

## Introduction

If there is always an individual who can exclude all others from access to any given area, then individuals will endeavor by cultivation or other improvements to maximize the value of the land.<sup>1</sup>

– Richard Posner

In 2018, the Paramount Network premiered “Yellowstone,” a television series that quickly became a ratings boon.<sup>2</sup> The show featured Kevin Costner as John Dutton, the descendant of European-American emigrants who homesteaded the largest fictional ranch in Montana history. As the episodes rolled out, viewers were introduced to the fictional Yellowstone Dutton Ranch and the challenges its ownership posed for the Dutton family. They watched, captivated, as constant drama unfolded surrounding the family during its never-ending battle to keep the ranch, which was the only home that generations of Duttons had ever known. Somewhat surprisingly for a cable television show, the writers accurately depicted many modern challenges of operating a large ranch in a state like Montana. Located adjacent to a national park and national forests, the show documents wildfire threats, the burden of state, and federal government regulations protecting endangered species, along with threats like drought, financial hardship, and predatory land developers (mostly from California) seeking to pounce on the Duttons’ land. In a twist on the usual Western drama, viewers got a glimpse into Dutton’s challenging and complex relationship with the fictional Tribal nation whose lands his ancestors settled under the federal homestead laws.

“Yellowstone” captured the resource challenges and sociopolitical dynamics of Montana and the West in a way that clearly resonated with people across the

<sup>1</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, p. 30 (3rd ed. 1986).

<sup>2</sup> Nicole Bitette, *The Audiences Behind “Yellowstone’s” Success*, PARAMOUNT (Aug. 23, 2019) (noting that the series is “the most-watched cable series on TV for a second straight summer,” thanks to national audiences tuning in to watch the “compelling” stories that are not “too dystopian or too cerebral.”), [www.paramount.com/news/content-and-experiences/the-audiences-behind-yellowstone-success](http://www.paramount.com/news/content-and-experiences/the-audiences-behind-yellowstone-success).

country and around the world. Even for the viewer steeped in history, law, and policy, including the history of Indigenous land loss and white settlement, Dutton's struggle evokes a certain empathy because of the way that his family's relationship to the land is portrayed. The Duttons seem to belong to the peaks and valleys of the Yellowstone Dutton Ranch, and it seems to belong to them. But on a slightly deeper level, viewers are no doubt captivated because the storylines of this show are the ones that Americans of most generations grew up with, in one form or another. Whether it is John Wayne or John Dutton, Americans have had a national fascination with Western stories involving settler colonialism, exploration, family legacies, human connection with rugged and beautiful land, and of course, with the relationship of cowboys and Indians. People seem particularly captivated by all the strange rituals, norms, and values that authors and screenwriters in this genre have so compellingly told, time and time again, for nearly a century.

Even though viewers are given brief glimpses of the past through flashback segments that illustrate the challenges and successes of previous generations, and of Dutton as a young father, the show tells the story of these descendants of white European immigrants who established their massive ranch from only one perspective – their own. Though it is made clear that these lands were once Tribal lands, the story of Tribal divestiture and Dutton acquisition is vague and largely brushed over. It is unclear to viewers whether the federal government took this land from a Tribe and then sold or gave it to the Duttons, or perhaps negotiated with a Tribe to purchase or otherwise acquire it by treaty. All viewers get are clips depicting Indigenous Peoples camped along the banks of the river that passes through the modern-day ranch, occupying tipis and hunting game species like bison. They are brief glimpses of the past and seem to suggest that, for a time, Tribal members and the Duttons used the same land without conflict. Successive episodes document the modern pressures facing the descendants of the original Duttons and those Tribal members, with the former trying to keep “their” land from being sold and subdivided, and probably developed, and the latter pursuing self-determination on their reservation through ranching and gaming. Almost every episode alludes to the past conflicts that landed everyone in the tenuous circumstances they occupy today, although the definition of “tenuous” is very much a matter of perspective, and closely tied to the color of the perceiver's skin. And the history and process involved in the Tribe's loss of this land are never fully explored on the show, although glimmers of resentment surface from time to time when modern Tribal leaders and Tribal members talk about the Duttons and “their” land.

Although viewers are not treated to this part of the story, Tribal citizens at some point stopped using the Dutton ranch lands, either voluntarily or forcibly. For their descendants, who still hold connections to this land, the strength of the modern relationship to it seems to depend on the strength of their relationships with the mercurial Dutton patriarch, who holds the proverbial keys to this vast kingdom. For Dutton's daughter-in-law Monica, who is one of these Tribal descendants,

access to the ranch lands is easier, although in passing, Monica frequently makes comments about her conflicting feelings toward the ranch and her role in preserving the “family legacy” of this land. For the Tribal governmental leaders, it seems to be somewhat of a political gamble to get too close to Dutton, although it certainly makes life easier for any Tribal member to have a powerful white ally like him on their side, especially when he runs for Governor and handily wins the election in Season 4.<sup>3</sup>

The grasses of the Yellowstone Ranch are not exactly the stars of the show, although they are typical of those found throughout the western region that is the focus of this book. Unlike the grassland ecosystems of regions like the Great Plains, in and among the mountainous terrain of the arid West, grasses have fewer opportunities to take root and thrive, as they tend to be nestled in pockets of terrain that are otherwise inhospitable to many plants. Dutton works with this reality by rotating the pastures that his cattle have access to, which is also typical for the region. Moreover, when the summer sun and grazing cattle and wildlife finish doing their work, the remaining grasses turn brown, and the wind blows dust through the air. Sometimes, fall comes earlier than expected when the summer rains stop early, and Dutton has to supplement his cattle’s feed and water using baled hay and diverted or pumped water.<sup>4</sup> Like so many others in the region, the fictional Dutton ranch is highly dependent on not only the weather and the climate, including annual precipitation content and form, topography, and access to land and other resources, like surface and groundwater sources, but also other influences, like law, policy, race, class and social status.

The fields of natural resources and public lands law and policy treat the subtext of the scenarios depicted in “Yellowstone” using a unique vocabulary. The terminology used to discuss land changes is distinct and steeped in history. For instance, where a scientist might use the words “ecosystem” or “habitat”, natural resources lawyers might select “range” or “rangeland,” even though all terms relate to the same land.<sup>5</sup> Range and rangeland are terms that are used to signify lands used by ranching operations, which, in the West, is sometimes a blend of federal land, state land, and private property. Similarly, where the scientific term species might describe a grass plant, natural resources law uses the term “forage,” or in other words, grass and other vegetation that feeds domestic livestock. And finally, while scientists might view public lands as a source of biodiversity, natural resources law describes the public lands as “resources,” which have derived their modern value based on their economic value to certain groups of people.

<sup>3</sup> Bryan Alexander, *Kevin Costner Talks Ruling as “Yellowstone” Montana Governor and Real Politics: “I’m disappointed,”* USA TODAY (Nov. 10, 2022), [www.usatoday.com/entertainment/](http://www.usatoday.com/entertainment/).

<sup>4</sup> NOAA Nat’l Centers for Environmental Information, *State Climate Summaries 2022: Nevada* (last visited Dec. 16, 2023), <https://statesummaries.ncics.org/chapter/nv/>.

<sup>5</sup> Rasband at 367, 1013.

The following chapters analyze the development of this terminology through the stories of individual and communal agricultural operations. Using the stories of real ranchers, like John Dutton and others who are quite different, the historical evolution of law and policy becomes more relatable and understandable, and the “real-life” consequences of the laws and policies designed by and for the “lords of yesterday” become clearer. Also, the consequences of other social influences will be explored, such as the Indigenous calls for “land back” to redress genocide and land divestiture, and the impact of the social justice movement that spread throughout the country after the tragic murder of George Floyd by Minneapolis police officers in 2020. Floyd’s murder spurred a series of conversations about the need for a comprehensive national reckoning with police brutality, systemic racism, and intergenerational trauma. The effects of Floyd’s death were felt beyond African American communities, with women, Latinos, Indigenous Peoples, and other marginalized peoples galvanized by the global attention that Floyd’s death and subsequent protests received, demanding justice, standing against racism, and organizing to spur long-desired change.<sup>6</sup> For Indigenous Peoples in particular, George Floyd’s death and the protests that followed resonated with aspects of their own history, marked by similar challenges with policing and law enforcement, systemic racism, colonization, boarding schools, and the resultant intergenerational trauma.

The stories of the ranches and other agricultural operations in the following chapters echo many of the themes of “Yellowstone,” although they depict a reality that is much more complicated, legally, financially, and otherwise, than what the millions of viewers would understand from watching the show. These stories tell a more complete picture of the evolution of agricultural practices in the West, exploring the relationship between Indigenous Nations, historically and at present, with the lands that became these ranches, and the role of European, Mexican, and European American settler colonizers, together with the laws they created to fortify their exclusive use and access to these lands. The following chapters will use the stories of these ranches to illustrate less visible aspects of the larger arc of this region over time, to illustrate how the rule of law influenced the establishment of the operation, how the owner’s race impacted the trajectory of the operation historically and today, the manner in which its grass (and grass-dependent) species changed as a result of these earlier laws and uses. The chapters will also explore the regulatory framework governing and restricting operations today.

The grasslands of what is now the western United States have experienced relatively rapid social and sociopolitical changes in waves. One well-known wave is

<sup>6</sup> Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements around the World*, CBS News (June 4, 2021), [www.cbsnews.com/news/george-floyd-black-lives-matter-impact/](http://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/).

documented in a “Yellowstone” prequel, which follows the first Duttons across Texas, Colorado, and Wyoming as they made their way toward “open” land to homestead, like so many other Europeans and European Americans of the 1800s. But that was not the first. The first Europeans – Spanish explorers – arrived via Mexico in the 1540s, well before the British established the first European settlement at Jamestown. In the ensuing years, the Spanish presence grew, particularly in the regions now comprising the southernmost states of the intermountain West – Arizona, New Mexico, Colorado, and Utah. Indigenous Nations were subjugated to Spanish rule when their lands and resources were needed to support the expanding Spanish empire. As the Spanish presence and their need for land and water grew, so did tensions with Indigenous governments seeking to defend their citizens and their lands. During the centuries of colonization that flowed from these initial European forays into the intermountain West, the grasslands were both the allure and the anchor point for the immigrants. They were a necessary element of immigration, whether as fuel for the animals bearing loads for human occupants in their travels or as food for people once they arrived and decided where to settle down and stay.

Today, the western grasslands bear the scars of these waves of colonization, use, and overuse. In many places, soils are unstable due to overgrazing and other surface-disturbing activities, surface and groundwater has been depleted, while native grasses have in many places been replaced by more resilient invasive species. The grasslands are also now heavily impacted by urban growth and suburban and exurban development, because they are still the most habitable places in the West. Physical modifications by past and present settlers have made many grassland areas highly susceptible to fire and drought. Legal and policy modifications adopted to address problems resulting from these modifications have created a complex patchwork of laws and regulations that provide imprecise and, sometimes, counterproductive authority. Finally, while it has become clear to ecologists and climate scientists that grassland biomes will be a critical component of a national strategy to combat climate change, the laws and policies created to solve resource problems in times of scarcity now frequently hinder efforts to use them for this purpose.

As noted above, there is also the complicated role of race in the tableau of modern agriculture in the West. The famous rap artist Kanye West, whose ranching story is the focus of Chapter 8, echoes the stories of the Dearfield homesteaders in Chapter 4. Through the stories of these farms and ranches and their owners in the chapters that follow, a deeper understanding will emerge: one of law dividing a region and allocating its resources using race as an unspoken criterion, which affected land tenure rights, access to water and land, and so many other factors that position a farm or ranch for success in this region. The white ranchers and their successors, whose title is derived from the white ranchers who homesteaded these lands, own their property in fee simple, which is the strongest form of title recognized in the United States. The Indigenous rancher in Chapter 3, by contrast, does not own his land in fee; his

ranch is a patchwork of parcels of land to which he has legal rights akin to tenancy. He must, literally, obtain the permission of the Bureau of Indian Affairs (BIA) to do anything on his land that produces a profit, because of archaic laws that were developed during a time in which federal policy dictated that Indigenous Peoples were incapable of managing their land and financial affairs. Tribal and individual member legal rights in these lands are subordinated to the paramount rights of the United States federal government by operation of the legal doctrines explored in Chapters 1 and 2, and the rancher's land use is subject largely to the regulatory approval and oversight of the BIA. The differences between the respective circumstances in which white ranchers, and white-owned corporate ranchers, operate, and those in which Indigenous and Black farmers and ranchers operate, is often stark. The stories explored in the following chapters will bring much of this history from the relative shadows into the light.

The patterns that emerge elucidate themes that play out, time and again, throughout the West. Considering these themes in the larger context of federal law and policy is essential given the public interest in federal public land, public waters, and wildlife species. Analyzing the ecological costs and values associated with the conversion of these grasslands during and after the population waves discussed below is also necessary for any effort to restore the relationship of people to land and wildlife that is necessary to achieve true justice for Tribal Nations and others whose lands were taken to achieve the goals of Manifest Destiny. For these hundreds of Indigenous Nations, whose cultural and physical survival depended upon their relationship with, and understanding of, the ecological interactions of water, land, grass, wildlife, and other species throughout the seasons and from year to year, the severing of that relationship has caused intergenerational trauma, disease, death, and other consequences. In recent years, ecologists, archaeologists, and ethnobotanists have proven what Indigenous Nations have documented in their own languages and histories for centuries and longer, which is that their ancestors throughout the regions that eventually became the United States had widely curated different ecosystems to suit their needs, using fire to cultivate grasslands that would lure bison and antelope, cultivating plants like wild rice to ensure that the genetic constitution of the plants would survive and thrive in adapted wetland ecosystems, and cultivating many other plant species, including those that would currently be labeled as “crops,” such as beans, peas, and maize.<sup>7</sup> Even in the driest and most arid regions of the southern Rocky Mountains, Indigenous Peoples used agriculture and resource stewardship practices that allowed vast populations to survive and thrive for hundreds of years.

<sup>7</sup> Jules Janick, *Development of New World Crops by Indigenous Americans*, 48 JOURNAL OF HORTICULTURAL SCIENCE 4, 406–07 (2013); Baldes, Jason. Native Memory Project, “Native Fire Management” (last accessed Oct. 16, 2024), <https://nativememoryproject.org/voice/native-fire-management/>.

Post-contact historical accounts of non-Indigenous explorers, such as European fur trappers and traders, reveal evidence of the tremendous agricultural productivity of Indigenous Nations across the continent.<sup>8</sup> Indigenous crop production in and near the Great Lakes region and along the Missouri and Red Rivers sustained the fur trade and thereby contributed to broader regional economies.<sup>9</sup> Individual Indigenous Nations navigated far-reaching trade routes to leverage their agricultural productivity and these networks sometimes required extensive travel. People traveled to trade for items that were not available in their immediate area,<sup>10</sup> seeking supplies to use in ceremonial dress, such as feathers or shells, but also those that became incorporated into their diet.<sup>11</sup> Precontact, people and entire nations moved, changed, innovated, and responded to intertribal pressures, enticements, and conflicts, adapting their environments along the way.

There has been some momentum recently galvanizing around attempts to incorporate Indigenous stewardship of land and resources into federal, state, and even private land management frameworks. Yet, these efforts are still in their early days. To avoid repeating the mistakes of the past, it will be important to thoroughly understand what happened in the past, and what has come of those changes and challenges. It will also be essential to understand the people who used, changed, and in some cases, dominated these lands over time, including the role of race in shaping the resultant laws and policies. These laws and policies impacted, and were also informed by, ownership, use, and access rights, which were, in turn, influenced by race – the race of those creating the laws and the race or races of those affected (and often, excluded) by them. The chapters that follow will therefore explore the foundations of the rules of law that established ownership and use rights over time, using various policy approaches. Through this lens, it is possible to gain a more comprehensive picture of how law, policy, and race shaped the region's grassland ecosystems.

In recent years, studies like the ones documenting the agricultural history of Chaco Canyon have changed the common understanding of the North American continent before the arrival of significant populations of Europeans. As Western scientific research has revealed more of the complex picture of Indigenous Nations and their agricultural practices, broader awareness of the nuances of Indigenous societies, including their languages, horticultural practices, and their laws and customs regarding ecological stewardship, has grown, giving scholars and policymakers substantive guidance to replace the previous narrative of North America as an untouched wilderness prior to European arrival. While Indigenous Nations and communities have

<sup>8</sup> D. G. Kapayou, E. M. Herrighty, C. G. Hill *et al.* *Reuniting the Three Sisters: Collaborative Science with Native Growers to Improve Soil and Community Health*. 40 *AGRIC HUM VALUES* 65–82, p. 66 (2023), <https://doi.org/10.1007/s10460-022-10336-z>.

<sup>9</sup> *Id.*

<sup>10</sup> PETER IVERSON, *WHEN INDIANS BECAME COWBOYS: NATIVE PEOPLES AND CATTLE RANCHING IN THE AMERICAN WEST*, p. 6 (University of Oklahoma Press 1994) (Iverson).

<sup>11</sup> *Id.* at 7.



documented these historical events and passed them down through successive generations internally, their knowledge base was not always mirrored, much less recognized, by that of non-Indigenous scholars, historians, and other experts in fields like natural resources, agriculture, and ecology.<sup>12</sup> In recent years, interdisciplinary research has demonstrated the extent to which that Indigenous Peoples throughout what became the United States have been cultivating plants for thousands of years pre-contact.<sup>13</sup> Some Indigenous Nations had been actively engaged in what non-Indigenous cultures would recognize as “agriculture” on a large scale, cultivating crops that supported vast population bases.<sup>14</sup>

This book will not analyze every law that contributed to changes in the ecological constitution of grasslands in the West, nor assemble a complete list of those that must be changed to restore plant species like Indian ricegrass. It will not propose to abolish entirely the structures of colonialism that permeate federal and state law and policy, although these structures are sometimes obvious impediments to ecological restoration. Instead, it will explore key laws and policies that were adopted to solve problems that no longer exist, or that have changed in the ensuing years since these rules of law were established, and outline the ways that these laws no longer serve the ecosystems or their modern human stewards, whether they are ecological, social, or political. This book will also propose certain reforms to these laws, which if adopted, could result in significant progress toward creating a more just, diverse, and climate-resilient West. The laws in these chapters are, in a sense, the low-hanging fruit of the national ecological and social reckoning and reconciliation that should occur in the American West. Once this begins, the changed landscape of the agricultural system will be better positioned to provide for the American West of the twenty-first century and beyond.

The existing literature on grazing and the law of grazing, more specifically, is often dichotomous, characterizing agriculture as the friend or foe of grassland ecosystems. This is frequently echoed by the media sources that cover these issues in the West. Yet, emerging scientific research is replete with evidence that the existing structures of law and policy relating to grazing fail the ecosystems and human stewards of those ecosystems, most critically with respect to Indigenous stewards. The nascent body of social and racial justice literature largely has not entered the dialogue surrounding public lands and natural resources management, and the aim of

<sup>12</sup> Interview with Gary Tso, Second Mesa, Hopi Nation (Oct. 21, 2023) (recounting Hopi migration story from northern regions near Bears Ears National Monument to present location of Hopi reservation).

<sup>13</sup> Aurelien Bouayad, *Wild Rice Protectors: An Ojibwe Odyssey*, 22 ENVIRONMENTAL LAW REV. 27, p. 34 (2020); Jules Janick, *Development of New World Crops by Indigenous Americans*, 48 JOURNAL OF HORTICULTURAL SCIENCE 4 (2013).

<sup>14</sup> Andrew D. Cliburn & Hillary M. Hoffmann, *Coming Home Again: Inherent Tribal Sovereignty, the Tribal Wildlife Grant Program, and Their Potential for Endemic Wildlife Reintroduction*, ARIZ. JOURNAL OF ENV'T'L LAW & POLICY (Jan. 2022), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3895078](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3895078).



this book is to begin to fill some of that void with concrete, tangible analyses and recommendations for a path forward.

Carving the path forward requires an understanding of the history of the American West, including through the stories of the people who used and occupied this region over time, while reexamining back some of the narratives surrounding the so-called settlement of the West to evaluate more critically how factors like race, ethnicity, and social status and influence impacted land ownership, use, and access rights. Through this deeper exploration of the relationship of people to place, using the lens of the rules of law, a more holistic and accurate picture of the evolution of agriculture in the grassland regions emerges. It becomes apparent, for instance, that European-Americans established rules of law to colonize and then displace Indigenous Peoples and divest them of their lands, largely for the purpose of furthering their own agricultural interests.<sup>15</sup> It also becomes apparent that when a series of laws failed to achieve their objectives, successive efforts were frequently undertaken to “double down” on the initial investment. Included in these layers of developing law and policy were incentives or mandates for Tribes to convert from their traditional agricultural lifeways to ones reliant on cattle, sheep, and horses, instilling the once-foreign value of domestic animal agriculture in some Tribes that continues today.<sup>16</sup> Slightly different tactics were employed to target Black and Latino farmers and ranchers and incorporate them within the western agricultural tableau, and the result of these compounding layers of law and policy was a system incorporating structural racism that tied access rights, land tenure rights, water rights, and other valuable preferences to the color of a person’s skin.

The chapters that follow will explore the systems that arose to support agriculture in the West under the European and European American model, placing those systems in the broader context of Indigenous stewardship and the legacy of past laws that have permanently changed the relationship of Indigenous Nations to their lands and their stewardship of traditional knowledge and traditions.<sup>17</sup> They will also explore the history of Black and Latino farmers and ranchers and their experience with some of these same laws. These historical analyses will reveal correlations

<sup>15</sup> There were other drivers, too, such as the pursuit of mineral-bearing lands, but this book argues that the agricultural need was in some ways greater, fulfilling colonization and settlement of a much greater portion of the continent, using both general and specific laws.

<sup>16</sup> The book will not offer normative commentary on this change but will explain the legal rules that arose to ensure that individual tribal members cannot engage in agriculture to any significant degree on certain types of tribal lands without seeking the approval of the Bureau of Indian Affairs and subjecting their operations to continuing oversight and “management” by the Bureau, including the problematic financial arrangement the Bureau has set up, which requires all agricultural lease payments to be submitted to the Bureau, which deducts administrative fees before remitting the balance to the tribal allottee.

<sup>17</sup> Beth Mitchell, *Plant Species Richness at Bears Ears Reveals Archeo-ecosystems, and Implications for Public Land Management*, Natural History Museum, University of Utah (May 17, 2021), <https://nhmu.utah.edu/articles/2023/05/ecological-legacy-bears-ears>.

between law and policy and access to resources like water and grass, and describe how so many endemic species like Indian ricegrass faced extreme tests with the combined effect of removing Indigenous Peoples and their stewardship practices and the surge in non-Indigenous agricultural operations.

The latter chapters will reveal a change in collective consciousness around wildlife, public lands, and public sentiment, and the resulting pressures these changes placed on ranchers. More recent tensions between ranchers and wildlife conservation efforts will be explored, including Kanye West and Wyoming laws and policies protecting sage grouse habitat, and the famous standoffs between the Bundy family and the federal government in Nevada and Oregon. Chapter 9 will explore the causes and circumstances leading to a Bundy ally, Lavoy Finicum, being shot and killed during a roadblock set up by the FBI and Oregon State Police following his participation in the occupation of the Malheur Wildlife Refuge in eastern Oregon.

Each of the following chapters illustrates who benefits from the existing framework of laws related to agricultural use of land in the West, and the resulting cost.<sup>18</sup> Each also explores the intersection of law and policy with this power and ecological structure of the West. The common thread is that grass, land, and other resources in the West are still viewed as “gold” by not only ranchers, but also wildlife, the federal government, state governments, Tribal governments, and for profit and nonprofit corporations. These are finite resources, and the choices that were made in the chapters that follow illustrate the collective cost well.<sup>19</sup> The system of laws, incentives, and other policies that grew up around these choices still permeates critical policy debates today about land use, conservation, and critically, climate change. Therefore, the book will conclude with observations and suggestions for law and policy reform that could benefit western grassland ecosystems and the people and wildlife who rely upon them, without perpetuating the classism, racism, and other problematic values of the past.

<sup>18</sup> Bradley J. Gentner & John A. Tanaka, *Classifying Federal Public Land Grazing Permittees*, 55 J. RANGE MGMT. 2–11 (Jan. 2002).

<sup>19</sup> Caroline Fraser, *The Crucial Role of Predators: A New Perspective on Ecology*, 360 Yale Environment (Sept. 15, 2011).