

JOHN PAGE*

Grazing Rights and Public Lands in New Zealand and the Western United States: A Comparative Perspective

ABSTRACT

Private rights in public resources have a propensity to dominate resources for the private benefit, unless the property rights framework clearly demarcates and vigilantly enforces the private/public divide. This proposition is examined in the public lands of the western United States and New Zealand from the comparative perspective of private rights, as seen in the natural resource of pasturage, and of public rights, as seen in the natural resource of recreation. Grazing use rights in these two jurisdictions share more in common than a superficial examination may suggest. Yet, it is the potency of their relatively fewer differences that has fed the expansion of private rights at the expense of public rights in New Zealand's public lands.

I. INTRODUCTION

Private rights in public resources have a propensity to encroach into the public domain and privatize residual rights and interests lacking legal certainty or definition. The corollary of this tendency is the suppression of any latent public rights in the public resource. However, where the nature and extent of both private and public rights are clearly and transparently defined, there is less scope for the private rights to overreach and a greater scope for public rights to subsist and prosper.

This article shall examine grazing use rights in the western United States and New Zealand, as exemplars of private rights in public resources. In so doing, the relationship between private rights in the natural resource of pasturage and public rights in the natural resource of recreation shall be explored. It will posit that both grazing property rights regimes developed from analogous historical circumstances, where similarities are striking and differences can be explained. In New Zealand, the private right has expanded to fill the vacuum of legal uncer-

* John Page, B.A., L.L.B. (Hons), L.L.M. (University of Queensland), Grad Cert. Higher Ed. (UNE), Solicitor of the Supreme Courts of New South Wales and Queensland, is a legal academic teaching and researching in Property Law at the School of Law, University of New England, New South Wales, Australia. Prior to academe, the author was a practicing lawyer for 18 years. The author sincerely thanks Dr. Ann Brower of Lincoln University, New Zealand, for helpful comments on an earlier draft, the Western History Museum at Denver Public Library, the Rocky Mountain Mineral Law Foundation, and the Natural Resources Law Center at the University of Colorado, Boulder, Colo.

tainty, thereby casting doubt on public rights of access to public lands. In the western United States, however, the private and public rights coexist in a multiple use context.

In Part II, the generic nature of property rights and public resources will be canvassed. The primary statutes that established grazing use rights in the New Zealand Crown pastoral estate, and the federal lands of the western United States, will be analyzed in Parts III and IV respectively. Part V will identify the commonalities of the two property rights regimes, while Part VI will reflect on their differences. The contested consequences for both private grazing use rights and public recreational rights, where the line of demarcation is uncertain, are examined in Part VII. The implications for the law are noted in Part VIII.

The discrepancy in the two jurisdictions—between the (assumed) bundle of private rights in public grazing lands and the relative size and status of the commensurate public bundle—affirms the need for certainty and integrity in the private/public divide in publicly owned resources.

II. OF PRIVATE RIGHTS AND PUBLIC RESOURCES

In the later nineteenth century, the concept of property fragmented into a now widely accepted metaphor of the “bundle of sticks.” Property is thus conceptualized as a bundle of rights. Scholar Sally Fairfax describes this progression in the following terms:

The disjuncture between ownership and control can be attributed partially to the legal fragmentation of ownership rights in the nineteenth century, when property evolved from a unilateral and exclusive power over a material item to a more . . . divisible set of specific rights. Prior to the Civil War, property in the United States was generally viewed in terms discussed by John Locke. In Locke’s work, labor provides the justification for . . . a natural right that must be respected by legitimate government actions at all costs. . . . After the Civil War, America’s strong commitment to the Lockean view of ownership weakened, and our concept of property fragmented.¹

This fragmentation allowed society to treat private property rights as severable, such that the hallmark rights—the rights to possess, use and enjoy, alienate, control, exclude, and develop (amongst many others)—are distinct “sticks.” This notion of property as a divisible and relative

1. SALLY K. FAIRFAX ET AL., *BUYING NATURE: THE LIMITS OF LAND ACQUISITION AS A CONSERVATION STRATEGY, 1780–2004*, at 15–16 (2005).

bundle of rights has specific resonance in relation to private rights in public land.

First, it validates the notion of contemporaneous and multiple interest holders who may conceivably hold discrete rights simultaneously, rather than a single right-holder enjoying “despotic dominion” in the Blackstonian ideal.² Thus, separable rights may move amongst multiple owners in the same land. In the context of public lands, the federal government or Crown³ may vest private use rights for specific purposes and for certain durations, while retaining an allodial bundle of sticks as a collection of public property rights. Such public rights may vest in government agencies, privileged collective groups, or the unorganized public at large.⁴ The net effect is the creation of a mosaic of coexisting public and private rights.⁵

The second consequence of the bundle metaphor is that flexibility is introduced into the concept of property rights, such that an unbundling or reconstruction of the bundle by the subtraction or addition of property rights is theoretically feasible. This malleability is evidenced in two ways; first, by creating “off the rack” statutory rights⁶ designed to meet circumstantial exigencies and, secondly, by permitting or sanctioning the evolution of new property rights to add to an existing bundle of rights.⁷ The evolution of new property rights in public lands occurs “incrementally in response to the needs and pressures of the moment.”⁸ For private rights in public lands, the collection of sticks vested in a private holder may be a statutory invention, a novel combination of existing rights, a combination of evolved use rights, or a combination of both.

The third consequence, in terms of public lands, is the emphasis placed on property rights of a less-than fee-simple nature—in particular,

2. Blackstone described the right of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion to the right of any other individual in the universe.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK 2, at 1 (The Avalon Project, Yale Law School) (1765–1769) available at http://avalon.law.yale.edu/subject_menus/blackstone.asp#intro.

3. The term “Crown” is used in constitutional monarchies such as New Zealand and Australia to describe the state.

4. Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720–23 (1986).

5. FAIRFAX ET AL., *supra* note 1, at 5.

6. Carol M. Rose, *What Government Can Do for Property (and Vice Versa)*, in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 213 (Nicholas Mercurio & Warren J. Samuels eds., 1999).

7. ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 333–59 (1995).

8. *Id.* at 194.

use(r) rights⁹ that authorize private “stick holders” to exploit available public resources. Such “rights” embrace a plethora of nomenclature: lease, license, permit, concession, privilege, and so forth. Confronted by a diversity of labels, the nature of the private grazing rights shall be observed from a perspective of substance rather than form. Analyzing the property right from a substantive content approach embraces wider notions of “property” than the yes or no dichotomy of the “Is this a property right?” question.¹⁰ Unrestrained by common law distinctions¹¹ or conventional paradigms,¹² the private “right” can be seen for what it palpably confers.

“Public resources” have traditionally been construed through the prism of commodity or extractive use, including but not limited to pasturage, forestry, or minerals. However, the transformation¹³ in public lands away from commodity to non-commodity use, with the accompanying rise in recreation and preservation, has expanded the concept of public resources. A non-exhaustive list of potential public resources could include fish and wildlife, as well as the activities of hiking, camping, hunting, or white-water rafting. In the United States this evolution of the definition of public resources is a given. A leading text describes “recreation” as

a more variegated and amorphous resource than minerals or wildlife. It is a major use of all federal land systems and is the dominant use in several land classes. . . . Recreation is a multiple use under the MUSY Act [16 U.S.C. §§ 528–31] and the FLPMA [43 U.S.C. §§ 1701–82], and recreation as a resource use inspired the Land and Water Conservation Fund Act of 1965 [16 U.S.C. §§ 4601–04 to 4601–11]. Congress decreed that recreation (“enjoyment”) would be a coequal primary purpose of national parks [16 U.S.C. § 1]. . . .¹⁴

Access for recreation is a public right over most federal lands, including the public domain, and is legally articulated in terms of an “implied licence.”

9. Also known as usufructs; see BLACK’S LAW DICTIONARY 712 (8th ed. 2004).

10. Leigh Raymond calls this approach “more sophisticated” and “fruitful.” LEIGH RAYMOND, PRIVATE RIGHTS IN PUBLIC RESOURCES: EQUITY AND PROPERTY ALLOCATION IN MARKET-BASED ENVIRONMENTAL POLICY 15, 194 (2003) (arguing that the proper question should be, “what kind of property right is this?,” rather than “is this a property right?”).

11. See *Fatac Ltd (in liq.) v. Comm’r of Inland Revenue*, [2002] 3 N.Z.L.R. 648 (C.A.).

12. For example, the enquiry as to whether the taking is compensable.

13. Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140 (1999).

14. GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 6.29 (19th ed. 2009).

In New Zealand, the concept that non-commodity uses, such as recreation or preservation, are legitimate categories of “public resources” is less explicit—notwithstanding the growing momentum since the late 1970s advocating for conservation and recreation as an alternative use of Crown lands generally.¹⁵ Certain recreational organizations¹⁶ have pushed for reform and greater access rights to the Crown pastoral estate.¹⁷ These efforts are acknowledged through the statutory recognition of “public resources” in fish and game¹⁸ and the adoption of the term in the Walking Access Act 2008.¹⁹ Nonetheless, recreational access “privileges” remain at the discretion of the high country run-holder (New Zealand equivalent to the American rancher, this term describes the holder of the pastoral lease). This contrast between the implied recreational license in the United States and the weak public privilege in New Zealand, along with the related wider consequences for private and public rights in public lands, is revisited in Part VII.

III. NEW ZEALAND’S LAND ACT 1948

In examining private rights in public lands through the prism of grazing use, this article concentrates on original legislation rather than subsequent amendment or policy overlay. In this way, the intent behind the Act, and the historical context²⁰ in which such regimes were devised, can be interpreted without the burden of later gloss.

The principal legislation regulating the use of public lands for pasturage purposes in New Zealand has been the Land Act 1948.²¹ For the most part, the Land Act facilitated the disposal of unalienated Crown lands. However, ongoing retention by the Crown was deemed necessary in the case of the Crown pastoral estate²²—the high country of the South-

15. ANN BROWER, WHO OWNS THE HIGH COUNTRY? THE CONTROVERSIAL STORY OF TENURE REVIEW IN NEW ZEALAND 32–36 (2008).

16. For example, the Fish and Game Council of New Zealand or the Federated Mountain Clubs.

17. See generally PROCEEDINGS OF THE FMC BACKCOUNTRY RECREATION 2000 CONFERENCE (Grant Harper ed., 1992) (Sept. 27–29, 1991).

18. See, e.g., Wildlife Act 1953, 1953 S.N.Z. No. 31 (N.Z.); Conservation Act 1987, 1987 S.N.Z. No. 65 (N.Z.).

19. Walking Access Act 2008, 2008 S.N.Z. No. 101, § 3 (N.Z.).

20. See also John D.E. Page & Ann L. Brower, *Property Law in the South Island High Country—Part II*, 16 WAIKATO L. REV. (2008), for a discussion on the background to the 1948 Land Act.

21. See Land Act 1948, 1948 S.N.Z. No. 64, § 66 (N.Z.), although the principal operative provisions relating to Crown pastoral estates were repealed by the Crown Pastoral Lands Act 1998, 1998 S.N.Z. No. 65 (N.Z.).

22. Land Act 1948: New Zealand Parliamentary Debates, vol. 284, at 3993 (Nov. 24, 1948) (statement of the Honorable C.F. Skinner, Minister of Lands).

ern Alps, which comprises some 10 percent of the New Zealand land-mass.²³ This land was treated differently because of longstanding concerns as to soil erosion, land degradation, and the sustainability of the dominant sheep grazing industry. These concerns translated into a need for the Crown to retain control of such lands in the national interest. This policy of retention stood in stark contrast to the general tenor of the Act.²⁴

The condition of the high country had been of concern for decades before the Land Act. In 1920, the Sadd royal commission inquired into the condition of Southern Pastoral Lands. Its warrant *inter alia* demanded investigation into the “present tenures under which the said lands are held,” the “conditions now existing regarding the occupation, cultivation, and stocking[.]” and the “causes of the deterioration or depletion of grass lands.”²⁵ Its conclusions were guided by two overarching principles:

(1) That the tenure must in every detail be such that all rights of the tenant be respected compatible with the best interests of the State; and (2) that the tenure shall not only deal with the occupation of the Crown lands . . . but shall also be so constructed that the tenant will be encouraged in every way possible to improve his holding, and to bring it into as high a state of efficiency and productivity as is possible according to the present state of knowledge. In short our aim is to suggest what appears to us the very best both for the tenant and the State.²⁶

This commission identified the nexus between security of tenure and sustainable grazing operations. It also stressed the primacy of the Crown’s interest in these lands. Regrettably, its recommendations were ignored for 28 years as the condition of the pastoral lands deteriorated. A royal commission investigated the sheep industry in 1946, highlighting the concerns of high country run-holders and reignited impetus for legislative action. In hearings held on the South Island, the commission took evidence from run-holders and scientific experts that identified the problems besetting high country pastoralists,²⁷ and canvassed tenure re-

23. BROWER, *supra* note 15, at 8.

24. See R. J. Maclachlan, *Land Administration in New Zealand*, in *RURAL LAND ADMINISTRATION IN NEW ZEALAND* 15, 15–36 (J. Bruce Brown ed., 1966) (discussing policies governing land use from the 1890s to 1950s).

25. Comm’n Report to the General Assembly of New Zealand, C-15, at 2 (1920) (appointed to inquire into and report on Southern pastoral lands).

26. *Id.* at 8–9.

27. These concerns included security for run-holder improvements, soil erosion, the incidence of pests, the spread of weeds, indiscriminate burning of the tussock country,

forms that sought to eliminate chronic overstocking, soil erosion, and land degradation. Underscoring these high country deliberations was the need to ensure that the appropriate pastoral tenure was formulated; one that facilitated the sheep industry's viability and yet balanced the Crown's interest. While the final report post-dated the Land Act, this commission was seen as instrumental to the final tenure model adopted in section 66 of the Land Act 1948.²⁸ This section created new and distinctive tenures applicable to high country pastoral lands. Section 66 reads:

(1) A pastoral lease or pastoral occupation licence shall entitle the holder thereof to the exclusive right of pasturage over the land comprised in his lease or licence, but shall give him no right to the soil.

(2) Every pastoral lease or pastoral occupation licence may be subject to such restrictions as to the numbers of stock which may be carried on the land comprised therein as the Board in each case determines.

(3) A pastoral lease under this Act shall be a lease for a term of 33 years with a perpetual right of renewal for the same term, but with no right of acquiring the fee simple.²⁹

Section 2 defined a "lease" as "*a lease granted under this Act*,"³⁰ or any former Land Act, suggesting that the term had a statutory basis. Section 26 guaranteed unrestricted ingress and egress rights to the Crown.³¹

Protection of the Crown's interest was implemented by a dual strategy: land classification and restrictive controls. At the heart of the new tenure was the classification of the high country lands as "suitable or adaptable only for pastoral purposes."³² This classification acknowledged that its singular use was pastoral. In using the term "pastoral purposes," there was convincing evidence that the Act's framers understood

drought, and unrelated issues such as the scarcity of farm labor. Royal Comm'n on the Sheep Industry, Transcripts, Evidence Vol. IX, Ashburton to Mackenzie Country (Mar. 9-15, 1948).

28. Other influences included a growing national awareness of the perils of soil erosion. See *Soil Conservation and Rivers Act 1941, 1941 S.N.Z. No. 12 (N.Z.)*; see also the writings of K.B. Cumberland, including *High Country "Run": The Geography of Extensive Pastoralism in New Zealand*, 20 *ECON. GEOGRAPHY* 204 (1944). See generally HORACE BELSHAW, *LAND TENURE AND THE PROBLEM OF TENURIAL REFORM IN NEW ZEALAND* (1948).

29. Land Act 1948, 1948 S.N.Z. No. 64, § 66 (N.Z.) (§ 66 repealed by the Crown Pastoral Lands Act 1998, 1998 S.N.Z. No. 65 (N.Z.)).

30. *Id.* (emphasis added).

31. *Id.*

32. *Id.* § 51; see also H. Blake et al., *Pastoral High Country: Proposed Tenure Changes and the Public Interest, A Case Study*, in *LINCOLN PAPERS IN RESOURCE MANAGEMENT*, No. 11, at 45 (1983).

“pastoral purposes” to mean “the extensive pastoralism for which such land was . . . used in a largely undeveloped state.”³³ Crown control reflected a prevailing policy of concern for soil erosion, and “the Act provided for . . . special . . . tenures with perpetual right to renewal but no right to freehold.”³⁴ This removal of the right to freehold was explained by Lands Minister F.C. Skinner in the following terms: “If there is any doubt as to the suitability of the land for permanent alienation, obviously the Crown must retain some control over it. That is why there is no right of purchase in these hill country leases called pastoral licenses.”³⁵

Soil conservation was not a high country issue alone. A national failure to address endemic problems in the “back country” had the potential to adversely impact productive lands downstream.³⁶ Other control mechanisms included restrictions on burning and cultivation without prior consent, implied obligations to practice “good husbandry,”³⁷ and, most importantly, “no right to the soil.”³⁸

The ongoing viability of the sheep grazing industry was primarily addressed by a 33-year term of exclusive pasturage and permanent rights of renewal. It was reinforced by a low grazing-fee structure. This exceedingly powerful right guaranteed fixity of tenure and the creation of a tenorial climate conducive to further capital investment in the runs, which would obviate the lack of security that had led to past overstocking and land degradation. Yet, despite its language of exclusivity and perpetuity, the right was also very narrow. Parliamentary debates preceding the bill’s passage affirmed the qualified nature of the tenure. While praising incentives for fixity and security, speakers talked equally of the Crown’s vital interest in these lands:

33. The Comm. of Inquiry into Crown Pastoral Leases and Leases in Perpetuity, Report, Final Report (1982) § [2.7] (1982) (N.Z.).

34. R.J. MacLachlan, *Land Administration in New Zealand*, in *RURAL LAND ADMINISTRATION IN NEW ZEALAND* 15, 31 (J.B. Brown ed., 1966).

35. Land Act 1948: New Zealand Parliamentary Debates, *supra* note 22.

36. “It is only in recent years . . . that we have come to realize the dangers in this country of soil erosion, and the dangers of what good land we have being devastated because of our failure to take proper care of all the back country . . . [t]he only exception that occurs in this Bill to the right of freeholding . . . is land which belongs to that hill country . . . , [w]hich is important in itself, but also for the sake of . . . the . . . areas of front land and good land from which the greater part of our production comes.” *Id.* at 4071 (statement of Mr. Wilson). Such concern is mirrored in the Soil Conservation and Rivers Control Act 1941, 1941 S.N.Z. No. 12 (N.Z.).

37. Land Act 1948, 1948 S.N.Z. No. 64, §99(a) (N.Z.).

38. See also *Pastoral High Country Proposed Tenure Changes and the Public Interest: A Case Study*, in *LINCOLN PAPERS IN RESOURCE MANAGEMENT*, No. 11 (1983) (discussing the restrictive nature of the tenure); Comm. of Inquiry, Crown Pastoral Leases and Leases in Perpetuity, Report of the Comm. of Inquiry into Crown Pastoral Leases and Leases in Perpetuity, Final Report (1982) § [2.5] (1982) (N.Z.).

[I]t is a wise provision, I think, to keep the high country land in the South Island under lease, but there are too many restrictions applying to those leases. The lessee has a right only to the pasturage, but no right to the soil. He has to get the consent of the Commissioner of Crown Lands before he can carry out any cultivation.³⁹

I want to deal with tenures, in particular Members of the Opposition have got on their high horse about the absence of the freehold tenure. . . . I see no reason why the people as a whole should provide an asset to a particular individual, and allow him from time to time to capitalize on a matter towards which he has made no contribution. . . . I believe that the unimproved value of land is that community-created asset. The rights of the individual are confined to the improvements that he places on the land.⁴⁰

In sum, the Land Act vested a constrained bundle of rights in run-holders, giving exclusive pasturage but no right to the soil and no right to freehold. By definition and exclusion, these rights remained with the Crown. Powerful rights to pasturage—perpetually renewable and monopolistic—delivered the security and fixity of tenure, which is regarded as critical for a sustainable sheep grazing industry. Yet the use of such lands was restricted to pastoral purposes only; there was not a right to either cultivation or activities involving the disturbance of the soil. This statutory tenure was a response to the exigencies of the high country in the late 1940s, and the neglect of the decades before. The Act also marked a radical departure from previous government policy that encouraged the disposal of Crown lands. These public lands were to be henceforth retained; their optimal grazing utility validated by perpetual private use rights. In all other respects, however, the high country was to be restrictively controlled by the Crown in the national interest.

IV. THE TAYLOR GRAZING ACT OF 1934

Fourteen years earlier, the passage of the Taylor Grazing Act marked the end of two eras for public domain lands in the western United States. The first was the era of unregulated use of the public domain as a “free for all” commons,⁴¹ while the second era was a shift to-

39. Land Act 1948, New Zealand Parliamentary Debates, *supra* note 22, at 4054–55 (statements by Mr. Kidd).

40. *Id.* at 4009 (statements by Mr. Baxter).

41. Congressman Edward T. Taylor described range conditions as “a free-for-all and general grab-and-hold-if-you-can policy.” KARL HESS, VISIONS UPON THE LAND, MAN AND NATURE ON THE WESTERN RANGE 59 (1992).

ward federal retention—rather than disposal of public lands—by the reversal of homestead entry onto the public domain.⁴²

The public domain lands were the leftovers⁴³ overlooked by homesteaders⁴⁴ because of their climatic harshness, aridity, or high altitude. Their value lay not in fee simple ownership but rather as seasonal grazing lands that not only supplemented but were integral to adjacent private ranching operations.⁴⁵ Theoretically, the public domain was available to all comers as an unregulated commons. While in practice some of the lands were “subdivided” by a combination of de facto factors (illegal fencing,⁴⁶ restrictions on water access, intimidation, violence, or tacit agreement of established grazing interests⁴⁷), the official laissez-faire policy encouraged over-exploitation, unsustainable grazing practices, and subsequent soil erosion and depletion of native grasses.

[T]he slopes were seamed with deep erosion gullies, and the water conserving power of the drainage basins became seriously impaired. Flocks passed each other on the trails, one rushing in to secure what the other had abandoned as worthless . . . the ranges were occupied before the snow had left them. Transient sheepmen roamed the country robbing the stockmen of forage that was justly theirs.⁴⁸

42. Legislators appeared to keep their options open with the caveat “pending its final disposal” in the Act. Taylor Grazing Act of 1934, 43 U.S.C. § 315. The possibility of disposal was not definitively ruled out until the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–82 (2006). Some texts call the insertion of these words in 1934 inexplicable. *See, e.g.,* WESLEY CALEF, *PRIVATE GRAZING AND PUBLIC LANDS* 70 (1960).

43. Farrington R. Carpenter, *The Law of the Range*, Paper delivered at the Colo. State Bar Ass’n Meeting, Colorado Springs, Colo. (Sept. 28, 1940) (on file with the Western History Museum, Denver Public Library, Denver, Colo.).

44. The Homestead Act of 1862 permitted U.S. citizens (and prospective citizens) to settle 160 acres of public land, and through five years of settlement, labor, and improvement, gain private title to that land. The maximum acreage was later increased to 320 and 640 acres respectively, but the areas still remained unviable. The Homestead Act of 1862, ch. 75, 12 Stat. 392 (expired in 1976 in all states but Alaska; expired in Alaska in 1986).

45. PHILLIP O. FOSS, *POLITICS AND GRASS* 197 (1960).

46. The earliest form of federal regulation was a proscription on the fencing of the public domain. *See* 43 U.S.C. § 315.

47. The public domain lands were fiercely contested between cattlemen, sheepmen, and homesteaders. *Id.*

48. WILLIAM D. ROWLEY, *U.S. FOREST SERVICE GRAZING AND RANGELANDS* 20–21 (1985) (quoting Albert F. Potter). The grazing lands were stocked beyond their capacity and vegetation was foraged by animals before it had the opportunity to reproduce. As the valuable forage plants gave way to worthless weeds, the productive capacity of the lands rapidly diminished. *Id.*

The parlous condition of the public domain had concerned federal legislators for decades prior to the grazing regulation enacted by the Taylor Grazing Act of 1934.

The Taylor Grazing Act was not hastily conceived legislation: bills for regulating and leasing the public domain had been under consideration by the Public Lands Committee . . . for more than 20 years before its passage. What finally forced its enactment was the condition of the range itself . . . the range was pushed ever backwards. . . .⁴⁹

Although there was not a universal consensus, cattlemen such as Farrington Carpenter—the first director of the Grazing Service⁵⁰—were fearful for their industry and recognized the need for federal control of the range.⁵¹ Carpenter testified at hearings before the House of Representative's Committee on the Public Lands in 1934 as follows:

We believe that the Federal control over this area should be extended. That is the only chance against being completely wiped out of existence as far as the cow industry is concerned, and to have this range controlled by the federal authorities. . . . [Y]our public domain is being grazed by these [sheep] herds, and it is being turned into a dust pan.⁵²

The Taylor Act's preamble articulated its threefold objective: "(1) to stop injury to the public grazing lands by preventing over-grazing and soil deterioration; (2) to provide for their orderly use, improvement, and development; and (3) to stabilize the livestock industry dependent on the public range."⁵³ Thus, the Taylor Act had multiple agendas: conserving public grazing lands,⁵⁴ committing to long-term⁵⁵ federal man-

49. CARPENTER, *supra* note 43.

50. Later the Bureau of Land Management (BLM).

51. Early conferences in July–September 1934 were heated, "Ranchers . . . issued beligerent statements that they would shoot anyone trespassing on their range." CALEF, *supra* note 42, at 57.

52. *To Provide for the Orderly Use, Improvement, and Development of the Public Range: Hearings on H.R. 2835 and H.R. 6462 Before the H. Comm. on the Public Lands, 73rd Cong. 143–44 (1934) (statement of Farrington Carpenter).*

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

54. *Id.*; see also Letter from Harold Ickes, Secretary of the Interior, to Farrington Carpenter, Dir. of Grazing (Nov. 8, 1938) (on file with the Western History Museum, Denver Public Library, Denver, Colo.).

55. However, the act was dogged by the late and relatively unexplained insertion of the words "pending its final disposal" in section 1. See 43 U.S.C. § 315. See also SAMUEL T. DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY* 161–63 (2d ed., 1980).

agement and improvement of public lands, and sustaining the dominant livestock grazing industry.

The Taylor Act was relatively brief in content. Sections 1 and 3 were its core. Section 1 allowed for the establishment of internal "grazing districts" for those public domain lands "chiefly valuable" for grazing purposes.⁵⁶ This classification of lands as predominantly pastoral was fundamental in terms of the Act's ambit.⁵⁷ Section 3 authorized the granting of grazing permits within such districts to select users, with a prioritization dependent upon ownership of adjacent commensurate property or water and past range usage.⁵⁸ Terms were not to exceed 10 years, "subject to the preference right of the permittees to renewal. . . ."⁵⁹ Section 3 concluded with the statement that, "grazing privileges . . . shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands."⁶⁰

Section 4 authorized permittee improvements, and guaranteed their security by requiring incoming permittees to pay their reasonable value to any outgoing permittee.⁶¹ Section 6 preserved "ingress or egress over the public lands . . . for all proper and lawful purposes,"⁶² while section 1 preserved hunting and fishing rights.

Implementation of the new grazing rights regime was a daunting task for the Grazing Service and its fledgling staff.⁶³ One of the first obstacles was the subdivision of a largely unmapped public domain into geographically coherent grazing districts. "The crucial task in implementing the . . . [A]ct was the internal organization of the grazing districts . . . and the exclusion and removal of unlicensed users from the federal lands."⁶⁴ Another challenge was securing the cooperation of existing range users, some of whom did not necessarily welcome regulation of "their grazing rights" and the charging of a fee (albeit far below market rates) for what had previously been free forage. Nonetheless, the Taylor Grazing Act was the first "widespread or coordinated effort to

56. 43 U.S.C. § 315.

57. Section 7 of the Act allowed the subsequent re-classification of lands within a grazing district more valuable for the production of agricultural crops, and to re-open them for entry and disposition. *Id.* § 315(f).

58. *Id.* § 315(b).

59. *Id.*

60. *Id.*

61. *Id.* § 315(c).

62. *Id.* § 315(e).

63. See G. CHAMBERS, "Ferry Carpenter" in the Taylor Grazing Act 1934-1984: 50 Years of Progress 7-8 (1984); see also CHARLES MOORE ET AL., EARLY HISTORY OF THE TAYLOR GRAZING ACT (1981).

64. CALEF, *supra* note 42, at 60.

manage, conserve, or improve the public domain lands.”⁶⁵ The Act represented “an unmistakable commitment of 142 million acres to a single use, [and] a potential and urgently needed assertion of public regulation.”⁶⁶

V. COMMON DENOMINATORS

Both the Land Act and the Taylor Grazing Act are products of the first half of the twentieth century. The chronic problems besetting like lands, and the tenurial solutions crafted to sustain dominant grazing industries and protect their environments, reflect similar circumstances and rationales. While the commonalities are numerous, the differences have the most telling consequences and are the subject of the concluding Part VII.

In the high country of New Zealand’s Southern Alps and on the public domain lands in the western United States, concerns as to land degradation, soil erosion, overstocking, the impact on riparian systems, and the sustainability of the livestock industry were pressing and dominant themes. Legislative inaction for decades had failed to tackle the problems and remediate the conditions of the range/high country. Moreover, such endemic issues had been long-identified officially and anecdotally. Both Acts were overdue, and their implementation was seen as urgent. The answer to the endemic problems of the high country in both cases was the manifestation of control at the national level, and in the national interest.

The lands themselves bore many similarities. They were historically viewed as either “waste lands”⁶⁷ or “left-over lands,”⁶⁸ where governments had promoted settlement⁶⁹ in pursuit of Manifest Destiny by offering generous freeholding or homesteading arrangements. However, their immediate value lay not in ownership, since settlers had largely ignored the freeholding opportunities open to them.⁷⁰ The lands were

65. DANA & FAIRFAX, *supra* note 55, at 144.

66. *Id.* at 162.

67. For example, unalienated Crown lands in Otago Province were administered by the Waste Lands Board pursuant to the Waste Lands Act 1866. Waste Lands Act, 1866, No. 18 (Austl.).

68. DYAN ZAWLOWSKY ET AL., *THESE AMERICAN LANDS: PARKS WILDERNESS AND THE PUBLIC LANDS* 107 (1994).

69. Daniel Webster in 1825 described the public domain as follows: “I could never think the national domain is to be regarded as any great source of revenue. The great object . . . with respect to these lands is . . . getting them settled.” C.E. WINTER, *FOUR HUNDRED MILLION ACRES: THE PUBLIC LANDS AND RESOURCES* 111 (1932).

70. “Historically, the public lands not sold or homesteaded were the lands ‘nobody wanted.’” MICHAEL DOMBECK ET AL., *FROM CONQUEST TO CONSERVATION: OUR PUBLIC LANDS LEGACY* 2 (2003).

widely viewed as valueless except for pasturage or grazing purposes.⁷¹ Valuing the lands as a pastoral resource⁷² rather than their potential as fee-simple title, the lands remained in the public domain. Along with such historic similarity, they also shared a common symbolism: the nation-building imperative that required the settlement and physical improvement of these vast, empty hinterlands to further national progress.

The Acts represented a marked shift in government policy and national priorities toward public lands. Jettisoning Lockean notions of “sweat equity,” the new schemes made public retention the long-term focus. In retaining these public lands, the governments incorporated management devices which (at their outset at least) sought to protect the public interest, while bolstering the viability of private grazing operations. The shift to retention was matched by a policy strongly imbued with progressive ideals of scientific management.⁷³ This notion was used by government experts in the employ of both the Commissioner of Crown Lands and the Grazing Service to discretionally decide which activities were permissible on the public lands, and which were not. Outside core pasturage activities, government experts were mandated to know best.⁷⁴

In both jurisdictions, established grazing interests actively sought intervention at the highest government level. Appreciating the dire state of the pastoral lands and the ramifications this had for their livelihoods, leading graziers wanted relief and security for their industry. Farrington Carpenter told the House Committee in 1934: “What form of administration [the proposed legislative regulation] takes, so long as it improves our condition, it is immaterial to us.”⁷⁵ Similar sentiments were ex-

71. D.H. Hughes of the Colorado Woolgrower’s Association, speaking to the House Commission on Public Lands in 1934, testified that “[o]ur experience teaches us that the main value of that land, or probably the only value of large parts of it, is the grazing value.” Foss, *supra* note 45, at 56. “[T]he western range[s] . . . are ordinarily of value for pasturage only.” *Id.* at 198. “In and of themselves they are almost valueless. But when considered . . . in connection . . . to private lands and water that are largely dependent upon them, they are indispensable . . . [T]hey have as yet an undetermined watershed value.” Theodore A. Walters, First Assistant, U.S. Secretary of the Interior, *The Use and Abuse of the Public Range*, Speech to the 40th Annual Convention of the American National Livestock Ass’n (Jan. 13, 1937).

72. Also, on occasion, their sub-surface mineral wealth.

73. See BROWER, *supra* note 15, at 55 (describing the “progressive era principles of scientific management [as giving] birth to the myths of apolitical administration and pesky politics”). In the United States, there is vast literature on this subject. For example, see NELSON, *supra* note 7, for a critical view of the subject; see also HESS, *supra* note 41, at 76, 80.

74. See, e.g., Land Act 1948, 1948 S.N.Z. No. 64, § 108 (N.Z.). See also Taylor Grazing Act, 43 U.S.C. § 315(b) (2000).

75. Carpenter, *supra* note 52.

pressed in hearings before the Sheep Industry Royal Commission in 1946, where a leading South Island run-holder told the Chair: "We must get security . . . before good husbandry can be practiced and confidence restored to high-country farming. . . . Unless we can have some security for our improvements, by a valuation by arbitration on termination, then no-one at present is going to put any improvements on the back country."⁷⁶ Responding to these common pressures, the statutory tenures created by section 66 of the Land Act and section 3 of the Taylor Grazing Act were widely perceived as new and distinctive. Moreover, they had been drafted to meet contemporary exigencies—the previously discussed problems of the range and high country—and they shared dual emphases: the facilitation of optimal conditions for sustainable grazing, amidst a restrictive framework of pasturage rights seeking to preserve public rights and/or interests.

The key to the former was achieving industry stability. Fixity of tenure, security for pastoral improvements, and low grazing fees were critical factors. These enabled long-term business planning and the requisite comfort for lenders to provide working capital. Fixity reached its high water mark in the New Zealand legislation, with terms of 33 years that were perpetually renewable.⁷⁷ Under the Taylor Act, the term was 10 years "subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior."⁷⁸ In practice, this provision of the Taylor Act was translated into a virtually automatic right of renewal to existing permittees provided there was no default. A late amendment to section 3 eliminated any real discretion by stating that a permittee, not in breach of any rules or regulations, cannot be denied renewal where "such denial will impair the value of the grazing unit . . . when such unit is pledged as security for any bona fide loan."⁷⁹ Hence, a permit encumbered by any loan, however small, obviated the scope for bureaucratic discretion. Grazing Service director Carpenter recognized in 1934 that as "90 [percent] of the applicants for permits have bona fide loans . . . any and all permits issued will become irrevocable for all practical purposes."⁸⁰ The Office of the Solicitor in the Interior Department concurred, advising that grazing permits issued under section 3

76. Royal Comm'n on the Sheep Industry, Transcripts, Evidence Vol. IX, Ashburton to Mackenzie Country (Mar. 9–15, 1948).

77. Land Act 1948, 1948, S.N.Z. No. 64, § 66(3) (1948) (N.Z.). Licensing was ultimately subject to Crown forfeiture under section 146(2) of the 1948 Land Act. *Id.* §146(2).

78. 43 U.S.C. § 315.

79. *Id.* § 315(b).

80. Letter from Farrington Carpenter, Dir. of Grazing, to Nathan Margold, Solicitor, Dep't of the Interior (Sept. 12, 1934) (on file with the Western History Museum, Denver Public Library, Denver, Colo.).

contain “nonrevocable conditions set out in the act.”⁸¹ This amounted to a “back door” perpetual renewal for compliant permittees.⁸²

In both jurisdictions, grazing fees were set at nominal or low values that were far less than the prevailing private market rate for pasturage. Historically, this acknowledged the near insolvency of many graziers in the 1930s and 1940s, and a reluctance to add to their struggling operating costs. In the United States, “[t]he very low first fee (5 cents per a.u.m. [animal unit month]) was designed partly to enlist rancher co-operation and acquiescence in Taylor Grazing Act administration.”⁸³

Offsetting an entrenchment of grazing viability, the restrictive use framework left a comparatively large bundle of property rights in the hands of the Crown or federal government. Logistically, this relied on a rigid land classification system that excised pastoral lands from the rest of the public land estate and deemed their most productive use as “chiefly . . . grazing” or “pastoral.”⁸⁴ This institutionalization of pasturage as the most productive use set exceedingly narrow statutory parameters for the available private uses of these lands. Taylor grazing lands could only be utilized by permittees for grazing and raising forage crops, while exceptional private uses other than grazing were of a limited and domestic nature only.⁸⁵ Importantly, the production of “agricultural crops,” instead of “native grasses and forage plants,” required reclassification of the land and its removal from “grazing district” status.⁸⁶ Under the Land Act, activities involving disturbance of the soil required the prior consent of the Commissioner of Crown Lands. Such activities included cultivation, cropping, land clearance, and the burning of tussock.⁸⁷ In sum, any activity that was not incidental to the core use right of pasturage was precluded and required the run-holder to seek permission—permission which could be refused without giving reasons or requiring any degree of reasonableness. The restrictive nature of the tenure

81. Letter from Nathan Margold, Solicitor, U.S. Dep’t of the Interior, to Farrington Carpenter, Dir. of Grazing (Sept. 21, 1934) (on file with the Western History Museum, Denver Public Library, Denver, Colo.).

82. See generally CALEF, *supra* note 42, at 70.

83. *Id.* at 732.

84. Land Act 1948, 1948 S.N.Z. No. 64, § 51(d) (N.Z.); and the Taylor Grazing Act, 43 U.S.C. § 315 (2000).

85. 43 U.S.C. § 315(d) (exempting the use of “timber, stone, gravel, clay, coal and other deposits . . . for firewood, fencing, buildings, mining, prospecting, and domestic purposes” from regulation under the Act).

86. *Id.* § 315(f).

87. Land Act 1948, §§ 106 & 108.

was also evident in its limited alienability. Any dealing with either pastoral tenure required prior consent.⁸⁸

In the United States, the narrowness of the use permit was clearly expressed as “not creat[ing] any right, title, interest, or estate in or to the lands.”⁸⁹ In New Zealand, it was articulated as conferring “no right to the soil.”⁹⁰ In both jurisdictions the right to freehold or seek homestead entry was precluded. These restrictions allowed the Crown or federal government to retain overarching control. Hence, stocking levels could be set; harmful activities restricted; and soil erosion, flooding, and land degradation mitigated.

Parallels between the two grazing regimes were more than coincidental because lands with analogous histories under similar adverse conditions require similar regulatory strategies. Regulation of these like lands served two objectives: stabilization of the dominant grazing industry⁹¹ and amelioration of the excesses of environmental degradation.⁹² Intervention involved rigid land use classification and strict controls on forage users, yet generous and secure terms for run-holders or ranchers.⁹³ Public lands under both regimes were to be retained, not disposed, and managed in accord with progressive principles of scientific management, while the implementation of these goals was to be achieved by a pastoral tenure crafted by legislators to address the range and high country exigencies of the 1930s and 1940s.

VI. POINTS OF DIFFERENTIATION

The major difference between the two grazing rights regimes is the relative clarity of the private/public divide in the Taylor Grazing Act, and its relative opaqueness in the Land Act. That this line of demar-

88. *See id.* § 89; 43 U.S.C. § 315(b).

89. Taylor Grazing Act, 48 Stat. 1268, § 3 (June 28, 1934) (current version at 43 U.S.C. § 315(b)).

90. Land Act 1948, § 66(1).

91. Stabilization has also meant entrenchment of the grazing status quo. *See* MARION CLAWSON, *THE FEDERAL LANDS REVISITED* 65 (1983) (“Today there is no place for the newcomer on the federal range; someone must buy an established ranch and take over its grazing . . . [T]o establish a wholly new grazing use is virtually impossible.”).

92. “The Taylor Act was set up as a land stabilization act and . . . to stabilize the livestock industry.” Farrington Carpenter, Dir. of Grazing, Speech to the Second Annual District Advisor’s Conf., Salt Lake City, Utah (Dec. 9–11, 1936) (on file with the Western History Museum, Denver Public Library, Denver, Colo.).

93. These essential elements necessary for successful grazing systems have been described elsewhere as including “clear rules for resource use, initial security of tenure, and recognition of environmental limits.” *See* William Riebsame, *Creating a New Political Ecology on Public Rangelands*, Paper delivered at the Western Lands Conf., Nat. Resources Law Center, Univ. of Colo., Boulder, Colo. (Sept. 28–30, 1994).

cation is patent—or, perhaps, less latent—in one jurisdiction than the other is not only due to the choice of terminology, but because the distinction between public and private property was more fundamental to grazing in the American public domain.⁹⁴ In the Land Act, private rights were conflated, public rights were absent, and the divide between private and public property in the New Zealand high country was more nuanced.

In the public land states of the western United States, it is and was obvious where private lands end and public lands commenced. For the traveler they are clearly signposted. For the grazier they were those rangelands where livestock must graze to fatten, or indeed survive. Federal grazing lands were integral to grazing operations that were restricted to otherwise unviable and small homestead parcels. Linked from the outset to adjacent commensurate private holdings, the distinction between private land and the public domain was unambiguous to graziers. Permits were defined as privileges over the public lands and had operational consequence in terms of the seasonal grazing practice. There was also a financial consequence; permits were transferred upon the sale of the private homestead and added inherent value to the ranch's collective worth. The private/public divide was tangible and external. While such externality did not avoid a significant debate as to whether the Taylor grazing right was a thing of property, it did not diminish the inherently public nature of the public domain. As a result, any property rights debate of the Taylor Act stayed within the confines of the private right.

In the New Zealand high country, the distinction between public and private was and remains more sophisticated, as it is more theoretical than practical. Grazing operations were run exclusively on the Crown pastoral estate, with no legal nexus or trigger between an adjacent private land holding and access to public lands. The public/private divide manifested itself within the metaphor of property as a bundle of rights; private pasturage being a stick in the run-holder's bundle, with the public sticks excluding all other private rights but pasturage. Being intangible and metaphorically internal, the divide's whereabouts could not be signposted and such internality has proved fertile ground for the privatization of the Crown's public lands.

The language of the two primary statutes analogously reflected these differences in the emphasis and quality of the public/private divide. The Taylor Grazing Act was explicit in stipulating that the grazing

94. Marion Clawson observed that the "relationship between private and federal lands is closer for grazing than for any other major land use, largely because of the seasonal nature of that use. . . ." CLAWSON, *supra* note 91, at 65.

privilege conferred no interest in the land to the “permittee.”⁹⁵ It was also explicit in reserving rights of ingress and egress, and vocalized such public rights as hunting and fishing.⁹⁶

By contrast the Land Act adopted the phrase “no right to the soil,” a translucent expression that hinted not only of “no estate or interest in the land,”⁹⁷ but of a prohibition on activities that disturbed the soil. While permittees under the Taylor Grazing Act enjoyed exclusivity of use—an early policy objective of the Grazing Service attempting to end illegal cattle and sheep trespassing within the grazing districts⁹⁸—rights of pasturage were described transparently in section 66 of the Land Act also as “exclusive.” The Land Act, however, did not term run-holders “permittees” and preferred the colonial-era expression “pastoral lessee”; an expression carrying forward the inappropriate common law implication of exclusivity of possession.⁹⁹ The use of pastoral lessee denied the run-holder any interest in the land and became a doctrinal impediment to any putative leasehold interest at common law. Yet the implication was inappropriate because, *in substance*, the run-holder enjoyed an exclusivity of pastoral use, even though there was no right to the soil.¹⁰⁰ Moreover, there was no mention of public access rights such as hunting and

95. Taylor Grazing Act, 43 U.S.C. § 315 (2000). The term “permittee” is used in the Taylor Grazing Act of 1934, but it was not specifically defined for the purposes of the Act. The term refers to a person who is the recipient or grantee of a permit.

96. *Id.*

97. Stuart Banner construes this expression to mean having no proprietary interest in the land. See STUART BANNER, *POSSESSING THE PACIFIC* 36 (2007).

98. Charles Moore et al., *Early History of the Taylor Grazing Act*, RANGE BIOME: A PUBLIC RANGELAND ALMANAC (July 23, 1981), available at <http://www.rangebiome.org/genesis/colohist.html>.

99. The Australian High Court held that pastoral leases in Australia are exclusively statutory creatures, long removed from their common law antecedence. *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1. This view is more than a century old. See AUGUSTUS B. ABRAHAM ET AL., *OPINIONS OF COUNSEL AS TO THE RIGHTS OF PASTORAL TENANTS OF THE CROWN* 25 (1856). For a New Zealand perspective, see *The N.Z. Fish and Game Council v. Her Majesty’s Attorney-General in respect of Comm’r of Crown Lands*, [2009] CIV 2008-485-2020 (H.C.). See generally BROWER, *supra* note 15; John D.E. Page & Ann L. Brower, *Property Law in the South Island High Country: Statutory Not Common Law Leases* 15 WAIKATO L. REV. 48 (2007).

100. Land Act 1948, 1948 S.N.Z. No. 64, § 66(1) (N.Z.) (§ 66 repealed by the Crown Pastoral Lands Act 1998, 1998 S.N.Z. No. 65 (N.Z.)). In *Comm’r of Crown Lands v. Bennie*, [1909] 28 N.Z.L.R. 955, 960 (C.A.), the formula “no right to the soil and exclusive rights to pasturage” was construed as meaning “strictly limited rights to the surface, and . . . a right to the vesture only.”

fishing¹⁰¹ although unrestricted ingress and egress to Crown lands was preserved in section 26.

The language adopted in the Taylor Grazing Act favored the integrity of the public/private divide, but it is deceptively simple to leave that statement without qualification. Evidence suggests that policymakers in both jurisdictions were more concerned with addressing the chronic conditions of the range/high country and the economic sustainability of its dominant user, than they were with the technical niceties of the common law. In describing the statutory tenure needed to meet the exigencies of the time, they were not overly legalistic in the common law tradition¹⁰² but rather pragmatic, doing “whatever it takes” to craft tenurial solutions.¹⁰³ In the Taylor Act, rights to areas of public domain incapable of being designated grazing districts—due to geographical limitations—were called “section 15 leases” and academic commentators liberally swapped the terms “permit” and “lease” in discussing range grazing.¹⁰⁴ The *Grazing Bulletin*, published by the Department of the Interior in 1936, described the “leasing of the public domain for grazing . . . as a radical change.”¹⁰⁵ In New Zealand, there was no parliamentary debate in 1948 on the need for exclusive possession—a hallmark right of leases—and the Lands Minister called section 66 rights “pastoral licences” when introducing the bill. W.R. Jourdain, the author of an authoritative text on New Zealand Crown land tenures in 1925, described the diversity of Crown tenures as “*designed to meet the special needs of the case . . . all helped to settle the country in a satisfactory man-*

101. This was despite the efforts of New Zealand acclimatization societies (forerunners to the Fish and Game Council of NZ) that sought to avoid a repeat of English common law that vested title in freshwater fish and game in aristocratic land holders.

102. Seen in the lease/licence dichotomy at common law. See *Fatac Ltd (in liq.) v. Comm’r of Inland Revenue*, [2002] 3 N.Z.L.R. 648 (C.A.).

103. U.S. Secretary of the Interior, Harold Ickes, told the House Comm. reviewing the Taylor Grazing Act in 1934 when asked as to particularities of the tenure, “[w]e would not object to anything within reason that the committee decides upon.” *To Provide for the Orderly Use Improvement, and Development of the Public Range: Hearings on H.R. 2835 and 6462 Before the H. Comm. on the Pub. Lands*, 73rd Cong. 139 (1934). Grazing Director Carpenter is quoted, “We have a national act known as the Taylor Act. As to what theory it was founded on, I do not know. I doubt whether anyone knows.” RAYMOND, *supra* note 10, at 109.

104. See, e.g., CALEF, *supra* note 42, at 52 (“The law . . . put an end to the free common use . . . and substituted a system of leasing these lands for grazing.”); DANA & FAIRFAX, *supra* note 55, at 161 (“The forage resources were to be leased to established operators for ten year periods.”); HESS, *supra* note 41, at 76 (“Leasing would protect the interests of established ranchers and, at the same time, resolve the crisis of the open range.”).

105. U.S. DEP’T OF THE INTERIOR, *GRAZING BULLETIN*, DIV. OF GRAZING, Vol. 1, No. 1, at 2 (Mar. 1936).

ner.”¹⁰⁶ In the case of private forestry rights in public lands, there is analogous expedience. “[G]overnments . . . freely created permit, license, lease . . . without much concern for whether or not they correspond to common-law interests of the same names . . . [They often] changed the name simply to advertise their new policies.”¹⁰⁷ To borrow the Carol Rose analogy, there was no shortage of mud to cloud the legal crystals.¹⁰⁸

Lastly, there were important historical differences between the jurisdictions that had significance. Before the Taylor Grazing Act, there had been no formal regulation in the western range of pasturage use (except purportedly at the state level¹⁰⁹ or experimentally¹¹⁰). In New Zealand, however, there had been a long history of regulation of Crown lands that came from the experience of the Australian colonies.¹¹¹ Many of the early Canterbury runs were taken up by sheepmen fleeing drought in New South Wales, so-called Prophets who had “unlimited faith in the squatting system and a great contempt for . . . freehold.”¹¹² The first national Land Act was passed in 1877 but before that time provincial governments had regulated their “waste lands.” This history had significance in terms of continuity. While section 66 of the Land Act devised a new tenure for “pastoral lands,” the Act still relied heavily on past statutory precedent and the legislative drafters in 1948 did not have to invent the term “no right to the soil” as it was a part of precedent. Because there was no formal regulation of pastoral uses in the western United States—when compared to New Zealand—the slate was far cleaner, and any residual baggage was far leaner.

106. W.R. JOURDAIN, DEP’T OF LANDS & SURVEY, *LAND LEGISLATION & SETTLEMENT IN NEW ZEALAND* 54 (1925) (emphasis added).

107. ANTHONY SCOTT, *THE EVOLUTION OF RESOURCE PROPERTY RIGHTS* 395 (2008).

108. Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577, 577–78 (1988).

109. See, e.g., Farrington R. Carpenter, *The Public Domain in Colorado*, 13 *ROCKY MNTN. L. REV.* 296 (1941) (discussing the state regime in Colorado).

110. There was an experimental leasing scheme in the Mizpah-Pumpkin Creek Basin, Montana in 1928 that incorporated “grazing districts.” DANA & FAIRFAX, *supra* note 55, at 150–60. There was also a sample study of public domain grazing lands in Nevada in 1927. E.O. WOTTON, *THE PUBLIC DOMAIN OF NEVADA AND FACTORS AFFECTING ITS USE*, U.S. DEP’T OF AGRICULTURE TECHNICAL BULLETIN NO. 301, at 1 (1932).

111. See, e.g., W.J. GARDNER, *A Colonial Economy*, in *THE OXFORD HISTORY OF NEW ZEALAND* 57, at 63 (Geoffrey W. Rice ed., 2d ed., 1992); Peter Karsten, *They Seem to Argue that Custom Has Made a Higher Law: Formal and Informal Law on the Frontier*, in *LAND AND FREEDOM, LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA* 63, 70 (A.R. Buck et al. eds., 2001); John Weaver, *Frontiers into Assets: The Social Construction of Property in New Zealand, 1840–65*, *J. IMPERIAL & COMMONWEALTH HIST.* 17, 29 (1999).

112. L.G.D. ACLAND, *EARLY CANTERBURY RUNS* 12 (1946).

VII. CONSEQUENCES FOR PRIVATE GRAZING USE RIGHTS AND PUBLIC RECREATIONAL RIGHTS

A hiker at a trailhead on Bureau of Land Management (BLM) land may face a very different experience than a naïve trampler embarking on a walk through the South Island's high country—particularly when the trampler has not sought the prior permission of the run-holder to enter the run. In the former case, the hiker is a legitimate user of “your public lands,” while in the latter, the trampler risks committing a crime. To the unobservant recreationalist, this outcome is perverse given the apparent similarity of the countryside, the dispersed nature of grazing in the vicinity, and the low-impact, passive nature of the proposed hike. However, to the more attentive, the plethora of “keep out” signs in New Zealand—as compared to the “please close the gate” signs on the American public domain—is elemental.¹¹³ These signs speak loudly and unequivocally as to the respective standing of private and public rights between these two public land jurisdictions. The former sign assumes an unabashed right to exclude; the latter asks the public user to respect the legitimate needs of the private grazing user. One is commonly and traditionally perceived as an exclusive right; the other is premised on a reasonable co-existence of mutually compatible rights.

While the line of demarcation between private and public rights relies on an internal, theoretical allocation of sticks, there is a critical need for clarity and transparency in the instruments creating and allocating those rights. The Land Act fails on this score; as its inconclusive property rights framework casts shadow, rather than light, on the extent of public and private rights in the Crown pastoral estate.¹¹⁴ The consequence of this murkiness is a private pasturage right that boasts many of the indicia of freehold title¹¹⁵ alongside a public right that must argue—even litigate—a case for its recognition.¹¹⁶ The ascendancy of the private

113. See also SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* 3 (1995).

114. In making this assertion, this article only considers legal property rights; however, for a wider public policy context, see BROWER, *supra* note 15; and Ann Brower et al., *The Cowboy, the Southern Man, and the Man from Snowy River: The Symbolic Politics of Property in Australia, the United States and New Zealand*, 21 *GEO. INT'L. ENVTL. L. REV.* 455 (2009).

115. See generally BROWER, *supra* note 15; see also the comments of MP Mr. Blincoe (Nelson) who said in 1995, “They [run-holders] argue essentially that their pastoral leases are the next best thing to freehold . . . and that essentially they were freeholded in 1948 under the existing Act, and really they already have virtually the whole bundle of rights that freeholding would represent.” *Crown Pastoral Land Bill*, New Zealand Parliamentary Debates (Apr. 6, 1995). Mr. Blincoe subsequently qualifies this assumption by saying that the pastoral leasehold estate “does have huge values for New Zealanders.” *Id.*

116. See *The N.Z. Fish and Game Council v. Her Majesty's Attorney-General in respect of Comm'r of Crown Lands*, [2009] CIV 2008-485-2020 (H.C.). In this case the assertion of a

right has occurred despite the absence of any express statutory mandate, and the dearth of historical corroboration.

The primary consequence is the conflation of the grazing use right. Run-holders claim that the Land Act in 1948 transferred the vast majority of rights to their bundle, analogous to a limited fee simple grant. Yet there is little evidence in the sections of the Act, or the circumstances behind its enactment, that justify such claims. If not quite freehold, then the orthodox argument stresses that the tenure is a common law lease, conferring exclusive occupation as an implied consequence of its common law status. While acknowledging the persuasive authority of the High Court of Australia,¹¹⁷ a single judge of the New Zealand High Court in May 2009 nonetheless adopted this orthodox view, favoring the dissenting Australian position.¹¹⁸ This was despite observations that “the language of the statute is a mixed bag” and that the statute “does not always [use common law terms such as lease and licence] in a way consistent with the common law concept underlying the term.”¹¹⁹ Thus, in trying to locate the grant of exclusive occupation in the Act, a court must continue to “star[e] hard at the space between the lines of statute.”¹²⁰ The pastoral lease remains one that is qualified by the extent of the rights conferred,¹²¹ namely in the original section 66. The subject matter of such a “lease” from the Crown is that of exclusive grazing rights with no interest in the soil. Albeit powerful property rights, they are exceedingly narrow,¹²² yet it is their former characteristic that is predominant. It was observed in 1966, “I must deplore the way in which the benefits conferred by the 1948 Land Act have been and are being converted into capital gain to the individual. . . .”¹²³ The corresponding consequence of an exaggerated private right is the diminution of any public right—assuming a greater bundle of private sticks renders the size of the public bun-

limited public right of access was ultimately not prosecuted by the New Zealand Fish and Game Council.

117. A pastoral lease is exclusively statutory. *See, e.g.,* *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1.

118. In so ruling, the judge conceded that he was making “no attempt to add to the debate.” *N.Z. Fish and Game Council v. Her Majesty’s Attorney-General in respect of Comm’r of Crown Lands*, [2009] CIV 2008-485-2020, at 59 (H.C.).

119. *Id.*

120. Page & Brower, *supra* note 20.

121. In the Clause-by-Clause analysis of public submissions to the Crown Pastoral Land Bill, clause 3(a) of the Bill was described as “bring[ing] forward section 66 of the Land Act which qualifies the basis of the lease.” *Crown Pastoral Land Bill, Clause-by-Clause Analysis of Public Submissions*, pt. 1, cl. 3 (1995).

122. BROWER, *supra* note 15, at 37–47.

123. L.W. McCaskill, *Rural Land Use*, in *RURAL LAND ADMINISTRATION IN NEW ZEALAND* 57, 71 (J.B. Brown ed., 1966).

dle that much smaller. Yet, if there is no engorged quasi-freehold title, there is ample scope for both rights to co-exist. In the American public domain, accessing the public resource of recreation is authorized by “implied license.” Historically, the right of access across the public domain for the purposes established in early mining laws was included in the right to settle, explore, and develop the public domain.¹²⁴ From these beginnings, provided the recreational use was “casual” and, by definition, involved “no or negligible disturbance,”¹²⁵ access across public lands evolved into an entitlement. This “legal and philosophic cornerstone”¹²⁶ of the public right to access public lands for recreational purposes is articulated as follows: “Americans have a right to enter public lands for recreation until Congress or the land management agency says otherwise.”¹²⁷

In *United States v. Curtis-Nevada Mines, Inc.*, the Ninth Circuit held that all citizens automatically qualify as recreational licensees on federal lands despite having no actual permission for access.¹²⁸ This holding has several grounds: (1) that Congress or agencies had never required written permission for access; (2) that agency regulations assume free access except to areas specifically restricted; and (3) that Congress never objected to free recreational access, thus creating an implied license similar to that enjoyed by livestock graziers in the 1800s.¹²⁹ The Ninth Circuit recognized a recreational interest—not unlike the right to locate hardrock mineral claims, a right which endures until Congress revokes it— “[putting] recreation on a higher level than commodity uses such as grazing.”¹³⁰

The right was enshrined in statute in 1964, as one of the mandated multiple uses of BLM lands.¹³¹ In 1970, the Public Land Law Review Commission reported that “[t]hose who use the public lands as a basis for economic enterprise and those who use the public lands for personal

124. Mary Jane C. Due, *Access over Public Lands*, 17 ROCKY MOUNTAIN MIN. L. INST. 171 (1972). See generally R.L. Kourlis, *Access to and Across Public Lands*, Fed. Land Policy & Mgmt. Act Conf., Nat. Resources Law Center, Univ. of Colo., Boulder, Colo. (June 6–8, 1984).

125. 43 C.F.R. § 2800.0-5(m) (2006); 36 C.F.R. § 2.251.50(c) (2006); see also Heidi J. McIntosh, *Rights of Way on Federal Lands*, Fed. Lands Law Conf., Salt Lake City, Utah (Oct. 18–19, 2001); Mark D. Bingham, *Access Issues and Public Lands Rights of Way*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION: PUBLIC LAND LAW II, at 7-1 n.3 (1997).

126. Lori Potter, *Preservation and Recreation on the Public Lands*, in ROCKY MOUNTAIN MINERAL LAW FOUNDATION, PUBLIC LAND LAW 9-3 (1992).

127. *Id.* at 9-4 to 9-5 (quoting George Coggins).

128. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277 (9th Cir. 1980).

129. *Id.*

130. Potter, *supra* note 126, at 9-45.

131. Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411–18 (2000) (expired 1970).

recreation, together have an identifiable interest.”¹³² Today, recreational use is unquestionably a dominant use of federal lands in the western United States¹³³ and serves an important role for an increasingly urbanized constituency.¹³⁴ Scholars suggest other policy rationales: that recreation serves the public good by promoting sociability and social cohesion;¹³⁵ public recreational lands act as a “powerful symbolic affirmation of the egalitarian ideal in a largely private system”;¹³⁶ access to BLM lands assists local economies and fosters public health;¹³⁷ or that public lands are “riding into a different sunset,”¹³⁸ promoting values such as relaxation, health, adventure, exploration, solitude and spiritual replenishment.

In New Zealand, rights of access to *some* public lands have statutory approval but not in the case of the Crown pastoral estate. The mantra of “exclusive occupation” fences off these public lands from the public at large and the Trespass Act 1980 criminalizes recreational access by deeming “public land” as “private” for the purposes of the Act. The Trespass Act is described by its critics as harsh, draconian,¹³⁹ and unnecessary. Others ascribe more cynical motives, including the “capture” of exclusive hunting and fishing access by misuse of the state’s police power.¹⁴⁰

If those station owners can prevent New Zealanders from getting access to Crown land, in effect they will be the owners of the land. They will be able to say to wealthy Americans, “Sure,

132. PUBLIC LAND L. REV. COMM’N, ONE THIRD OF THE NATION’S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 37 (1970).

133. See, e.g., MARION CLAWSON, THE FEDERAL LANDS SINCE 1956: RECENT TRENDS IN USE AND MANAGEMENT 1 (1967); PUBLIC LAND L. REV. COMM’N, *supra* note 132, at 197–216; GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 672 (1981); Jan G. Laitos & Thomas A. Carr, *The New Dominant Use Reality on Multiple Use Lands*, 44 ROCKY MTN. MIN. L. INST. 1-1, 1-17 (1998).

134. Joseph L. Sax, *Perspectives Lecture: Public Land Law in the 21st Century*, 45 ROCKY MTN. MIN. L. INST. 1-1, 1-9 to 1-10 (1999).

135. Rose, *supra* note 4, at 779.

136. NELSON, *supra* note 7, at 213.

137. KORI CALVERT ET AL., PUBLIC LANDS: USE AND MISUSE 85 (2007). CRS REPORT FOR CONGRESS: RECREATION ON FEDERAL LANDS 17 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL33525.pdf>.

138. Sally K. Fairfax, *Riding into a Different Sunset: The Sagebrush Rebellion*, 79 J. FORESTRY (1981); see also Jerry L. Anderson, *Countryside Access and Environmental Protection: An American View of Britain’s Right to Roam*, 9 ENVTL. L. REV. 241 (2007) (canvassing policy issues).

139. See generally Janet Girvan, *Access to Private Land and the Trespass Act*, in PROCEEDINGS OF THE FMC BACKCOUNTRY RECREATION 2000 CONF. (Grant Harper ed., 1992) (Sept. 27–29, 1991).

140. See Trespass Bill, New Zealand Parliamentary Debates 514 (June 5, 1980) (statement of Mr. Prebble, MP).

you can come and shoot on my property, and I will give you the right of access to go and shoot on a whole mountain owned by New Zealanders." . . . By this legislation New Zealanders will be wrongly prevented from going on to Crown property, which, in effect, they own.¹⁴¹

On the Crown pastoral estate, there is no "implied recreational license." Yet the policy arguments for an "implied recreational license" are equally cogent to New Zealand. Egalitarian ideals informed early rights to access, with formal measures—such as the incomplete "Queen's Chain" along water foreshores—operating in tandem with informal measures (termed colloquially as "New Zealand traditions of access"¹⁴² or a "heritage of freedom of access to the outdoors"¹⁴³) all of which were intended to protect the ordinary person's access rights to public resources. Early mining rights to gold resources were documented in 1862 when the Otago Provincial Waste Lands Board discussed the "prospecting of parties on licensed Runs": "[T]he Board are decidedly of Opinion that Runholders have no right to interfere with persons digging for minerals on their Runs or even turning the course of streams on those runs. . . ." ¹⁴⁴ More widely, "unrestricted" Crown rights of ingress and egress were preserved in section 26, a provision with parallels to section 2 of the Taylor Grazing Act. Similarly, demands from an increasingly urbanized population could transform New Zealand's public lands, as they did in the United States, with equivalent caveats that free access does not mean unrestricted access; public users must conform to other private rights¹⁴⁵ within a framework of compatible and conditional public and private use rights.¹⁴⁶

Grazing on the American public domain is a private privilege that has not fundamentally undermined the land's "publicness." Any propensity of the private right to encroach into the public realm has been constrained by a clear articulation in the Taylor Act of the public/private divide. Rather, the inherent propensity of the private right to conflate has taken root within the private bundle in disputes as to whether the grazing privilege is a thing of property. In 1940, Farrington Carpenter

141. *Id.*

142. See, e.g., David Grinlinton, *Private Property Rights versus Public Access*, 7 N.Z. J. ENVTL. L. 313, 319–20 (2003).

143. John Acland, ANALYSIS OF WRITTEN SUBMISSIONS ON THE REPORT, "WALKING ACCESS IN THE NEW ZEALAND OUTDOORS" 13 (2004), available at <http://www.walkingaccess.org.nz/store/doc/analysis-of-submissions.pdf>.

144. Minutes of the Archival records of Otago Waste Lands Board 114 (Sept. 25, 1862) (unpublished archives on file at Archives N.Z., Dunedin).

145. LEHMANN, *supra* note 113, at 3.

146. See generally WILLIAM O. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1965).

saw grazing permits as “not determined on personal rights at all but solely on the possession and extent of [a] certain kind of privately owned real estate. Such rights were an appurtenance to certain lands. . . .”¹⁴⁷ The tone set by Carpenter colored decades of debate between ranchers and federal land managers. The former relied on local customary use, informal codes, and the belief that the Taylor Act had created “marketable, although legally tenuous, property rights.”¹⁴⁸ The latter believed they had to hold the line in enforcing permits as privileges, not as rights.¹⁴⁹ While ultimately grazing permits were not held to be compensable property by the courts, they remain things of value with many indicia of property, or so-called “licensed” property.¹⁵⁰

Moreover, where there has been a deleterious impact on the wider public interest, the effects are diffusely felt. For example, in public policy terms, the wisdom of public land ranching is questioned where administrative costs exceed the return from grazing fees. This imbalance has led to descriptions of range grazing as a form of publicly subsidized welfare,¹⁵¹ but this is a fiscal drop in the budgetary ocean. In environmental terms, the Act’s objective to “stop injury to the public grazing lands” is seen as unfulfilled, with claims that the condition of the range in many locations is little improved since 1934.¹⁵² It is argued that livestock production wreaks ecological havoc but the damage is seen by few.¹⁵³ In governance terms, the perception of the BLM as a “weak, ineffective and vulnerable” agency captured by stronger grazing interests contributed to the historic perception of the public domain as grazing lands; yet, recreation on BLM land continues to expand.¹⁵⁴ The public domain is not immune to controversy, whether “sagebrush rebellions”¹⁵⁵ or “storm over

147. Carpenter, *supra* note 43. See also KAREN R. MERRILL, PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM 202 (2002) (describing Carpenter’s early administration of the Grazing Act as influencing an interpretation of the permit as an attached right).

148. HESS, *supra* note 41, at 125.

149. MERRILL, *supra* note 147, at 202.

150. Leigh S. Raymond, *Viewpoint: Are Grazing Rights on Public Lands a Form of Private Property?*, 50 J. OF RANGE MGMT. 431, 432–37 (1997); RAYMOND, *supra* note 10, at 11–39.

151. See generally, DENZEL FERGUSON & NANCY FERGUSON, SACRED COWS AT THE PUBLIC TROUGH 184 (1983).

152. *Id.*

153. Debra L. Donoahue, *Western Grazing: The Capture of Grass, Ground, and Government*, 35 ENVTL. L. 721, 723–31 (2005).

154. DANA & FAIRFAX, *supra* note 55, at 160–61, 163 (attributing weakness to unwise promises Secretary Ickes made to stockmen in 1934 for a small bureaucracy and a “gross” misrepresentation of administrative costs).

155. See, e.g., NELSON, *supra* note 7, at 167–82.

the rangeland,"¹⁵⁶ but such contretemps have played out largely on the private side of the divide.¹⁵⁷

In marked contrast, grazing on the New Zealand pastoral estate has undermined the "publicness" of the Crown's lands. Exclusive rights of pasturage have assumed rights of exclusive possession, and taken on the latter's form and substance. This process has effectively privatized these lands by excluding public access rights. The public rights were themselves weaker through an ambivalent and uncertain status, and an assumption that the "people's heritage" to outdoor access was assured.¹⁵⁸ Yet, if there had been greater recognition in the years after 1948 as to the basic property rights statutorily allocated between public and private bundle holders, this "privatization" may not have been such a *fait accompli*. An adherence to the public property rights approach was evident in the comments of some parliamentarians in the late 1990s:

The property rights of the Crown, which owns the land, and the lessees who lease it are absolutely clear under the Land Act. The Crown retains ownership of the land; the lessee leases the right to pasture animals on the vegetation. It is clear under the Land Act that the lessee had to apply for permission to do anything other than that. . . .¹⁵⁹

On the one hand we have the Act party beating the drum as though the property rights of the pastoral leaseholder are absolute, and ignoring the fact that the land is still Crown owned. Yes, the pastoral leaseholder has a perpetual right, and that needs to be recognised, but the land remains Crown land.¹⁶⁰

Yet, 50 years after the Land Act, the privatization of New Zealand's public lands came full circle with the qualified reinstatement of freeholding rights and the return to a policy of public lands disposal.¹⁶¹ In compari-

156. WAYNE HAGE, *STORMS OVER RANGELANDS* (1989).

157. See GARY D. LIBECAP, *LOCKING UP THE RANGE: FEDERAL LAND CONTROLS AND GRAZING* 78 (1981); Raymond, *supra* note 150, at 437; RAYMOND, *supra* note 10, at 109–52.

158. In 1968, the government introduced the first Trespass Act designed to "give a greater degree of protection to farmers and other landowners against irresponsible trespass, but without taking away freedom of access to the open country so valued by the citizens of New Zealand." Trespass Bill, New Zealand Parliamentary Debates, *supra* note 139, at 517 (statement of Mr. Maxwell, Waitakere).

159. Crown Pastoral Lands Act 1998, New Zealand Parliamentary Debates 9334 (May 27, 1998) (statement of Ms. Fitzsimmons, The Alliance).

160. *Id.* at 9335 (statement of Hon. Nick Smith, Minister of Conservation).

161. *Id.* at 6829 (statement of Hon. Denis Marshall, Minister of Lands). "The pastoral lease estate . . . is now the last frontier of Crown land settlement. I believe that the time has finally come for the Crown to withdraw from an interest in . . . this estate." Crown

son, 42 years after the Taylor Grazing Act, the United States reaffirmed its policy of retention with the Federal Land Policy and Management Act of 1976.¹⁶²

VIII. CONSEQUENCES FOR THE LAW

In creating and regulating private rights in public resources, lawmakers must remain cognizant of the propensity for private rights to diminish public rights. An acknowledgment of this propensity is critical at all stages after a private right is recognized—from creation onwards.

It requires the law to act with clarity and transparency in the initial allocation of private and public rights in public resources. The greater the clarity in the laws and regulations, the less likely it is that public rights will suffer in a New Zealand-like property rights game in which more for the run-holder is less for the public. Moreover, such patency serves the public interest by quarantining debate regarding the extent of the private property right over public lands, as seen in the American public domain where public access rights remain unimpeded.

Clarity and transparency is served when the law is acting within principled parameters, rather than individualized ad hoc decision-making. In property law, the adherence to principles over self-interest is represented by an insistence for substance over form when scrutinizing the nature of property rights. Hence, the law should place primacy on the substance of the rights conferred, and not their nomenclature.¹⁶³ This principle is all the more cogent given the tendency of legislatures to adopt property law terminology that is convenient to the sui generis scheme in question, rather than doctrinally faithful to the common law. “[L]and law is but one area in which, whilst statute may appear to have adopted general law principles and institutions as elements in a new regime, in truth the legislature has done so only on particular terms.”¹⁶⁴ Significantly, a higher state of vigilance is required when the public/private divide is metaphorical rather than physical. In New Zealand, the distinction between private and public rights exists within the metaphor of property as a bundle of sticks. The New Zealand experience suggests that the purity of the theoretical divide is more difficult to uphold than the external tangible divide of the American rangelands. Such vigilance

Pastoral Lands Bill, New Zealand Parliamentary Debates, *supra* note 114, at 6829 (statement of Hon. D. Marshall, Minister for Lands).

162. Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–82 (2006).

163. See, e.g., *Fatac Ltd (in liq.) v. Comm’r of Inland Revenue*, [2002] 3 N.Z.L.R. 648 (C.A.) (2002).

164. *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1.

is bolstered where the law keeps its focus on the original rationales for the private right, rather than the allure of later extraneous gloss.

IX. CONCLUSION

Grazing use regimes in the western United States and New Zealand share more in common than a superficial examination may suggest. Yet, it is the potency of their relatively few differences that has fed the expansion of private rights at the expense of public rights in New Zealand's public lands.

In the American public domain, notwithstanding skirmishes over the status of the grazing privilege, private rights co-exist equitably with their public counterparts in a functioning mosaic of multiple uses. Tensions exist wherever there is any shared use and the public domain is no exception to this truism.¹⁶⁵ Yet, the relative clarity of the private/public divide resolves these differences satisfactorily (at least when compared to the New Zealand public right-holder's perspective). Importantly, it also resists undue encroachment by private right-holders. By contrast, where the private/public divide is opaque, the vested interests of private right-holders have greater scope to prevail against a diffuse public interest.

165. There are many critics of Taylor Grazing Act administration who cite "agency capture" of the BLM by grazing interests. See, e.g., FERGUSON & FERGUSON, *supra* note 151; JOHANNA WALD ET AL., HOW NOT TO BE COWED (1991); MERRILL, *supra* note 147; DANA & FAIRFAX, *supra* note 55; Donoahue, *supra* note 153. However, this debate is largely restricted to the nature of the private right with few deleterious impacts on public rights such as access. The question of public harm relates to wider public interest issues.