Ranchers as Regulators: The Fight over America’s Public Lands through *Public Lands Council v. Babbitt*

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**ABSTRACT**

Ranchers, environmentalists, and the Federal government have long struggled over use of America’s public lands. After a contentious history between stakeholders, the government created grazing districts in the Western states in an effort to reduce overgrazing and misuse, but little changed. Drawing on capture theory literature, I argue that ranchers successfully “captured” the Bureau of Land Management, illustrated through the complete lack of regulation over rangelands. Faced with continued abuse of the grazing system, President Clinton and his Secretary of the Interior, Bruce Babbitt, undertook the first major rangeland reforms in 1995. Ranching interests, united under the name Public Lands Council, greeted these reforms with hostility, and sued Babbitt in a case that moved to the Supreme Court in 2000. The court found in favor of Babbitt. This paper examines the role of ranchers as regulators in determining public land use, and traces the history of public land use through literature and court documents.

**I. INTRODUCTION**

“The public lands are a public stock, which ought to be disposed of to the best advantage for the nation.”

When James Monroe, the fifth President of the United States, spoke those words at his first State of the Union Address, America was a fledging nation hovering around the Atlantic Coast. To the
west, north and south stretched broad swaths of unexplored territory, lands begging for exploration and conquest. America’s first decades as a nation were spent grappling with questions of democracy, states rights and independence. As the years progressed and the new government stabilized, Americans turned their attention towards unexplored areas. Westward expansion gripped the new nation, and the unexplored western lands began to hold value.

America’s balancing of public land and private industry has always been fraught. The 2000 Supreme Court decision of Public Lands Council v. Babbitt provides a lens through which to examine the history and intricacies of grazing rights on public lands. Through this case, and relevant legislative history and analysis, I examine the role ranchers themselves played in attempt to control regulation of public lands. The ranching industry fits into the traditional form of capture theory, defined by Viscusi and others. I argue that the influence displayed by ranchers is notable for its negative success. Whereas traditional capture theory has the industry influencing the regulatory body to create favorable regulations, the influence of ranchers is shown through a complete lack of statutory legislation. Public Lands Council v. Babbitt is especially important because it marks one of the first direct clashes between ranchers and regulators.

I start by exploring the history of public land usage, with special emphasis on the Taylor Grazing Act of 1934, before examining the case of Public Lands Council v. Babbitt, and the Rangeland Reforms of 1995 that initiated the court case. I then turn to the role of ranchers as regulators, and explore how ranchers have captured the regulatory body, with special emphasis on Viscusi’s concept of capture theory. To conclude, I look to continuing cases as the ramifications of the 2000 Supreme Court decision continue to unfold. As the debate over public lands continues, it is clear that we are no further towards a resolution than Babbitt and the PLC were in 1995. Perhaps, as this paper shall discuss, an equitable solution is impossible. As Aldo Leopold wrote, “We shall never achieve harmony with land, any more then we shall achieve absolute justice or liberty for people. In these higher aspirations, the important thing is not to achieve but to strive.” Through the Taylor Grazing Act, the role of the Bureau of Land Management, and the case of Public Lands Council v. Babbitt, we can trace the government’s changing approach to public land, and the ranching industry’s changing influence on the government.
II. RANCHER RIGHTS AND THE TAYLOR GRAZING ACT OF 1934

Since the days of the Founding Fathers, through Western Expansion and the Gold Rush, attempts have been made to privatize America’s massive spread of free land (Rundle, 1806). Spreading livestock across the empty plains was a way of staking one’s claim on the land, increasing the wealth of a new nation, and providing additional, nonmilitary protection against foreign occupation (Rundle, 1817). Grazing was free for all who wanted it (Epperson, 151), and many did.

Ranchers have a strong history of political power in the Western states. In the initially wild West, the livestock industry was well represented in early legislative bodies. In a tempestuous time and place, where few settlers “settled” and cowboys roamed the land, livestock was one of the few organized, stable interests (Arrunda, 416-417). More and more livestock, especially cattle, was brought west through the next decades. With little oversight and fewer regulations in a landscape unsuitable to large scale grazing, too much livestock fed off too small an area. By 1886, over a million cattle roamed Montana. That winter was especially harsh, in a landscape unused to such large scale grazing; that winter, Arrunda states that 70% of the cattle had perished (419). In 1890, the Supreme Court held that by its silence, Congress had given anyone wishing to graze animals on public lands the right to do so (Rundle, 1808, citing Buford v. Houtz). The subsequent use resulted in dead livestock, erosion, overgrazing, and weed spread. The tragedy of the commons had come to the West, and it was clear that regulation was needed.

The Taylor Grazing Act, passed in 1934, was the most important public lands regulation of its time. The constant overgrazing of public lands—Rundle also credits the Dust Bowl of the 1930s as an impetus for the Act, although he points out that the dust storms receive little mention in Senate debates on the grazing bill (1817)—called for government action. Named for Congressman Edward Taylor of Colorado, the Taylor Grazing Act reserved eighty million acres of previously unclaimed land to be allotted into grazing districts, administered by the Department of the Interior. The original bill left the amount of land to be parceled into grazing district unspecified, but Senator O’Mahoney of Wyoming argued successfully for the eighty million acre limit, stating that additional lands were too spread out to be consolidated effectively (Merrill,
Where ranchers could previously graze livestock where they wanted, permits were now needed for both grazing privileges and to make changes such as digging wells and building fences. The Act set up a section within the Department of the Interior to oversee grazing (aptly called the Grazing Bureau), which in 1946 merged with another office to become the Bureau of Land Management, which today continues to oversee public land use. To ease ill-will from the ranching industry after the grazing bill passed, Secretary of the Interior Harold Ickes promised to charge grazing fees sufficient only to cover administrative costs (Rundle, 1817).

One important point of the Taylor Grazing Act, as Merrill discusses, is the increased role in policy now played by livestock owners (141). Previous legislation (through the U.S. Forest Service) called for cooperation with ranchers; the Taylor Act now expanded that cooperation to include state officials. Moreover, ranchers were now in practice implementing the new regulations themselves through the stockmen’s advisory boards on which they served (Rundle, 1817). The Act also stated that no rancher, obeying the rules and regulations laid down by the Department of the Interior, would be denied a renewal of a grazing permit, giving ranchers a codified hold over public land (Merrill, 141).

Initial unease over the Taylor Grazing Act took a different form than later concerns regarding Babbitt’s amendments. The Forest Service and the Department of Agriculture were worried that the Federal government was ceding too much control over the public lands, but believed the beneficiaries of control were the States, not the ranchers. As Merrill notes, and as I discuss below, the Taylor Grazing Act was the first point at which the range livestock industry “captured” the federal administration (136). As the Public Lands Council’s suit against Secretary of the Interior Babbitt in 1995 shows, that capture had become more marked in the years since the Taylor Grazing Act, and the ranchers were not willing to give up their control in their industry’s regulators.

III. PUBLIC LAND FROM TAYLOR TO BABBITT

While Congress continued to pass legislation in efforts to manage public land productively, including the 1976 Federal Land Policy and Management Act, and the 1978 Public Rangelands
Improvement Act, studies found that in spite of 40 years of Federal management, rangelands were increasingly unhealthy.¹ In these statutes, Congress attempted to overcome agency capture of public land management by broadening interest group competition, thereby evening the odds between the emerging environmental movement and the historically dominant commodity interest groups (Blumm, 419).

After a series of Presidents ideologically unconcerned with the environment, the incoming Administration of President Bill Clinton had a chance for substantial change. Since joining the Clinton Administration in 1993, Secretary of the Interior Bruce Babbitt, formerly the head of the League of Conservation Voters, had worked to introduce an ecological perspective into government policy in the forms of a new western land ethic (Watson, 413). Secretary Babbitt stated, in *Public Lands News*, that he and President Clinton took office with the express intention of reforming the allocation of federal grazing leases to private ranchers (Arrunda stating Babbitt, “High Fees and No Grazers Doesn’t Help Range, Public Lands News, Feb. 4, 1993). Leshy credits Clinton’s desire to prove his environmental dedication to those on the left who had voted for him in the somewhat heavy-handed approach Clinton and Babbitt took towards environmentally-beneficial land reforms their first years in office.²

Another important factor in rangeland regulation was the role of the Bureau of Land Management. While Harold Ickes created the BLM in the 1940s to oversee grazing and public land use, the department changed courses politically in the 1980s under President Reagan and his Interior Secretary, James Watt. Far from administering public land, under Watt the Reagan Administration not only allowed but encouraged ranchers to file for stock-water rights on public (BLM managed) lands in their own names. The agency changed course again under the Clinton Administration. The Rangeland Reform regulations promulgated by Interior Secretary Bruce Babbitt in 1995 reestablished the pre-1980s policy and conformed BLM's policy with that of the Forest Service by providing that stock-water rights on BLM land "shall be acquired, perfected, maintained, and administered in the name of the United States" to the extent permitted by state

¹ These regulations would render most environmental standards for rangelands unenforceable, exclude voices other than those of ranchers from critical decisions, and allow the establishment of additional private water rights on public lands that will interfere with the ability of BLM managers to do their job (Feller).

² John Leshy, now The Harry D. Sunderland Distinguished Professor of Real Property Law at the University of California, Hastings College of Law, served as Solicitor of the U.S. Department of the Interior under Secretary Babbitt through the Clinton Administration.
law (Feller). The BLM was known as a notoriously anti-conservationist agency: its leaning was so strong towards industry that it was commonly known among environmental circles as the Bureau of Logging and Mining. Babbitt and Clinton attempted to change that. As Leshy writes in a retrospective of Babbitt’s tenure at the helm of the Department of the Interior (Leshy describes him as the most qualified person ever to run the department), Babbitt saw an opportunity to increase conservation efforts through the Bureau of Land Management.

*Public Lands Council v. Babbitt* upheld the Clinton Administration’s Rangeland Reform regulations and reaffirmed the Bureau’s longstanding authority to limit or restrict livestock grazing in order to protect environmental resources or promote other uses of the public lands. Neither the decision nor the reformed regulations that it affirmed, however, guaranteed that BLM will exercise that authority (Feller).

The first attempt of reform was unsuccessful. In 1993, a push was made to reform grazing rights and mining policies through the budget process, and then through Congress when the budgetary process proved unworkable. Raising grazing fees to market value was not a populist (or popular) move, and although Clinton’s own party controlled Congress, the plan crashed in the Senate (Leshy, 221). Ignoring his subsequent loss of political capital, Babbitt undertook an admirable public relations campaign, flying to Colorado for a series of public meetings and workshops with those Leshy describes as “grazing stakeholders” (Leshy, 221). It can be concluded that the resolutions crafted through those workshops formed the basis of the Rangeland Reforms of 1995.

**IV. PUBLIC LANDS COUNCIL V. BABBITT**

In 1995, the Department of the Interior announced that it would propose amendments that would significantly change the grazing regulations stipulated by the Taylor Grazing Act. Public land use decisions would now be overseen by Resource Advisory Committees; these regulatory groups would democratically determine land use. Essentially, the changes meant that the Secretary would now have the leeway to determine how grazing rights would be protected without getting steamrolled by industry. Ranchers objected to the large-scale changes, as well as the small.
Feeling that the land they used to graze stock would be inaccessible with the new restrictions, groups of ranchers banded together, forming special interest groups to protect their interests. These groups together joined forces as the Public Lands Council, a powerful enclave of wealthy landowners in the West. On July 27, 1995, the Public Lands Council and other ranching groups brought suit against Secretary Babbitt in a Wyoming District Court, announcing that Babbitt had overstepped the boundaries of his office by changing existing statutes. The Public Lands Council challenged ten provisions of the new regulations: modification of the grazing preference, the addition of a regulation that would consider the past performance of a permit applicant’s affiliate, vesting title to range improvements in the federal government, conservation us permits, limits on temporary non-use, elimination of the requirement that permittees be engages “in the livestock” business, denial of exclusive use of water-related range improvements, addition of conditions under which grazing permits will be suspended or cancelled, addition of surcharges for pasturing agreements, and the Fundamentals of Rangeland Health.

District Judge Brimmer, the Wyoming District judge assigned the case, reviewed the regulatory changes under the Administrative Procedure Act (APA). Unless an agency stepped out of line, the APA required upholding agency action. Regulations, Rundle points out, would fail only if they were “arbitrary and capricious, exceed[ed] statutory authority, or violat[ed] the Constitution” (Rundle, 1819). The court struck down additional changes to the Taylor Grazing Act. It felt that Babbitt exceeded his statutory authority under the Taylor Grazing Act by replacing the term “grazing preference” with “permitted use” because it endangers ranchers’ presumptive grazing privileges, instead of safeguarding them, which the Secretary of the Interior had an affirmative duty to do under the Taylor Grazing Act (Rundle, 1819). The court upheld the affiliate resolutions, limits on temporary non-use, exclusive use of water diversions, and

3 For a detailed description of each proposed regulatory change, and a close history of Public Lands Council v. Babbitt from Wyoming District Court through the U.S. Supreme Court, see Nicholl, The Death of Rangeland Reform, 75-111.

4 “Fundamentals of Rangeland Health” was the provision that instructed range managers to ensure the health of watersheds and riparian areas, maintenance of or progress towards healthy water cycles, compliance with state water quality standards, and maintenance or restoration of habitats for threatened or endangered species. (Rundle, 1821-1822)
suspension of cancellation of grazing permits if the permittee is convicted of violating environmental laws.

The government appealed to the Tenth Circuit, which voted 2-1 to reverse three of the four appealed rulings: “grazing preference” versus “permitted use”, title to range improvements, and mandatory qualifications regulation (Rundle, 1822). The Tenth Circuit also specifically overturned the issuance of permits for conservation purposes (Waterman, 553, see 43 USC case 1752(g) (200). The court also affirmed the district court’s findings that one of the new regulations was beyond the scope of the Secretary’s authority (Molyneaux, 132). While Secretary Babbitt refused to appeal the reversal of conservation use permits, the Public Lands Council appealed the decision to the Supreme Court.

As Secretary Babbitt and President Clinton prepared to end their second term, both sides awaited the decision of the Supreme Court, where a decision was reached in 2000. The Supreme Court affirmed, with a vote of 9-0. As Waterman discusses, the unanimity of the Supreme Court’s decision in Public Lands Council (PLC) indicated that the Justices to a person believed the ranchers had overstated their worries about the 1995 regulatory amendments. With this ruling, the Court returned leeway to the Secretary of the Interior to determine how grazing privileges will be protected, and how public land should be managed. The Court also made clear that an important concern in this ruling was preventing injury to public lands by preventing overgrazing and protecting livestock (Epperson, 153).

The Supreme Court’s decision in PLC has two important components. The first is that it affirmed the broad discretionary powers the Secretary enjoyed in carrying out his duties. The other was the limitation the Court recognized upon the ends to which the Secretary may direct his broad discretionary power (Rundle, 1823).

V. RANCHERS AS REGULATORS

Public Lands Council v. Babbitt is an interesting intersection in the continued power struggle between the federal government and western ranchers. Considered the first important regulation of grazing on the public domain, the Taylor Grazing Act was largely ineffective. Its impotence, according to Donahue, was due primarily to the inordinate influence of those it aimed to
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regulate, an influence explained by both public choice theory and, more specifically, capture theory. In this section I analyze the unique role of ranchers in the public lands regulatory process. Informed by Donahue and others, I argue that while the ranchers successfully “captured” the regulatory bodies meant to oversee their industry, that “capture” inverts traditional capture theory; the ranchers’ influence is marked by lack of action by the government, rather than legislation written in their favor.

Public choice theory (which applies the economic method to the political scientist’s trade) predicts that small, well-organized special interest groups will exert a disproportionate influence on policymaking (Blumm, 406). Blumm’s reasoning for the particular relevancy of public choice theory will regards to public lands is that the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity interests. Using the metrics of public choice theory, scholars can accurately predict political decisions made during rangeland reform efforts: the model accounts for the disproportionate impact of the ranching community on the legislation (Nicholl, 107). Crucial to this argument is the fact that although only a small fraction of the country uses public lands for grazing, ranchers were able to create substantial opposition to the grazing reforms.

The concept that industry can "capture" or co-opt Congress or regulatory agency has waxed, waned, and evolved since its origins in the 1950s (Donahue). Capture theory, following Viscusi’s definition, states that “either regulation is supplied in response to the industry’s demands for regulation (in other words, legislators are captured by the industry), or the regulatory agency comes to be controlled by the industry over time (in other words, regulators are captured by the industry)” (Viscusi, 379-380).

During Babbit, capture theory with respect to ranchers was proven to be slightly different. While Viscusi’s definition of capture theory is action-based (“regulation is supplied in response to the industry’s demands for regulation” or the regulating agency “comes to be controlled” by the industry), my own understanding of the ranchers’ form of capture theory, informed by Donahue’s discussions, is of a far more action-negative influence. That is, the ranchers’ influence is notable not for the regulation they support, but by the lack of regulation to oppose. Since continued regulation is exactly what the ranching community does not want, each passage of further regulation is a defeat, not a victory. It is the very lack of legislation on the
subject that proves how influenced the regulators are by the regulated. The influence of ranchers can be traced through the scanty history of public lands regulation.

As we saw earlier, prior to 1934, public lands were essentially an open invitation for any and all. With limited interruptions from the federal government, ranchers in many ways wrote their own rules. As I discuss below, until the Taylor Grazing Act, in 1934, the role of ranchers’ influence in federal circles (their “capture” of the agencies involved) was marked largely by a lack of legislative action, rather than by favorable legislation. Until President Clinton and Secretary Babbitt took office in the 1992, the federal government had mounted no serious challenge to the ranchers’ status quo. Indeed, Donahue argues that political pressure from the livestock industry from 1934 to 1976 “effectively hamstrung” implementation of the Taylor Grazing Act, meaning that the one substantial piece of legislation reining in ranchers was ineffective.

After the failure of reform in 1993, the 1995 reforms marked an aggressive move against ranchers by the government, and one that had considerable backing. To a rancher, thousands of miles away from the wrangling and meetings of Washington, D.C., every piece of regulation, no matter how favorable towards ranching interests, was a loss of some freedom.

*Public Lands Council v. Babbitt* is one of the first occasions in which the ranching industry was faced with (what they saw as) a direct threat from the government. Forming the Public Lands Council, a consortium of smaller interest groups determined to support ranchers and livestock owners, the industry came together with a united front to take an active stand against Washington’s regulatory attempts. As we have seen above, the suit the Public Lands Council brought against the government contested the points of Secretary Babbitt’s reforms the industry found most unpalatable. Previously the ranchers’ influence had been quiet, mostly internal, and partially through their capture of portions of the Department of the Interior, discussed above. “Of all federal agencies,” Donahue states, “the BLM best epitomizes rancher capture. Its bias is frequently apparent in management decisions that disregard available science and policy guidance”. With the ability to influence lawmaking (or to quiet it) through the Executive Branch, ranchers had not wielded their influence through the court system. With *Public Lands Council v. Babbitt*, that would change, and the fight would drag through the Wyoming District Court, the 10th Circuit Court, and the Supreme Court.
Babbitt showed his awareness of ranchers’ capture of the industry through the new regulation he required. With the new regulations, as mentioned above, Resource Advisory Committees would be the determining mechanism through which ranching decisions would now be made. A requirement of these advisory groups was the inclusion in their membership of representatives of different factions: ranchers, yes, but also environmentalists and other public land users. Rather than being the controlling interest in the public lands, ranchers would now be simply one of many given a seat at the table. By including representatives from other interest groups in these advisory boards, Babbitt stealthily provided assurance that ranching groups would not capture the reform process. In addition, “centering reform on the RACs took into account how much grazing practices varied across the west, and how much ranching was woven into the national and local culture, and it dampened down political opposition to rangeland reform” (Leshy, 22).

Viscusi has several criticisms to level at capture theory as a way to view all regulatory decisions. One such critique of capture theory in terms of ranching interests can be ameliorated. He writes that capture theory does not explain how regulation comes to be controlled by the industry. A point by Donahue can address this concern. She writes that the Bureau of Land Management staff resoundingly felt a sense of identification with the very ranchers they were set to regulate. Many staff members were westerners, children of ranchers or former ranchers themselves, with more interest towards ranchers than towards political power in Washington. With a stronger sense of identifications with the western states, many BLM employees had deeper loyalties to the ranching industry, sort of a revolving door of family ties. These ranching allies, in addition to the expertise that made them valuable employees, had a deep-seated interest in the results of their regulation.

An interesting side note to this discussion of ranchers as regulators is the role of environmentalists adopting behavior patterns of ranchers, in order to become “regulators”. As environmentalists looked to conserve the public land from overgrazing and misuse, several groups actually applied for permits, and, despite the apparent absence of livestock, to all intents and purposes controlled their areas of public land, just as the ranchers did. This use of permits would have become codified under Babbitt’s reforms. Previously, a rancher had to apply to the BLM annually for the right to rest the allotment (Nicoll, 86). Rather than wielding authority from the insider’s network of agency politics, like the ranching community, the
enlightmentalists attempted to regulate rangeland from within: as permit holding, grazing fee paying beneficiaries of the BLM.

VI. CONCLUSION

The ultimate test of grazing reform will be time. Under Clinton and Babbitt, and largely thanks to *Public Lands Council v. Babbitt*, public awareness of the conservation of public land became an important aspect of the Department of the Interior. After a history of turning a blind eye towards ranchers, it seemed as though rangeland reform would be accomplished. As we have seen, progress was made, but setbacks were also faced. With a new president, however, comes new legislation, and new views. On December 8, 2003, President George W. Bush’s Secretary of the Interior, Gale Norton, issued proposed amendments to the Bureau of Land Management’s grazing regulations. Norton, who after retiring from Interior became a legal advisor to the oil-shale division of Royal Dutch Shell Oil Company and is currently facing a Justice Department investigation about misusing her public office, designed the regulations to “improve working relationships” between the BLM and the ranchers. “If anything,” Feller notes facetiously, “the proposed amendments seemed late in coming. The Bush Administration had already proposed regulatory amendments and legislation to relax environmental controls and ease access to federal lands by loggers, miners, and oil companies. The ranchers' turn seemed overdue” (Feller, 1123). After years of attempting reform, Babbitt’s efforts were overridden by Norton, a “captured” politician at the highest level within the Department.

In today’s political climate, as the Department of the Interior tries to weather corruption and accusations of hedonism, as oil creeps further towards Florida’s white sand and images of slick seabirds haunt the media, it is hard to believe that regulating public land for ranching use is the first item on Secretary Ken Salazar’s agenda. Secretary Salazar took office among mixed reviews from the environmentalist left, and many pointed to his own background as a rancher. As the oil is cleaned up and thoughts turn again to regular life, it will be interesting to watch as Secretary Salazar navigates the line between regulation and ranchers’ rights. As Babbitt himself said at a celebration of the writer Wallace Stegner, “We’ve never yet succeeded in finding this balance between exploitation and conservation of our natural resources; that duality, that tension,
has never been resolved.” (Babbitt quoted by Blumm, 405). At least in acknowledging this truth ranchers, politicians, government bureaucrats and conservationists can all agree, and find common ground.

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Looming over the community is a coal-fired power plant built by the Puerto Rican branch of AES Corporation, a Virginia-headquartered multinational. The plant’s smoke stack dominates the horizon, as does a huge mound of residue from the combusted coal that rises to at least 70ft like a giant sandcastle. The mound is exposed to the elements and local people complain that toxins from it leach into the sea, destroying the livelihoods of fishermen through mercury poisoning. They also fear that dust coming off the pile causes health problems, a concern shared by local doctors who told the UN monitor.

New regulations on livestock grazing on lands managed by the Bureau of Land Management became effective August 21, 1995. Many aspects of the new regulations were challenged in Public Lands Council v. Babbitt, 529 U.S. 728 (2000). A federal district court upheld many of the regulations, but struck down four of them and enjoined their implementation. A permit and gave more stability to the ranchers than is true under the new regulations, and that this change would destabilize the livestock industry, a result contrary to a purpose of the TGA. However, the majority at the appellate level, and the Supreme Court held to the contrary.