

# Taking Back Our Land

## A History of Railroad Land Grant Reform

by George Draffan

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*I now wish to prevent a perpetual monopoly of over 50,000,000 acres of lands by an immense railroad company... I hope that the American Senate... will not by their action here to-day cause their posterity to curse their memories for thus building up such an immense monopoly to the detriment of the country, to the oppression and injury of all who may settle in that region.*

-- U.S. Senator Howell, arguing against additional subsidies to the Northern Pacific Railroad, in 1870.<sup>1</sup>

*The possibilities of power involved in such a concentration of land ownership, irrespective of the timber, hardly require discussion. The danger of abuse of that power, in the absence of restrictive regulation, is obvious. This danger, moreover, is greatly increased because a few of the largest owners of this land also occupy dominating positions in railroad transportation over great sections of the country.*

-- U.S. Bureau of Corporations, 1913-14.<sup>2</sup>

*The historian is less interested in whether the government drove a sharp bargain than he is in the fate of the 174,000,000 acres of Federal land and the approximately 49,000,000 acres of state lands which were offered to the railroads.*

-- Historian David Maldwyn Ellis, 1946<sup>3</sup>

*The lesson of the railroad land grants after more than one hundred years is that the government has been incapable of dealing affirmatively and at arms length with powerful economic interests.*

-- Attorney Sheldon Greene, 1976.<sup>4</sup>

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<sup>1</sup> Quoted in U.S. Congressional hearings on the Northern Pacific Railroad, 1924-1928, p. 4683-4684.

<sup>2</sup> In its report on *The Lumber Industry*, Vol. 1, p. 29.

<sup>3</sup> Ellis, 1946.

<sup>4</sup> Greene, 1976, p. 725.

## The Disposal of America's Public Lands

Soon after the Revolution, the American government began transferring much of the continent into private ownership. More than a billion acres was given or sold to war veterans and other individuals for their service to the nation, granted to states for developing their education and transportation systems, to individuals for homesteading, and to corporations to develop water, timber, and mineral resources for the nation.

Laws passed to transfer public lands to private hands included the Land Act of 1796, the 1841 Preemption Act, the 1862 Homestead Act, the General Mineral Law of 1872, the Desert Lands and the Timber & Stone Acts in the 1870s. The laws did succeed in rapidly giving away the bulk of public lands, though not always, as we shall see, to the public. By the late 1880s, the land laws were being revised or repealed, because the end was in sight for the disposal of America's public lands.

As attorney and land reformer Sheldon Greene has described, "During its first one hundred years, the work of the United States was to take possession of its land. The colonization and territorial expansion of the United States were, simply put, a colossal land rush."<sup>5</sup> Such a transfer of wealth was not accomplished without speculation, greed, and outright fraud. Throughout much of the settlement and preemption and homestead eras, corruption in land dealings was the rule, rather than the exception. The head of the U.S. General Land Office, the agency which disbursed federal lands, estimated that in 1883 fraud accounted for 40 percent of the 5-year homesteads, 90 percent of the timber claims, and 100 percent of the Preemption and commuted Homestead claims.<sup>6</sup> A 1910 survey estimated that 90 percent of the preemption and homestead land in Wisconsin had actually been acquired for timber.<sup>7</sup> In the 1880s, "the going rate for dummy entrymen ranged from \$50 to \$125; you could buy a witness for \$25."<sup>8</sup>

Greed and waste so characterized the era that it was dubbed "the Great Barbecue." The disposal of the public domain was inextricably tied to the Gilded Age, the Robber Barons, the Wild West, and the other great myths of the American industrial age, and to the dramas and problems that they encompass. Many of these dramas are still being played out across the country today.

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<sup>5</sup> Greene, 1976, p. 707.

<sup>6</sup> Seventy-five years later, a public lands historian wrote that "historians have never discredited these estimates, nor . . . even challenged them" (Le Duc, 1950).

<sup>7</sup> Fries, 1951, pp. 176-177 and 179; citing *U.S. General Land Office (GLO) Annual Report*, 1877, p. 35. From 1885 to 1888, during the brief tenure of GLO Commissioner William Sparks, only a quarter of the land was fraudulently claimed.

<sup>8</sup> Steen, 1991, p. 24, citing Ise, 1920, pp. 74-75; and *GLO Annual Report*, 1886, pp. 95, 200, 213.

"Dummy entrymen" were individuals who would apply for homestead lands and then turn them over to timber, mining, real estate, or other corporations.

It is the purpose of this paper to outline the successes and failures of the movement to re-vest the railroad land grants, and to show that as long as the “unintended empires” of the railroad land grants continue to exist, the political, socioeconomic, and environmental controversies will also continue, as will options for taking remedial action by re-vesting the lands back to the public.

**Table 1. Disposition of Public Lands<sup>9</sup>**

Type of grant or sale	Acres	% of total
Cash sales & miscellaneous	303,500,000	27%
Homestead	287,500,000	25%
Railroads (direct to corporations)	94,400,000	8%
Railroads (via grants to states)	48,883,372	4%
Other grants to states	279,596,628	24%
Timber & Stone law sales	13,900,000	1%
Timber Culture law grants and sales	10,900,000	1%
Desert Land law sales	10,700,000	1%
Military bounty grants to veterans	61,000,000	5%
Private land claims	34,000,000	3%
Total land granted or sold	1,144,380,000	100%

### **The Railroad Land Grants**

One of the most controversial of the public lands “disposals” was the railroad land grants, a series of federal and state acts between 1850 and 1871. The ostensible purposes of the railroad land grants were to build the transcontinental railroad and telegraph systems, and to help settle the West. The railroad corporations, often federally-chartered public corporations, were in effect to be agents of federal and state public lands policies.<sup>10</sup> The railroads, rather than the U.S. General Land Office, as was usually the case, would sell the land to settlers, and use the money raised to pay for the construction of the national transportation and communication systems. Besides these public sale provisions, there were other conditions placed upon the land grants, including constructing the railroads within a specified period, providing railroad service in perpetuity, and hauling military and postal freight at reduced rates.

The nature, magnitude, and implementation of the land grant program was debated hotly for many years. Proponents of the land grants included the arguments that the nation

<sup>9</sup> U.S. Bureau of Land Management, 1986; and Ellis, 1946, in Carstenson, 1963, p. 146.

<sup>10</sup> This status has been upheld in the courts. For example, the U.S. Supreme Court has declared that “the interest that the granting acts conferred upon the railroad was \$2.50 per acre,” and the right to sell at that price were only “aides to the duty of transmitting the land to settlers” (*Oregon and California R. Co. v. U.S.*, 243 U.S. 549 (1917)).

needed military roads for the Indian wars and the Civil War. The West was a wilderness needing to be settled and developed. People needed land, but Western land was worthless without opening by the railroads. Land grants were the only way to fund railroad construction, and the U.S. would not lose any money by granting half its land and selling the other half for twice the price. Opponents of land grants argued that the railroads should not be subsidized with public resources, and that the government would lose revenues from its public land sales program. The land grants were far in excess of what was needed to secure construction of the railroads, and would result in corporate monopolies of land and resources.<sup>11</sup> Even as the debate continued, the land grants began to be legislated, with opponents managing to include what were thought to be safeguards against mismanagement or abuse.

Prior to 1862, the grants were made via the state governments; nine states granted almost 49 million acres in railroad land grants.<sup>12</sup> In 1862, with the advent of the interstate transcontinental railroads, the federal government began making the grants directly to railroad corporations. Table 2 shows the largest of the land grants.

**Table 2. Railroad Land Grants Over a Million Acres<sup>13</sup>**

<b>Million Acres</b>	<b>Railroad</b>
38.6	Northern Pacific
12.4	Atlantic & Pacific
11.4	Union Pacific
7.9	Central Pacific
7.1	Kansas Pacific
6.8	Southern Pacific
3.3	St. Paul & Pacific
2.8	Oregon & California
3.2	California & Oregon
2.9	Atchison, Topeka & Santa Fe
2.8	Chicago, Burlington & Quincy
2.6	Illinois Central
2.1	Chicago, St. Paul, Minneapolis & Omaha
1.7	Winona & St. Peter
1.4	St. Louis, Iron Mt. & Southern
1.3	Florida, Atlantic & Gulf Central
1.2	Pacific Railroad of Missouri
1.2	Dubuque & Sioux City

<sup>11</sup> Mercer (1982) does his best to show that the land grants were a profitable deal for the public, but even he concludes that the Northern Pacific grant in particular was excessive.

<sup>12</sup> Ellis, and 1946, Comment; and 1946, Forfeiture, p. 28, citing U.S. Federal Coordinator of Transportation, 1938-1940.

<sup>13</sup> Root, citing Wilner, 1981.

1.2	Mobile & Ohio
1.1	Chicago & North Western
1.1	St. Paul & Sioux City
1.1	Little Rock & Ft. Smith
1.0	Cedar Rapids & Missouri River
116.2	total of large land grants
14.2	smaller land grants
130.4	total land grant acreage

Three quarters of all railroad grant lands were eventually gathered under the four railroads: the Northern Pacific (40 million acres), Santa Fe (15 million acres), Southern Pacific (18 million acres), and Union Pacific (19 million acres).<sup>14</sup> In 1995 and 1996, after more than a century of acquiring and consolidating dozens of smaller railroads, these four railroads were merged into two: the Burlington Northern Santa Fe and the Union Pacific (which had acquired the Southern Pacific).

The railroad land grants covered ten percent of the continental United States, yet because of the corridor and checkerboard patterns of the grants, their influence extends considerably beyond that. One historian estimates that railroad corporations controlled the settlement of a third of the country, and an even greater portion of the American West, where most of the land grants were located.<sup>15</sup> Even today, the largest land owners in many Western states are still the land grant railroads and their corporate heirs.<sup>16</sup> Much of the land has been sold to or spun off into new corporations, and the legacy of the nineteenth century railroad land grants is a remarkable and troubling concentration of land ownership and exploitation of natural resources which was never intended by Congress.<sup>17</sup> Control of the grant lands has and continues to translate into economic and political power for the corporations which control them.

As with most of the public lands disposal, the railroad land grants were rife with pork barrel politics and fraud. Actions committed in order to evade the provisions of the land grant, or to defraud the government, the public, and/or railroad shareholders, included:

- ◇ Bribery of federal and local officials.

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<sup>14</sup> Ellis, 1946, Forfeiture, p. 29, citing U.S. Board of Investigation and Research, 1944.

<sup>15</sup> Shannon, 1946.

<sup>16</sup> California (Southern Pacific Railroad, Sierra Pacific, Catellus), Montana (Plum Creek Timber, Great Northern Coal Properties), Washington (Weyerhaeuser, Plum Creek). BNSF, UP and other railroads also hold hundreds of thousands of acres of prime industrial and commercial real estate in the cities along their tracks.

<sup>17</sup> Again, the U.S. Supreme Court, in its litigation with the Oregon & California Railroad, has clarified what was transferred: the right to sell the land, not the land itself nor the timber, minerals, or other resources upon it (*Oregon and California R. Co. v. U.S.*, 243 U.S. 549 at 552 (1917)).

- ◇ Threats and violence against officials, competitors, settlers, and jury members.<sup>18</sup>
- ◇ Hiring dummy entrymen to evade the public sale provisions of the land grants.
- ◇ Stock watering (selling more stock than the corporation is worth) and other forms of financial manipulation and fraud.
- ◇ Illegal bankruptcy proceedings.
- ◇ False advertising in land sales.<sup>19</sup>
- ◇ Diverting construction funds to real estate and non-rail ventures.
- ◇ Discriminatory rail rates which discriminated against farmers and other small shippers.
- ◇ Price-fixing, illegal kickbacks, and other sweetheart deals with interlocked corporations.
- ◇ Failure to survey and patent grant lands in order to evade property taxes.
- ◇ Holding of grant lands for real estate speculation and other non-rail purposes.
- ◇ Stealing timber from adjacent public lands.
- ◇ Poor rail service and abandonment of branch lines.<sup>20</sup>
- ◇ Monopolistic agribusiness practices: railroads controlled farmers' transport, grain terminals, mortgages and other loans, and often inspected farmers' books to monitor their profits, and set their rates at "whatever the traffic could bear."<sup>21</sup>
- ◇ Control of regional economies and the destruction of small businesses.
- ◇ Deforestation and loss of biodiversity.
- ◇ Toxic waste from mining operations.
- ◇ Corporate-government exchanges of checkerboard grant lands for yet more public lands.

Some of these problems surfaced in the decades after the grants had been made and the railroads had been constructed; others continue after more than a century, while some are just beginning to be heard.<sup>22</sup>

For a variety of reasons, ranging from lack of capital, rough terrain, bad weather, engineering problems, labor problems, repeated bankruptcy, mismanagement, corruption, and outright fraud, many of the railroads were not built as planned: in fact, forty of the

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<sup>18</sup> See Crawford, 1928, p. 100; and Bederman, 1988.

<sup>19</sup> The Northern Pacific's techniques of promotion and propaganda are analyzed in Mickelson, 1940.

<sup>20</sup> A rail system, being a transportation utility built with public lands and monies, should not necessarily abandon unprofitable lines, but maintain them in the public interest.

<sup>21</sup> Goodwyn, 1978.

<sup>22</sup> Many of these forms of fraud are illustrated by studying the Pacific and Northern railroad lines. For a summary discussion of the Oregon & California Railroad case, see Jones, 1973. The sensational Oregon land fraud trials are described by Messing, 1966. For the original and exhaustive accounts of the Union Pacific and Central Pacific Railroads, see the Pacific Railroad Commission hearings (50th Cong., 1st Sess., Exec. Doc. 51). The epic battle for Northern Pacific Railroad is described in the 1924-28 Joint Congressional Committee hearings (U.S. Congress, Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants, 1924-1928, *Hearings*), and in the trial of 1930-1940 (Supreme Court decision in *U.S. v. NP*, 311 U.S. 317) and the 1941 settlement (*U.S. v. NP*, 41 F. Supp. 273).

seventy land grant railroads missed their construction deadlines.<sup>23</sup> For example, the Northern Pacific, having missed its deadlines repeatedly, took twenty years (1864 to 1883) to build, and was still making claims for grant lands in 1940.

In the end, after the construction failures, financial collapses, lawsuits, and forfeiture and revestment acts, only three-quarters of the total land grant acreage offered was actually transferred to the railroads.<sup>24</sup> Slightly more than 131 million acres of federal land,<sup>25</sup> and almost 49 million acres of state land,<sup>26</sup> were eventually transferred to 61 railroads, including 25 percent of the land in Washington and Minnesota, 20 percent of Wisconsin, Iowa, Kansas, North Dakota, and Montana, 14 percent of Nebraska, and 12 percent of California.<sup>27</sup>

Between 1867 and 1890, about 35 million acres were forfeited by 20 railroads back to the federal government because of the railroads' failure to fulfill their land grant requirements.<sup>28</sup> In 1916, two million acres were revested from the Oregon and California Railroad. In 1929, the Northern Pacific Railroad lost its claim to an additional three million acres. In 1941, about eight million acres of additional land claims were released by the railroads, which in exchange were released from their contract to give the government discounted rail rates.<sup>29</sup> In the conventional wisdom, the railroad land grant era was over.<sup>30</sup> But by tracing the history of forfeiture, and examining its accomplishments and failures, we will see that the land grant legacy is very much alive.

## **The Movement for Forfeiture Gains Steam**

The construction of the land grant legislation turned out to be a bigger challenge than the construction of the railroads. Given the ineptitude and collusion of the U.S. General Land

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<sup>23</sup> Ellis, 1946, *Forfeiture*, p. 30.

<sup>24</sup> Land grant railroads "forfeited" their claims to lands when they violated their legislative contracts; the government "revested" the land, that is, took it back, either for sale to the public, or for reservation purposes.

<sup>25</sup> Ellis, 1946, *Comment*.

<sup>26</sup> Ellis, 1946, *Comment.*, p. 145.

<sup>27</sup> Petulla, 1977, p. 184.

<sup>28</sup> Ellis, 1946, *Forfeiture*.

<sup>29</sup> Various estimates have been made of the value of the grant land versus the value of the reduced freight rates (see Mercer, 1982; Henry, 1946, and Henry's critics, in Carstenson, 1963). All of the estimates seem low by several orders of magnitude, given the current market value of over \$50 billion just for the largest of the land grant railroads (Burlington Northern Santa Fe and Union Pacific) and a few of their timber, mining, and oil and gas spin-offs (UP Resources, Catellus, Santa Fe Energy Resources, Santa Fe Pacific Gold, Sierra Pacific Industries, Weyerhaeuser, Boise Cascade, and Potlatch). This author's estimate of current market value was compiled from 1997 corporate annual reports and *Fortune* magazine.

<sup>30</sup> The "conventional wisdom" is often promulgated by railroad employees and partisans (for example, Root, Wilner, and Cotroneo). But the power of the railroads' propaganda can be gauged by the fact that even critical historians, such as Ellis and Gates, have made statements to the same practical effect, though their apparent understanding and analyses contradict. Some historians (such as Shannon, 1946) and analysts (such as Greene), have tended toward the more radical view that public lands ought to be public.

Office,<sup>31</sup> Congress, and the courts, the public's ambivalence toward corporations, the near-universal desire for private property, the confusion between the nature of private and corporate property, and the widespread beliefs in "manifest destiny" and the inexhaustibility of the frontier and its resources, it is no surprise that the land grant policy was troubled from the beginning.

There were debates over the propriety and magnitude of federal subsidies to corporations for building public roads. While there had been land subsidies for canals for decades, the railroad enterprise dwarfed the canals. Not everyone had equal enthusiasm for building thousands of miles of rail lines through the wilderness of the West. The debate over the need for the railroads was mixed with debates over states' rights and the nature of interstate commerce. Intertwined with these questions were the regional disputes of the 1850s, which stalled Congress's selection of the general routes of the railroads. With the onset of the Civil War, the Southern delegation left Capitol Hill in the hands of Northern politicians. Not surprisingly, then, when Congress passed the 1862 Pacific Railway Act, the first transcontinental railroad was the Union Pacific rather than the Confederate Pacific. The Northern Pacific followed two years later.

Once a majority of Congress was persuaded that transcontinental railroads should be subsidized by the federal government, there were additional problems in the design and implementation of the subsidy policy. The land grant legislation itself was ambiguous and contradictory. It was poorly administered by the Interior Department, the General Land Office, and U.S. Forest Service, which often colluded with the railroad corporations to transfer excess land. There was an unclear and shifting jurisdiction between the legislative, administrative, and judicial branches, and all three branches alternated between indecisiveness and collusion.<sup>32</sup>

The unfortunate checkerboard pattern of the land grants had begun during the canal land grant era, and continued with the railroad grants as a concession to opponents both of land subsidies and of interstate railroads. Land grant proponents compromised by agreeing to grant every other square-mile section of land to the railroads. The rationale for this was that the government's sections would double in value because of their proximity to the railroad, and thus the government would lose no revenues from its own land sales. The reality turned out quite differently for a number of reasons, including the fact that ultimately, not all the checkerboards were sold by the railroads *or* by the government, and the fact that the government did not always receive the expected \$2.50 per acre.<sup>33</sup>

The pork barrel nature of many of the railroad projects, which seemed designed more to line private pockets than to build rail systems, became apparent early on. In some cases,

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<sup>31</sup> For critical discussion of the GLO, see Dunham, 1937 and 1941.

<sup>32</sup> Even the U.S. Supreme Court was divided over the major issues in the Northern Pacific case, reserving certain issues for later resolution (*U.S. v. NP*, 311 U.S. 317 (1940)). There is also a body of literature on various federal judges' relationships with railroad owners: for example, Bederman, 1988; Frederick, 1991; and Swisher, 1930, chapter 9 ("The Octopus").

<sup>33</sup> Gates, 1968, in Carstenson, 1963, p. 358.

land grants passed from corporate shell to corporate shell, without the roads ever being built. With a rising Populist movement threatening more than land grant forfeiture, a divided Congress finally began to recover some of the unearned land – even before ending the handouts.

Arguments for forfeiture were based on the views that many of the railroads hadn't been built on time, or at all, or had abandoned unprofitable lines. The railroads were actually delaying settlement by withholding land they were supposed to sell to the public; the railroads should not be rewarded for their speculative holding of lands. The railroads received more land than they needed to construct and maintain the railroads; the excess should be returned to the public domain.

Opponents of forfeiture tried to defend the railroads, saying that the railroads had earned their grants, and the U.S. was responsible for fulfilling its part of the contracts. Revesting grant lands would deprive railroad stock and bondholders of their value. “Many stockholders were widows and orphans.”<sup>34</sup> Some of the railroads claimed that the unsold lands should not be forfeited because the land grant legislation did not actually require them to sell their land, but only to “dispose” of it. Union Pacific Railroad mortgaged its lands to an affiliated corporation, and claimed that while the lands had not been sold to settlers, they had been “disposed of,” and so were not subject to forfeiture. The Supreme Court agreed in that case,<sup>35</sup> but rejected that argument in the Oregon & California Railroad case.<sup>36</sup> The Northern Pacific Railroad made a similar claim, that in its 1890s bankruptcy, it had “sold” the lands – even though they were all sold to one of its own subsidiaries, the Northern Pacific *Railway*. Northern Pacific’s land transfers to itself were also approved by federal courts.<sup>37</sup>

Forfeiture was not the only method used to try to enforce the public sale requirement of the land grants. Two other methods were the homestead clause and administrative action by the General Land Office. After 1866, land grants included a “homestead” or “actual settlers” clause requiring the sale of grant lands to actual settlers only, in maximum parcels of 160 acres, at a maximum price of \$2.50 per acre.<sup>38</sup> This clause was routinely ignored by many of land grant corporations, as well as by the administrative agencies and Congress. One of the most disturbing aspects of the land grant story is the continued failure of Congress to draft unambiguous legislation, and the failure of the administrative and judicial bodies to enforce the law. Occasionally, as in the Oregon & California case, violation of the settler clause did result in reversion. But even in that case, the railroad

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<sup>34</sup> This claim disregards the fact that then (as now), the overwhelming majority of stocks and bonds are held by a small percent of the population.

<sup>35</sup> *Platt v. Union Pacific R.R.*, 99 U.S. 48 (1878).

<sup>36</sup> 243 U.S. 549 (1916).

<sup>37</sup> That is, they were approved by the bankruptcy court at the time, and later confirmed by the federal court in the *U.S. v. Northern Pacific* litigation (*Findings of Fact and Conclusions of Law* by Judge Webster, E. Dist. Wash., June 27, 1939).

<sup>38</sup> Ellis, 1946 b, p. 37, citing *Cong. Globe*, 40 Cong., 2 Sess., 4428.

was paid for the land (at the rate of \$2.50 per acre, as specified in the land grant contract), and the illegal sales were allowed to stand.<sup>39</sup>

The public sale provision was reemphasized in 1870, when U.S. Representative William Holman of Indiana introduced a resolution declaring that the remaining public lands should be held for “the exclusive purpose of securing homesteads to actual settlers under the homestead and preemption laws.”<sup>40</sup> The House endorsed the resolution, but proceeded to grant another 20 million acres to railroad corporations in the next year.<sup>41</sup>

Holman became the shepherd of forfeiture legislation for twenty years. He introduced legislation throughout the 1870s and 1880s, and in 1884 sponsored a stronger resolution calling for the forfeiture of all expired land grants.<sup>42</sup> He was also a principal participant in the compromises which led to the General Forfeiture Act in 1890.

## **75 Years of Land Grant Forfeiture**

The forfeiture of land grants began even before they were all handed out, and continued for 75 years. Twenty-six railroads lost 40 million acres. There were many reasons for forfeiture, and most of the forfeitures were enacted as separate acts. For simplicity, historian David Ellis has divided the land grant forfeitures into three periods, to which we may add a fourth and fifth.<sup>43</sup>

### **Period 1: 1867-1877: The Early Period of Forfeiture**

The decade marked the end of the land grants and the beginning of forfeiture. Wholesale forfeiture was restrained by the wish to complete the railroad system, and by the fact that many grants did not expire until after 1877. Total forfeited: 650,000 acres.

<b>Year</b>	<b>Railroads Forfeiting Grant Lands</b>	<b>Acres</b>	<b>Statute</b>
1870	New Orleans, Opelousas & Great Western (LA)		16 Stat. 277
1874	Placerville & Sacramento Valley (CA)		18 Stat. 29
1874	Stockton and Copperopolis RR (CA)		18 Stat. 72
1876	Leavenworth, Lawrence, & Galveston (KS)		19 Stat. 101
1877	Kansas & Neosho Valley RR (KS)		19 Stat. 404
	total forfeited	650,000	

<sup>39</sup> This was guaranteed through additional legislation, the Forgiveness Act or Innocent Purchaser’s Act of Aug. 20, 1912, 37 Stat. 320.

<sup>40</sup> Ellis, 1946, Forfeiture, p. 38, citing *Cong. Globe*, 41 Cong., 2 Sess., 2095.

<sup>41</sup> Ellis, 1946, Forfeiture, p. 38.

<sup>42</sup> Ellis, 1946, Forfeiture, p. 52ff.

<sup>43</sup> Sources include Ellis, 1946, Comment., note 2; Ellis, 1946, Forfeiture, pp. 36-37, 52ff; and the *GLO Annual Report*, 1888, p. 100.

By 1872, the Republican Party followed the Liberal Republicans and the Democrats in adopting a platform against additional land grants.<sup>44</sup>

In 1873, the Credit Mobilier scandal broke. The Credit Mobilier, a construction subsidiary of the Union Pacific Railroad, had bribed its way to success by giving shares of stock to the U.S. vice-president, the vice-president-elect, Congressional committee chairmen, a dozen Republican House and Senate leaders, and the Democratic floor leader. Millions in capital were missing, reportedly funneled into the Credit Mobilier. All this became public knowledge: “The members of it are in Congress; they are trustees for the bondholders, they are directors, they are stockholders, they are contractors; in Washington they vote these subsidies, in New York they receive them, upon the Plains they expend them, and in the Credit Mobilier they divide them... Under one name or another a ring of some seventy persons is struck...”<sup>45</sup> Congress investigated itself, and censured a few of its members. UP stock fluctuated, manipulated by railroad financier Jay Gould, and the UP debt to the U.S. went unpaid. The affair left the public aware of and disgusted by financial and political manipulation on a grand scale.<sup>46</sup>

In the beginning, forfeiture was seen as an administrative matter in which the General Land Office could restore to the public the grant lands of a railroad which had failed to meet its construction deadlines. In 1874, the Supreme Court’s *Schulenberg v. Harriman* decision<sup>47</sup> made forfeiture more difficult by ruling that it required Congressional action. “If the grant be a public one, it must be asserted by judicial proceedings authorized by law... or there must be some legislative assertion of ownership of the property for breach of condition.” In other words, even when a railroad failed to comply with the land grant conditions (as they often did), the title to the land remained with the railroad if the government did not take positive action. Even when lawsuits or legislative actions were underway, the lengthy nature of these actions meant that the railroads could proceed to construct track and patent land.<sup>48</sup> Citizen oversight did not exist, and government oversight was often tardy or nonexistent.

In 1877, the General Land Office urged Congress to either extend the construction deadlines or take action to forfeit the unearned grants. In that same year, a decade before the Northern Pacific forfeiture controversy reached its full height, Washington Territorial attorney general McGilvra urged the forfeiture of NP’s Cascade branch.<sup>49</sup>

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<sup>44</sup> Ellis, 1946, *Forfeiture*, p. 38.

<sup>45</sup> Charles Francis Adams, in the *North American Review*, quoted by Brown, 1977, p. 181.

<sup>46</sup> See also Crawford, 1890.

<sup>47</sup> 21 Wallace 44.

<sup>48</sup> Ellis, 1946, *Forfeiture*, pp. 30-31. The speed of the process is illustrated well by remembering that the Northern Pacific took more than twenty years to build its tracks (1864-1887), but the government waited more than a half-century, and then took almost 20 years more to investigate and litigate (1924-1941). This is hardly unusual in the land grant era; Ellis (1946, *Forfeiture*, p. 32) points out that “the indemnity lands of nearly all the railroads were withdrawn for over thirty years.”

<sup>49</sup> *New York Tribune*, Dec. 21, 1877; Yonce, 1969, pp. 211ff; and Yonce, 1978.

## Period 2: 1877-1887: Major Period of Forfeiture

During this decade, while 21 million acres of grant land was reopened to settlement, many railroads managed to avoid forfeiture by continuing construction. Total forfeited: 28,000,000 acres.

Year	Railroads Forfeiting Grant Lands <sup>50</sup>	Acres	Statute
1884	Iron Mountain RR (MO, KS)	601,000	23 Stat. 61
1885	Oregon Central RR (OR)	810,880	23 Stat. 296
1885	Texas Pacific RR	15,692,800	23 Stat. 337
1886	Atlantic & Pacific RR (MO, AR, to Pacific Coast)	10,795,480	24 Stat. 123
1886	5 railroads: Jackson (MS) to AL Elyton to Tennessee River (AL) Memphis and Charleston Railway (AL, SC) Savannah & Albany RR (AL) New Orleans to MS State (LA)		24 Stat. 140
1887	New Orleans, Baton Rouge & Vicksburg	352,587	24 Stat. 391
	Total forfeited:	28,000,000	

In 1878, Representatives Joyce and Thurman introduced forfeiture legislation in the House; the Thurman bill forced the Union Pacific and Central Pacific to create sinking funds to ensure repayment of their debts to the government.<sup>51</sup>

Ever-creative, the railroads themselves used forfeiture as a strategy against their rivals. For example, Henry Villard, who controlled the Oregon Navigation and Railroad Company, pushed for the forfeiture of the Northern Pacific's grant, until he gained control of the NP in 1881.<sup>52</sup> Subsequently another NP rival, the Central Pacific, pushed for the forfeiture of NP's grant in the 1882 Casserly bill.

In the early 1880s, Knights of Labor and the Greenback National Party urged forfeiture, and by 1884, both major political party platforms included forfeiture, though the Republican platform included a loophole for any railroad except those "where there has been no attempt in good faith to perform the condition of such grants."<sup>53</sup>

<sup>50</sup> Ellis, 1946, Forfeiture, p. 42, citing *GLO Annual Report*, 1888, p. 100.

<sup>51</sup> Ellis, 1946, Forfeiture, p. 41. A sinking fund is an account into which regular payments are made and reserved for paying off debts.

<sup>52</sup> Hedges.

<sup>53</sup> Ellis, 1946, Forfeiture, p. 40-41.

In 1883, the Knights of Labor urged forfeiture.

In 1883, the Senate Committee on the Judiciary suggested that the courts, rather than Congress, were the proper arena for forfeitures,<sup>54</sup> but on January 21, 1884, the House passed, in a 251 to 17 vote, a resolution introduced by forfeiture champion William Holman. The resolution urged the recovery of all unearned grants, and gave priority to forfeiture bills on the congressional calendar.<sup>55</sup>

More than half of the 70 railroads were not built on time. By 1885, up to a hundred million acres of grant lands lay along late or non-existing track.<sup>56</sup> These became the focus of the proposals for a general forfeiture act.

### **The U.S. General Land Office**

The U.S. Department of Interior's General Land Office (GLO), as the administering agency for public lands, was a key to the failures and the forfeitures of the land grants. Created in 1800 to administer the transfer of public lands into private hands, the GLO was variously described over the next 150 years as underfunded, inept, and/or corrupt. It was at times all of those, and played a key role in the implementation of the homestead and land grant policies.

The GLO Commissioner's report for 1872 admitted that the agency's substandard salaries made the agency "merely a sort of training school for land lawyers and agents for railways and private land companies."<sup>57</sup> The GLO training school had a revolving door which very well served those corporations. For example, both of the principals of the premier land law firm of Britton & Gray were former employees of the GLO, and their brothers-in-law were chief clerk and assistant chief of the GLO's railroad division.<sup>58</sup> Britton & Gray represented the Atlantic & Pacific Railroad in its unsuccessful defense against the GLO's 1885 revocation of unselected indemnity lands,<sup>59</sup> but were quite successful representing the Northern Pacific during the 1920s-30s hearings and lawsuit brought by the U.S. government.

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<sup>54</sup> Ellis, 1946, Forfeiture, p. 41, citing *Senate Reports*, 47 Cong., 2 Sess., No. 906: see also Donaldson, 1884, p. 536. The 1874 *Schulenberg v. Harriman* case had declared that forfeiture must be accomplished by judicial or Congressional action.

<sup>55</sup> Ellis, 1946, Forfeiture, p. 41, citing *Cong. Record*, 48 Cong., 1 Sess., 547-51.

<sup>56</sup> Ellis, 1946, Forfeiture, p. 30, citing GLO and Congressional reports of the time.

<sup>57</sup> Rae, 1938, p. 212. The words are Rae's.

<sup>58</sup> Dunham, H.H., 1937, citing Crawford, 1885.

<sup>59</sup> Rae, 1938, p. 218. Britton & Gray argued that (even though the A&P had not fulfilled its end of the land grant contract) the A&P should not be held responsible for delays which were the fault of Congress. The GLO's decision can be found in *Palmer vs. Atlantic & Pacific (GLO Annual Report, 1886, p. 30)*. The A&P forfeiture was followed by the GLO's 1887 order recapturing indemnity lands from many of the land grant railroads (see below).

The nemesis to the General Land Office's routine failures and collusion was William Andrew Jackson Sparks, a self-made attorney, federal lands office receiver, Illinois state representative and senator, and from 1872 to 1882, a U.S. Representative, where he was an advocate of railroad regulation. In March 1885, Sparks was appointed GLO Commissioner by Grover Cleveland.<sup>60</sup>

Sparks found the state of affairs intransigent as well as unacceptable:

I found that the magnificent estate of the nation in its public lands had been to a wide extent wasted under defective and improvident laws, and through a laxity of public administration astonishing in a business sense if not culpable in recklessness of official responsibility.<sup>61</sup>

That the abuses of the public lands laws are largely due to inefficient administration, to the conduct of weak or corrupt officials, and to erratic and fanciful decisions, is undeniable; but that the laws themselves are defective in want of adequate safeguards is also true.<sup>62</sup>

The vast machinery of the land department appears to have been devoted to the chief result of conveying the title of the United States to public lands upon fraudulent entries under strained construction of imperfect laws and upon illegal claims under public and private grants.<sup>63</sup>

Within a month of being appointed GLO Commissioner, Sparks suspended the transfer of homestead entries in 10 states.<sup>64</sup> He recommended the repeal of preemption acts and other public land laws; that cash sales should be stopped, and that land should be made available to actual settlers only.<sup>65</sup> Sparks also abolished land lawyers' access to GLO clerks, thus making bribery and threats more difficult.<sup>66</sup>

Sparks estimated that ten million acres had been claimed in excess of the land grant formulas,<sup>67</sup> and in 1885 and 1886, he administratively revoked 97,000 acres of NP grant land in Washington state, and 1.5 million acres of Atlantic & Pacific Railroad grant in California, but he failed to recover another 90,000 acres from the A&P in Missouri.<sup>68</sup>

Sparks also went after lands fraudulently claimed by timber corporations.

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<sup>60</sup> *Dictionary of American Biography*, 1935, vol. 17, pp. 434-435.

<sup>61</sup> 1885 *Annual Report*, p. 3.

<sup>62</sup> Sparks' *GLO Annual Report*, 1885, pp. 218-219.

<sup>63</sup> Sparks' *GLO Annual Report*, 1885, pp. 155-156.

<sup>64</sup> *GLO Annual Report*, 1885, pp. 43, 196-198.

<sup>65</sup> *GLO Annual Report*, 1886, p. 43.

<sup>66</sup> Dunham, in Carstenson, pp. 187-188.

<sup>67</sup> *GLO Annual Report*, 1885, p. 184.

<sup>68</sup> Rae, 1936, pp. 299-301.

“Depredations upon public timber are universal, flagrant, and limitless. Whole ranges of townships covered with pine timber, the forests at headwaters of streams, and timber land along water-courses and railroad lines have been cut over by lumber companies under pretense of title derived through preemption and homestead entries made by their employees and afterward assigned to the companies. Steam saw-mills are established promiscuously on public lands for the manufacture of lumber procured from the public domain by miscellaneous trespassers. Large operators employ hundreds, and in some cases thousands of men, cutting government timber and sawing it into lumber and shingles... Under cover of the privilege of obtaining timber and other material for the construction of ‘right-of-way’ and land-grant railroads, large quantities of public timber have been cut and removed for export and sale...”<sup>69</sup>

In his 1885 report, Sparks specifically mentions two corporations: the Sierra Lumber Company of California, and the Montana Improvement Company (MIC). In 1885, Sparks accused the MIC of cutting 45 million board feet from public lands, but the proceedings were dropped when the federal funds allocated to the case were exhausted.<sup>70</sup> What followed was a convoluted series of transactions and corporate reorganizations—a pattern that has come to characterize the land grant’s evolution. The MIC, actually owned by principals of the Northern Pacific Railroad and Amalgamated Copper, went through a series of reorganizations. Amalgamated Copper itself, which purchased a million acres of NP grant land in Montana in 1907, was soon reorganized as Anaconda Copper. In 1993, the Northern Pacific’s timber spin-off, Plum Creek Timber, bought back much of the Anaconda grant land (which had since been owned by ARCO and then by Champion International). Plum Creek Timber currently holds title to more than 1.5 million land grant acres in Montana, 90 percent of the timber industry land in the state.

In 1885 and 1886, the two largest forfeitures were enacted by Congress: the Texas Pacific lost 15 million acres in New Mexico and Arizona, and the Atlantic & Pacific lost 10 million acres along uncompleted roads in New Mexico and California.<sup>71</sup> In March 1887, Congress directed the Department of Interior (DOI) to adjust all the railroad land grants, a process which until then had been up to the discretion of the DOI. If upon the GLO’s calculation, it was found that railroads had too much land, they would be asked to relinquish it; if they refused, the U.S. Attorney General was instructed to bring suit.<sup>72</sup> In May 1887, the General Land Office (GLO) ordered railroads to show why their unselected indemnity lands should not be revoked, and in August 1887, the Interior Department restored 21,323,600 acres from the Northern Pacific, Southern Pacific, Oregon & California, and other railroads to the public domain.<sup>73</sup>

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<sup>69</sup> Sparks, *GLO Annual Report*, 1885, pp. 233-234.

<sup>70</sup> Toole and Butcher, 1968, p. 354, 356, and 357, citing GLO reports and the *Helena Independent Weekly*; Rae, 1938, p. 17, citing *GLO Annual Reports*, 1885, pp. 311-312 and 1887, p. 83.

<sup>71</sup> 23 Stat. 337 (1895) and 24 Stat. 123 (1886).

<sup>72</sup> 24 Stat. 556, Mar. 3, 1887. See also Rae, 1936, p. 312.

<sup>73</sup> Aug. 13, 1887, *Land Decisions*, VI, 1887-1888, pp. 85-91; *Annual Report of the Secretary of the Interior*, 1887, pp. 10-12; see also Rae, 1936, pp. 301-311.

But public lands reform had its limits. In 1886, Sparks had attempted but failed to cancel 1.5 million acres of the Northern Pacific's land grant in Washington State. Much of this land was soon purchased by the Weyerhaeuser timber syndicate. Sparks continued to push, but his limits were soon exceeded, in another case involving Weyerhaeuser. Sparks' calculation that the Chicago, St. Paul (formerly St. Croix) Railroad had an excess of 406,684 acres was rejected by Interior Secretary Lucius Lamar, who ruled that the railroad had a right to indemnity for 200,000 acres. Sparks again clashed with Lamar in 1887, ending hopes of a threatened suit against Weyerhaeuser over title to North Wisconsin Railroad indemnity lands.<sup>74</sup> Having pushed as far as Cleveland's administration and the corporations would allow, the tension led to Sparks' forced resignation in November 1887.<sup>75</sup> Sparks' departure, instigated by the future Secretary of the Interior William Vilas of Wisconsin, was covered by newspapers, which included descriptions of Vilas' timber interests.<sup>76</sup>

Sparks is famous for being "impetuous," for having an "excitable disposition," and for his "crusading fervor."<sup>77</sup> Sparks' blunt style can be found in the *Congressional Record*,<sup>78</sup> and in his annual reports, which are full of stories about the "bold, defiant, and persistent depredators on the public domain."<sup>79</sup> His sympathies were clear: "The rights of the corporations have been upheld... The defaults of the companies have been voluntary. The rights of the public are now to be considered – the right of the people to repossess themselves of their own. The case is not one calling for sympathy to the corporations; it is one calling for justice to the people of the country."<sup>80</sup>

One historian has observed, "During his three years in office Commissioner Sparks established a record practically unique in Land Office history. He attempted with considerable vigor to improve the methods, practices, and conditions of the Office... At times he blundered, but there is no question of his honesty... He worked with hope that he could secure Congressional assistance, but Congress only confronted him with additional handicaps."<sup>81</sup>

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<sup>74</sup> Hidy, Hill, and Nevins describe Weyerhaeuser's monopolistic North Wisconsin timber interests and Sparks' attempts to restrain them (pp. 90ff, 131 and 141 note 25, citing Lillard's *The Great Forest*, p. 203).

<sup>75</sup> Rae, 1936, pp. 313ff, citing *GLO Annual Report*, 1888, p. 63. See also the coverage in the *New York Tribune*, Nov. 12, 1887, and the *New York Times*, Nov. 13 and 16, 1887, which, according to Dunham, 1937, stated that Interior Secretary Lamar, who was being appointed to the Supreme Court, removed Sparks "at the instigation of the incoming Secretary [of the Interior], William F. Vilas of Wisconsin, who disliked Sparks," perhaps because the Chicago, St. Paul land grant involved land in Wisconsin.

<sup>76</sup> *New York Tribune*, Nov. 12, 1887; *New York Times*, Nov. 16, Dec. 7 and 9, 1887.

<sup>77</sup> Rae, 1938.

<sup>78</sup> Cong. Record, 46th Cong., 3rd Sess. p. 211, Dec. 20-21, 1880.

<sup>79</sup> *GLO Annual Report*, 1886, p. 102.

<sup>80</sup> *GLO Annual Report*, 1885, p. 50.

<sup>81</sup> Dunham, 1937.

One wonders, given the legal and political atmosphere during the wholesale disposal of the public lands, and given the state of the General Land Office, if an effective reformer might *not* have blundered. Sparks' honesty and willingness to act boldly were what the GLO most needed. Yet more than a century later, Sparks is still viewed from some quarters with condescension and ill feeling.<sup>82</sup>

During Sparks' short tenure, Congress revested more than 28 million acres of railroad land grants, most of it from the Texas Pacific and Atlantic & Pacific Railroads in New Mexico, Arizona and California. In August and December 1887, Interior Secretary Lamar had revoked 21 million acres in railroad land withdrawals and restored the lands to public entry.<sup>83</sup> During President Cleveland's administration, more than 81 million acres were (at least temporarily) restored to the public domain, land that had been seized, as Sparks put it, by "illegal usurpation, improvident grants, and fraudulent claims and entries."<sup>84</sup>

But in the end, the value of the lands and resources made the transfer process impossible to control. Sparks' removal from office in 1887 was followed by a backslide into frenzied patenting of public lands by corporations, guided by the cronyism of Interior and GLO executives,<sup>85</sup> and covered up by the convenient disappearance of General Land Office records. The new GLO Commissioner explained in his annual report that he tried to make up for the delays Sparks had caused in transferring public lands to private ownership, claiming that the GLO's work had to be resumed so hastily that many of the records had disappeared because of "bad ink."<sup>86</sup>

Interior Secretary William Vilas approved the speed-up in the work of the GLO, once issuing 3,633 patents in one week. His successor, John Noble, an attorney serving railroad, mining, and other large corporations in the Southwest, went even farther in speeding the patenting process, especially for timber cases, proving himself a true friend of the corporations' dummy entrymen. GLO Commissioner Lewis Groff attacked Sparks' reforms and did his best to downplay the fraud.<sup>87</sup>

By the height of the movement to revest railroad land grants, Congressmen were announcing that

The great corporations and other monopolies have for many years been stretching out their strong and unscrupulous arms over the public lands remaining for enterprising and honest settlers. Millions of acres of this domain have been seized and stolen, and I have to say this robbery could not have succeeded without the

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<sup>82</sup> In 1996, more than a century after Sparks' departure, an officer of the U.S. Bureau of Land Management (the GLO's successor) told this author that "Sparks was a *jerk*." Sparks clearly made an impression on the public lands--and on the agencies which administer them.

<sup>83</sup> Lamar's decision is at 6 LD 77-93; discussion can be found in Yonce, 1969, pp. 216-217.

<sup>84</sup> Sparks quote from Hidy, Hill, and Nevins, p. 130-132. For descriptions see Ellis, 1946, Forfeiture, p. 42; and Rae, 1936, p. 320; Greever, 1951, p. 84; Robbins, p. 255-267; and Nevins, p. 361.

<sup>85</sup> Dunham, in Carstenson, 1963, p. 197-198.

<sup>86</sup> *GLO Annual Report*, 1888, pp. 4 and 64.

<sup>87</sup> Dunham, in Carstenson, 1963, pp. 189-190.

collusion and cooperation of agents employed to protect the interests of the people... Immense combinations have been formed, including the ties of political and social life, for a common object—to break down all attempts at Washington to crush out a venal system which has flourished by departmental indifference or favor.<sup>88</sup>

But Congress steadfastly refused to improve the GLO, and the courts refused to enforce the laws. Open fraud by prominent figures, ignored by Congress and upheld by the courts, was accompanied by continued bribery and violence against government officials and witnesses.<sup>89</sup> The Great Barbecue continued until there was little left. What was left, the Forest Reserves, had to be set aside by administrative order. The GLO was absorbed into the U.S. Bureau of Land Management in 1946, which continues to pass public land and timber to corporations.

### **Congressional Committees and the Regulation of Railroads**

Several Congressional committees investigated the construction of railroads and the implementation of the land grant policy. The Credit Mobilier scandal of the mid-1870s has already been mentioned. In another investigation in 1887 and 1888, the U.S. Pacific Railway Commission investigated the Central Pacific and Southern Pacific Railroads, finding corruption, unpaid debts, missing funds, and missing receipts and other records.<sup>90</sup>

Other investigations, concerned with the ongoing operation of the railroads, led to the creation of the first regulatory agency: the Interstate Commerce Commission. In 1885 and 1886, the Senate's "Cullom" Committee investigated various railroad abuses, including excessive and discriminatory rates, secret rebates, and manipulation of railroad company stock. The committee's work led to the creation in 1887 of the Interstate Commerce Commission (ICC) for the regulation of railroad operations. However, the ICC was stacked with railroad men, and with their usual creativity and ruthlessness, the railroads managed to use the ICC to their advantage. In an 1892 letter to his friend Charles E. Perkins, president of the Chicago, Burlington & Quincy Railroad, U.S. Attorney General Richard Olney wrote:

The Commission, as its functions have now been limited by the courts, is, or can be made of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between railroad corporations and the people and a sort of protection

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<sup>88</sup> *Cong. Record*, 17: 6245, June 28, 1886.

<sup>89</sup> Dunham, in Carstenson, 1963, p. 189ff, citing Yard, 1928. An example of Supreme Court collusion is noted in Dunham's description of the infamous Maxwell case (1963, at p. 194).

<sup>90</sup> U.S. Pacific Railway Commission, 1887-1888. See also newspaper columns by Ambrose Bierce (such as those in Hearst's *San Francisco Examiner* and *Cosmopolitan*) and others.

against hasty and crude legislation hostile to railroad interests... The part of wisdom is not to destroy the Commission but to utilize it.<sup>91</sup>

### Period 3: 1887-1894: The Push for a General Forfeiture Act

The organized push for general forfeiture legislation was softened by land grant defenders in the Senate, who succeeded in limiting the forfeitures to lands adjoining uncompleted portions of the railroads.

Year	Railroads Forfeiting Grant Lands	Acres	Statute
1887	Adjustment Act <sup>92</sup>		24 Stat. 556
1889	Ontonagon & Brule River Railroad Marquette, Houghton & Ontonagon		25 Stat. 1008
1890	General Forfeiture Act: Northern Pacific (Columbia River line) Southern Pacific Gulf & Ship Island Mobile & Girard Wisconsin Central Marquette, Houghton & Ontonagon Ontonagon & Brule River Coosa & Chattanooga Coosa & Tennessee Selma, Rome & Dalton Atlantic, Gulf & W. India Transit	2,000,000 1,075,200 652,800 536,064 406,880 294,400 211,200 144,000 140,160 89,932 76,800	26 Stat. 496
	Total forfeited:	5,627,436	

From 1888, the real focus of Congress was on passage of a general forfeiture act which would deal with the almost 100 million acres of grant lands alongside railroads which had not been built on time. Various versions of general forfeiture legislation were pushed and compromised by land reformers, rival railroads, their stock and bondholders, and by their lobbyists and representatives in Congress.

A triangle of interests sought various degrees of forfeiture of unearned land grants. Three members of the House Committee on Public Lands agreed with the Senate's stance that 5,600,000 acres of lands adjoining uncompleted railroads should be forfeited. The majority on the Committee sought forfeiture of 54,000,000 acres of lands adjoining any portions of railroads not completed within their time limits. Two members sought the forfeiture of all

<sup>91</sup> Quoted in Fellmeth, 1970, pp. xiv-xv. For a history and analysis of railroad regulation, see Kolko, 1965.

<sup>92</sup> 43 U.S.C. 894-99 (Supp. IV, 1974).

78,500,000 acres of the grant lands of railroads which had not been completed on time.<sup>93</sup> Having sought revestment of grant lands for 20 years, U.S. Representative William Holman now argued against radical proposals which would doom the legislation, warning that endless litigation would result. The middle ground was approved by the House in a vote of 179 to 8, but it was rejected by the Senate.

Holman needn't have feared a radical law that couldn't be enforced. The General Forfeiture Act which did pass in 1890 was the conservative Senate's version of less than six million acres, which Holman charged was sponsored by the Northern Pacific Railroad itself in order to avoid a larger forfeiture. In fact, the Northern Pacific, having acquired the existing Oregon Railroad line along the Columbia River, did not intend to build another, and had given up any claims to the adjoining land.<sup>94</sup>

The General Forfeiture Act reclaimed only 5.6 million acres from eleven railroads, including the Northern Pacific (2,000,000 acres), the Southern Pacific (1,075,200 acres), the Gulf & Ship Island (652,800 acres), and the Mobile and Girard (536,064 acres).<sup>95</sup>

The fight in Congress was not yet over. In 1892, with the Populist Party calling for the return of all land "held by railroads and corporations in excess of their actual needs, and all lands now owned by aliens," the House passed a bill which called for the recovery of all lands not earned within the time limits. The bills would have revested more than 50 million acres, but the Senate failed to act.<sup>96</sup>

The House passed a similar bill in 1894, even protecting innocent land purchasers by including an exemption for purchasers of less than 320 acres. The Senate again opposed the bill, with forfeiture opponent Dolph warning that "vast interests, large farms, vast tracts of lands, the interests of the purchasers of the railroad companies... would be destroyed" by further forfeitures.<sup>97</sup> Of course, that was the point of forfeiture--to dismantle unintended empires. But Dolph represented powerful interests, and prevailed. Forfeiture historian Ellis marks 1894 as the end of the forfeiture movement, observing that the later forfeiture cases of the Oregon & California and Northern Pacific Railroad grew out of special circumstances, and were different from the 1867-1890 forfeitures, which were based mainly upon the construction and time limit failures of the railroads.

## **Period 4: 1908-1917: Oregon & California Revestment**

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<sup>93</sup> Ellis, 1946, *Forfeiture*, p. 52, citing *House Reports*, 50 Cong., 1 Sess., No. 2476 and *Cong. Record*, 50 Cong., 1 Sess., 5913.

<sup>94</sup> 24 Stat. 496. See Schwinden, p. 79; and Ellis, 1946, *Forfeiture*, p. 51.

<sup>95</sup> Ellis, 1946, *Forfeiture*.

<sup>96</sup> Quote from Porter, 1924, pp. 102-126; the House bill is discussed in the *Cong. Record*, 52 Cong., 1 Sess., 5125. See also Ellis, 1946, *Forfeiture*, pp. 52-55; Rae, 1938, p. 228; and Schwinden, 1950, p. 84, who lists several of the many forfeiture bills and resolutions which did not pass.

<sup>97</sup> Ellis, 1946, *Forfeiture*, p. 55.

The General Forfeiture Act of 1890 had marked the climax of forfeiture as a strategy to deal with the failures of the land grant policy. Later forfeitures, while large, concerned but two railroads whose failures were especially glaring: the Oregon & California Railroad (by then a subsidiary of the Southern Pacific) and the Northern Pacific Railroad.

The Oregon & California forfeiture was preceded by the Oregon land fraud trials of 1903 to 1910. More than a thousand people were indicted, and more than 100 were convicted for defrauding the U.S. and Oregon state governments of land by forgery, perjury, falsification of records, bribery and intimidation of witnesses and officers of the courts, and obstructing free passages over public lands. Those indicted included the U.S. District Attorney, a General Land Office Commissioner and some of his agents, U.S. government surveyors, both U.S. Senators and a U.S. Representative from Oregon (including U.S. Senator Mitchell, who had been one of the staunch opponents of land grant forfeiture). Also indicted were Oregon State Senators, Assistant Attorneys for Oregon, city and county officials, and bankers, attorneys, lumber dealers, hotel owners, real estate agents, and stockbrokers.<sup>98</sup> While convictions were relatively few, they were scandalously noteworthy, and resulted in the break-up of several land fraud rings, and in the repeal of the easily-abused lieu-land provisions of the Forest Reservation Act.<sup>99</sup>

The Oregon land fraud trials set the stage for a much larger case: that of the Oregon & California Railroad. By 1908, the O&C, out of its grant of 3.7 million acres, had sold only 813,000 acres, and only 127,000 acres of that had been sold in parcels no greater than 160 acres, to actual settlers only, for no more than \$2.50 per acre. The O&C had sold the other 700,000 acres, much of it to timber corporations, in violation of the law, in parcels of thousands or tens of thousands of acres, at prices up to \$10 per acre.<sup>100</sup> And in 1903, the O&C (by then a subsidiary of Harriman's Southern Pacific) announced that it would sell no more land at all. Investigators sent by President Roosevelt ended up on railroad and timber payrolls. Roosevelt eventually turned to Gifford Pinchot, who sent U.S. attorney Francis Heney, who successfully prosecuted some of the principals.<sup>101</sup>

After a series of Congressional acts and court decisions between 1908 and 1918, the Oregon & California Railroad forfeited 2,900,000 acres.<sup>102</sup> The revested acreage was transferred to the GLO's successor agency, the U.S. Bureau of Land Management (BLM), which sold most of the timber to corporations over the next fifty years.

The O&C revestment set several important precedents. One was that railroads were not entitled to be rewarded for their speculation: with the backing of the U.S. Supreme Court,

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<sup>98</sup> Jones, 1973, p. 19ff.

<sup>99</sup> Messing, 1966, p. 62-63.

<sup>100</sup> 2238 U.S. 408, cited by Greene, 1976, p. 719.

<sup>101</sup> See Jones, 1973; and Messing, 1969, for summaries of the frauds and the trials. For a contemporary account by a participant in one of the fraud rings, see Puter, 1908. It was Puter who had bribed U.S. Senator Mitchell.

<sup>102</sup> The 1915 decision in *Oregon & California Railway Co. v. U.S.* (238 U.S. 393) declared that the land should be revested; the Chamberlain-Ferris Act, 39 Stat. 218 (1916) legislated the revestment.

the railroad was paid only the \$2.50 per acre it was supposed to have received.<sup>103</sup> Another part of the revestiture proved quite agreeable to the purchasers of the railroad's lands. In 1912, Congress passed the Forgiveness (or Innocent Purchaser's) Act, which allowed purchasers of O&C parcels of more than 1,000 acres to keep the lands if they paid the U.S. government the \$2.50 per acre originally required. Smaller purchasers weren't required to pay at all.<sup>104</sup>

## **Period 5: 1924-1940: The Battle for the Northern Pacific**

The Northern Pacific Railroad received the largest of all land grants. Running across the northern tier from the Great Lakes to Puget Sound, the NP eventually claimed almost 40 million acres. In the size of its land grant, but also in its violations, controversies, investigations, and lawsuits, the Northern Pacific had no peers.

In 1886, General Land Office Commissioner Sparks restored to the public domain 1.5 million acres of Northern Pacific grant land grant in western Washington, declaring that the 1870 amendments to the original 1864 NP legislation did not clearly and unequivocally grant additional land.<sup>105</sup> Although House and Senate reports in 1884 recommended forfeiture of the NP's grant along the Columbia River,<sup>106</sup> and there was a proposal in Congress to forfeit the Northern Pacific Railroad's Cascade line,<sup>107</sup> Sparks' order was reversed by Interior Secretary Lamar in 1887.<sup>108</sup> In 1888, a H.R. 9151, which would have forfeited three-quarters of the NP land grant, was passed without debate, but the Senate refused to act upon it.<sup>109</sup> The Western Washington land remained under the control of the NP, and soon became the basis for Weyerhaeuser's vast timber holdings in the Northwest.<sup>110</sup>

Instead, the 1890 General Forfeiture Act reclaimed only the two million acres of unearned NP land along the Columbia River, leaving most of the grant lands in control of the railroad. In the next two decades, the NP sold millions of acres to timber and mining corporations, including Weyerhaeuser, Boise Cascade, Potlatch, and Amalgamated Copper (later named Anaconda Copper).

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<sup>103</sup> *Oregon & California Railroad Co. v. U.S.*, 243 U.S. 549 (1918).

<sup>104</sup> 37 Stat. 320 (1912). Jones (1973, p. 28-31) claimed that the government thereby received a total of \$1 million for timberlands worth more than \$447 million.

<sup>105</sup> Rae, 1938, p. 219, citing *McRae vs. Northern Pacific*, Jan. 12, 1886, *Copp's Land Owner*, XII, 1886, p. 267.

<sup>106</sup> *House Reports*, 48 Cong., 1 Sess., No. 1256; *Senate Reports*, 48 Cong., 1 Sess., No. 804.

<sup>107</sup> Schwinden, p. 78ff.

<sup>108</sup> Sept. 30, 1887, *Decisions of the Interior and the General Land Office in Cases Relating to the Public Lands*, IV, 1887-1888, p. 400. For a Seattle newspaper's defense of Sparks' action, see *Seattle Weekly P-I*, Feb. 4, 1886. See also Rae, 1936, p. 301ff.

<sup>109</sup> Schwinden, p. 84.

<sup>110</sup> Weyerhaeuser bought almost a million acres of NP land in 1900; see Jensen et al 1995.

In 1905, the Northern Pacific had filed a claim for 5,600 acres within the Gallatin National Forest. In 1915, the GLO, having realized its error in issuing the patents, filed suit against the NP, but the U.S. Supreme Court ruled in 1921 that the government could not deny land claims that fell within forest reserves.<sup>111</sup>

The U.S. attorneys who worked on that case were soon brought in for a much larger job: investigating the entire 40-million-acre Northern Pacific land grant. Joint Congressional hearings were held from 1924 to 1928, detailing dozens of violations by the Northern Pacific Railroad, ranging from failure to sell the grant lands at public auction, diverting construction funds to non-rail purposes such as timber, mining, and real estate speculation, failure to sell stock to the public as required, tax evasion, and fraudulent classification of land.

In 1929, Congress acted upon the Joint Committee's recommendations by revoking NP's claims to another 2,900,000 acres lying within National Forests in Montana, Washington, Idaho, and Oregon, and directing the U.S. Attorney General to file suit against the railroad in order to have a complete judicial accounting and determination of any and all issues arising out of violations of the Northern Pacific land grant.<sup>112</sup>

Twenty-two charges were brought by the U.S. against the railroad. A complex ten-year case followed, with rulings by special masters, federal district courts, and the U.S. Supreme Court.<sup>113</sup> The Supreme Court left several major charges undecided, and the entire case was ended with a settlement between the railroad and the Attorney General. Northern Pacific agreed to pay the U.S. \$300,000 and lost its claims to 2.9 million acres, but retained 39 million acres of land.

## **1941: The Railroads Release Further Claims**

Between 1867 and 1940, more than forty million acres of railroad grant land had been forfeited. On the eve of World War II, the railroads and the federal government had another concern: the requirement that the land grant railroads haul military freight at reduced rates. The U.S. Board of Investigation and Research, created by the Transportation Act of 1940, concluded that the ending of land grant rail rate concessions should be a "two-way street," with the railroads returning their remaining lands to the government.<sup>114</sup> So in 1941, with their eye on wartime profits, the land grant railroads released further claims on eight million acres, in exchange for being released from reduced rates for government freight. More than half of the acreage released was by the Northern Pacific, which surrendered 4,500,000 acres of additional claims.<sup>115</sup>

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<sup>111</sup> *U.S. v. NP*, 256 U.S. 51, 41 S. Ct. 439 (1921), the Forest Reserve Case.

<sup>112</sup> 46 Stat. 41

<sup>113</sup> *United States v. Northern Pacific*, 311 U.S. 317 (1940).

<sup>114</sup> Transportation Act of 1940, 54 Stat. 898 at 954.

<sup>115</sup> Ellis, 1946, *Forfeiture*, p. 44.

The Board's investigation provided the following list: <sup>116</sup>

**Table 3. Patented Railroad Grant Lands in 1941**

Atlantic Coast Line	1,843,922
Atchison, Topeka, & Santa Fe	14,886,795
Canadian Pacific	1,273,960
Chicago & Northwest	7,302,338
Chicago, Burlington & Quincy	3,292,749
Chicago, Milwaukee, St. Paul & Pacific	1,453,565
Great Northern	2,823,145
Illinois Central	4,630,453
Missouri, Kansas, Texas	576,683
Missouri Pacific	3,749,157
Northern Pacific	39,843,053
Seaboard Air Line	1,318,913
Southern Pacific	21,648,681
Union Pacific	18,979,659
all other railroads	6,680,595
lands patented between 1933-1940	97,938
total acres patented	130,401,606

### **The Accomplishments and Failures of Forfeiture**

Law professor John Lesly has summarized the problems in the land grant policy, and of the attempts of Congress and the courts to address those problems.<sup>117</sup> His conclusions are quoted at length because he is currently the Solicitor of the U.S. Department of Interior.

[L]itigation has been... ineffective, even though the courts continue[d] to acknowledge that the intent of Congress has been thwarted.

In one celebrated instance arising shortly after the turn of the century, the United States sought to enforce a proviso of [the O&C] railroad grant, charging that the railroad grantee had retained most of the granted land and sold the rest of it in violation of the statutory size and price limits. After the Supreme Court agreed, Congress enacted legislation which revested title to the unsold lands in the United States but which, significantly, ignored those lands the railroad had previously sold to third parties in quantities or at prices exceeding the terms of the grants. Moreover, in taking back title to the unsold lands, the United States paid the railroad grantee the price the latter would have received if it had complied with the

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<sup>116</sup> U.S. Board of Investigation and Research, 1945.

<sup>117</sup> Lesly, 1984, pp. 242-243.

restriction by selling to settlers. Thus, even in this exceptional situation, which gave birth to the so-called O&C lands in western Oregon, purchasers from the railroad were fully protected despite their lack of *bona fides*, and the railroad suffered no actual penalty from its breach.

Apart from this almost unique case, the restrictions in the railroad grants turned out to be largely unenforceable and ineffective.<sup>118</sup> A basic problem was in the language of the grants: for example, the restrictions were not clearly labeled as covenants or conditions (a legally significant distinction), failed to set out a clear mechanism for transferring the land to settlers, and were silent both on remedies for violation and on their enforceability by the courts at the initiative of either the executive branch or potential settlers. These ambiguities eventually resulted in a series of Supreme Court decisions--such as the one allowing railroads to shield themselves from the duty to sell the lands simply by mortgaging them--which largely negated the restrictions. After years of wrangling, Congress and the executive branch together finally washed their hands of the matter on the eve of World War II.<sup>119</sup>

This is not to say that congressional attempts to include these restrictions were totally frustrated; indeed, some of the land subject to the restrictions passed from railroad ownership, and small parcels actually were sold cheaply to those *bona fide* settlers Congress apparently intended to benefit. But even today railroads own large acreages that had been subject to these restrictions, and undeniably disposed of some of their grant lands in large tracts, at higher than statutory process, to other than actual settlers, all in contradiction of the ostensible purpose of Congress. The fact that some of the granted lands actually ended up in the hands of the intended secondary beneficiaries seems more coincidental than not.<sup>120</sup>

Was the public interest served by subsidizing the transcontinental railroads with public land grants? Historians have argued convincingly that not only would the land grant railroads have been built without subsidies,<sup>121</sup> but that the land grant railroads actually *delayed* settlement of the West.<sup>122</sup> In the nineteenth century, the opening and settling of the West was widely assumed to be a public good bordering on absolute necessity. But it

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<sup>118</sup> They were ineffective more because they were *unenforced* rather than *unenforceable*, ultimately because Congress chose to use ambiguous language and to include contradictory clauses, and the courts chose not to interpret it.

<sup>119</sup> At least they tried to wash their hands; the checkerboard pattern remains.

<sup>120</sup> Leshy, 1984, pp. 242-243.

<sup>121</sup> See, for example, Morgan, 1946. Even land grant defender John Rae concludes that the subsidies merely hastened railroads which would have been built anyway, citing the U.S. Federal Coordinator of Transportation's estimate in *Land Grants, Contributions, Loans, and Other Aids to Railroads* that the roads would have been built within ten to fifteen years in any case.

<sup>122</sup> Shannon, 1946.

clearly benefited some more than others, and the wisdom of the land grant policy was ferociously debated even at the time.<sup>123</sup>

Another issue is the size of the land grants. Author Lloyd Mercer, who spent years analyzing the land grant subsidies, did his best to show that they were a profitable deal for the public, but he didn't factor in the billion of dollars worth of real estate, timber, coal, oil, gold, and other resources in his calculations. He also stopped his calculations at the year 1900, using turn of the century land values and rates of return. Even so, he concluded that the Northern Pacific grant was particularly excessive.<sup>124</sup>

The public (i.e., the settlers) should hardly have been “secondary beneficiaries,” as Leshy describes them. Yet the public has participated in its own defrauding. It is time for the public, through its representatives in Congress, to right the wrongs of a century.

The Northern Pacific “Empire Builder” James Hill dismissed the controversies, claiming that “When we are all dead and gone the sun will still shine, the rain will fall, and this railroad will run as usual.”<sup>125</sup> He may have been right about that. But “as usual” turns out to mean that the sun shines on deforested hillsides, and the rain falls in torrents and landslides, and trains are frequently derailed because of inadequate safety and manpower. The country can do better with its public lands and with its rail system.

Perhaps a more realistic estimate has come from public lands scholars George Coggins and Charles Wilkinson:

It is not necessary to chronicle fully the splendid indifference to the common public good in the matter of transcontinental railroads. When the Great Barbecue was over, Congress had given over 90 million acres to the railroads directly and another 35-40 million acres to states to be used by the railroads (in addition to another 200 million acres for other internal improvements, some of which were also granted to railroads). The progress of the first transcontinental line [the Union Pacific and Central Pacific] is somewhat typical of the problems generated... The Gilded Age was one of the low points of public morality in the United States, but its effects were not uniformly bad.<sup>126</sup> As promoters, the railroads encouraged and directed immigration. The West was developed, and towns sprang up in the railroads' wake. Opposition to the worst abuses was noteworthy and led to some worthwhile reforms. The railroad enterprise effectively ended the frontier. Pressure to force return of the railroad lands to the public domain has continued all through this century and has not yet died out completely.<sup>127</sup>

Nor will it, as long as the lands are controlled by corporations to the detriment of local communities, the public, and the land itself. As historian Fred Shannon wrote in 1946,

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<sup>123</sup> The era is rife with Congressional debates over “perpetual monopolies”, newspaper stories and editorials, and pamphlets such as the *Seattle Post-Intelligencer's* “Black Cloud.”

<sup>124</sup> Mercer, 1982.

<sup>125</sup> Quoted in the *Encyclopedia of American Business and History: Railroads in the Nineteenth Century*, p. 175.

<sup>126</sup> One can argue that the list of effects which follows are not unalloyed benefits.

<sup>127</sup> Coggins and Wilkinson, 1987, pp. 106-108.

If any lobbying is justifiable today it should be from a people's lobby. It should demand that after three-quarters of a century (in some cases almost a century) of private profit from public gifts, it is now time for the people to take back the property without further recompense, so that in the future the benefits shall be reaped by the people who paid. Any reimbursement to the people made by the land-grant railroads [such as reduced rates for government freight], to the present, has been just a little interest on the original obligation.<sup>128</sup>

## **The Land Grant Legacy Lives On**

The railroads and their defenders continue to claim that the land grant era ended in 1941. For example, railroad lobbyist Frank Wilner has argued that "both Congress and the federal courts have ruled that the books have been closed on the matter of past railroad land grants."<sup>129</sup> Many legal scholars disagree, and the U.S. Supreme Court itself, in the O&C revestment case, declared that "[the land grant laws] are covenants, and enforceable... The grants must be taken as they were given. Assent to them was required and made... The acts are laws as well as grants and must be given the exactness of laws... This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defenses of laches and the statute of limitations."<sup>130</sup>

Regardless of the pronouncements of railroad men, lobbyists, and judges, the land grant legacy clearly lives on, as can be seen by examining today's socioeconomic and environmental controversies in newspaper headlines,<sup>131</sup> Congressional hearings, citizen's petitions for return of the grant lands, land exchanges involving land grant checkerboards, and other efforts to address the continuing problems deriving from the land grant legacy.

The days of robber barons, open fraud, and railroad wars are not over. The heirs to the land grant empires continue their control of the land, and their political influence. Timber and mining corporations which acquired railroad grant lands use their wealth to defeat state referendums for forest protection, to forward their own legislative proposals which give them access to additional public lands<sup>132</sup> and exempt them from environmental laws,<sup>133</sup> to squeeze independent companies out of business, and to price-gouge consumers,<sup>134</sup> and to export forests and jobs.<sup>135</sup>

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<sup>128</sup> Shannon, 1946.

<sup>129</sup> Wilner, 1981. Another example, from the American Bar Association, is Root, 1987.

<sup>130</sup> *Oregon & California Railroad Company v. U.S.*, 238 U.S. 393 at 423-427 (1915).

<sup>131</sup> For example, see Long, 1993, and Nelson et al, 1998. Dozens of modern and historical news stories about the land grants have been collected in *Transitions*, the journal of The Lands Council, 517 S. Division St., Spokane WA 99202, [www.landscouncil.org](http://www.landscouncil.org).

<sup>132</sup> The Quincy Library bill was crafted by the land grant heir Sierra Pacific Industries.

<sup>133</sup> When Northern Pacific land grant heir Weyerhaeuser was threatened with cutting restrictions due to spotted owl protections, chairman George Weyerhaeuser lobbied Yale classmate George Bush, to apparent

## **Citizen Pressure, Agency Hearings and Investigations**

As in the nineteenth century, the public pushes regulators, Congress, and the courts to understand and resist the political power of the land grant corporations.

In 1972, the National Coalition for Land Reform (NCLR) filed a “Petition for Return of Railroad Lands” as an administrative complaint to the Secretary of the Interior. The petition asked the Secretary to investigate the status of the land grant-based corporations and their noncompliance with the law, an investigation which the petitioners were convinced should result in forfeiture or sale of the remaining grant lands, and reimbursement to the public treasury of profits derived from illegal exploitation of the grant lands.<sup>136</sup> The Secretary’s rejection of the petition was filed on August 31, 1972, “on behalf of the Southern Pacific Transportation and Southern Pacific Land Company.”

A few years later, the non-profit Center for Balanced Transportation (CBT) urged Congress to conduct oversight hearings into the Interior Department’s handling of the NCLR’s land grant petition. The CBT, whose work encompassed national and state transportation and energy issues, had conducted historical and legal analyses of the Northern Pacific land grant, concluding that the policy had failed, but that Congress could still address the problems.<sup>137</sup>

In the early 1980s, the National Council of Farmer Cooperatives, backed by the National Grange, the National Farmers Organization, the American Farm Bureau, and the National Wheat Growers Association, called for congressional investigation into the “obligation of the land grant railroads to use their land grant income to sustain and strengthen rail operations and the extent to which the carriers have breached their contracts with the government by transferring land grant assets out of the railroad without adequate compensation.”<sup>138</sup>

## **Unhitching the Grants, Exploiting the Land**

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good effect. Plum Creek Timber’s Habitat Conservation Plans give it 50-year exemptions from the Endangered Species Act.

<sup>134</sup> Weyerhaeuser and its associated companies, Boise Cascade and Potlatch, have been investigated, indicted and convicted of numerous counts of price-fixing and other anti-trust violations from the early 1900s up through the 1990s.

<sup>135</sup> Public Information Network, *Railroads & Clearcuts News*, No. 3, September 1997.

<sup>136</sup> Greene, et al, 1975.

<sup>137</sup> See CBT director Rick Applegate’s testimony (Applegate, 1979), and Goetz, 1979.

<sup>138</sup> Letter from NCFC to Chairman Packwood, U.S. Senate Committee on Commerce, Science and Transportation, Nov. 17, 1981, cited by Creedy, 1983, p.159.

In the 1970s and 1980s, as a result of a complex web of events, including the depletion of public lands resources, declining railroad profits, and railroad deregulation, many of the land grant railroads “spun-off” their land grant resources into new, independent corporations. The railroad mergers and restructuring inspired protest from rival transportation systems, railroad employees, citizens, and a new wave of hearings and studies by state<sup>139</sup> and federal governments.

The U.S. Interstate Commerce Commission (ICC) conducted several studies on railroad mergers and holding companies.<sup>140</sup> Its 1977 study on “Railroad Conglomerates and Other Corporate Structures” showed that land, natural resources, and other valuable assets (assets acquired over the years by government grant) had been diverted from the railroads’ transportation purposes and had diminished railroad revenues. “The railroad as an instrument of public service has been deprived of wealth accumulated over many years, including resources such as land grants provided at public expense.” The ICC concluded that “the interests of conglomerate managements and their stockholders often diverge from the public interest in a sound transportation system,” and that “the continuation of asset separation poses a potential threat to the future health of the Nation’s rail system.”<sup>141</sup>

In 1982, U.S. Representative Byron Dorgan (D-SD) initiated a Congressional investigation of railroads by the House Committee on Energy and Commerce. Dorgan claimed that the Interstate Commerce Commission “has adopted such a narrow view of its authority regarding rail holding companies and land grants... that it is doing virtually nothing to protect the public in these areas. This is why the ball is in the Congress' court... It does not seem fair to expect our taxpayers to provide additional subsidies, and our shippers and merchants to pay exorbitant freight rates, while rail managements turn to other uses the subsidies they have already received. Nor does it seem fair to permit these managements to use the holding companies' device to walk away from the bargain with the American people regarding the railroad land grants.”<sup>142</sup>

Joint Congressional Committee hearings requested by Dorgan and Representative Pat Williams (D-MT) were followed by a bill introduced by Williams that would require all land grant railroads (or their holding companies) to put a third of their pre-tax profits from resource extraction into railroad maintenance. Williams declared that “Congress must decide whether the public still has a right to demand service from the railroads as a result of the enormous grants of land they received in the 1880s.”<sup>143</sup>

In 1980, U.S. Rep. John Dingell (D-MI), chairman of the House Energy and Commerce Committee, requested that the Interstate Commerce Commission condition approval of

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<sup>139</sup> For example, see *Burlington Northern: Its Continuing Responsibilities as a Land Grant Railroad*: Hearing before North Dakota State Tax Commissioner Kent Conrad, Bismark, ND, Oct. 1, 1981. See Creedy, 1983.

<sup>140</sup> U.S. ICC, 1969, 1970, and 1977.

<sup>141</sup> U.S. ICC, pp. 30, 71-72.

<sup>142</sup> Dorgan letter, May 12, 1982, quoted in Creedy, 1983, p.161.

<sup>143</sup> Cited in Creedy, 1983.

the proposed merger of the Union Pacific, Missouri Pacific, and Western Pacific Railroads upon a study of the value of their land grants and mineral rights. Dingell wrote that “it is unacceptable to have government aid diverted from its main objective of benefiting the ultimate public which the railroads serve.”<sup>144</sup> The next year, U.S. Representative Sieberling (D-OH), also concerned about the transfer of land grant assets to non-rail corporations, requested that the ICC continue its investigations of the effects of railroad holding companies which then spun off land grant assets to separate corporations.<sup>145</sup>

Calls for the investigation of railroad holding companies and land grant spin-offs also came from railroad employees and rival transportation systems. For example, the Water Transport Association claimed that the revenues and profits from land grant resources should be included when determining how much railroads should be allowed to charge for service.<sup>146</sup> Additional challengers to Burlington Northern Railroad’s move to create a holding company for land grant assets included the Western Coal Traffic League, the State of Minnesota, BN employees, and a citizens group.<sup>147</sup>

In 1982 hearings before the Senate Judiciary Committee, the Railway Labor Executives Association expressed concern over the reduction of railroad plant and rail labor jobs due to the stripping of assets. The Western Coal Traffic League (utilities and industries) supported “legislative initiatives to prevent the ‘milking’ of the [Burlington Northern Railroad<sup>148</sup>] of its resource assets, including its land grant assets.” Congressman Pat Williams of Montana claimed “that the land grant assets should come into play. BN ought to call upon some of its remaining land grant properties as a source of revenue with which to upgrade [railroad lines in Montana]. Continuation of service on the [lines] may or may not be profitable, but will be a public service, and public service was the intent of the land grants.” Not surprisingly, Richard Bressler, the CEO of Burlington Northern, testified that his corporation did “not recognize any continuing obligations,” but hearings chairman Senator Max Baucus said “I believe the federal government should determine once and for all whether the land grants created a continuing obligation for rail carriers to provide rail service.”<sup>149</sup>

The conclusions of these hearings were backed by Congressional Research Service studies which reiterated the continuing obligations of the railroads, and the duty of Congress to determine just what those obligations were.<sup>150</sup>

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<sup>144</sup> Traffic World, 1981.

<sup>145</sup> Sieberling’s letter is cited in *Traffic World*, 1981; see also the report by the U.S. Interstate Commerce Commission, 1977.

<sup>146</sup> Traffic World, 1981; Creedy, 1983.

<sup>147</sup> Traffic World, 1981.

<sup>148</sup> The Burlington Northern was created by the merger of the Northern Pacific, Great Northern, Chicago Burlington & Quincy, the St. Louis San Francisco, and other railroads.

<sup>149</sup> All quotes from Creedy, 1983, citing *U.S. Senate Judiciary Committee, Hearings on Rail Mergers and the Formation of the BN Holding Company*, March 26, 1982.

<sup>150</sup> Baldwin, 1981; Wiemer, 1983; and Backiel and Baldwin, 1986.

## Land Buy-Outs: Buying Back Public Land

Though the grant lands were supposed to be sold to settlers, generally at \$2.50 per acre, much of the land was held by the railroads or sold in large parcels to other corporations. Under the rationale that the public needs green space, some of the corporations are now selling the grant lands back to the public--at hundreds or thousands of dollars per acre.

**Table 4. Land Grant Sales to Public Agencies**

Date	Buyer	Seller	Acres	Location	Price per acre
1990	King Co. WA	Glacier Park Real Estate	500	Squak Mt. State Park, WA	\$5,800
1990	City of Tacoma	Glacier Park Real Estate	6.7	Tacoma, Washington	\$582,090
1993	U.S. Congress	Blixseth Big Sky	80,000	Yellowstone, Montana	\$150 to 250
1993	King Co. WA	Weyerhaeuser	1,800	Rattlesnake Ridge, Snoqualmie Pass, WA	\$2,500
1995	U.S. Forest Service	Plum Creek Timber	960	Silver Creek, Wenatchee National Forest, WA	?
1998	King Co. WA	Weyerhaeuser	2,000	Grouse Ridge, North Bend, WA	\$3,500

## Land Exchanges

Every year, there are dozens of land exchanges around the country. Originally used as a way to deal with small private inholdings within public lands, in recent years the exchanges have become much larger, often encompassing tens of thousands of acres. Many of the land exchanges now being arranged involve the land grant checkerboards. Exchanges are a politically palatable way to consolidate the fragmented public-private land ownership patterns created by the railroad land grants. But in the process, public lands are being exchanged for land that had already been donated to the railroads--in effect, a second public land grant. Timber corporations, real estate brokers, and others are misusing the land exchange process in order to speculate for quick profits. Improper procedures, conflicts of interest, and bribery in connection with various land exchanges have led to four audits of the BLM and several ongoing investigations of the U.S. Forest Service.

An investigative series on the abuses and problems with the land exchanges was published in the *Seattle Times* in 1998. The authors recommended several reforms, including (1) that exchange lands should be traded lands to the highest bidder, rather than to the corporation which suggests a deal; (2) the land appraisals should be made public; and (3)

the public should be given a seat at the negotiating table.<sup>151</sup> Many of the grassroots citizens groups which have arisen to monitor corporate-government land exchanges, including the Seattle-based Western Land Exchange Project, agree with these recommendations, and are working to expose land exchange abuses, and to ensure that reforms will take place.

The land exchanges give a century-old court decision new relevancy: "It seems but an ill return for the generosity of the Government in granting these [rail]roads half its lands to claim that it thereby incidentally granted them the benefit of the whole."<sup>152</sup>

## **The Land Grant Vision Unfulfilled**

The names and faces of land grant reformers have changed, and the current issues may seem unique. But the goals and visions of the Farmers Alliances, the Populists, the conservationists, and all the others who have fought for democracy are alive. Their work to mitigate and reform the land grant policy continues, as it has for more than a century. What is missing from the scene today is an informed, aroused movement to re-vest the land grants themselves.

An opinion poll during World War II showed that only half of the population had ever heard of the railroad land grants, and most of them thought the railroads had paid for the land.<sup>153</sup> Since then, another half-century has passed, and the land grants have an even smaller place in our social memory. Without an awareness of the past, and an understanding of how it affects the present, we will continue to suffer the continuing impacts of the land grant legacy.

Most of the recent attempts to correct or mitigate the problems unleashed by the railroad land grant policy are well-intentioned and necessary. They are also symptomatic treatments which do not address the underlying problem: a bad policy poorly implemented. As land reformer Sheldon Greene clearly stated,

“The economic interests of large landowners and railroads have prevented a broad-based distribution of public lands without proper regard for the public interest. Although 70 years [now a century] have passed since the bulk of our public lands were transferred to private ownership, the original distributive goal of the land laws remains unfulfilled. Yet, despite the lapse of time, it is still realistic to seek to attain this objective.”<sup>154</sup>

As William Faulkner once wrote, “history isn’t dead; it’s not even past.” It is time to revisit the land grant era, an era which never ended. It’s time to re-vest the land back to

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<sup>151</sup> Nelson et al, 1998.

<sup>152</sup> *Camfield v. United States*, 167 U.S. 518 (1897).

<sup>153</sup> Morgan, 1946, citing *Railway Age*, Dec. 9, 1944, pp. 888-889.

<sup>154</sup> Greene, 1976, p.p. 750-751.

the public. The era of selling public lands to settlers is long over, but corporate control of land and resources has never been stronger than today. And the public lands have never been more in need of protection.

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