

AMERICAN GRASSLANDS

American Grasslands provides a comprehensive review of select laws and policies that have shaped modern western agriculture. Through compelling stories of famous and lesser-known ranches, the book explores the trajectory of law and policy that has consolidated power in certain western ranchers and agricultural enterprises. Drawing lessons from historical events such as the Dust Bowl and the current climate and extinction crises, the book illustrates the harmful externalities of agricultural activity and the need for meaningful reform. The book also addresses recent national calls for social and racial justice in the context of western agriculture and disputes over access to public resources such as water, land, and wildlife. After highlighting the problems created by current laws and policies, the book offers practical recommendations for future legal and policy reform. *American Grasslands* is a must-read for anyone interested in the history and future of western agriculture and the role of law and policy in shaping it.

Hillary M. Hoffmann is an author, legal scholar, and nonprofit leader with expertise in natural resources and Indigenous law and policy. She has been a law professor since 2008, winning the Richard L. Brooks Prize for Distinguished Faculty Scholarship in 2020. She is also the coauthor of *A Third Way: Decolonizing the Laws of Indigenous Cultural Protection* (2020).

American Grasslands

RECKONING WITH THE LAW AND POLICY
THAT SHAPED AGRICULTURE IN THE WEST

HILLARY M. HOFFMANN



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To my parents, my sister, and to Pleasant Valley.

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Prologue

The origins of this book lie deep in my past, but the moment that my ideas crystallized into maturity happened only a few years ago. One cold and windy late spring morning in the early 2020s, I was trying to go for a hike on BLM-managed land in southern Utah. I had a narrow window of time before I had to head east and north, back to the airport in Salt Lake City to catch a flight home. To reach the trailhead, I had to drive across a creek that had temporarily flooded the road, which appeared to be knee-deep. This is a common scenario in the southwest – where it is often uneconomical to build a bridge or dig a culvert to account for a few weeks of seasonal flooding each year. Drivers are accustomed to having to gauge whether they can cross, then determine whether to make their way through the flowing water. I could roughly estimate the depth of this water because there were live measuring tapes standing in the middle of the road (that was now a creekbed) in the form of a small herd of cattle. They were distributed across the width of the road in a way that blocked any attempt I might make to cross. As I sat in the car and waited for them to move on, and out of my way, I had nothing to do but think. The longer I sat, and particularly as my precious window of time rapidly dwindled, the more I thought. I thought about the cows, the water, and the land surrounding us, which was all public land managed by the Department of Interior's Bureau of Land Management (BLM). I also wondered where these cows had come from, whether they were supervised, and whether it would be worth it to continue sitting there, given that they might never move. I thought about how, if I were a cow in the middle of the desert, I probably would stand in cool running water all day, too, rather than wandering the parched nearby remnant of a field with no shade in sight.

I ended up waiting for a little more than an hour, but the cattle never moved, so eventually I turned around and left. The hike would have to wait, but the thoughts continued. During those hours it took to drive north to the airport in Salt Lake City, my thoughts ran deeper, into the history of this area, the role of private agriculture in the development of land and water rights in the West, and to so many other topics that were the genesis of the chapters of this book. Of course I knew, from my years of working with natural resources and public land laws, that the reason the cattle

were freely roaming on public land, wallowing in a creek that flows directly into a national park, is that their owners held certain privileges on public lands, derived from privileges their predecessors established almost a century earlier. I knew that the water they were wallowing in was likely almost entirely privately controlled, despite crossing federal public lands. The laws that secured this framework date back even further, to the late 1800s, when Congress passed a series of statutes that allowed homesteaders, miners, and other individuals and corporations to secure private rights in what were then, and still are, public resources in the West.

The arc of natural resources and public lands law reveals tensions underlying the situation at the wash, although it usually does not resolve them to the complete satisfaction of anyone. The little scenario that unfolded that day illustrated this well. I was the representative of the public, wanting to use “my” public lands to hike (and relive a cherished childhood memory), and the cows were the representatives of private interests who want to use this area to water their livestock, possibly free of interference from recreationists like me. In my view, the cows got in my way and prevented me from accessing “my” public lands. In their view, maybe, the cows were here first and this was their pasture. I wondered what would happen if I called the local BLM field office and asked them to remove the cattle so I could cross, but I quickly discarded that thought, guessing that they likely would not do much, if they were even near enough to take action before I had to leave. But as I drove north, I began a familiar exercise of extrapolating this scenario across the West, thinking about all of the land and water subject to similar tensions. I also imagined how this scenario could have escalated. It probably would not have gotten close to the armed conflicts described in Chapter 9 of this book, but certainly could have gotten rather heated, relatively fast.

Resource competition breeds fear and uncertainty, and in the West, this fear has at times led to violence, and even full-blown wars. Livestock and human beings have died over resources like land, grass, and water, and well into the 2020s, there is really no end in sight. I knew this not only in my professional experience, but I knew it in my bones. Growing up in one of these states, agriculture and public lands were dominant themes in my life, ebbing and flowing as I roamed the national forest and BLM lands surrounding my childhood home and then moving into the realm of my work once I graduated from law school and began working with the various laws that govern natural resource and public land use in the West. I was born in Steamboat Springs, Colorado, on the ancestral lands of the Yamparika Ute people. The 7-acre property my parents established in a 2,000-acre valley in the heart of the Colorado Rockies could barely be properly labeled a ranch, given its small size. But my childhood years on this little gem of a property near the headwaters of the Colorado River planted a lot of seeds that ran through my mind that day driving away from the wash: seeds of questions involving the interplay between public lands and agriculture, tensions over “rights” to resources and how they worked in such a strange way in the West, and musings on grass, fences, ranches, and the deep sense of belonging to a place that arises from working on and with land and animals every day.

The West of my childhood is the West as I am defining it for the purposes of this book. It does not include the Pacific coast, nor its coastal mountain ranges, but starts in the drier portions of the Pacific coast states and reaches across the Great Basin of Nevada and Idaho to Montana, Wyoming, and south to Utah, Colorado, New Mexico, and Arizona. These areas are home to the western ranches of my childhood, and the ones depicted in so many Hollywood films and television shows, with cowboys on horseback herding livestock across vast open ranges. Like so many ranches in this region, our family's land was surrounded by federal public lands – the Routt National Forest on one side, BLM lands on another, and the Service Creek Wilderness less than five miles to the south. It was also located above public mineral rights managed by the BLM, in an arrangement known as a “split estate,” which is another dominant land tenure theme throughout the West.¹ The proximity to public lands had attracted my parents to this property in the 1970s – the nearby open spaces were free to access and use, contained thousands of acres of pristine hiking and backcountry skiing, and offered perquisites like free Christmas trees every December, if we could cut and haul them out.

Our property had a mix of aspen and pine trees, a hay meadow, several barns for the sheep, and two creeks that we were legally obligated to let flow unimpeded and unused down to a neighbor's ranch because that family owned the rights to their waters. Even though it was small, it still qualified as a ranch in my mind because our land produced a crop – hay – and our sheep were wild. We kept them fed, watered, and gave them the basic shelter of their barn, while they in turn produced wool every spring that my mom would knit into sweaters, hats, and mittens. Also, much to my horror, we docked the lambs in the spring (tails and testicles) and then sent them to the butcher in the fall, when they would return in white paper packages that we stored in the freezer and ate throughout the winter.

In this idyllic valley surrounded by mountains and vast undeveloped tracts of federal public lands, I never questioned the role of agriculture. It just seemed to make sense that people would raise livestock here – water was abundant, the temperatures were never high enough to scorch crops or parch herds, and sun was plentiful, although the growing season was incredibly short due to the long winters, which could last half the year. It seemed like there was a lot of land, and certainly enough for the number of people who wanted to use it, whether for raising livestock or for hiking, fishing, hunting, and other things people did in this region, like skiing. Ranchers coexisted with ski racers and miners and aside from the occasional grumblings by the former about the endless stream of “newcomers,” life just went along. There were no standoffs, no occupations of Forest Service offices, and definitely no FBI sting operations or deadman roadblocks over grazing disputes.

¹ A split estate results from a legal severance of mineral rights lying under a given parcel of land from the surface rights above. JAMES RASBAND, *et al.*, *NATURAL RESOURCES LAW AND POLICY*, p. 1163 (Foundation Press, 3rd ed. 2016).

In this part of western Colorado, in the 1980s, no one was yet raising livestock for any purpose other than to supply meat, and no one was raising species of livestock other than sheep, horses, or cattle. That would change in the ensuing decades, but as of then, the biggest agricultural controversies in this area were the same ones that had permeated the community dating back to the early 1900s – tensions between sheep ranchers and cattle ranchers and between all ranchers and wildlife. As far as the former, if you raised sheep, the cattle ranchers looked down on you, and you knew to keep your head down at county commission meetings and local bars, to avoid any dustups. And regarding the latter, if wildlife were bothering your livestock, in any way, you simply had to call the state agency charged with wildlife “management,” and they would send rangers out to shoot, poison, or trap the offending beasts and cart them away.² Otherwise, the peace was kept and things worked for these ranches much like they might have fifty years before.

Things were a little more tense to the south and west of us, though. Down there, in the desert, I could detect resource tension and scarcity issues even as a child. On the five-hour drive from our home to the public lands in southern Utah where we camped every year (near the location of the aforementioned missed hiking opportunity), we passed a lot of ranches. I could spot them easily by the gate and the arch near the highway, with the telltale brand sign front and center. Sometimes the cows did not appear for a few miles after passing the ranch entrance, was although it could be a much larger distance. On the bigger ranches, I only knew that the cattle belonged to the ranch because my parents would talk about the massive size of these operations as we drove, and we all wondered aloud how it came to be that one family or one person could have so much land. Some of these ranches took hours to cross, even at highway speeds.

As I finished middle school and began high school, I read more about the history and ecology of Colorado and Utah, and these desert ranches raised even more questions. Plant life was so scarce, especially in southern and eastern Utah, and shade was hard to find. There was little grass, and so much sagebrush. I wondered if the cows ate sagebrush (and whether they liked it). Then I wondered what impact their presence had on other species, because it was not hard to calculate the resource scarcity scenario even from the window of a passing car. There were hundreds of cattle in some places, and there was just not very much to eat or drink. On one of our family trips, we went further south in Utah than we had gone before, seeking to escape the crowds that had begun to amass in the region around Moab and the national parks in its immediate vicinity, including Arches National Park and Canyonlands National Park. We were looking for less visited public lands, and we found them to the south, in a never-ending series of canyons and cliffs in San Juan County. We ended up camping for most of the trip, but for a treat on the last night,

² See, e.g., Mike Koshmrl, *Wyoming Spends Record \$4.2 Million to Kill Coyotes, Other Predators*, WYOFILE (June 1, 2023), <https://wyofile.com/wyoming-spends-record-4-2-million-to-kill-coyotes-other-predators/>.

we stayed in a guesthouse, where I found a series of black and white photographs on a wall-mounted pegboard in the lobby. The moment I first saw them, tacked to the wall amid shelves of maps, books, petrified corncobs, bird nests, and other desert tokens people gather when they visit places like this, I stopped and stared for a long time. Normally it would be the book spines that I would gravitate to, in search of the next title by Wallace Stegner or Everett Ruess that might unveil a previously unknown nugget or two about the history of this place. But that day, it was these photos that drew me in. They were photos of tall grasses, seemingly thriving in the desert.

Many years later, I found out this was ricegrass, or Indian ricegrass, as the plants are commonly known. *Achnatherum hymenoides* is an endemic species that is one of the most widely adapted native grasses of Utah's grassland regions.³ It is hardy, drought tolerant and thrives at elevations between 3,000 and 10,000 feet. It was once hard to miss, with plants regularly growing waist-high and appearing throughout the nooks and valleys nestled at the base of the red rock canyons and cliffs.⁴ Ricegrass thrives in the cool climate of these high desert elevations and has adapted to a wide variety of soils found in the rocky, sandy, stony, and shallow soils of the semidesert region of southeastern Utah. It does not survive in wet or poorly drained soils,⁵ which also makes the plant perfectly suited to the desert, and it can thrive even in soils high in lime, salt, and alkali. Ricegrass is a foundational grass species in the foothills and semidesert grasslands of Utah, which historically and today, are also the places where people usually want to settle down. As I learned more about this grass species during the research for this book, I learned that it used to grow in the area surrounding the wash where I had my frustrating interaction with the wallowing cattle.

Judging from their appearance in the guesthouse photos alone, these grasses were once healthy and abundant. The old wooden structures in the background of the photo looked like they came from a movie set. Settling down in this little town in the early 1900s, when the photos were taken, would not have been a bad decision, especially for a budding rancher, as ricegrass is well suited for domestic livestock and provides excellent forage for spring and summer grazing seasons.⁶ Ricegrass can even sustain livestock through the winter, with plants retaining their taste and appeal well after being harvested and dried. A field of ricegrass would also attract birds, like upland game species such as mourning doves, pheasants, and

³ Horton, Howard, Interagency Forage and Conservation Planting Guide of Utah, Utah State University Extension Service. Publication EC433. Logan, UT, p. 67 (1989); Utah State University, *Range Plants of Utah: Indian Ricegrass* (last accessed Oct. 10, 2023), <https://extension.usu.edu/rangeplants/grasses-and-grasslikes/indian-ricegrass>.

⁴ Roger M. Hybner, U.S. Department of Agriculture, Natural Resources Conservation Serv., Plant Materials Technical Note No. MT-74: Indian Ricegrass, p. 1 (Sept. 2011).

⁵ Horton at 67.

⁶ *Id.*

others, which found the plant's abundance of plump and nutritious seeds an excellent food source. Some of these birds could be hunted to supplement livestock production, and one could paint a picture of a nice life here as a newly arrived family in the spirit of Laura Ingalls Wilder's experience in *Little House on the Prairie*.

As with any Hollywood story, though, there is more context behind this scenario than one could understand from the photos. Like other desert plants, ricegrass cannot sustain year-round grazing by herds of domestic livestock, or even three-season grazing, because the plants depend on the moisture of the early growing season in the spring to complete their normal growth and food storage cycles.⁷ So, if ranchers use ricegrass pastures to sustain their cattle herds, they must remove their stock during the spring to allow the plants to go through their flower and seed formation stages before the moisture they need to complete these processes is drained or evaporates from the soil. Also, even during the seasons when the plants are mature and capable of sustaining grazing, ranchers cannot allow more than 60 percent of the plant growth to be removed, or the plants will die.⁸ The ranchers in southern Utah found this out through trial and error, and the results of their experiment can be seen in areas like the one I set out to hike in, where there is no longer any ricegrass to be seen.

Ricegrass also had a relationship with people long before the Euro-American settler colonizers arrived in southeastern Utah in the late 1800s. Indigenous Peoples used this grass to make flour, and it was a preferred source of meal, due to its flavorful taste and protein-laden seeds. This flour was combined with water to create a "mush," with a distinct nutlike flavor. People and animals alike in southern Utah wanted to eat ricegrass and like most plants, there were limits to the harvest levels it could sustain over time. So, a logical assumption explaining the difference between the area in the guesthouse photos and the view I could see from the guesthouse window – devoid of any ricegrass whatsoever – is that the plant was overharvested or overgrazed. And that is, in fact, exactly what happened.

The chapters that follow analyze how this happened, not only with ricegrass but also so many other grass and plant species in the West, but they also explore the cascading effects of laws and policies that facilitated overgrazing and resource depletion. They highlight key laws and policies that created or responded to inflection points in the trajectory of agriculture throughout the West and explore the intersections of natural resources laws, Indigenous law and policy, property law, and water law in the evolution of the West. They relate, in an abbreviated fashion, the relatively rapid transition from Indigenous stewardship to settler colonizer models of resource allocation and explore the consequences of these transitions, including wildfire frequency and intensity, drought, invasive species, and declines in wildlife populations. And no discussion of any of these issues in the West would be complete without exploring the role of climate change in resource allocation.

⁷ *Id.*

⁸ *Id.*

While this might sound somewhat foreboding, the following chapters also reveal that these acute threats may spur change that could be good for the West, in so many ways. For example, deconstructing old patterns can allow for an accounting of the racial and social inequities that settler colonialism has wrought throughout the region over the past century and a half, while allowing legal reform that avoids the mistakes of the past. In addition, the percentage of federal land in the West, and the federal government's role in managing and regulating its use, has traditionally been resented by western ranchers, which has led to the conflicts that are described in Chapters 4–9. Viewed from a different perspective, these federal lands are the lands of all Americans and should reflect the collective values and diversity of the entire population. At the lower end of the spectrum, in Montana, the American public owns 30 percent of the state, but at the higher end, the American public owns more than 60 percent of the land in states such as Idaho and Utah (without accounting for unceded Tribal lands that may be restored to Indigenous Nations, or other land tenure adjustments that might occur as a result of the reckoning this book calls for). This reality means that the federal government, as a trustee for the American public, will remain present in these states, but perhaps not in the same way as in the past, as Chapter 10 will explore.

Discovering the extent to which law and policy lay at the root of the challenges that plants like ricegrass have faced was incredibly exciting to me, because the intersection of law, policy, and more recently, racial and social justice, is where I have spent the bulk of my career. What I found during the years I interviewed ranchers and researched the statutes, judicial opinions, and regulations in the pages that follow is that law and policy are inextricably intertwined with power, which is true almost everywhere, but especially in regions such as the Rocky Mountains, the Great Basin, and the Colorado Plateau, where resources are scarce. Controlling access to scarce resources creates power, and powerful people have historically been the ones to create natural resources and property laws, which has resulted in myriad laws that consolidate this power. I also found, not surprisingly, that the issues of resource scarcity in the West intersect with race, socioeconomic class, race and ethnicity. One only needs to google “water” and “the West” to find a series of news articles exploring the water shortages facing this region, which tend to impact Tribal Nations, rural regions, and people of color most acutely.⁹

Yet, many resource challenges of the twenty-first century are not new to the West, and this region has sustained agricultural enterprises on a significant scale for over

⁹ Sharon Udasin, *Wester Tribes Face Challenges Capitalizing on Water Rights: Study*, THE HILL (Apr. 19, 2023), <https://thehill.com/policy/equilibrium-sustainability/3959010-western-tribes-face-challenges-capitalizing-on-water-rights-study/>; Leslie Sanchez, *et al.*, *The Inequitable Exposure of Socially Vulnerable Groups to Water Shortages across the United States*, ENVTL. RES. LETT. 18, p. 7 (2023), www.fs.usda.gov/rm/pubs_journals/2023/rmrs_2023_sanchez_loo1.pdf.

4,000 years, if not longer.¹⁰ The history of the West has been inextricably intertwined with resource scarcity and agricultural ingenuity since well before the arrival of Europeans in the 1500s, with Indigenous histories documenting sustained dryland farming operations in locations that receive only inches of precipitation annually, for hundreds of years prior.¹¹ Once European immigration and colonization began, new agricultural practices and customs were adapted and added to the agricultural landscape, with some of them sustaining populations for centuries. But others did not fare as well. The homesteading era of the 1800s brought more aspiring ranchers and farmers than the land could sustain, and the region collapsed under the pressure. This, of course, was the now famous Dust Bowl that wreaked havoc on the US economy, as well as the ecology of the Midwest and West.

The rule of law – which was used to address the causes of the Dust Bowl and has so often been used throughout history to relieve pressure on finite resources, address resource conflicts, and establish a durable system of land and resource use – sometimes outstays its usefulness, though. And in the case of agriculture and public lands in the West, it is seen by many as having outstayed its usefulness for perhaps a half-century or longer, continually failing western ranchers, conservationists, wildlife, and the public more broadly. The rules of law analyzed in Chapters 1–3 often fail to allocate resources in a way that reflects the values of twenty-first-century America, which has begun to discard the principles of the so-called lords of yesterday, who amassed power and privilege and wielded them against the land and those less powerful and privileged.¹² The pattern readers will note is that those with the power to establish permanent systems of resource allocation and resource exclusion were usually from somewhere else, and their desire to be of this new place, and securely of this new place, caused them to be deeply and personally invested in the rules of law they were crafting for the arguable benefit of “everyone,” including the first peoples of this region. The power these lords of yesterday wielded over natural resources has permeated much of the legal system that governs resource allocation and use in the West. And the descendants of yesterday’s lords still reign unchallenged, in pockets throughout the region.

But the story cannot be viewed only through the binary lens of colonizers and colonized. Law and policy had profound and permanent consequences for African Americans who wanted to move West after the Civil War, in search of land and the American dream that had been sold to them. Like Indigenous Peoples, they were

¹⁰ CRAIG CHILDS, *HOUSE OF RAIN: TRACKING A VANISHED CIVILIZATION ACROSS THE AMERICAN SOUTHWEST*, p. 13 (Little, Brown & Company 2006).

¹¹ U. of Ariz. Indigenous Resilience Ctr., “The Man Working to Sustain Hopi Dry Farming in Arizona” (Sept. 2, 2022), available at <https://resilience.arizona.edu/news/man-working-sustain-hopi-dry-farming-arizona#:~:text=It%20is%20Hopi%20women%20who%20%E2%80%99Cown%E2%80%99D%20the%20fields%20C,crop%20genetics%20carried%20on%20from%20generation%20to%20generation>

¹² CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST*, pp. 20–21 (Island Press 2013).

excluded from the process of law and policymaking that influenced their access to land, water, and ultimately, legal rights that would be necessary to secure their future and the success of their dream. Yet, they were not colonizers in the sense that the white immigrants were, having little to no support for their westward migration and attempts at land acquisition from far-flung politicians and power brokers in the east. African Americans who succeeded in amassing the resources to move West found themselves attempting to farm in foreign landscapes, where the skills they had acquired during the slavery and sharecropping eras in the south were often of little practical value. Their dream also included the mirage of equality and freedom, which had begun to appear in law, but had not been recognized by those who controlled the banks, land offices, legislatures, Governor's offices, and executive branch agencies. As hard as they were willing to work to make their dream a reality, the forces of institutional and structural racism were continually working against them, as they still do today.

The chapters that follow will tell the story of how agriculture evolved in the West, from the precontact era until the present, highlighting some of the most influential laws and policies that shaped the modern tableau of agricultural use in this region. They will explore law and policy through the stories of several agricultural operations to highlight the aspects of these laws that profoundly impacted land, water, wildlife, livestock, and people. Read in sequence, the chapters trace the arc of agricultural stewardship, depicting how so many laws and policies were developed to resolve resource scarcity or crises of one form, but while attempting to fix the problems they were created to solve, they often caused new and unexpected externalities, which have continued through the present day.

This book represents, in several ways, the culmination of much of my prior research in the areas of natural resources law, Indigenous law and policy, environmental governance, and in the subspecialty area of federal grazing law. It grew from the thoughts I ruminated on during my drive away from the wash that day in southern Utah, which took me back to my childhood and the photos I saw in that guesthouse. In the car that day and so many other days before and since, I have imagined a West in which some of the resource tension dissipates and the ricegrass might once again grow and thrive. There is room for agriculture in this vision, but not in the form it has taken to date. Instead, the new agricultural reality of the West must reflect the diversity that permeates the region, allowing it to truly serve all the people who live there. In my imagination, this land could once again contain healthy, regal grasses, representing a visible sign of ecological health, and a rejection of the agricultural colonization that has so damaged it. Whether that is a dream or could one day be reality remains very much an open question – one that will not be entirely resolved by the ensuing pages of this book. However, the exploration that follows might provide a foundation from which to build this new framework – a framework that protects land, water, and plants, and embraces the present diversity of people, customs, and stewardship practices of this beautiful and beloved region.