FROM PREFERENCE RIGHTS TO GRAZING ALLOTMENTS: WHY RANCHERS OWN THEIR ALLOTMENTS

By Angus McIntosh PhD
Executive Director, Range Allotment Owners Association

There are many US Supreme Court decisions on the subject of “pioneer rights” or settler's rights of “possession”, “occupancy” or “use” through “settlement” and “improvement”. One case that specifically refers to these possessory rights as "pioneer rights" is Lamb v Davenport, 85 US 307 (1873). However, this concept of “possessory” property rights as an individual right (regardless of whether the individual was an Indian, Hispanic, Anglo, etc.), existed in the Western territories under the prior English, French or Mexican laws and customs (Sunol v Hepburn, 1 Cal. 254 (1850)). Regarding “stockraising” or “grazing” the US Supreme Court stated in Arguello v United States, 59 US 539 (1855), that a “cattle range” held in “possession” for 50 years (from prior to the Mexican cession to the US) was sufficient evidence of ownership. “Possessory" or "occupancy" rights of actual settlers typically have the sanction of State or Territorial legislation, or; local laws, customs and decisions of the courts; or “aboriginal” title” or “possessory” or “occupancy” rights dating from a time prior to US acquisition through “treaty” (ie. Guadalupe-Hidalgo, 1848, or the Oregon-Northwest Treaty with Great Britain, 1846). This same possessory or occupancy right of “actual settlers” gives the settler a “color of title” which has been referred to as the "preference" right. The preference is the preferred right to acquire the government's “legal title” when the land occupied or in the possession and use of the pioneer is eventually opened to disposal. (See Frisbie v Whitney, 76 US 187 (1869)). This pioneer right of possession and preference gives the occupant the right to sell his improvements as well as his possessory right prior to acquiring the government's “legal title”, and such ownership will "relate back" to the first pioneer's date of settlement. This is important when establishing senior “water rights” and "land use rights" that predate later competing claims. The Supreme Court has held that this pioneer/possessory right or title is good against all the world, except the United States as the actual legal title owner. However, once the United States Congress by positive legislation recognizes, confirms, or sanctions a “use”, or grants a right or title, then it is no longer a mere preference or possession. Once recognized or granted to a settler by an Act of Congress, that right could not be defeated by an employee of the Executive Branch (i.e. Interior or Agriculture) who failed to perform their duty to survey and record the settler's claim, (Shaw v Kellogg, 170 US 312 (1898), Nobel v. Union River Logging R.R. Co., 147 US 165 (1893)).

Regarding stockraising by bona fide settlers on “public lands” prior to passage of the Grazing Act of March 3, 1875 (18 Stat 481), stockgrazing was merely at the sufferance or tacit consent “under an implied license” of Congress under a color of title based on State/Territorial “range” laws. While this “possessory/preference” right was good against all others, it was not good against the United States as legal title owner until validated by, or properly initiated under, an Act of Congress (Frisbie v Whitney, 76 US 187 (1869) and The Yosemite Valley Case, 82 US 77 (1872)). However, after passage of the Grazing Act of 1875, Congress validated the right of settlers to “graze” cattle, horses and other stock animals (even to the point of “destroying grass and trees”), on any land open to settlement under the homestead, preemption, or mineral land laws. Of course it was often necessary to destroy trees in order to improve pasture, or to destroy grass in order to plant forage crops (Shiver v United States, 159 US 491 (1895); Stone v United States, 167 US 178 (1897)). By the Act of July 26, 1866 (14 Stat 2530) Congress had already recognized, sanctioned and confirmed ranch settler's

stockwater rights (United States v New Mexico, 438 US 696 (1978)), and stocktrail ("highway") right-of-ways (Curtin v Benson, 222 US 78 (1911)). Therefore, when land in the actual possession of a bona fide settler as a "range" was later incorporated into a federal military reservation, the ranch settler not only owned stockwater rights and stocktrail ROWs, but, had the "preference" right over all others to be "granted the privilege" to continue "grazing cattle, horses, sheep and other stock animals" following a determination that stockgrazing would not interfere with the military's use of the reservation, (Act of 1884, 23 Stat 103). Here it is important to note that a Congressional "grant" could not be defeated by a bureaucrat's failure to make a required determination (Shaw v Kellogg, supra.). It must also be noted that a "privilege" is not a general "right" because it cannot be exercised by every citizen. A "privilege" is a "preferential right" that can only be exercised by a "preferred", favored or exclusive class or group of citizens. In the case of the "grazing privilege" it could only be granted to the actual settlers in possession of the range who owned the water rights (Griffith v Godey, 131 US 89 (1885); United States v Krall, 174 US 385 (1899); United States v New Mexico, 438 US 696 (1978)), range rights and easements (Curtin v Benson, 222 US 78 (1911)), and improvements (forage, fences, etc), (Atherton v Fowler, 96 US 513 (1877)). Additionally, when the reservation was no longer needed for government purposes, any actual settler still in possession had the preference right to acquire legal title through the homestead laws or by purchase (Act of 1884, supra). Congress first established a specific process for granting homesteads plus an "additional entry" of grazing land as "grazing allotments" in the General Allotment Act of 1887 (24 Stat 388). Congress' first large scale Act granting split surface estate "grazing allotments" to settlers while retaining title to the mineral estate was the Curtis Act of 1898 (30 Stat 495).

A short list of key decisions pertaining to this principle of "preference/possessory rights" related to "range" rights would be:
Arguello v US, 59 US 539 (1855), 50 yrs possession of cattle range under color of title gives title good against the United States government.
Frisbie v Whitney, 76 US 187 (1869), Possession and improvement gives a settler a preference right to acquire title, which right land department officers are bound to protect.
Lamb v Davenport, 85 US 307 (1872), Possessory rights and improvements could be sold even before any act of congress was passed allowing for disposal of that land.
Atherton v Fowler, 96 US 513 (1877), Possession of an enclosed range and improvement of the forage was sufficient to establish possession and defeat later homestead claimants even if the enclosed land far exceeded the amount allowed under the homestead laws. The first settler was entitled to compensation as owner of the forage cut and removed by a second fraudulent claimant even if the legal title to the underlying land was still in the US.
Hosmer v Wallace, 97 US 575 (1879), Where a settler was in possession or occupancy of thousands of acres as a stock ranch the land was segregated from appropriation by later settlers.
Griffith v Godey,113 US 89 (1885), A settler in possession of thousands of acres of a cattle range, controlled by his ownership of water rights in key springs and of a homestead was the owner of a property right in the range.
Wilson v. Everett, 139 U.S. 616 (1891), An expansive cattle range on the Republican river and its tributaries covering portions of Colorado, Nebraska, and Kansas was a possessory private property interest subject to recovery of damages.
Cameron v United States, 148 US 301 (1893), Possession and improvement of thousands of acres as a cattle range gave color of title or a claim that removed the land from the class of "public lands" and therefore the enclosure of such was not a violation of the Unlawful

Occupancy act of 1885,
Lonergan v. Buford, 148 US 581 (1893), An expansive cattle range together with all water rights, fences and improvements thereon covering portions of Utah and Idaho was possessory private property capable of sale and subject to contract enforcement.
Swan Land and Cattle Co. v Frank, 148 US 603 (1893), A large cattle range in Wyoming together with water rights, and improvements were possessory property rights subject to actions at law for recovery.
Catholic Bishop v Gibbon, 158 US 155 (1895), By treaty possessory rights of settlers in British Oregon shall be respected.
Grayson v Lynch, 163 US 468 (1896), A cattle range suitable for pasturage, watering, and raising cattle in New Mexico was a property right such that the owner could recover for damages caused by diseased cattle being driven across his range.
Tarpey v Madsen, 178 US 215 (1900), Possession implies improvement and settlement with intent to acquire title when land is opened for disposal, but cabins, corrals improvements for hunting, trapping, etc also allowed.
Ward v Sherman, 192 U.S.168 (1904), A large cattle range, cattle then on the range, and the desert wells were all private property subject to sale and mortgage.
Bacon v Walker, 204 US 311 & Bown v Walling, 204 US 320 (1907), Idaho range laws recognizing settler's right to exclusively graze lands within two miles of their homestead did not infringe on United States' underlying title.
St Paul M&M R Co v Donohue, 210 US 21 (1908), All public lands were opened to settlement and entry after 1880 and a settlers' improvements were sufficient notice of his claim to defeat later claimants.
Northern Pacific R Co v Trodick, 221 US 208 (1911), Until a local land office was established and a survey conducted the rights of settlers in possession of public lands could not be defeated by either subsequent withdrawal or grants to third parties.
Curtin v Benson, 222 US 78 (1911), Where a settler owned seven scattered parcels of land connected with 1866 Act right-of-ways, intermingled with 23,000 acres of range rights, before the United States included that land into a national park, the possessory range owner did not afterwards have to acquire a permit prior to using his property rights.

Under the Forest Reserve/Homestead Acts of 1891/1897 (26 Stat 1102/30 Stat 33) all land withdrawn as Forest Reserves that was occupied by “actual settlers” (possessory range rights), and was valuable for “agriculture" (stockraising), not only had “preference” rights attached to them, but also owned “property” in the form of easements, water rights, Right Of Ways, forage crops, timber use rights, and improvements that belonged to the bona fide settlers (Act of July 26, 1866 (14 Stat 253); Mining Act of 1872 (17 Stat 91); Livestock Reservoir Site Act, of 1897 (29 Stat 484), and cases cited above). The Act of 1880 (21 Stat 141), had opened all the land in the West to settlement, and had recognized that settlers' improvements and possession were sufficient to put any later claimants on notice that the land was already occupied (Cox v Hart, 260 US 427 (1922). The free homestead Act of 1900, (31 Stat. 179), opened all agricultural public lands acquired by treaty to settlement and entry free of charge (except for filing fees).

In1902 Congress enacted the Reclamation Act (32 Stat 388), which altered the policy of granting specific acreage amounts of Desert Land (i.e.160, 320, 640, etc.) and adopted the “Unit policy” which instead granted to a homestead entryman an “amount of land sufficient for the support of a family”. The same policy was followed when Congress enacted the Forest Homestead Act of June 11,1906 (34 Stat. 233, 35 Stat. 554) which included a “preference”

right for actual settlers to enter any number of 160 acre tracts up to the amount of their actual settlement. In1910, Congress authorized the granting of “allotments” to Indians “occupying, living on, or having improvements on” land within National Forests “more valuable for agricultural or grazing purposes than for timber” (36 Stat 863). In 1912 and 1913 Congress “directed and required” the Secretary of Agriculture to classify and open to agricultural entry and settlement all land within National Forests (37 Stat 287 & 842). Even heavily timbered land could be granted as grazing allotments (United States v Payne, 264 US 446 (1924). Also, United States v Jackson, 280 US 183 (1930), held the terms “allottee and allotment” and “homesteader and homestead” were synonomous.

This was the law as it existed in 1912 when Congress amended the 1880 Act For Relief of Settlers (37 Stat. 267) and recognized a “preference right” of settlers to an ”additional entry” under the “enlarged homestead provisions” of the Desert Land Laws to claim an amount of land to the extent of their occupancy and possession as long as their boundaries were plainly marked. By the end of 1914 all land in National Forests had been classified and designated as “grazing allotments”. The Desert Land Act Amendment of July 17 (Agricultural Entry of Mineral Land),1914 (38 Stat 509), and the Stock-Raising Homestead Act of 1916 (39 Stat 862), were the culmination of the change in Congressional policy that created a split-estate that divided the surface agricultural and grazing values from the mineral estate and “merchantable timber”, (Kinney-Coastal Oil Co. v Kieffer, 277 US 488 (1928); and Watt v Western Nuclear Inc., 462 US 36 (1983)).

In1916 (after 17 years of debate) Congress finally passed the only homestead Act specific to livestock production, the Stock-Raising Homestead Act. The intent of the SRHA was to make a permanent disposal of all the remaining approximately 600 million acres in the West "chiefly valuable for grazing and raising forage crops".(Stock-Raising Homesteads, 1916. House Rep. No.35. 64Th Cong., 1st Sess.) Section 10 of the SRHA provided for the withdrawal of 600 million acres under the 1910, Pickett Act (36 Stat 847) for "classification" so the range could be surveyed, and allotted as “preferential” “additional entries” under Section 8 of the SRHA. Under the “unit policy” of the Reclamation law, once an entryman had paid the required fees, made the required improvement and cultivation, and the size of the unit was determined and the plat returned, the entryman had done all required and the equitable title was vested in the entryman (Irwin v. Wright, 258 US 215 (1922)). Amendments to the SRHA in 1919, required that stockraisers make an “additional entry” of all land “valuable for grazing and raising forage crops” within 20 miles of their original entry upon which they had improvements (41 Stat 287).

By an Act for the Relief of Settlers of March 4, 1923 (42 Stat 1445) Congress allowed settlers under previous homestead acts to convert their “original” or base property entries to either Desert Land (Enlarged) Homestead entries or to Stock-Raising Homestead Act entries in order to change their required “proofs” to $1.25/acre “improvements”. See also the Act of June 6, 1924 amending the SRHA (43 Stat 469). Both the Desert Land (Enlarged) Homestead Acts and the Stock-Raising Homestead Act also allowed “preferential” or “preference” right “additional entries” to the extent of the settler's actual possession (where his boundaries were clearly marked), of an amount of land “sufficient for the support of a family”.

The Pickett Act (in conformance with Section 10 of the SRHA) and the Act of March 4,1927 (44 stat 1453), provided authority for the creation of Grazing Districts outside of National Forests, and the President began creating Grazing Districts in 1928. The Taylor Grazing Act

(48 Stat 1269) provided for administration of Grazing Districts and provided a formalized process for establishing them. The TGA did not affect valid existing rights, and allowed for ranchers to complete their improvement requirements under section 8 of the SRHA. The TGA provided that the livestock numbers could not be reduced if the “grazing unit” was pledged as collateral for any loan. The TGA makes numerous references to “grazing rights” “range”, “grazing privileges”, and ”preference rights”. The Act to Conserve and Develop Indian Lands and Resources of 1934 (48 Stat 984), also references valid rights, surface rights, and water rights of allotment owners. The Act also refers to “range units”, and “full utilization of the range”.

During the Dustbowl/Depression era of the 1930's Beginning with the Act of March 3, 1933 (48 Stat 22), Congress enacted a series of statutes to buy failing, or abandoned farms (typically 160, or 320 acre homesteads), and then “resettle” them in “farm management units of a size sufficient for the support of a family” (Bankhead-Jones Farm Tenant Act BJFTA July 22, 1937, 50 Stat 522). This was a continuation of the “Unit Policy” adopted by Congress beginning with Section 3 of the Reclamation Act of 1902 (32 Stat 388). The Act of March 3, 1933 (48 Stat 22) is the Act referred to in United States v Otley, 127 F2d 988 (9th Cir 1942), as the authority for the United States to acquire by condemnation the lands of the ranchers within the Malheur Bird Reserve. This was all in response to the Great Depression and Dust Bowl. This was an era of failing and abandoned farms, bankrupt counties due to no tax revenue, high unemployment, and failing banks due to defaulted farm and ranch loans. Congress passed a number of laws (48 Stat 22, 49 Stat 163, 49 Stat 1148, 49 Stat 2035, 50 Stat 8690) to create make-work conservation projects and buy up failed or abandoned farms in order to “resettle” the land under the Stock-Raising Homestead Act in conjunction with the BJFTA as “ranch units”, or to add the purchased lands to “Grazing Districts” established under the Taylor Grazing Act (48 Stat 1269). This land would no longer be plowed, but would be reclassified as “land chiefly valuable for grazing and raising forage crops”. Although Congress required that a minimum 3/4th interests in the minerals be retained by the United States, the whole idea behind these Acts was simply to “resettle” the surface estate or build conservation “projects”. By the Farmers Home Administration Act of 1946 (60 Stat 1062) all lands purchased under these conservation or resettlement statutes were disposed of and farm and ranch “allotments” and “units” of a size sufficient for the support of a family”.

Congress wanted to make it clear there was no intention to acquire any jurisdiction over the land. So, it enacted the “Act to Waive Exclusive Jurisdiction” of June 29, 1936 (49 Stat 2035) : *“That the acquisition by the United States of any real property heretofore or hereafter acquired for any resettlement project or any rural-rehabilitation project for resettlement purposes heretofore or hereafter constructed with funds allotted or transferred to the Resettlement Administration pursuant to the Emergency Relief Appropriations Act of 1935, or any other law, shall not be held to deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or to impair the civil rights under the local law of the tenants or inhabitants on such property; and insofar as any such jurisdiction has been taken away from any such State or subdivision, or any such rights have been impaired, jurisdiction over any such property is hereby ceded back to such State or subdivision.”*

The SRHA Act was the grant from Congress, the survey of the ranges into allotments the recording of the maps, improvement of the additional entry to an amount equal to $1.25 per acre, and return of the maps to the ranchers in possession was all that was required by the statute, (see Sellas v Kirk, 200F.2d 217 cert. Denied 345 US 940 (1953). See also Shaw v

Kellogg, 170 US 312 (1898).

Some bureaucrats would have people believe that somehow the Federal Land Policy and Management Act (FLPMA) of 1976 somehow changed 130 years of Congressional grants and property rights. FLPMA itself contains 2 pages of “savings provisions” intended to “grandfather” in place all prior existing rights. FLPMA specifically states “All actions by the Secretary [of Interior] concerned under this Act are subject to valid existing rights”. If it was true that FLPMA was intended to extinguish all of ranchers (and anyone else's) property rights, then Congress the next year would not have provided for the protection of ranchers' property rights under the Surface Mining Reclamation Act of 1977. (91 Stat. 524, Sec. 714, 715 and 717). In1983 the US Supreme Court ruled that the Stock Raising Homestead Act was intended to grant the surface estate to ranchers while retaining the mineral estate to the United States (Watt v Western Nuclear, 462 US 36 (1983)). See also Kinney Coastal Oil v. Kieffer, 277 US 488 (1928). Also, see Stock-Raising Homesteads. 1916. House Rep. No. 35, 64th Cong., 1st Sess.