

Chapter 12

The Public Domain Since the Homestead Act

Congress passed the Homestead Act on May 1, 1862. As in the case of the previous Pre-emption Act, this act was designed to aid the actual settler to obtain ownership of the land. The grant of "free land" to the settler was a question which had agitated Congress for twenty years, and it was closely linked to the slavery question. Successive bills were introduced in Congress to accomplish the purpose, but it was not until after the Republicans won the national election, and southern congressmen were absent, that the act was passed. It was hailed as a liberal land measure, but its implementation was impaired by other national land policies which removed large areas of valuable land from its application. Its benefits were also retarded by fraudulent entries and other unscrupulous practices, such as prevailed during the previous history of the public domain.

Under the Homestead Act, any citizen or any person who had declared his intention of becoming a citizen if twenty-one years of age, or the head of a family if not twenty-one years of age, could acquire a tract of land, already surveyed and not to exceed 160 acres, by maintaining a residence of five years upon the land and by making certain specified improvements thereon. There was one additional provision in the act, one which tended to defeat its very purpose. It was provided that after a six months' residence and improvement the applicant could acquire immediate title to the land by paying \$1.25 per acre for it. This was contrary to the purpose of the act, which was to promote a large number of relatively small landowners who would retain title

to the land and cultivate it. The right to acquire the land after a short residence, on which merely a log cabin could be built, gave land engrossers an opportunity to acquire favorable and adjoining tracts and thus, in a way, promoted rather than deterred concentration of land-ownership. It was, therefore, an incentive to fraudulent entries.

In amplification of the original Homestead Act, other public land measures were passed. The first was the Timber Culture Act of 1873. Under this measure a citizen could obtain a patent to 160 acres of land by cultivating trees on 40 acres of it. In 1878 the required acreage of planted trees was reduced to 10 acres. According to Marion Clawson, "probably no other statute was as generally evaded as the Timber Culture Act."¹ There was no limitation on the areas in which it could be applied, regardless of the unlikelihood of growing trees successfully on the land. Thus a patentee could plant and cultivate trees in an essentially prairie country if he planted and cultivated wheat at the same time. He could not be penalized if the wheat grew and the trees did not.

Another supplementary act, passed in 1877, was the Desert Land Act, designed to promote irrigation of arid lands. Like the Homestead Act, it required a period of residence and improvements, but it allowed an entry of 640 acres (later reduced to 320 acres), under the assumption that a larger acreage was required for irrigation. The applicant had to provide a water supply and he was charged a nominal price (usually \$1.25 an acre) for the land. This act also is accountable for extensive frauds in acquiring public land. Other important acts relating to the disposition of public lands were: (1) an increase of the maximum area of homesteads to 320 acres in dry farming areas, passed in 1909; (2) the reduction of the residence period on homestead from five to three years, enacted in 1912; and (3) an act granting stock-raising homesteaders 640 acres instead of 160, if they acquired land suitable only for stock-raising purposes. This act was passed in 1916.

Perhaps the most unique act relating to public land disposal in recent times was the so-called Carey Act, enacted in 1894. This act provided for large grants of land to states on condition that they be irrigated and, when thus reclaimed, the land be made available to actual settlers

¹*Op. cit.*, p. 67.

only. Though generally applauded, on the whole the act did not work out well because the states were unable or unwilling to finance irrigation projects or they lacked the technical organization and skill to create them. To remedy the situation, the Reclamation Act of 1902 was passed, which provided for using the revenues from public land sales to finance irrigation construction. In applying the act, however, it was found that much of the land which could be included in an irrigation project was already in private ownership and therefore not available to homesteaders.

Summing up his discussion of the Homestead Act and the various other land acts modeled after it, Marion Clawson, a director of the Bureau of Land Management (the former General Land Office), in his book, *Uncle Sam's Acres*, has this to say:

[These Acts] were the means whereby large acreages of land passed . . . to private ownership. There was a lag between the date at which entries were made and the date at which the land was patented; the minimum lag was specified by law, and this might be extended in various ways. Many homesteads were never "proved up," but were relinquished by the applicant, who was then under certain circumstances free to take up another homestead elsewhere. Many entrymen made additional entries to bring their holdings to the legal limits. Thus, the number of entries is larger than the number of persons who ultimately got homesteads, and also larger than the number receiving patents. . . . All told, more than 3 million homestead entries were made. Possibly, two thirds of these were successfully completed, resulting in the disposal of almost 300 million acres. . . .²

The "Opening Up" of New Lands

As the public domain, subsequent to the Civil War, was rapidly taken up and transferred to private ownership under the various acts of Congress, the choicest lands for entry gradually were exhausted. Accordingly, when the General Land Office opened up new areas for settlement, there was a "rush" of applicants for entry. These "land rushes" were dramatic, but they were tragic episodes in American his-

²*Ibid.*, p. 69.

tory. Never was a more insane method of land disposal ever experienced. Wearing of the method previously followed, when long lines of supposed settlers (who in the main were likely to be "stooges" of speculators) confronted the land office having the task of opening up a new public land "strip," the General Land Office in 1889 hit upon another procedure.

The occasion was the opening up of the "Cherokee Strip," a large area of what is now Oklahoma. In this case applicants for land entries were lined up at a starting line and at the sound of a gun were allowed to rush forward to find and settle upon the tract of their choosing. The grand rush, dramatically portrayed in novels and moving pictures, gives the affair an alluring setting—but it resulted in violence, deaths, and frauds. Similar but smaller "openings" occurred in other areas, but the system has now been abandoned. As a substitute, the problem of allotting new openings of disposable public land has been solved by considering simultaneously all applications that are filed, and then, through a lottery, selecting the successful applicants. But it is not likely that there will be many such drawings in the future. Except in Alaska, public lands still available for homestead applications have dwindled almost to the vanishing point.

Frauds and Abuses in the Homestead Era

It was expected that the Homestead Act would not only encourage actual settlement of small holders on the public domain but would, in addition, tend to eliminate the fraud and corruption which had characterized previous periods of land disposal. But this did not generally happen. There were plenty of frauds and abuses, too numerous to mention. The law and its subsequent amendments and additions did not prevent land engrossment. Homesteaders, in many instances, did not really inhabit or improve the land and, after obtaining title to it, readily disposed of it to others, usually to land grabbers.³ As stated by

³For the story of Homestead Law abuses, see *Government Handout, A Study in the Administration of the Public Lands*, by H. H. Dunham, New York, 1941. Despite the catch-penny title of this book—a Ph.D. thesis—it is a scholarly and authentic work.

W. A. Phillips, who was a member of the Public Lands Committee of the 43rd Congress:

The preemption and homestead laws professed to do what they did not. The theory was that the land should be reserved for the cultivators. . . . Neither law secured that end. I have been very much at a loss in different stages of my land experience to determine exactly the sentiment in the public mind that has prevented a wise and far-reaching adjustment of the public land question. It could hardly be an accident. The first idea would be that the speculative and real estate interest was too strong to permit of wholesome, permanent legislation. Such a view . . . is not without foundation. But there may have been something else. Perhaps it was thought by men, not destitute of capacity, that it was desirable as early as possible to have the public domain in private hands, and by making it a chattel, providing for its easy transfer without let or hindrance, they believed all could be thus accommodated. If the hat-maker became dissatisfied with silk, felt and beaver skins, he could sell his blocks and smoothing irons, and buy eighty acres. If the pioneer, who imagined an Arcadia with the genial farmer sitting under his vine and fig tree, got tired of mauling rails, breaking prairie with oxen, and the ague with quinine, he could sell his "place," together with what a young squatter once proposed to sell, "his embedments," and try to get a position as a clerk in a store. . . . Young America might cry "scatter and divide all this national real estate; tangle it with no bars; make it easy to get and easy to sell, and thus it can best serve all interests." I have endeavored to define and exhibit what I have reason to suppose is a strong underlying sentiment. In regard to it I would only say that such a system might do in the squatting era. There is a future coming to the American land system with changed conditions.⁴

Commenting on the same topic, Marion Clawson, who has already been quoted in these pages, lays the blame for failure to prevent land frauds on inadequate administrative personnel. He states:

More serious than trespass were the extensive frauds that occurred in disposition of federal land. Many laws imposed certain restrictions, such as settlement or improvement, as a condition for obtaining public land; others applied only to . . . swamp or over-

⁴W. A. Phillips, *Labor, Land and Law*, pp. 341-42.

flow, or non-mineral lands. The only way the Nation could have known that these conditions were being met would have been to have had an adequate force of competent honest men, freed as far as humanly possible from political pressures, and, of course, themselves divorced from any personal participation in land dealings. Perhaps, even so, it would have been impossible to control settlement and insure that it conformed fully to applicable law. The spirit that made for rapid settlement and conquest of the American continent was one uniquely impatient against restraint of any kind. Laws were invariably a compromise between the goals and objectives of the people in the older areas of the Nation and those of the people on the frontier. The compromises were tolerable to the frontier only because they were not more strictly enforced.⁵

Speaking further on the topic, Mr. Clawson points out serious defects in the land laws. They did not classify lands sufficiently or distinguish between the varying needs of settlers. "The land laws simply were not well designed to meet their ostensible objectives. The Congress did not have adequate personal contact with natural conditions in the public land areas to make wise decisions . . . based on their own knowledge, and they were unwilling to appropriate adequate funds to make the necessary investigations." They failed time and again to correct deficiencies in the laws called to their attention by the administrator of the laws.⁶

Concerning the effects of land engrossment by private capitalists, who garnered large tracts under the lax administration of the public domain, Professor Gates of Cornell University, who, as already stated, more than any other scholar has studied the land history of the Middle West, has this to say:

Cattle kings and bonanza farmers retarded the growth of the community first by using their land extensively and later by encouraging and even requiring abusive and careless farm practices. Hired hands and shiftless tenants worked the land which small farm owners might otherwise have acquired. The hired hands were migratory workers who were undependable, drank heavily, sometimes shirked their work, and were frequently in trouble

⁵*Op. cit.*, pp. 83-84.

⁶*Ibid.*

with the law. The tenants, having no hope of acquiring ownership of the land they farmed, had little initiative to make improvements or to farm properly. Their chief concern was to raise the largest possible corn crop—their principal source of cash. Some of the second and third generation heirs of the cattle kings, especially if absentee landlords, showed a tendency to extract as much from the land as possible. Even where the modern farm manager was employed he also had a strong motive to make favorable cash rent returns to his employer. Some great estates developed into rural slums in the nineteenth century and even in the twentieth century exhibited backward social features that would shame poorer sections elsewhere.⁷

The evil has been done! The effects are not yet fully manifest! But the wasteful and inordinate manner of the distribution of the vast public domain is bound to have serious repercussions in the future. Despite the abundance of land, which Thomas Jefferson said would be enough for all for many generations to come, there still is in America, in large numbers, "the landless man." Landlordism and absentee ownership not only have persisted and prevailed but, as has been the experience of older nations, are increasing and more widely spread. The "land question" may be ignored economically and politically for some time to come, but it is bound to be a disturbance in the future unless proper action is taken to solve it.⁸ We are land animals, and all of our material wealth, whether gadgets or airplanes, comes

"Cattle Kings in the Prairies," in the *Mississippi Valley Historical Review*, December 1948, Vol. XXXV, p. 411.

⁸For a detailed account of the disposal policies of the public domain from 1900 to 1950, see E. Louise Peffer, *The Closing of the Public Domain*. In the concluding paragraphs of this historical study, p. 340, the author states:

"The attitude of the people of the United States toward their vast land holdings has been traditionally one of indifference. Even in the days of greatest public land activity, the interested public was small. It has been possible from time to time to arouse opinion sufficiently to obtain new public land legislation; it has never been able to sustain that interest for long. The public, until disaster stunned it into thought in the early 1930's, retained the old romantic view of the public domain—when it recalled that there was one.

"The old public domain of land open to entry and settlement has, like the American frontier, lost its significance in the contemporary scene. The closing phase has not been a heartening one, although it is difficult to see how it could have been otherwise."

from the application of labor to land and the products of land. Land is the ultimate source of whatever we produce and it is also the common inheritance of all living people, for them to use in common in their lifetime and to pass on under the rights of natural law to those who will come after them.

The California and New Mexico Land Grants

Before completing the history of the disposal of the public domain, there is yet to be considered: (1) the enormous grants to railroads and educational institutions, and (2) the grants, both valid and invalid, claimed by individuals and corporations that were made or claimed to have been made under the Spanish and Mexican regimes in California and New Mexico.

California occupies an exceptional situation as an episode in American land history. The discovery of gold there in 1848 soon after the American occupation drew a large movement of population to the region. They were not all "gold diggers." Among them were adventurers of all sorts seeking new riches. Many turned their attention to land acquisitions. "In all the new States of the Union," wrote Henry George in 1871, "land monopolisation has gone on at an alarming rate, but in none of them so fast as in California, and in none of them, perhaps, are the evil effects so manifest."⁹ George evidently had in view the claims to vast territories which were put forward by individuals and corporations of almost all types, under grants purporting to come from both Spanish and Mexican sources—claims which, if valid, the United States, under treaty obligation, was bound to respect.

As had occurred previously in Texas, the Mexican Government, through its appointees, was exceedingly liberal in California in giving away parts of its public domain. It is estimated that prior to the American conquest there were approximately eight hundred "grants" to individuals. These comprised about eight million acres, or about one quarter of the cultivable area of the whole state. It was a wonderful opportunity for land-jobbers to acquire these "grants" from the reputed owners and to resell them, in whole or in part, at a profit.

⁹*Our Land and Land Policy*, p. 36.

Many of the Mexican grants were of a conditional nature, and legal titles in most instances were doubtful. Their validity had to be determined. As in the case of Louisiana a half century previous, Congress appointed a commission to investigate land titles in California and New Mexico. Owners of grants were called upon to prove their titles. In many instances this they could not do, since they had received no deeds or patents. Verbal gifts by governors and prefects had been quite common. All this made a wonderful harvest for lawyers, speculators, and politicians. "He was not much of a lawyer in those days," remarks Hubert Howe Bancroft, the California historian, "who had not a Mexican Grant in his pocket, the title to which his client paid for."¹⁰

The work of the California Lands Commission extended over many years, and there are probably cases still pending. It would be exceedingly tiring to cover even a substantial portion of the fraud, deceit, speculation, and villainy that prevailed in the settlement of titles to California lands. A group of Philadelphia speculators are reported to have established headquarters in San Francisco for the purpose of acquiring Mexican grant claims. Local politicians, financiers, and non-resident capitalists also sought to obtain windfalls by buying up the claims. The numerous reports submitted to Congress by the land-office officials and the special land commissioners appointed to investigate the claims contain frequent references to these fraudulent land-grabbing operations.

Among the prominent land grants declared fraudulent or invalid were the Limantour Claim (600,000 acres), the Santillan Grant, and the Mariposa Estate, the latter held by General John C. Frémont. Claims confirmed were 326,000 acres to the De La Guerra family, and 532,000 acres to the brothers Pio and Andre Pico. Both of these claimants failed to exploit their holdings and died poor.

Despite the culling of the Mexican land claims, California, according to Henry George and later investigators, has more large landed estates than any other state in the Union. From a report of the California Tax Commission, three hundred landed proprietors in 1916 owned over four million acres "capable of intensive cultivation and of

¹⁰*Retrospection*, p. 309.

supporting a dense population." The report states further: "The evil of such ownership in each year is becoming more apparent. We have at the end of the social scale a few rich men who as a rule do not live on their estates, and at the other end, a body of shifting laborers or farm tenantry. And so much for California, with more to come."

Mexican Land Grants in New Mexico

The story of jobbing in Mexican grants would not be complete without some reference to the land deals in California's sister state, New Mexico. The grants in New Mexico, like those in California, covered large areas of vacant lands and the boundaries were indifferently described. The grantees, also, claimed larger acreages than the patents called for. The reputed conveyances, moreover, were made much earlier than those west of the Sierras.

Following the cession of the Mexican territory to the United States, American speculators stepped in and acquired the most important claims. The titles to these New Mexican land claims were as troublesome to settle as those in California. Congress, however, did not take up the problem until a decade or more later, after the California mess was attended to. The courts, moreover, were slow in adjudicating New Mexico claims, and as late as 1890 there were still 107 claims pending. Most of these were not settled until 1904. Here, also, the lawyers found the land-claim business highly lucrative. One who became extremely wealthy was Stephen B. Elkins, in later life a United States Cabinet officer and a United States senator from West Virginia.

George W. Julian, who in 1885 was appointed United States Surveyor General of New Mexico, accused Elkins of buying up the Spanish grants at a small price and then, largely through his political influence, having the survey of the grants made to contain hundreds of thousands of acres that did not belong to them. By such methods, Julian stated, "more than 10 million acres of public domain in New Mexico became the spoil of land grabbers."¹¹

Senator Elkins made himself conspicuous as a hero in successfully prosecuting the notorious Maxwell Grant. In 1864, Lucien Benjamin

¹¹See *History of New Mexico, Its Resources and Its People*, Vol. I, p. 183.

Maxwell, one of the most striking early figures along the Rocky Mountain frontier, acquired from Carlos Beaubien and Guadalupe Miranda, original grantees, a tract of land in northern New Mexico that comprised almost the whole of present Colfax County, an area about three times the size of Rhode Island. Here Maxwell resided as a feudal baron, but his principal income was from sheep raising. The discovery of gold on his domain gave him plenty of excitement. He invested large sums in the development of placer mining. Like Sutter in California, he was met by an army of squatters and free-lance miners who refused to be ousted. In order to save the remnant of his fortune he sold his grant to an English syndicate for \$1,250,000, which in turn organized it into the Maxwell Land Grant and Railroad Company. The Hon. Stephen B. Elkins was made its president.

All this was done before the validity of the grant was affirmed. This came in time, but meanwhile the company experienced financial difficulties. In 1875 it became bankrupt. Its lands were sold for unpaid taxes and its personal property disposed of at a sheriff's sale. Among the principal sufferers from the event were Dutch financiers who had purchased the bonds of the bankrupt concern.^{11a}

Another notorious New Mexico land claim, which became a securities gamble and which, in 1893, was adjudged a criminal forgery, was the so-called Peralta-Reavis Grant. The promoter was James Addison Reavis, a St. Louis real estate dealer who, before he petitioned Congress to validate the supposed grant of 1,300,000 acres, sold releases to squatters on the land. The Southern Pacific paid him \$50,000 for a right of way through the property. He obtained additional cash from other sources. But in 1889 the grant was declared to be an out-and-out forgery. He was subsequently convicted on this charge and spent two years in prison. The attorney who prosecuted the case remarked: "In all the annals of crime there is no parallel. This monstrous edifice of forgery, perjury and subornation was the work of one man. No plan

^{11a}For further history of the Maxwell Grant see Herbert C. Brayer, *William Blackmore: The Spanish-Mexican Land Grants of New Mexico and Colorado, 1863-1878, passim.*

was ever more ingeniously devised: None ever carried out with greater patience, skill and effrontery."¹²

Summation of Land-Disposal Policies

To enumerate adequately the shortcomings and errors of the public land-disposal policies is out of the question in this volume. The preceding pages, however, have indicated many of these shortcomings, and it is not necessary to repeat or enumerate them here. Perhaps it is best merely to quote from the most recent work relating to the land question, the excellent treatise, *Land Problems and Policies*, by V. Webster Johnson and Raleigh Barlow, and published by the McGraw-Hill Book Company in 1954. Commenting on the disposal policies in the distribution of the public domain, these two writers state:

Perhaps the most fateful and potentially tragic development was the consistent adoption of alodial tenure in fee simple. This conferred on the individual owner a virtually unrestricted right of use and abuse, limited in practice only by the legal doctrine of nuisance, the tenuous application of the police power and the power of taxation subject to the constitutional principle of "due process."

Much can be said of the granting of broad fee-simple rights of ownership. These grants fitted in with the virile pioneer spirit and in many ways influenced the rapid . . . development of frontier areas. . . . At the same time, however, the almost unrestricted right of use and abuse of land has resulted in devastation of a major portion of our forests, rapid dissipation of mineral resources, and serious deterioration of a large proportion of our range resources, and the social dislocations that flow from these devastations.¹³

¹²For a detailed account of the Reavis fraud see the magazine *Land of Sunshine*, Los Angeles, February and March 1898.

¹³Pp. 57-59.