

Land Grants from the Federal Public Domain

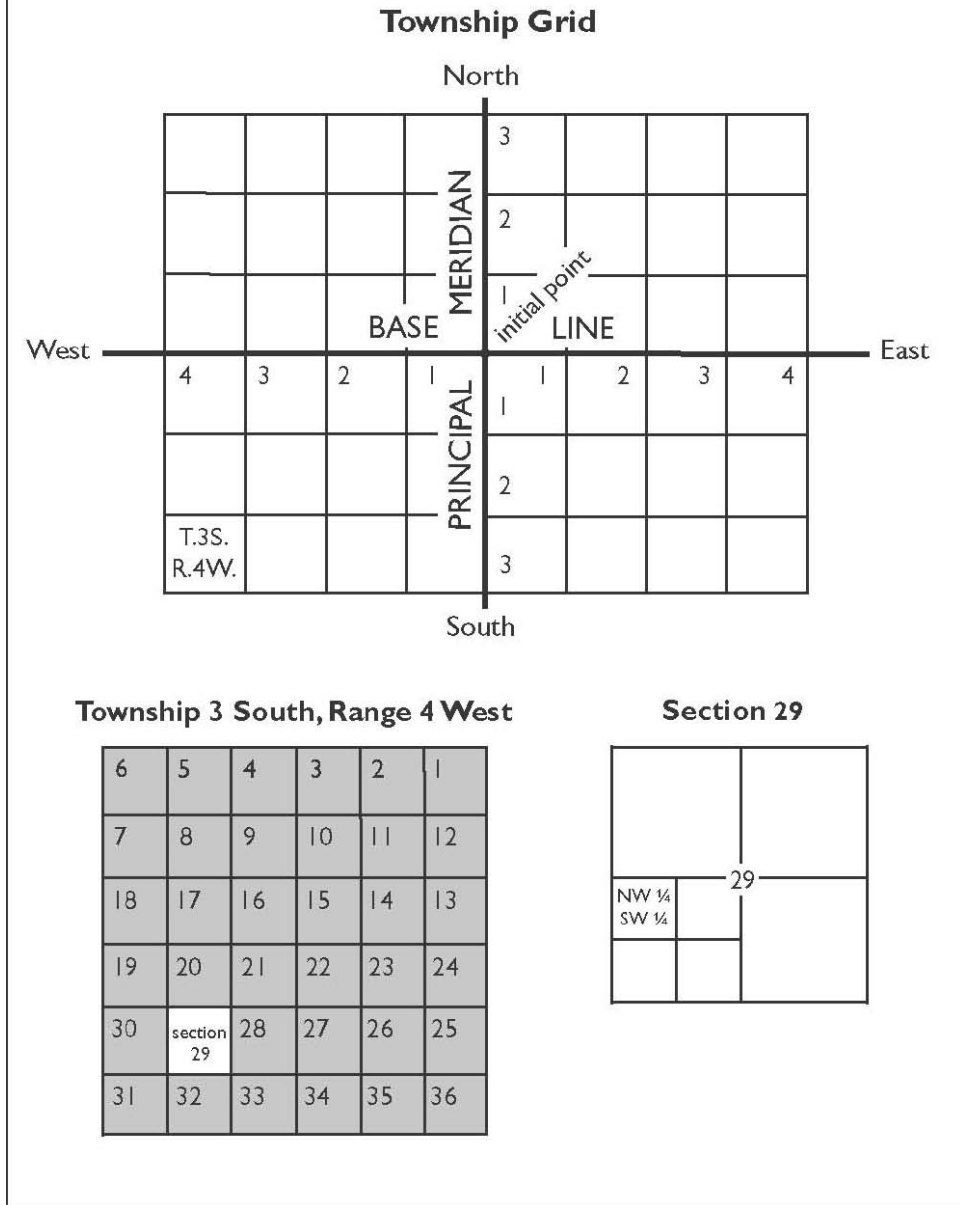
[The following account is primarily drawn from Paul W. Gates, History of Public Land Law Development (1968), a magisterial study of the history of public lands in the United States. – eds.]

When the original thirteen colonies broke free from Britain, a number of them – Massachusetts, Connecticut, New York, Virginia, North and South Carolina, and Georgia – had land charters issued by the British monarchy that included lands extending from the Atlantic seaboard to the Mississippi River. The remaining colonies had much more limited claims to territories along the Atlantic coast. After much political wrangling, the states with claims to western lands agreed to cede those lands to the newly formed federal government. This was the beginning of the federal public domain, a vast quantity of land held by the government for disposition and eventual formation of new states. The original federal public domain, which extended from the Allegheny Mountains to the Mississippi River, was soon enormously expanded. The largest augmentations were the Louisiana Purchase of 1803, which acquired most of the land from Louisiana to Montana; the Treaty with Spain in 1818, which added Florida and western Louisiana; the annexation of Texas in 1845; the Oregon Compromise with Britain in 1846, which secured what is now Washington, Oregon and Idaho; the concessions wrested from Mexico in 1848 after the Mexican-American War, which included California, Nevada, Utah, Arizona, New Mexico, and western Colorado; and the purchase of Alaska from Russia in 1867. The quantity of resources to be disposed of, once Indian title to the lands was extinguished by treaty or conquest, was staggering – approximately 1.4 billion acres of land.

The reigning idea was that the federal government would sell the lands at auction in order to raise money to pay off war debts. To facilitate this process, Congress (during the waning days of the Articles of Confederation) adopted legislation known as the Land Ordinance of 1785. **This statute probably had a more profound impact on the physical appearance of America than any other piece of legislation before or since.** Influenced by the ideas of a committee headed by Thomas Jefferson, the Ordinance of 1785 mandated a system for surveying and disposing of public domain lands. Starting from the point where the Ohio River crosses the Pennsylvania border, “a north-south line – a principal meridian – was to be run and a base line westward – the geographer’s line – was to be surveyed; parallel lines of longitude and latitude were to be surveyed, each to be 6 miles apart, making for townships of 36 square miles or 23,040 acres. Seven rows or ranges of townships running south from the base line and west of the principal meridian were to be surveyed. Each township was to be divided into lots of one mile square containing 640 acres” (Gates, pg. 65). Nearly all the land in the federal public domain – the vast preponderance of the physical space of America – was eventually surveyed into this neatly laid out grid system and disposed of using this system. This is why rural roads in most parts of the country run along straight lines (section lines), why most farms are square in shape, and why most lots in cities are rectangular.

The following diagram illustrates the system of surveying established by the Land Ordinance of 1785. It shows how you would identify a tract of property with the following legal description: “the Northwest quarter of the Southwest quarter of Section 29, Township 3 South, Range 4 West, ____ Base and Meridian.” Note that every section contains 640 acres, a quarter section 160 acres, and a quarter-quarter section (such as described here) 40 acres.

Figure 2-4
System of Land Description
 Established by the Land Ordinance of 1785



Another important provision of the Ordinance of 1785 was the reservation of section 16 in every township “for the maintenance of public schools within the said township.” The idea was not that all 640 acres in Section 16 would be the playground for a one-room school house (although one can see the remains of one-room school houses on Section 16 in many rural areas today). Rather, the territorial governments, and then the states formed out of the territories, would be able to sell or lease the land in Section 16 in order to raise revenue for the support of public schools. Thus, the federal government, from the very beginning, was committed to heavily subsidizing public education through the disposition of the public lands. This was followed by other measures, most prominently the Morrill Act of 1862, which set aside large tracts of public

lands for sales to support the creation of public universities – the so-called “land grant” colleges and universities that form the backbone of much of our system of higher education today.

Following the Ordinance of 1785, the official policy of the federal government continued to emphasize sales of land from the public domain. Once Indian claims were extinguished and the land was surveyed, it would be placed for sale at public auction. Congress set the initial minimum price at \$2 an acre, with no limitation on the amount of land that could be purchased. Sales were disappointing, however, apparently because the minimum price was too high, and agitation for more liberal divestment policies quickly mounted. Congress responded by easing the conditions for sales on credit. Widespread defaults and forfeitures followed. Various relief acts were passed by Congress to benefit those who were unable to come up with cash to pay for the lands they had purchased. In 1821 further credit sales were prohibited, and the minimum price was reduced to \$1.25 per acre. Forfeitures continued to plague those who had previously purchased on credit, and in 1832 Congress essentially gave up on further attempts to recover amounts still owed. Federal land prices were lowered further by the Graduation Act of 1854, which allowed for progressively lower prices for any land that did not sell at the minimum price.

While official federal policy continued to favor sales of land, the reality on the ground was different. During the colonial era, many states outside New England had seen widespread claims of unsettled land by squatters who moved onto choice parcels without any pretense of legal title. As Paul W. Gates recounts:

Squatters were a rough and sometimes unruly lot. They were contemptuous of the rights of large owners, contributed no taxes to the support of government, and caused conflicts for colonial administrations by their intrusions into areas claimed by the Indians. James Logan, agent for the Penn holdings, described the Scotch-Irish – the most restless and least law-abiding of the hordes of immigrants coming into Pennsylvania – as “bold and indigent strangers” who, when challenged for their titles, replied that the Penns “had solicited for colonists and they had come accordingly.” They took up land in “an audacious manner,” alleging that “it was against the laws of God and nature that so much land should be idle while so many Christians wanted it to labor on to raise their bread.”

These squatters became numerous and vociferous enough that even before the cession of western lands to the federal government, Virginia and North Carolina had enacted laws allowing squatters a right of “preemption,” which essentially gave squatters an option to purchase the land they occupied, thereby trumping the rights of purchasers at subsequent public-land sales.

After 1785, the practice of squatting continued, notwithstanding the official policy of disposing of land by sale. Although the practice was frequently condemned, Congress received hundreds of petitions from squatter-settlers seeking preemption rights for their holdings. Often, but not always, Congress responded with ad hoc legislation granting these requests, effectively ratifying actions that had been illegal when the land was taken. As western interests’ political representation in Congress increased, preemption acts became broader. The process culminated in the enactment of the Preemption Act of 1841, which granted a general prospective preemption right on federal land, provided Indian title had been extinguished and the land had been surveyed. Settlers could claim up to 160 acres of land before it went to public auction, provided they inhabited and improved the land, constructed some kind of dwelling on it, and agreed to pay the minimum price of \$1.25 per acre. There is considerable evidence that the

Preemption Act was often abused. For example, logging companies would use dummies, persons appearing independent but actually controlled by the company, to file preemption claims for timber land in Michigan, Wisconsin, and Minnesota, which provided the legal authority to enter the land. The companies would then clear cut the standing timber – often magnificent old-growth white pines – and the preemption claim would be abandoned before any funds were paid to the government. Nevertheless, preemption remained a significant avenue for disposal of public lands until 1891, when the Preemption Act was finally repealed.

Squatter-settlers adopted another tactic for securing legal title to the land they had occupied: They banded together to form claims associations. These were combinations designed to prevent competitive bidding at public land sales, in order to ensure that local settlers could purchase the land of their choosing at the minimum price. Little is known about exactly how these associations operated, since they did not keep written records of their activities. But it is widely surmised that they had an even greater impact on securing land for squatter-settlers than did the preemption laws. Gates relates the following account:

Sandford C. Cox, an eye-witness of a government sale at the Crawfordsville, Indiana office, wrote of the town being full of strangers when the sales commenced [in 1825]. The eastern and southern portions of the state were strongly represented, as well as Ohio, Kentucky, Tennessee, and Pennsylvania. There was little competitive bidding as “the settlers, or ‘squatters’ as they are called by speculators, have arranged matters among themselves to their general satisfaction. If, upon comparing numbers, it appears that two are after the same tract of land, one asks the other what he will take not to bid against him. If neither will consent to be bought off, they then retire, and cast lots, and the lucky one enters the tract at Congress’ price – \$ 1.25 per acre – and the other enters the second choice on his list.” If a speculator “showed a disposition to take a settler’s claim from him, he sees the white of a score of eyes snapping at him, and at the first opportunity he crawfishes out of the crowd.”

The most interesting legislation disposing of federal land, in terms of its impact on the popular imagination, was the Homestead Act of 1862. This legislation grew out of a land reform movement of the 1830s and 1840s, spearheaded by the New York newspaper publisher Horace Greeley. Advocates argued that the government should grant free small homesteads to any citizen who relocated westward, in order to draw surplus labor from the cities in the East. This, they argued, would help raise wages for the poor who remained behind, and would act as a “safety valve” against urban unrest. The original Act of 1862 allowed any citizen to claim 160 acres of unsold surveyed land. If the homesteader inhabited the land and cultivated it for five years, he received title to the land without any payment (other than filing fees). Only one homestead could be acquired per family, but it was possible to obtain 160 acres by homestead and another 160 by preemption – although not at the same time, since actual inhabitation was required for each. Homesteaders could also get title to their homestead land before five years were up, by converting the claim to a preemption claim and paying \$1.25 per acre. Congress eventually realized that 160 acres was too small to sustain productive agricultural operations in arid areas on the Great Plains, where there is not enough rainfall for crop production. Later homestead acts authorized larger claims of up to 640 acres.

Although granting individual plots of land to settlers was probably the largest single category of federal land disposal, the government granted lands for other purposes as well. Veterans of the

Revolutionary War, the War of 1812, the Mexican-American War, and the Civil War were given “scrip” that could be exchanged for federal lands. As previously noted, states were given Section 16 of every township to support public education, and were later given large grants for the support of state colleges. Generous grants of land were also given to companies formed to build turnpikes, canals, and railroads. Finally, special grants of land were made to settlers who agreed to plant trees on the prairies (the Timber Culture Act of 1873) or to irrigate desert areas (the Desert Land Act of 1877).

By the late nineteenth century, public attitudes toward disposition of the public domain began to change. The process of settlement began to run out of gas, as remaining tracts were too arid, mountainous, or remote to attract further private entry. The public also began to perceive that some of the federal land was simply too valuable to sell or give away. The area now occupied by Yellowstone National Park was reserved from further entry or homesteading in 1872, and reservations of Yosemite and other future national parks followed. Huge tracts of forested land in the West were reserved by presidential proclamation, followed by the creation of the National Forest System in 1897 and the National Park System in 1916. Finally, the Taylor Grazing Act of 1934 closed all of the remaining public domain from further private entry (other than entry by prospectors for mineral claims). Public sentiment since then has if anything hardened against further private disposition of federal lands. The result is that today almost 30 percent of the land mass of the United States – approximately 662 million acres – is controlled by the federal government. These lands are managed by large federal bureaucracies – the Bureau of Land Management, the Bureau of Indian Affairs, and the National Park Service in the Department of Interior, and the National Forest Service in the Department of Agriculture.

Notes and Questions

In retrospect, congressional policy toward disposition of the public domain seems riddled with inconsistencies. Congress was at once too generous (making grants to veterans and railroads and favored insiders) and too stingy (setting the initial minimum price for sale at \$2 per acre). Part of the problem was conflicting desires: to tap public lands as a source of revenue in order to pay off war debts; to promote rapid development of the interior of the continent; to avoid sanctioning either “speculators” or “squatters.” Two relatively consistent policies, either of which would have promoted rapid development, would have been to auction the land to the highest bidder with no minimums, or to permit unlimited homesteading. Either policy, however, might have reduced federal revenues from initial land sales. And the first (unlimited sales) would have had the appearance of abetting “speculators,” while the second (unlimited homesteading) would have appeared to sanction “squatters.” So instead, Congress vacillated back and forth between promoting sales (subject to minimum prices) and promoting homesteading (subject to acreage restrictions and other limitations). Somehow, the country got developed, although the system of disposal produced enormous conflict and litigation along the way.

Economists have pointed out that despite the appearance of free land, homesteading carried with it a steep price paid for by the hardships endured by the settlers and the concomitant premature cultivation of remote tracts. See Terry L. Anderson & P. J. Hill, *The Race for Property Rights*, 33 *J.L. & Econ.* 177, 195 (1990). Again, racing behavior if unconstrained can dissipate the value of a natural resource. On the other hand, it has also been argued that from the United States’

point of view, homesteading provided collective defense of the frontier areas against Europeans, Mexicans, and Indians. See Douglas W. Allen, *Homesteading and Property Rights*; or, “How The West Was Really Won,” 34 *J.L. & Econ.* 1, 22-23 (1991).

Are preemption laws and homestead laws additional examples of acquisition of property by first possession? By discovery? Under both systems, claimants would scout around until they spotted a choice parcel of unclaimed land, which they would then occupy and claim for themselves upon payment of a fixed minimum price (\$1.25 under the Preemption Act) or minimal filing fees (under the homestead acts). The law on the books – the Ordinance of 1785 and the system of land sales and registrations managed by the Land Office – would suggest that the public domain was divided into well-defined parcels and distributed in a very orderly fashion. But would it be more accurate to characterize the situation on the ground, at least for the first hundred years or so, as a kind of open-access commons? If so, what does this tell us about the conditions that cause a resource to be regarded as a commons?

What accounts for the great resistance today to further privatization of the public domain? Many national forests, for example, could be owned and managed by privately-owned lumber and paper companies, many of which already own and manage large tracts of forest lands. On one estimate, the National Forest System loses 25 cents on every dollar it spends managing the National Forests. Could it be that a variety of interest groups, including lumber and paper companies, are happy having their activities subsidized by federal taxpayers? See James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 *U. Colo. L. Rev.* 241 (1994). Or have past abuses of federal lands, such as the clear cutting of old-growth forests in the upper Midwest, created pervasive distrust of private stewardship for resources like timber?