game & Fish and the condemnation proceedings by the U.S. Army when it acquired the grazing preference as well as the non-federal lands within the McGregor Range in southern New Mexico. Note that the monetary value placed on the preference in the Glenn allotment was determined by the Forest Service.¹⁰⁰

Fourth, the Internal Revenue Service (IRS) taxes the preference as a property right. According to the IRS, that "indefinitely continuing right" is taxed upon the death of the owner as an additional portion of the *fair market value* of the private property. That value is based on the "animal unit" numbers or carrying capacity of the allotment. The IRS has determined this fair market value to be one third (1/3) of the value of the deeded lands.¹⁰¹

Fifth, preference rights on federal lands are also taxed by some of the western states. In California, grazing permits were recognized as equitable property rights in 1850 and are taxed accordingly.¹⁰²

Sixth, although the *Fuller* case is cited for the proposition that the federal government does not have to compensate the permittee for the taking of his preference, as was pointed out earlier, the issue of the grazing preference as a property right was not litigated in that case. Therefore the outcome may be different if the court were to hear a case in which the permittee actually lost his grazing preference and argued (1) that the tax court has ruled that the preference is a property right and may be taxed as such, (2) that the grazing preference is bought, sold, inherited and used as collateral,¹⁰³ (3) that the permittee owns private water and improvements on his federal land allotment which will have no use if the preference is taken,¹⁰⁴ (4) that the grazing preference is a prior

OF FEES FOR GRAZING LIVESTOCK ON FEDERAL LANDS C-31 (1977).

100. *Id.*

101. Letter from Internal Revenue Service to Dick Manning (July 31, 1990) (on file with author); letter from Internal Revenue Service to R.B. Tippeconnic of the U.S. Forest Service (August 25, 1988) (on file with author); letter from Internal Revenue Service to Robert Hadley (September 30, 1983) (on file with author).

102. *See Sproul*, 359 P.2d at 556-59.

103. Agricultural lenders, including banks backed by the Federal government, loan money on grazing preferences. The liens against such preferences are attached to the grazing permit in Forest Service and BLM files. *See Memorandum of Understanding between the Farm Credit Banks and the Forest Service*, U.S. Department of Agriculture, February 15, 1938, included as Exhibit 1, F.S.H. 5/86.

104. This is relevant because a government action that deprives a person of all use of his property may constitute a taking which requires compensation.

right protected by the Guadalupe Hidalgo Treaty, the Organic Administration Act, the Taylor Grazing Act and by doctrine of custom and usage as laid down by the Supreme Court and (5) that while a permit to build a house is not a property right, it is based on a property right; a permit to divert water is not a property right, it is based on an adjudicated water right; and likewise, while a grazing permit is not property although, it is based on an adjudicated prior right, a preference, which is a property right.

Federal lands ranching is a culture in crisis. If current trends continue, this way of life will be extinct within twenty (20) years. Ranchers do not need handouts or government support programs; all they need is recognition and protection of their federal land preferences. If federal agencies would pay "just compensation" when these rights are taken, the future of the industry would be more secure. However since the federal agencies have made it clear that they will not recognize any rights unless compelled by the court to do so, the courts must step in if this culture is to survive for the coming generations.

Florida Rock Industries v. United States, 8 Cl. Ct. 160, 179 (1985). In *Florida Rock Industries*, the Army Corps of Engineers denied a dredge and fill permit to the plaintiff. *Id.* at 163-64. The court ruled that the denial of the permit constituted a "taking" of plaintiff's property since the property could be put to no economically viable use without the permit. *Id.* at 165. The same was held true despite plaintiff's residual rights in the property and the property's residual market value. *Id.* Additionally, a case has been filed with the Federal Claims court in which a rancher is alleging that a Forest Service decision suspending his grazing preference and removing his livestock from his grazing allotment amounts to a taking of his private adjudicated water right. See *Hage v. United States*, No. 91-1470. (Cl. Ct. filed Sept. 26, 1991). The Court has not yet ruled in this matter.