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James L. Huffman\*

## AMERICAN PRAIRIE RESERVE: PROTECTING WILDLIFE HABITAT ON A GRAND SCALE

### I. INTRODUCTION: SAVING A BIT OF THE GREAT AMERICAN PRAIRIE

Since the European settlement of North America, humans have made themselves an ever more dominant feature of what was once a sparsely populated landscape. Today it is difficult to travel even a few miles in the United States without seeing evidence of human settlement and industry. Nonetheless, there remain a few places where the natural environment survives much as it was when Native Americans were the continent's only human occupants. One such place is now the home of the American Prairie Reserve (APR), an ambitious effort to preserve 3.5 million acres for buffalo to roam, along with dozens of other species, on native prairie.<sup>1</sup> Nowhere on earth do 3.5 million contiguous acres of uncultivated prairie actually remain. However, along the Missouri River in northeastern Montana there exist significant expanses of undisturbed prairie that have been grazed by cattle and sheep for over a century but never put to the plow. Interspersed, and far more common, are cultivated lands carved from the prairie by late 19<sup>th</sup> and early 20<sup>th</sup>-century homesteaders. The Missouri River Breaks are adjacent and have been protected since 1936 in the Charles M. Russell Wildlife Refuge.<sup>2</sup> The refuge surrounds Fort Peck Reservoir that extends over 125 miles of the once free-flowing Missouri.<sup>3</sup>

In the most general terms, APR's mission "is to create the largest nature reserve in the continental United States, a refuge for people and wildlife preserved forever as part of America's heritage."<sup>4</sup> To achieve this mission, APR must acquire title to hundreds of thousands of acres of private land while working closely with the federal and state agencies that manage public lands within and adjacent to the projected reserve. It is a daunting undertaking, not least because it is controversial

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1. *The American Prairie Reserve*, THE LONG RUN, <http://www.thelongrun.org/american-prairie-reserve/> (last visited Dec. 1, 2018).

2. *Charles M. Russell National Wildlife Refuge: History of the Refuge*, U.S. FISH & WILDLIFE SERV. (Feb. 27, 2013), [https://www.fws.gov/refuge/Charles\\_M\\_Russell/about/history.html](https://www.fws.gov/refuge/Charles_M_Russell/about/history.html).

3. *Charles M. Russell National Wildlife Refuge: About the Refuge*, U.S. FISH & WILDLIFE SERV. (Feb. 27, 2013), [https://www.fws.gov/refuge/Charles\\_M\\_Russell/about.html](https://www.fws.gov/refuge/Charles_M_Russell/about.html).

4. *Our Mission & Values*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/mission-and-values> (last visited Dec. 1, 2018).

among many of the people who live in this sparsely populated region of Montana. Although APR is a private entity funded entirely by private donations, many ranchers and local residents see it as a threat to their entrepreneurial and independent way of life. “Don’t Buffalo Me – No Federal Land Grab” read large protest signs posted near APR lands.<sup>5</sup> Because a significant majority of the lands within the intended Reserve are federal lands on which ranchers have grazed livestock for most of a century, the local population tends to see the project as a federal land grab rather than the result of the free market at work.<sup>6</sup>

Even if APR and its supporters were market purists who believed that any governmental land ownership is a bad idea, they would have no choice but to work with the federal government. The majority of the uncultivated prairie is in government ownership because Montana’s 18<sup>th</sup> and early 19<sup>th</sup> century homesteaders either passed it by in search of better land to farm or sold it back to the government pursuant to the Bankhead-Jones Farm Tenant Act of 1937.<sup>7</sup> In a real sense, these are the lands that no one wanted, and thus they remained under the control of the General Land Office and later came under the jurisdiction of the Bureau of Land Management when that agency was created from a merger of the U.S. Grazing Service and the General Land Office in 1946.<sup>8</sup>

The result is a patchwork of public and private lands with extensive private use of public lands for grazing, first by custom on an open range, and later under leases granted pursuant to the 1934 Taylor Grazing Act.<sup>9</sup> All the while the public lands remained habitat for wildlife to the extent they were able to compete with livestock and evade hunters and predator control efforts. But for some species, most notably bison, or buffalo as they have long been called in the American West, the patchwork ownership with its accompanying fences is too confining for their long-term success. Absent the buffalo, an essential element of the prairie ecology is missing. Hence, central to APR’s mission is to assemble an area large enough to sustain bison in as natural a condition as possible.<sup>10</sup>

APR’s core strategy of purchasing lands that have conservation and wildlife habitat values is not new. The Nature Conservancy and other conservation organizations have employed the approach for decades, but not on the scale planned by APR, nor with the intent to retain ownership and manage the lands in perpetuity. Nature Conservancy often avoids the significant costs of ongoing maintenance and management by transferring title to the government. While APR

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5. Ben Pierce, *American Prairie Reserve: Conservation Project Finding Success, Fueling Controversy in Northeast Montana*, BOZEMAN DAILY CHRON. (May 28, 2015), [https://www.bozemandailychronicle.com/outdoors/american-prairie-reserve-conservation-project-finding-success-fueling-controversy-in/article\\_7099a013-fe92-5a18-9fbc-ac7fe9fe5354.html](https://www.bozemandailychronicle.com/outdoors/american-prairie-reserve-conservation-project-finding-success-fueling-controversy-in/article_7099a013-fe92-5a18-9fbc-ac7fe9fe5354.html).

6. *Id.*

7. Bankhead-Jones Farm Tenant Act of 1937, Pub. L. No. 75-210, 50 Stat. 522 (1937). Many government maps show BLM managed lands in two colors distinguishing lands never claimed from lands purchased by the government under the Bankhead-Jones Act.

8. The merger was part of a government reorganization under the Truman administration.

9. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (codified at 43 U.S.C. § 315 (2012)).

10. BISON MANAGEMENT PLAN, AM. PRAIRIE RESERVE 101 (2018), [https://www.americanprairie.org/sites/default/files/APR\\_BisonPlan\\_062018.pdf](https://www.americanprairie.org/sites/default/files/APR_BisonPlan_062018.pdf).

intends for the Reserve to be open to the public, it retains title to the private lands it acquires and assumes the cost of management and property taxes.<sup>11</sup>

APR is an important initiative in its own right. It has the potential to save significant expenses of surviving prairie and to begin the long process of restoring other lands that have been altered, in some cases by over a century of cultivation. It also promises to reestablish a population of as many as 10,000 bison,<sup>12</sup> a small number in comparison to the tens of millions that once roamed the prairie,<sup>13</sup> but large enough to help restore a prairie ecology over three and a half million acres once the Reserve reaches its intended size. Assuming APR is able to raise an estimated 450 million dollars<sup>14</sup> for purchases of private lands, the success of the project turns on the control and management of between 1.75 and 2 million acres of BLM grazing lands historically associated with those private lands. APR has the fortuitous advantage of a central concern for providing grazing land for their privately owned bison, which are classified as livestock under Montana law,<sup>15</sup> compared to other environmental and conservation groups that promote their objectives by acquiring and then retiring grazing permits.<sup>16</sup> Nevertheless, the American Prairie Reserve can serve as a useful case study of the potential role for markets in the future use and management of the vast grasslands administered by the BLM and the Forest Service.

## II. AMERICA'S LARGEST LAND OWNER

The largest single owner of wildlife habitat in the United States is the United States federal government. The 1970 Public Land Law Review Commission exaggerated only a bit in titling its report *One Third of the Nation's Land*.<sup>17</sup> Today the federal government owns 640 million acres, which is roughly 28% of the nation's 2.27 billion acres.<sup>18</sup> Ninety-five percent of the federal lands, amounting to 610 million acres, are administered by four federal agencies: the Bureau of Land Management (BLM), the National Park Service (NPS) and the Fish and Wildlife Service (FWS) in the Department of Interior and the Forest Service in the Department of Agriculture.<sup>19</sup> The vast majority of these lands provide habitat for wildlife, either as a part of the agencies' missions or by default.

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11. *Building the Reserve: FAQs*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/building-the-reserve-faqs> (last visited Dec. 1, 2018).

12. AM. PRAIRIE RESERVE, *supra* note 10, at 7.

13. *Bison Restoration*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/project/bison-restoration> (last visited Dec. 1, 2018).

14. Interview with Pete Geddes, Managing Director, Am. Prairie Reserve, in Bozeman, Mont. (Jan. 3, 2018).

15. MONT. CODE ANN. § 81-1-101 (2011).

16. The National Wildlife Federation and Wildlife Guardians. *See About, NAT'L WILDLIFE FED'N*, <https://www.nwf.org/en/WCR/About> (last visited Dec. 1, 2018); *see also Grazing Permit Retirement, WILDEARTH GUARDIANS*, <https://wildearthguardians.org/public-lands/greater-gila/grazing-permit-retirement/> (last visited Dec. 1, 2018).

17. PUB. LAND L. REV. COMM'N, *ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS* (1970).

18. CONG. RESEARCH SERV., R42346, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 6* (2017).

19. *Id.* at 1.

The FWS manages 89 million acres, largely through the National Wildlife Refuge System.<sup>20</sup> These lands have been set aside, beginning in 1903 with the creation of the Pelican Island National Wildlife Refuge,<sup>21</sup> for the express purpose of protecting and preserving wildlife habitat.<sup>22</sup> The NPS manages almost 80 million acres in 418 distinct units, the earliest created was Yellowstone National Park in 1872.<sup>23</sup> While the individual national parks have varying purposes, most of the larger ones contain significant wildlife habitat. The Forest Service controls about 193 million acres, most of which are designated as national forests managed pursuant to a multiple-use mandate that includes wildlife habitat protection.<sup>24</sup> Finally, the BLM administers 248 million acres also managed under a multiple-use mandate from Congress that includes wildlife habitat protection.<sup>25</sup>

In addition to the wildlife-specific provisions of the various agencies' authorizing legislation, several federal environmental laws impose wildlife habitat protection responsibilities on the federal land management agencies, notably the Migratory Bird Conservation Act,<sup>26</sup> the National Environmental Policy Act (NEPA),<sup>27</sup> the Endangered Species Act (ESA),<sup>28</sup> and the Marine Mammals Protection Act.<sup>29</sup> NEPA requires federal agencies to consider the environmental impacts of all major federal actions.<sup>30</sup> This means that the land management agencies must assess the environmental impacts, including impacts on wildlife habitat, of most of their land and resource management policies and actions.<sup>31</sup> The ESA requires all federal agencies, in consultation with the FWS and/or the Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA), to document, justify, and mitigate where feasible actions likely to jeopardize the continued existence of any FWS or NOAA listed species or result in the destruction of adverse modification of FWS or NOAA designated critical habitat of such species.<sup>32</sup> The law also requires similar documentation, justification,

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20. *Id.* at 5.

21. See Exec. Order No. 1014 (Jan. 26, 1909) (expanding the original unnumbered Executive Order of March 13, 1903 creating the Pelican Island Reservation).

22. *Id.*

23. CONG. RESEARCH SERV., *supra* note 18, at 5; see also *Yellowstone: History & Culture*, U.S. DEP'T INTERIOR NAT'L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/index.htm> (last updated Mar. 29, 2018).

24. Multiple Use Sustained Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. § 583 (2012)).

25. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. § 1701 (2012)).

26. Migratory Bird Conservation Act of 1929, Pub. L. No. 70-770, 45 Stat. 1222 (codified at 16 U.S.C. § 715 (2012)).

27. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. § 4321 (1970)).

28. Endangered Species Act, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. § 1531 (1976)).

29. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified at 16 U.S.C. §§ 1361-1362 (1976)).

30. See *National Environmental Policy Act*, COUNC. ON ENVTL. QUALITY, <https://ceq.doe.gov/> (last visited Dec. 1, 2018).

31. 42 U.S.C. § 4321.

32. Endangered Species Act § 17, 16 U.S.C. § 1531.

and mitigation where feasible for actions that cause a “taking”<sup>33</sup> of any listed species of endangered fish or wildlife.<sup>34</sup>

While the FWS mission is to preserve and protect wildlife habitat and the NPS mission in most national parks includes wildlife habitat conservation, the Forest Service and the BLM often face management choices that conflict with wildlife protection and preservation goals.<sup>35</sup> Both agencies function under multiple-use mandates that require compromise of wildlife management objectives.<sup>36</sup> In a very real sense, the multiple-use laws that govern the management of Forest Service and BLM lands were Congress’ way of avoiding difficult policy choices by delegating them to the agencies. In doing so, members of Congress may have convinced themselves that the agencies would resolve contentious political issues by resorting to science and expert resource managers, but the reality has been that politics remains at the heart of public lands management. The public lands are, as economist Richard Stroup observed many years ago, America’s political lands.<sup>37</sup>

The political nature of public lands management was brought to a stark focus by the 2016 occupation of the Malheur National Wildlife Refuge headquarters in southeastern Oregon.<sup>38</sup> The occupation stemmed from long-running disputes between the federal government and some western ranchers.<sup>39</sup> In a nutshell, the ranchers and their supporters have claimed that the BLM’s management of the public lands, on which many western ranches depend for livestock grazing, has favored wildlife habitat protection and other environmental objectives in contravention of what the ranchers believe to be their long-settled rights under the Taylor Grazing Act.<sup>40</sup> It is not surprising that significant reductions in lands available for grazing and in numbers of livestock permitted on those lands over the last half-century have led ranchers to believe that their rights are being whittled away. But it is fair to say that both the politics and the law are not favorable to the ranchers’ claims.

What would be favorable to the interests of the ranchers is a reform of federal land management laws that would allow markets to substitute for at least some of the politics that now dominate the federal government’s management of its vast grazing lands. While many ranchers feel threatened by the prospect of their neighbors selling out to conservationists like APR, the reality has been that

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33. 16 U.S.C. § 1532(19) (1988) (defining “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”).

34. 16 U.S.C. § 1538 (1988).

35. See James L. Huffman, *Public Lands Management in an Age of Deregulation and Privatization*, 10 PUB. LANDS & RESOURCES L. REV. 29, 48-49 (1989).

36. *Id.*

37. James L. Huffman, *Managing America’s Public Lands: Proposals for the Future--Introductory Remarks*, 18 PUB. LANDS & RESOURCES L. REV. 143, 147 (1997).

38. Harrison Berry, *Militia Group Seizes Malheur National Wildlife Refuge Headquarters*, BOISE WKLY. (Jan. 3, 2016), <https://www.boiseweekly.com/boise/militia-group-seizes-malheur-national-wildlife-refuge-headquarters/Content?oid=3687251>.

39. *Id.*

40. The recent occupation of the Malheur Wildlife Refuge based on the grazing rights claims of the Bundys and others is illustrative. See SHAWN REGAN, *MANAGING CONFLICTS OVER WESTERN RANGE LANDS* 18 (PERC Policy Series No. 54) (2016); see also Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (codified at 43 U.S.C. § 315 (2012)).

regulatory changes have reduced the economic value of grazing leases without any compensation to the lessees.<sup>41</sup> Making grazing leases transferable without the many restrictions that currently exist would allow ranchers to recoup at least some of the investment they have made in public grazing lands and in private lands and improvements dependent on those public lands.<sup>42</sup> It would also require conservationists to put their money where their mouth is, as APR is doing, rather than investing in lobbying and litigation to influence public lands policies. As Shawn Regan puts it in *Managing Conflicts over Western Rangelands*,<sup>43</sup> allowing for grazing lands to be allocated through market transactions rather than bureaucratic fiat would shift the landscape from “raiding to trading” – from political competition and lawsuits to mutually beneficial, voluntary transactions.<sup>44</sup> Rather than conflict between what environmentalists view as welfare ranchers and what ranchers view as socialist environmentalists, conservationists like APR would occupy the position of ranchers while pursuing environmental objectives and ranchers would have incentives to collaborate on those environmental goals while continuing to profit from their ranching enterprises.

### III. THE EXISTING LAW OF THE PUBLIC LAND

The existing law of the federal public grazing lands emerged from a century of largely unregulated grazing on the public domain lands that had not been transferred to private owners or to state governments. In a sense, the lands had come into federal ownership by default as the result of the nation’s expanding sovereignty over formerly French, Spanish, British, Mexican, and Russian territories occupied by relatively few private landowners. Congressional policy for most of the 19<sup>th</sup> century was focused on disposal of federal lands via grants to newly admitted states for the support of schools and universities, grants to railroad companies to encourage railroad expansion, and grants to individuals for farming and ranching. Until late in the century, there were very few people in or out of government who imagined that the federal government would continue to own land other than for basic governmental services.<sup>45</sup>

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41. Bill Steven Stem, *Permit Value: A Hidden Key to the Public Land Grazing Dispute* 41 (Apr. 21, 1998) (M.S. thesis, University of Montana).

42. *Id.* at 53.

43. REGAN, *supra* note 40, at 8.

44. *Id.* at 26-27.

45. Debates over the appropriateness and/or constitutionality of federal retention of vast tracts of western lands continue today as exemplified by recent armed conflicts in Oregon and Nevada. Those defending extensive federal land ownership often reference statehood acts as support for their claim that federal retention was contemplated as early as the Ohio statehood act of 1804. While statehood acts vary one from another, most conditioned statehood on the new state disclaiming any interest in federal public lands within its borders. But this condition reflected a federal desire to retain the proceeds from any future sale of public lands, not a desire to retain title in perpetuity. Illustrative of this intent is a condition of the Oregon statehood act in compliance with which the Oregon legislature declared that the “State shall never interfere with the primary disposal of the soil within the same by the United States.” See Andy Kerr, *Statehood and Federal Public Lands: A Deal is a Deal*, PUB. LANDS BLOG (Sept. 9, 2016), <http://www.andykerr.net/kerr-public-lands-blog/2016/9/8/statehood-and-federal-public-lands-a-deal-is-a-deal>.

Land grants to states and railroads were significant but made only a dent in the vast public domain. It was generally assumed and expected that the remainder of the lands would be transferred to private owners for largely agricultural purposes.<sup>46</sup> Indeed it was anticipated that the checkerboard pattern of grants to railroads would entice private settlement of the intermediate lands.<sup>47</sup> Even before Congress took any formal action many people simply squatted on unoccupied lands, something of a precedent for the unauthorized grazing that was later common on the Western prairies. In the 1830s, Congress enacted preemption laws granting title, with certain conditions, to lands occupied by squatters.<sup>48</sup> Over the following decades, Congress enacted several laws designed to encourage settlement and homesteading by granting private title to public lands, again with conditions requiring active development and limits intended to prevent speculation.<sup>49</sup>

Millions of acres of federal land were transferred under these various disposal programs, but millions more were still in the public domain when public attitudes about federal land ownership began to change in the late 19<sup>th</sup> century. Tens of millions of acres of land thought to have special public value, beginning with Yellowstone Park in 1872 and soon to be followed by the Forest Reserve Act of 1891, were withdrawn (reserved) from the public domain and thus no longer available for private acquisition.<sup>50</sup> Over the next several decades, other national parks were created along with wildlife refuges and the vast majority of today's 190 million acres of forest reserves.

Even then, over half of the federal government's original land holdings remained in the public domain and were thus available for livestock grazing.<sup>51</sup> For decades, homesteaders and other farmers and ranchers grazed their cattle and sheep on the "open range" free of charge with predictable consequences.<sup>52</sup> The public domain constituted an open-access commons in which ranchers had no property rights and thus no incentive to conserve and protect the grasslands. The result was extensive over-grazing, erosion, and loss of habitat for wildlife. After several failed efforts to control the abuse of public grasslands, Congress enacted the 1934 Taylor Grazing Act "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration" and to "provide for their orderly use, improvement, and

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46. See MARK FIEGE, *THE REPUBLIC OF NATURE: AN ENVIRONMENTAL HISTORY OF THE UNITED STATES 72-74* (2012); see also Daniel W. Bromley, *Private Property and the Public Interest: Land in the American Idea*, in *LAND IN THE AMERICAN WEST: PRIVATE CLAIMS AND THE COMMON GOOD 25-28* (William G. Robbins and James C. Foster eds., 2000).

47. Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 *STAN. L. REV.* 1373, 1377 (1987).

48. Preemption Act of 1841, ch. 16, 5 Stat. 453 (repealed 1891).

49. See *id.*; see also Homestead Act of 1862, 12 Stat. 392 (repealed 1976); Timber Culture Act of 1873, Pub. L. No. 42-277, 17 Stat. 605c (repealed 1891); Kinkaid Amendment of 1904, 33 Stat. 547 (repealed 1976); Enlarged Homestead Act of 1909, ch. 160, Pub. L. No. 245 (repealed 1976); Stock-Raising Homestead Act of 1916, 39 Stat. 862 (repealed 1976).

50. Federal Reserve Act of 1891, 26 Stat. 1095 (repealed 1976).

51. Unlawful Enclosures Act of 1885, ch. 149, 23 Stat. 321 (codified at 43 U.S.C. § 1061 (2012)) (banning fencing that prevented access to the public lands for grazing).

52. See George Cameron Coggins, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 *ENVTL. L.* 1, 22 (1982) (discussing the consequences).



development.”<sup>53</sup> The U.S. Grazing Service was created to administer a system of grazing districts, as well as to grant and charge for grazing permits to be issued to qualifying ranchers.<sup>54</sup> To qualify for a permit, ranchers had to meet two conditions, the latter of which still today stands as a major obstacle to a market in the use of these lands.<sup>55</sup> The first condition was that permittees were required to have a recent history of grazing on the open federal rangelands, a requirement reasonably meant to respect established expectations.<sup>56</sup> The second condition was that permittees were required to have ownership of a nearby “base property.”<sup>57</sup> The latter requirement remains in place and thus precludes everyone except neighboring ranchers from competing to purchase existing grazing leases unless they are also willing and able to purchase the associated base property.<sup>58</sup> A renewal preference for the current permittee, even from nearby ranches that might qualify as base property, further limits any prospect for a competitive market.<sup>59</sup>

A result of the public lands grazing regime established under the Taylor Grazing Act is that the value, indeed the viability, of most ranches reliant on federal lands for summer forage now depends on the security of the rancher’s grazing leases. Leases are usually for a ten-year period with the aforementioned renewal preference.<sup>60</sup> Fees are set by statute at a minimum of \$1.35 per animal unit month (AUM) with annual increases limited to 25 percent.<sup>61</sup> Since 1980 the federal grazing fee has ranged from \$1.35 to \$2.31 per AUM.<sup>62</sup> In 2016 the fee was \$2.11.<sup>63</sup> The fee is set according to a statutory formula accounting for comparable private grazing fees, the sale price of beef and the cost of livestock production.<sup>64</sup> Environmentalists often refer to federal grazing lessees as “welfare ranchers” because federal grazing fees are a small fraction of what ranchers pay to lease private grazing lands. In 2015 when the federal fee was \$1.69 the average private fee per AUM was \$22.60.<sup>65</sup> The difference is stark, but the two numbers are not

53. Taylor Grazing Act of 1934, Pub. L. No. 73-482, 48 Stat. 1269 (codified at 43 U.S.C. § 315 (2012)).

54. *Id.*

55. See REGAN, *supra* note 40, at 14.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. See *How Do I Get a Grazing Permit?*, U.S. FOREST SERV., <https://www.fs.fed.us/rangeland-management/grazing/permits.shtml> (last visited Dec. 1, 2018).

61. See Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803 (codified at 43 U.S.C. § 1901 (1982)); see also *Livestock Grazing on Public Lands*, U.S. DEP’T INTERIOR BUREAU LAND MGMT., <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing> (last visited Dec. 1, 2018).

62. See Press Release, Wildlife News, *Grazing Fee Drops in 2017, Further Undervaluing Public Lands* (Jan. 31, 2017), <http://www.thewildlifeneews.com/2017/01/31/grazing-fee-drops-in-2017-further-undervaluing-public-lands/>.

63. See Memorandum from U.S. Dep’t of Interior Bureau of Land Mgmt., *2016 Grazing Fee, Surcharge Rates, and Penalty for Unauthorized Grazing Use to All Field Office Officials* (Mar. 2, 2016), <https://www.blm.gov/policy/im-2016-050>.

64. Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803 (codified at 43 U.S.C. § 1901 (1982)).

65. CONG. RESEARCH SERV., RS21232, *GRAZING FEES: OVERVIEW AND ISSUES* 7 (2016).

really comparable. Federal grazing lessees are responsible for maintenance costs (e.g. fencing, water supply) that are generally borne by private lessors. In addition, public grazing lands generally provide far less forage per acre requiring ranchers to invest more in fencing and livestock monitoring than is necessary on higher quality private lands. Whether a sixteen-fold difference actually makes the real costs of public and private land grazing roughly the same is a question for economists, at least some of whom conclude that the total costs of public land grazing might be even higher than private land grazing.<sup>66</sup>

Whatever one concludes about the adequacy of the federal grazing fee, there is no doubt that taxpayers are subsidizing the federal grazing program.<sup>67</sup> Together the BLM and Forest Service administer 26,000 permits on 29,000 allotments covering 245 million acres.<sup>68</sup> In 2014, combined federal appropriations for the two agencies' grazing programs totaled \$143.6 million.<sup>69</sup> During that same year, grazing receipts for the two agencies totaled \$18.5 million.<sup>70</sup> If the federal grazing lessees' total costs are, in fact, similar to those paid by private grazing lessees, and assuming private landowners do not lease grazing land at a loss, it is puzzling why BLM and Forest Service leasing program costs are nearly 8 times higher than their revenues. Obviously, it is possible to lease grazing land at a profit, so either BLM and Forest Service lessees are paying drastically underpriced fees or the government is even less efficient than the most cynical critics of government could have imagined. If ranchers' total costs are in fact comparable under public and private grazing leases, it is safe to assume that a significant increase in federal fees would drive ranchers to private leases where that is an option, or out of business where the only grazing land available is public. In any event, it is clear that taxpayers are spending far more to provide public land grazing than ranchers are paying to use it.

At least part of the explanation for the high costs of administering the grazing programs are the multiple-use responsibilities of both the BLM and Forest Service. As a result of the enactment of the Multiple-Use Sustained-Yield Act of 1960, the National Forest Lands are to be "administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."<sup>71</sup> A similar requirement has governed the BLM since passage of the Federal Land Policy and Management Act of 1976.<sup>72</sup> Whether or not Congress intended that every acre of the affected

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66. Jes Burns & Tony Schick, *Controversial Federal Grazing Fees Not a Great Deal For Anyone*, OR. PUB. BROADCASTING (Sept. 14, 2016), <https://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/federal-grazing-fees/>.

67. See generally Taxpayers for Common Sense, *The Federal Grazing Program: A Stampede of Taxpayer Handouts*, [http://www.taxpayer.net/wp-content/uploads/ported/images/downloads/TheFederalGrazingProgram\\_AStampedeofTaxpayerHandouts.pdf](http://www.taxpayer.net/wp-content/uploads/ported/images/downloads/TheFederalGrazingProgram_AStampedeofTaxpayerHandouts.pdf) (last visited Dec. 1, 2018).

68. Press Release, U.S. Dep't of Interior Bureau of Land Mgmt., BLM and Forest Service Announce 2017 Grazing Fee (Jan. 31, 2017), <https://www.blm.gov/press-release/blm-and-forest-service-announce-2017-grazing-fee>.

69. CHRISTINE GLASER ET AL., COSTS AND CONSEQUENCES: THE REAL PRICE OF LIVESTOCK GRAZING ON AMERICA'S PUBLIC LANDS 17 (2015).

70. *Id.*

71. Multiple Use Sustained Yield Act of 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. § 583 (2012)).

72. FLPMA, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. § 1701 (2012)).

public lands be administered for multiple-use purposes or that the agencies could effectively zone and supply multiple-uses in the aggregate has never been clear. It is reasonable to assume that, from the perspective of users of the public lands and advocates for particular uses, the multiple-use mandate invites challenges to any management decisions that appear to favor one use over another. A result of the “raid or trade” formulation has been a proliferation of single-interest groups advocating for their favored use. As described by political scientists R. McGregor Cawley and John Freemuth, multiple-use has created a zero-sum political game that “encourages the various participants to concentrate their energies on the task of blocking the moves of their opponents rather than on seeking to establish a common ground upon which compromises could be constructed.”<sup>73</sup> A history of decline in the number of AUMs permitted on the public lands gives ranchers every reason to see the political game as Cawley and Freemuth describe it.<sup>74</sup> Today, AUMs permitted on BLM lands are half what they were in 1954.<sup>75</sup> Reduction of over-grazing probably accounts for some of that decline, but much has been the result of politically driven shifts to competing uses.

It is obvious that not every acre can be managed for all of the prescribed multiple-uses – a campground cannot also accommodate cows. It is also obvious that the location of a campground cannot be determined without considering the impact on grazing and other potential uses. Because grazing, if regulated, is compatible with many other uses, management choices are not clear-cut and thus invite the political competition described by Cawley and Freemuth.<sup>76</sup> The 1976 Public Rangeland Improvement Act tips the balance in favor of the anti-grazing and pro other-interest groups, but even then, grazing administration requires consideration of the impact of grazing on the other multiple-uses.<sup>77</sup> Assuming these costs are included in the BLM and Forest Service grazing program budgets, it is not surprising that the costs of leasing are much higher for public grazing lands than for private grazing lands.

Although possession of a permit to graze on a particular public land allotment is essential to the economic viability of many ranches and is a significant factor in the market value of those ranches, it is not a property right.<sup>78</sup> Lessees hold a “grazing privilege” that the government can decline to renew without any liability to the lessee.<sup>79</sup> In the 1973 case *United States v. Fuller*, the U.S. Supreme Court held that the federal government is not required by the Fifth Amendment to compensate a property owner in a condemnation action for the extra value of his property attributed to his federal grazing permit.<sup>80</sup> In 2000, a unanimous Supreme

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73. R. M. CAWLEY & J. FREEMUTH, A CRITIQUE OF THE MULTIPLE-USE FRAMEWORK IN PUBLIC LANDS DECISION MAKING 35-36 (1997).

74. *Id.*

75. See REGAN, *supra* note 40, at 5.

76. CRAWLEY & FREEMUTH, *supra* note 73.

77. Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803 (codified at 43 U.S.C. § 1901 (1982)).

78. David K. Lambert & J.S. Shonkwiler, *Property Rights, Grazing Permits, and Rancher Welfare*, 20(1) J. AGRIC. & RESOURCE ECON. 146, 147 (1995).

79. *Id.*

80. *United States v. Fuller*, 409 U.S. 488, 493 (1973).

Court held that the Secretary of Interior “has always had the statutory authority . . . to reclassify and withdraw range land from grazing use.”<sup>81</sup> Despite this clear understanding that public land grazing lessees do not have property rights in their grazing leases, ranchers have been able to rely on the renewal of those leases, although not necessarily for the same level of usage, as the decline in total AUMs since 1954 underscores. Thus, purchasers of base properties with associated grazing allotments, and lenders who finance such purchasers, bear the not insignificant risk of a change in government policy.

Another factor affecting the security of federal grazing leases is a ‘use it or lose it’ requirement. BLM regulations make lessees subject to civil penalties for “failing to make substantial grazing use as authorized by a permit or lease for 2 consecutive years.”<sup>82</sup> The regulations further allow BLM to issue nonrenewable grazing permits to other qualified applicants “[i]f forage available for livestock is not or will not be used by the preference permittee or lessee.”<sup>83</sup> It is possible for grazing allotments or portions of allotments to be rested for purposes of range improvement or restoration, but only with the approval of the BLM.<sup>84</sup> Thus range management rests largely with the BLM, and grazing lessees are at risk of temporarily or permanently losing their grazing privileges at the discretion of BLM officials.<sup>85</sup>

#### IV. THE AMERICAN PRAIRIE RESERVE

Federal public lands subject to the foregoing laws and regulations form a significant part of the prairie ecosystems of the Northern Great Plains. In 1999, The Nature Conservancy (TNC) published an in-depth report identifying landscapes in the Northern Great Plains critical “to maintain the long-term viability of all native plant and animal species and examples of all natural communities across their natural ranges of occurrence and variation within the ecoregion.”<sup>86</sup> The Northern Great Plains Steppe ecoregion encompasses 250,000 square miles including parts of five American states (Montana, Nebraska, North Dakota, South Dakota, and Wyoming) and two Canadian provinces (Alberta and Saskatchewan).<sup>87</sup> Across the region, approximately 60% of the natural vegetation remains intact providing habitat for “42 primary species, 18 secondary species, 323 natural communities, and two general aquatic communities.”<sup>88</sup> The study prioritized landscapes on the

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81. *Public Lands Council v. Babbitt*, 529 U.S. 728, 741 (2000).

82. *Acts Prohibited on Public Lands*, 43 C.F.R. § 4140.1(2) (2006). Lessees can get approval for up to 3 years of non-use under 43 C.F.R. § 4130.2(g) (2006); see also *Transforming the Department of the Interior for the 21<sup>st</sup> Century: Hearing Before H. Comm. on Nat. Res.*, 117th Cong. 14-15 (2017) (statement of Shawn Regan, PERC Research Fellow).

83. *Range Improvement Permits*, 43 C.F.R. § 4120.3-3(c) (2006).

84. *Id.*

85. In practice, loss of grazing privileges is rare and generally only where the lessee has failed to comply with the terms of his or her lease.

86. THE NATURE CONSERVANCY, *ECOREGIONAL PLANNING IN THE NORTHERN GREAT PLAINS STEPPE* viii (1999).

87. *Id.*

88. *Id.*

basis of several factors related to prospects for achieving the conservation goals.<sup>89</sup> As one would expect, larger undisturbed landscapes were identified as the highest priority and, not surprisingly, those areas were largely in federal ownership under BLM and Forest Service management.<sup>90</sup> But because of the many interspersed private properties within the highest priority areas, The Nature Conservancy study concluded that “[i]t is critical that conservation action within these sites employ both private and public land strategies.”<sup>91</sup>

Among the highest priority sites identified by TNC is the Montana Glaciated Plains, a region constituting 2,545,985 acres north of the Charles M. Russell National Wildlife Refuge on the Missouri River in northeastern Montana.<sup>92</sup> Just over half of the region is managed by the BLM (43.4%) and the Forest Service (12.1%), with most of the remainder in private and some state ownership.<sup>93</sup> Although TNC has a long history of acquiring private lands for conservation and working with public agencies in the management of those lands, the scale of a conservation effort over the entirety of the Montana Glaciated Plains is beyond the means of an organization with a national and global conservation mission. In the wake of the Nature Conservancy study, the World Wildlife Fund decided to initiate a conservation effort in the Northern Great Plains and concluded that only an independent, focused conservation effort could succeed in the preservation of the region identified in the study.<sup>94</sup> In 2001 the American Prairie Foundation, now doing business as American Prairie Reserve, was formed as an independent, non-profit organization with the mission “to create the largest nature reserve in the continental United States, a refuge for people and wildlife preserved forever as part of America’s heritage.”<sup>95</sup>

APR has the very ambitious goal of assembling 2.5 million acres of private and leased public lands that when combined with the 1 million acres of the Charles M. Russell Wildlife Refuge will constitute a 3.5 million acre reserve.<sup>96</sup> By comparison, Yellowstone National Park covers 2.2 million acres.<sup>97</sup> “Our main focus,” declares the APR website, “is to purchase and permanently hold title to private lands that glue together a vast mosaic of existing public lands so that the region is managed thoughtfully and collaboratively with state and federal agencies for wildlife conservation and public access.”<sup>98</sup> To achieve its 3.5 million acre goal,

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89. *Id.*

90. *Id.* at 51.

91. *Id.* at 41.

92. *Id.* at 42.

93. *Id.*

94. *Partnering for America’s Plains*, WORLD WILDLIFE FUND, Summer 2016, <https://www.worldwildlife.org/magazine/issues/summer-2016/articles/partnering-for-america-s-plains>; see also *Our Story*, AM. PRAIRIE RES., <https://www.americanprairie.org/our-story> (last visited Dec. 1, 2018).

95. AM. PRAIRIE RESERVE, *supra* note 4; see Pete Geddes, *The Yellowstone of the Future*, N.Y. TIMES (Dec. 28, 2015), <https://www.nytimes.com/2015/12/28/opinion/the-yellowstone-of-the-future.html>.

96. AM. PRAIRIE RESERVE, *supra* note 11.

97. *Park Facts*, NAT’L PARK SERV. (May 31, 2018), <https://www.nps.gov/yell/planyourvisit/parkfacts.htm>.

98. AM. PRAIRIE RESERVE, *supra* note 4.

APR will need to acquire about 500,000 acres of private land.<sup>99</sup> As of October 2017, APR has acquired 91,588 deeded acres with leases on 272,717 acres of BLM lands and 34,674 of state trust lands at a total cost of close to 60 million dollars.<sup>100</sup> APR estimates that the remaining acquisitions of private lands will cost in the neighborhood of another 450 million dollars.<sup>101</sup>

However, acquisition costs are only part of the financial challenge facing APR. Unlike TNC and some other organizations that have chosen land purchase over lobbying and litigation as a conservation strategy, APR intends, as noted above, to retain ownership in perpetuity rather than avoid long-term management and maintenance costs by conveying title to the government. In 2017, Reserve operating costs, not including fund-raising and debt service, were about \$2.4 million<sup>102</sup> While operating and maintenance costs will continue in perpetuity, it is not expected that they will rise significantly as more lands are acquired. This is because the costs of removing fences and other farm improvements are one-time expenses. Perhaps the best basis for projecting APR's ongoing operating costs is the comparable costs on the CRM that in FY 2017 total \$2.16 million for management of 1 million acres.<sup>103</sup> Assuming no economies attributable to private efficiencies, or governmental inefficiencies, that translates to \$1.6 million annual operating costs on APR's projected 750,000 private acres, plus whatever management costs APR bears on BLM leased lands and the property taxes it pays.<sup>104</sup> Perhaps the current \$2.4 million budget is reasonable for the long-term (adjusted for inflation, of course).

APR has little prospect for earned revenue beyond camping and lodging fees, APR swag, auctioned permits to hunt buffalo on the Reserve, projected at \$550 for members and \$650 for non-members, and a fledgling membership program.<sup>105</sup> Because much of the Reserve will be on public lands, and because maintaining good public relations with a skeptical local population is a challenge, APR has included public access in its mission.<sup>106</sup> Thus they have no plans to charge visitors' fees.<sup>107</sup> But even if they did impose an entrance charge, their isolated

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99. AM\_PRAIRIE RESERVE, *supra* note 11.

100. *Id.*

101. Geddes, *supra* note 14.

102. AMATICS CPA GROUP, AUDITED CONSOLIDATED FINANCIAL STATEMENTS (2017), <https://www.americanprairie.org/sites/default/files/2017%20Audited%20Financial%20Statements%20-%20Final.pdf>.

103. A caveat on reliance on CMR costs is that, in the words of CMR manager Paul Santavy, "we are in a pretty steep human capital reduction phase." According to Santavy, CRM has experienced a 40% FTE reduction since 2010 and is scheduled to lose "the Deputy Project Leader, 2 refuge management specialists, and 1 natural resource specialist" pursuant to an FWS regional workforce realignment plan. That would mean reductions from a current staff of only 14, so the comparison may, in fact, underestimate the costs of a well-managed APR. See E-mail from Paul Santavy, CMR manager, to Pete Geddes, APR Managing Dir. (Jan. 4, 2018) (on file with author).

104. APR paid \$91,560 in property taxes in 2017. Geddes, *supra* note 14.

105. See generally *American Prairie Reserve*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org> (last visited Dec. 1, 2018).

106. See generally AM. PRAIRIE RESERVE, *supra* note 4.

107. See *Public Access FAQs*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/public-access-faqs> (last visited Dec. 1, 2018).

location assures that visitor fees will never yield significant revenues. Further, free access means that the membership program will depend on people committed to the APR mission rather than those looking for free or discounted admission to the Reserve or hunting privileges. Thus, APR faces an ongoing fund-raising challenge even after all the targeted lands are acquired. Although operating costs are not expected to rise in proportion to future land acquisitions, each acquisition will add to the property taxes APR pays on all of its private holdings, especially to economically struggling counties starved for revenue.

Going forward APR plans to rely on concessionaires for management of revenue generating initiatives on the theory that APR's expertise is in land acquisition and wildlife management, not recreation and tourism.<sup>108</sup> Even with that they expect earned revenues to provide a small part of future operating costs.<sup>109</sup> To meet the challenge of funding ongoing costs, APR has a target of raising a \$125 million endowment.<sup>110</sup> At a spending rate of 4%, once thought to be conservative but today probably realistic, if not optimistic, an endowment of that amount would generate \$5 million each year – clearly enough unless costs are far higher than expected. Because the focus here-to-fore has been on land acquisitions as opportunities arise, APR's present endowment is only \$1.3 million and is not likely to increase significantly in the near term given that they continue to have more land acquisition opportunities than they have been able to afford.<sup>111</sup>

The advantages of acquiring and retaining private ownership of Reserve lands are significant. Subject to any applicable federal, state, or local regulations, APR is free to manage its lands as it chooses and without the process and litigation delays common to public lands management. On its private lands, APR is also free from the multiple-use mandates that govern BLM and Forest Service grasslands. "We are," notes APR, "... free to focus our land management decisions exclusively on benefiting wildlife and the public's enjoyment of it."<sup>112</sup> In an expression of high confidence in its future fund-raising, the APR website also asserts an advantage over governments that "[f]rom time-to-time . . . struggle to fully fund large-scale parks and recreation areas, sometimes even needing to close them temporarily due to insufficient operational funds."<sup>113</sup>

These clear advantages do not alter the reality that the success of APR is heavily dependent on the cooperation of a wide array of governments with different missions. Between APR's westernmost properties near the confluence of the Judith and Missouri Rivers and its easternmost properties midway on the north side of Fort Peck Reservoir, BLM and FWS lands are variously designated for multiple-uses, wild and scenic river, wilderness, national monument and wildlife refuge. Fort Peck Reservoir, which runs through the Charles M. Russell National Wildlife

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108. Geddes, *supra* note 14.

109. *Id.*

110. See Pierce, *supra* note 5.

111. Geddes, *supra* note 14.

112. AM.PRAIRIE RESERVE, *supra* note 11.

113. *Id.*

Refuge, is managed by the U.S. Army Corps of Engineers.<sup>114</sup> The U.S. Fish and Wildlife Service and the Montana Department of Fish, Wildlife & Parks share wildlife management responsibilities. The Montana Department of State Lands has responsibility for state lands located within the Reserve.<sup>115</sup> Three Indian reservations are located near the Reserve, one of which is Fort Belknap that has its own bison herd, which has led to constructive collaboration with APR.<sup>116</sup> The Reserve occupies land in six counties that are home to many local residents who see their way of life threatened by the Reserve.<sup>117</sup>

Notwithstanding these seemingly daunting challenges, APR has had remarkable success in its first dozen years of land acquisition. Although many local residents conflate APR with big government takeover of lands on which rural economies depend, those who choose to sell benefit from the presence of a new potential purchaser in an otherwise uncompetitive market. APR has been outbid on a couple of its offers, but generally, there are few potential buyers unless a neighboring ranch owner wishes to expand operations, usually to accommodate a son or daughter who wants to be in the ranching business. There are far more landowners whose children have left for greener pastures and for whom their land is their retirement fund. Among a rural population that often feels victim to regulation and government indifference, the fact that APR pays market value to willing sellers is, at least, the American way – even if it brings unwelcome change.

On the ground, APR's achievements are many. Although they are quick to insist that they are not only, or even primarily, about bison, they have built a healthy and cattle gene-free herd of nearly a thousand animals.<sup>118</sup> In establishing its bison herd, APR has imported bison from other regions in the interest of avoiding inbreeding, but the options are limited in light of their desire to maintain a genetically pure herd. Because bison are fecund and conditions on the Reserve have been favorable, additional land acquisitions are required or the herd will need to be culled.<sup>119</sup> But even when the Reserve reaches its full 3.5 million acres, its projected capacity of 10,000 bison will eventually be exceeded.<sup>120</sup> It is a problem APR will no doubt welcome, although it will come with public relations challenges since auctioning hunting permits is a likely solution along with the transfer of bison to other reserves.

As large, heavy-grazing mammals, bison are important to the prairie ecosystem that supports a wide range of other animal and plant species, including prairie dogs, rattlesnakes, antelope and a wide array of raptors.<sup>121</sup> Bison are also

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114. See generally *Fort Peck Lake Reservoir and Recreation Area*, VISIT MONT., <https://www.visitmt.com/listings/general/lake/fort-peck-lake-reservoir-and-recreation-area.html> (last visited Dec. 1, 2018).

115. *Trust Lands Management*, MONT. OFFICIAL ST. WEBSITE, <http://dnrc.mt.gov/divisions/trust> (last visited Dec. 1, 2018).

116. See AM. PRAIRIE RESERVE, BISON REPORT 2016-2017 4 (2018), [https://www.americanprairie.org/sites/default/files/APR\\_Bison%20Report\\_16\\_17.pdf](https://www.americanprairie.org/sites/default/files/APR_Bison%20Report_16_17.pdf).

117. Pierce, *supra* note 5.

118. See AM. PRAIRIE RESERVE, *supra* note 116, at 2.

119. AM. PRAIRIE RESERVE, *supra* note 10.

120. *Id.*

121. *Id.*



important, as luck would have it, to the success of APR's core strategy. Under Montana law, APR's bison are classified as livestock, not wildlife.<sup>122</sup> This reflects a long history of efforts to crossbreed bison and cattle in hopes of combining the meat production of cattle with the winter hardiness of the bison. Whatever the logic of the classification today, it has made it possible for APR to acquire and retain public land grazing leases without a change in BLM rules, although APR must get BLM approval, which in turn requires NEPA review. APR can substitute bison for cattle on the BLM and Forest Service allotments. If APR sought to do the same with deer, elk or antelope, they would come afoul of the use-it-or-lose-it rules because wildlife do not count as grazers.<sup>123</sup>

In addition to its core wildlife habitat objectives, APR provides numerous other public benefits. They have established campgrounds and are in the process of developing a hut-to-hut system for hikers.<sup>124</sup> For those more interested in high-end glamping (glamorous camping), APR has luxurious yurts with a prairie vista unequaled anywhere. APR's deeded lands are also open to big game and bird hunting without an access fee.<sup>125</sup> They have an education and science center that can accommodate resident scientists and visiting school groups, and they employ their own staff of wildlife management professionals.<sup>126</sup>

APR is governed by a board consisting, in the words of APR Managing Director Pete Geddes, of people "from across the political spectrum."<sup>127</sup> What board members have in common, according to Geddes, is a passion for preserving a threatened ecosystem and a high tolerance for risk.<sup>128</sup> The latter, Geddes suggests, is the key to APR's early success. "Rather than sit back and wait until they have raised enough money to accomplish a lot of their objective, they just jump at opportunities that come along."<sup>129</sup> There is also agreement "across the board" on long-term retention of acquired lands which raises the question of whether investors and the public can expect APR to stay the course on its mission and methods. Board turnover is inevitable and new members might be more risk-averse

122. MONT. CODE ANN. § 81-1-101 (2009); MONT. CODE ANN. § 87-2-101(6) (2009). Under Montana law bison are classified as "domestic" if privately owned and "game animal" if wild. Under this definition, the only wild buffalo in the state are those that roam into the state from Yellowstone National Park. The National Bison Legacy Act of 2016 designates the American bison as the official mammal of the United States, a status that has no apparent relevance to the states' varying classification of their resident bison.

123. See Authority and Definitions, 36 C.F.R. § 222.1(b)(8) (1979) (defining livestock as animals kept or used for pleasure); see also 43 C.F.R. § 4140.1(2) (2006) (held invalid in *Western Watersheds Projects v. Kraayenbrink*, 632 F.3d 472, 480 (2011)). Lessees can get approval for up to 3 years of non-use under 43 CFR § 4130.2(g) (2006) (held invalid in *Western Watersheds Projects v. Kraayenbrink*, 632 F.3d 472, 480 (2011)).

124. *Hut-to-Hut System*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/project/hut-to-hut-system> (last visited Dec. 1, 2018).

125. See AM. PRAIRIE RESERVE, *supra* note 107; see also *Hunting*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/hunting> (last visited Dec. 1, 2018).

126. *Enrico Education and Science Center*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/enrico-center> (last visited Dec. 1, 2018); *Staff*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/profiles/staff> (last visited Dec. 1, 2018).

127. Geddes, *supra* note 14.

128. *Id.*

129. *Id.*

and less committed to the long-term retention of the lands. The possibility of selling or gifting the lands to the government as a means of freeing up resources for other purchases and reducing operating costs will be a recurrent temptation.

There can be no ironclad assurance that future APR boards will rigidly adhere to the mission and strategies of the founders, though in light of the steadily diminishing economic opportunities in the region it is hard to imagine significant diversion from the core mission of preserving the prairie for wildlife habitat and future generations. According to Geddes, APR's baseline – the prairie conditions they seek to preserve – is 1804 (the first year of the Lewis & Clark expedition). Presumably, that could change, although it makes sense in light of APR's acceptance of humans as part of the natural environment. The native tribes had important influences on the prairie ecosystem, as do neighboring ranchers and visitors to the Reserve.

Today's supporters of the Reserve will naturally wish that the APR they have helped to create will be the APR of the future and it probably will be, at least in its primary mission. It was the prospect of future adaptation to improved understanding of prairie ecosystems and to changing political and economic circumstances as a feature of the private model that may well have attracted APR's early investors. It is the reality of decades-old public lands laws and land managers constrained by mandates from regional and national officials that makes APR an exciting and promising alternative. To be sure, the APR model requires ongoing collaboration with government land management agencies, but most of the resource managers within those agencies will have every incentive to make the collaboration work if the prairie and wildlife prosper. Thus far, according to Geddes, government land managers have welcomed APR as a friendly neighbor with a shared mission of protecting wildlife, in contrast to the conflicts over wildlife the agencies often experience with other private landowners.<sup>130</sup>

## V. A MODEL FOR COLLABORATIVE PRIVATE-PUBLIC LAND MANAGEMENT

The idea of allowing conservation and environmental interests to acquire and retire federal public land grazing permits is not new, but the law and regulations have been slow to change. Some of the resistance is inherent in government. The federal bureaucracy is invested in the systems it has in place and is hesitant to embrace disruptive change. However, the resistance is more about public lands politics as it has evolved over the last century. For decades, resource users such as timber, mining and ranching have had the upper hand. Conservation was an important part of public lands policy, but conservation was for the purpose of sustained yield, not preservation.<sup>131</sup> Gifford Pinchot,<sup>132</sup> not John Muir, was the guiding light. With the Multiple-Use Sustained-Yield Act and the succeeding

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130. *Id.*

131. See JOHN B. LOOMIS, INTEGRATED PUBLIC LANDS MANAGEMENT: PRINCIPLES AND APPLICATIONS TO NATIONAL FORESTS, PARKS, WILDLIFE REFUGES, AND BLM LANDS 28 (2002).

132. Pinchot's philosophy was that management principles should be guided by providing the greatest good for the greater number for the long run. See *History & Culture*, U.S. DEP'T AGRIC., <https://www.fs.usda.gov/main/giffordpinchot/learning/history-culture> (last visited Dec. 1, 2018).

public lands management legislation, the Muir philosophy began to gain the upper hand. Public lands resources available for consumptive uses slowly declined as environmentalists gained political clout. Though outnumbered by the largely urban environmental interests, resource users fought a rear-guard action with remarkable success. Environmentalist objectives were achieved less by changing the underlying laws allowing for resource use than by superimposing process oriented mandates like FLPMA and NEPA. Ranchers with public land grazing privileges saw overall grazing allotments decline, but they managed to preserve their exclusive hold on whatever grazing was allowed.

More than 10 percent of the land area of the United States, approximately 245 million acres, is owned by the federal government and managed for livestock grazing by the Bureau of Land Management and the Forest Service.<sup>133</sup> The continuing existence of these mostly undeveloped lands is largely fortuitous. Even after a century of affirmative federal land disposal policies, the lands remained in public ownership when public attitudes shifted in the direction of public land retention and management. Since 1960, in the case of the Forest Service, and 1976, in the case of the BLM, these lands have been managed for multiple-uses, including wildlife.<sup>134</sup> But there remain significant, unexploited opportunities for wildlife habitat preservation and protection on these public lands. The experience of the American Prairie Reserve provides useful lessons for how the public grazing lands can better serve wildlife habitat protection on a large scale.

While APR's focus on bison as a key species in prairie preservation and restoration has allowed the organization to achieve many of its goals within existing government leasing regulations, the ambitious project also underscores how a few regulatory and institutional changes could facilitate further significant restoration and protection of wildlife habitat.

The first change is the elimination of the livestock grazing requirement. It is not surprising that there is an expectation that lands leased for grazing will be used for grazing. Early on, America's long-standing policy of public land and resource disposal to private parties reflected a strong bias against speculation.<sup>135</sup> Private acquisition and nonuse of land and resources were thought to run counter to the objective of promoting westward expansion and development. Whatever the merits of anti-speculation laws in terms of economic theory, the idea that public land grazing lessees must have grazing livestock on their allotments or lose their permit to others has long been a central aspect of the federal grazing programs.<sup>136</sup> While defenders of the use-it-or-lose-it rules contend that regular grazing is necessary to the health of grasslands, APR has demonstrated that grassland health can be served by the presence of large numbers of bison. The grazing patterns of

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133. *Livestock Grazing on Public Lands*, U.S. DEP'T INTERIOR BUREAU LAND MGMT., <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing> (last visited Dec. 1, 2018); *see generally* U.S. DEP'T OF AGRIC., GRAZING STATISTICAL SUMMARY: FY 2016 (2017), <https://www.fs.fed.us/rangeland-management/documents/grazing-stats/2010s/GrazingStatisticalSummaryFY2016.pdf>.

134. 16 U.S.C. §§ 528, 531 (1960); *see also* 16 U.S.C. §§ 528-31 (1960); 43 U.S.C. § 1732 (1988).

135. *See* Robert B. Kieter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1131-32 (2005).

136. *See* 43 C.F.R. § 4140.1(2) (2006).

deer, elk and antelope are different from bison, but it is the case that the native prairies evolved with and without bison present at all times in all areas.

Another change is the elimination of the base property requirement. Both the Forest Service and the BLM require that a grazing lessee own base property in the vicinity of the grazing allotment.<sup>137</sup> Generally, base property means land, although the BLM will consider water rights as base property in the desert Southwest.<sup>138</sup> The base property requirement appears to assume that a lessee cannot have a successful livestock operation without private land which functions as ranching headquarters. However, the fact that BLM allows water rights to count as base property in the desert<sup>139</sup> belies that a ranching headquarters is necessary. Indeed a water rights requirement, particularly in the desert Southwest, is far more likely than a land rights requirement to relate to the success of a livestock operation that relies on public grazing lands. In any event, the base property requirement makes little, if any, sense once grazing rights are made available to the highest bidder without regard to whether or not there is a plan to put livestock on the land. Because APR seeks to create a reserve of 3.5 million acres over which bison and other wildlife can freely roam, the acquisition of existing base properties avoids having to deal with un-cooperative private in-holders in the future. But recognizing that not all ranchers within the Reserve boundaries will be interested in selling, APR has developed a program designed to encourage private ranchers to accommodate wildlife and in return, they get the benefit of a premium grass-fed beef marketing program called Wild Sky Beef.<sup>140</sup>

Greater management autonomy for grazing lessees is another contributing change. Under existing BLM and Forest Service regulations, grazing lessees must get approval from government officials for many range management initiatives.<sup>141</sup> Over eight decades since enactment of the Taylor Grazing Act, ranchers and government bureaucrats have developed generally collaborative relationships that impose minimal constraints on ranchers, except when livestock numbers and particular lands have been limited for environmental reasons. Conservationists like APR have different objectives and often-greater expertise relative to those objectives, making many existing government regulations both burdensome and counter-productive. For example, APR must get BLM approval for the removal of fencing that is essential to cattle operations but an obstacle to free-roaming bison.<sup>142</sup> They must also get approval for year-round grazing which is appropriate

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137. 36 C.F.R. § 222.3 (1981); 43 C.F.R. §4110.1(a) (2006) (held invalid in *Western Watersheds Projects v. Kraayenbrink*, 632 F.3d 472, 480 (2011)).

138. *See* 43 C.F.R. § 4110.2-1(a) (2006) (held invalid in *Western Watersheds Projects v. Kraayenbrink*, 632 F.3d 472, 480 (2011)) (referencing water to qualify as base property); *see also* *Grazing Administration Requirements and Processes*, U.S. FOREST SERV., <https://www.fs.fed.us/rangeland-management/documents/grazing/BLMGrazingAdministrationRequirementsProcesses201708.pdf> (last visited Dec. 1, 2018).

139. *Id.*

140. *See generally* *About*, WILD SKY BEEF, <http://wildskybeef.org/about> (last visited Dec. 1, 2018); *Wild Sky Beef*, AM. PRAIRIE RESERVE, <https://www.americanprairie.org/wild-sky-beef> (last visited Dec. 1, 2018).

141. 43 C.F.R. § 4120.3-39 (2006); 36 C.F.R. § 222.9 (2017).

142. *See* 43 C.F.R. 4120.3-3 (2006).

for bison but has been considered inappropriate for cattle.<sup>143</sup> While the BLM is presumably required by NEPA to review the environmental impacts of fence removal and year-round grazing, and APR has learned to work closely with BLM on all management actions requiring BLM approval, the government oversight does impose costs on APR which depletes resources that otherwise could be devoted directly to the conservation mission. If and when grazing lands become more available for conservation purposes, it will be important for the BLM and Forest Service to eliminate regulations and procedures intended to serve grazing management objectives.

Additionally, consolidation of public lands is a change that APR demonstrates could facilitate restoration and wildlife protection. Ever since federal land policy shifted from disposal to retention and management, both public and private land managers have struggled with the checkerboard pattern of public and private ownership that resulted largely from the policy of granting to railroad companies title to every other section within as much as 40 miles of the railroad right-of-way.<sup>144</sup> Although the federal government has long sought to facilitate public land management by consolidating public ownership through public-private land exchanges, the checkerboard pattern persists in most of the West.<sup>145</sup> In a sense, APR is in the business of consolidating land ownership by purchasing private lands and working closely with government on leased and other public lands. But for the same reason that the federal government has sought to consolidate ownership, conservation organizations able and willing to lease federal grazing lands for wildlife habitat will benefit from land ownership patterns that provide more expansive landscapes.

Another beneficial change would be market rate leasing. Because Americans generally view conservation and environmental protection as public benefits and private economic enterprise as providing purely private benefits, many environmentalists will contend that the use of public lands for conservation and wildlife habitat should not come at a cost to conservation advocates.<sup>146</sup> A common refrain is that the public owns these lands and should not have to pay to use them. Putting aside the many public benefits from private enterprise, the history of public lands management, since the disposal era, has been one of competing claims on the public interest, leading to the politics of “raiding” as described by Shawn Regan.<sup>147</sup> As Regan contends, trading through markets both reduces transactions costs (the transactions costs of politics are too often ignored) and provides a better measure of

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143. There are studies finding that moderate, year-round cattle grazing can also be beneficial to the range, although cattle are more inclined to congregate in riparian areas during both hot and cold periods resulting in damage to both streams and grasslands. For a review of peer-reviewed literature on the question. See U.S. DEP'T OF AGRIC., CONSERVATION BENEFITS OF RANGELAND PRACTICES: ASSESSMENT, RECOMMENDATIONS, AND KNOWLEDGE GAPS (David D. Briske ed., 2011).

144. Roger D. Billings, *The Homestead Act, Pacific Railroad Act and Morrill Act*, 39 N. KY. L. REV. 699, 706 (2012).

145. CONG. RESEARCH SERV., R41509, LAND EXCHANGES: BUREAU OF LAND MANAGEMENT (BLM) PROCESS AND ISSUES 4 (2016).

146. See, e.g., *Statement on User Fees of Public Lands*, SIERRA CLUB (Nov. 4, 2004), <https://www.sierraclub.org/policy/user-fees-public-lands>.

147. Shawn Regan, *Raiding and Trading in the American West*, AM. CONSERVATIVE (May 23, 2014), <https://www.theamericanconservative.com/articles/raiding-and-trading-in-the-american-west/>.

the relative values of alternative uses.<sup>148</sup> Thus, it is important that non-grazing users of public grasslands pay market value for their leases. Under current law, market value is determined through an administrative process.<sup>149</sup> Market value would be better determined through a competitive bidding process in which potential conservation lessees compete with ranchers and other conservation groups to establish the most valued use of the land.

Long-term leases are a change that APR is showing could be effective. BLM grazing leases are generally for a ten-year period with a renewal preference to the existing permittee. While ranchers have been able to rely on regular renewal and continued access to public lands, they have experienced reductions in numbers of livestock allowed and are not guaranteed lease renewal. This means that any permittee, including APR, can have its lease canceled or the lease conditions altered at the discretion of the BLM. Clearly, APR is confident that their significant investments in base properties will not be undercut by a change in government policy; however, in the politics of competing claims on the public lands, anything is possible. It would be far better for BLM and the Forest Service to grant longer-term leases, particularly to entities like APR whose objective of prairie restoration will not be achieved for decades. There is a legitimate argument that public resources should not be alienated in perpetuity, but grants of as many as fifty years have proven, in the case of hydropower licensing, to be an effective way of assuring that future generations will have the option of following a different path.<sup>150</sup>

One of the biggest changes APR has demonstrated as effective is public-private collaboration. Essential to the success of any private conservation effort involving the use of public lands, whether federal or state, are good relations between the government and the private enterprise. Agreement on objectives, or at least government acceptance of the private objectives, and an established process for ongoing collaboration are critical to the success of the private effort. A record of successful collaboration will also encourage other private conservation groups to seek similar opportunities on public lands. As in purely private collaborations, it is always better to have clearly defined rights and responsibilities, but for now, the reality is likely to be one in which government has the authority to take actions contrary to the expectations and interests of the private conservation program. Therefore, private conservationists should make every effort to work with government officials, as APR has done, while also working to increase the security of their rights under the leases they negotiate.

User fees are a factor that could influence the success of private conservation efforts on public lands, providing potential revenues to offset acquisition and management costs. Fee hunting, which is the practice of private landowners charging an access fee to hunters licensed by the state, is controversial in Montana. Although it is clear that private landowners can exclude hunters and fisherman from their property, limiting access to those willing and able to pay a

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148. *Id.*

149. See Public Rangelands Improvement Act of 1978, Pub. L. No. 95-514, 92 Stat. 1803 (codified at 43 U.S.C. § 1901, 1905 (1982)); Exec. Order No. 12, 548, 51 Fed. Reg. 5985 (Feb. 19, 1986).

150. See HYDROPOWER LICENSING – GET INVOLVED, FED. ENERGY REGULATORY COMM’N 4 (2016), <https://www.ferc.gov/resources/guides/hydropower/hydro-guide.pdf>.

sometimes substantial fee is viewed by many as both elitist and contrary to a sort of pioneering tradition. APR could charge an access fee on its deeded lands but chooses not to for both philosophical and public relations reasons.<sup>151</sup> But they do plan to experiment with an auction for the right to shoot bison, something they can do because the private bison are considered livestock under Montana law.<sup>152</sup> Conservationist lessees of public grazing lands could not charge an access fee without a fundamental shift in federal policies with respect to access to public lands. With the passage of time and a significant shift in public attitudes, however, the idea of conservationists charging for access to wildlife they have effectively provided at their own expense may be accepted. It would contribute to the costs of wildlife habitat preservation and make the conservationists more competitive in the marketplace. Although potential revenues from fees for other services like campground sites will provide marginal revenues at best, they will be readily accepted by most people already accustomed to paying such fees on public sites.

The final change APR has demonstrated to be effective is property taxes and payments in lieu of taxes. The federal government is exempt from state and local property taxes on the lands it owns.<sup>153</sup> So too are lessees of those lands, although grazing lessees pay property taxes on the value of their deeded ranch which is significantly affected by the associated public land grazing allotments.<sup>154</sup> APR pays taxes on all its deeded lands as assessed by each of the six counties, as well as a state livestock per capita fee of \$6.38 on each of its bison.<sup>155</sup> The per capita fee for cattle is \$2.29 a head<sup>156</sup> suggesting, not surprisingly, that the cattlemen invest more in lobbying than the bison ranchers. As a non-profit, APR could be exempt on up to 80 acres of any property devoted to education, but they choose to forego the exemption. APR also pays the same BLM grazing fee as do cattle ranchers. Because APR is controversial, to say the least, in the counties in which it holds lands, paying its fair share of taxes is critical to building local public support. For the sake of public relations and in recognition of their reliance on local government services, conservation lessees of federal public lands should consider making payments in lieu of taxes, just as the federal government does, derived from the grazing fees paid by ranchers. Most counties with extensive public lands have a substantially reduced tax base making the financing of local government difficult.

## VII. CONCLUSION

Federal public lands now designated for grazing constitute over 10 percent of all land in the United States and a much higher percentage of undeveloped and

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151. Geddes, *supra* note 14.

152. *Id.*; MONT. CODE ANN. § 81-1-101 (2009); MONT. CODE ANN. § 87-2-101(6) (2009).

153. U.S. CONST. art. VI.; *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819), *affirmed by* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

154. Neil R. Rimbey et al., *Why Grazing Permits Have Economic Value*, 32.1 J. AGRIC. & RESOURCE ECON. 20, 30 (2007).

155. *Livestock Per Capita Fees*, MONT. OFFICIAL ST. WEBSITE, <http://liv.mt.gov/Centralized-Services/Per-Capita-Fees> (last visited Dec. 1, 2018).

156. *Id.*

sparsely populated lands. Most of these lands provide good wildlife habitat and could provide much more. This unexploited potential can be realized with the few policy changes suggested above. Although the American Prairie Reserve has been able to accomplish much within the existing regulations because of the fortuitous classification of bison as livestock, it illustrates how much more could be achieved if federal public grasslands were open to environmental and conservation uses in a competitive market.

Under the existing law and regulations, the BLM and Forest Service lease lands to private users for the limited purpose of grazing livestock. But decisions about which lands to lease and how many cattle or sheep to permit on a given allotment are made within the multiple-use management mandate that applies to both agencies. While the policy of multiple-use management reflects a recognition that the public has different and competing interests in how the land will be used, it creates a significant procedural challenge for public lands agencies. They must institute a process for determining what uses will be allowed, on which lands, and by whom. Under the Multiple-Use Sustained-Yield Act and subsequent public lands planning legislation, the agencies have relied on a mix of public input and resource management expertise. Public input is largely in the form of special interest pleas, often couched as scientific claims, for more of their preferred use. Because there is nothing in the concept of multiple-use, and little in other public lands management laws, that mandates a particular mix of uses or allows public lands managers to know when they have the mix right, resource allocation decisions are often followed by litigation. Although the litigants always know what substantive results they want, the litigation is usually over the process, in part because both litigants and courts are faced with the same vague management guidelines as the agencies.

Recurrent public land law review commissions, each asked to consider whether and to what extent federal public lands should be privatized, have concluded that the vast majority of public lands should remain in public ownership. But at the same time, a long history of private access to public land resources has made clear that public title does not necessarily imply or require public management. The demands for privatization of federal public lands or their transfer to state governments will continue, but those believing that markets offer a better way of allocating many public lands resources will better spend their energies on reforms that allow markets to function within the context of public ownership. As Montana rancher Dan Fulton observed many years ago,<sup>157</sup> those who depend on the public grasslands for their livestock have far greater interest in the security of tenure of sufficient duration to recoup investment than in title to the land. Ranchers have had reasonably secure tenure in their grazing leases for many years. They have also had an advantage in relation to those who, with similar security of tenure, would willingly pay to make designated grazing lands more available for conservation and wildlife.

The idea of allowing environmental organizations to acquire and retire grazing leases on public lands has been around for a long time. Such a mixed

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157. See generally DAN FULTON, *FAILURE ON THE PLAINS: A RANCHER'S VIEW OF THE PUBLIC LANDS PROBLEM* (1982).



model of public title and private management requires a level of public-private cooperation that is generally absent in today's partisan and contentious political climate. But the growing success of the American Prairie Reserve with the cooperation of the BLM, the U.S. Fish and Wildlife Service, and the Montana Department of Fish, Wildlife and Parks demonstrates that the possibilities for wildlife habitat preservation and restoration are both real and substantial.