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The Railroads Must Have Ties: A Legal History of Forest Conservation and the Oregon & California Railroad Land Grant, 1887-1916

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Naturalist and preservationist John A. Muir once scoffed at the way each of the transcontinental railroads advertised its line as the "scenic route." In his monumental portrayal of America's scenic wilderness areas, Our National Parks, he proposed a new and much more honest advertisement: "Come! Travel our way. Ours is the blackest. . . . The sky is black and the ground is black, and on either side there is a continuous border of black stumps and logs and blasted trees appealing to heaven for help as if still half alive, and their mute eloquence is most interestingly touching. . . . No other route on this continent so fully illustrates the abomination of desolation."¹

Observations such as this one regarding the ecological destructiveness of railroads have tended to obscure the fact that railroad companies themselves were not necessarily enemies of the environment. Indeed, in some cases they were at the forefront of the preservationist and conservationist movements that were still in their infancy at the time of Muir's writing in 1901. For example, the Southern Pacific, as historian Richard Orsi has demonstrated, "took a major role

¹John A. Muir, Our National Parks (Boston, 1901), 357–58.
in the emergence of modern management of water, wilderness parks, forests, and rangelands.”

Orsi’s conclusions regarding the Southern Pacific contradict the traditional view of that company as a “malevolent monopoly representing selfish, greedy, corporate interests” in opposition to the “people” and the “public interest.” But historians have, for the most part, left unchallenged a similar negative view of Edward H. Harriman, who headed both the Union Pacific and the Southern Pacific and was perhaps the most powerful of the railroad tycoons during the first decade of the twentieth century. Prior to Harriman’s takeover of the Southern Pacific in 1901, that railroad’s long-standing policy had been to subdivide and sell lands to farmers, miners, and loggers, the purpose being “to encourage long-term settlement, economic growth, and rail traffic,” but Harriman questioned and ultimately rejected this policy. In January 1903, he ordered the termination of sales of the remaining Southern Pacific land grant, including the heavily timbered lands of the Oregon and California Railroad, which had been a Southern Pacific subsidiary since 1887.

It remains unclear whether Harriman initially intended for this suspension to be temporary in order to allow his men to ascertain fully the nature of his extensive land holdings, or whether this move in fact represented a permanent shift in policy. What is clear is that by 1905 virtually all sales ceased. Local Oregonians, as well as prominent lumber companies and politicians in the state, accused Harriman of undermining Oregon’s development, and a political movement there ultimately led the federal government in 1908 to sue Harriman’s Oregon & California Railroad for the forfeiture of its unsold lands. At the culmination of a seven-year legal battle, the

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3Ibid., xvii.
6Orsi found evidence that the termination of land sales was, in fact, meant to be a permanent policy. This is contradicted, however, by the later testimony of Harriman’s land commissioner, Charles W. Eberlein, that the termination—at least as applied to all of the lands of the Southern Pacific, Central Pacific, and Oregon & California—was merely to allow Harriman and his centralized land office to ascertain the nature of the lands, a process delayed by the San Francisco earthquake and fire a couple of years later. See Orsi, *Sunset Limited*, 123–25.
Supreme Court gave Congress the legal authority to seize the land and to provide for its disposition "in accordance with such policy as it may deem fitting"—and Congress quickly passed the Chamberlain-Ferris Act of 1916, which vested the remaining 2.3 million acres of the grant to the United States. Although historians have, for the most part, accepted the view that Harriman's land policies in Oregon were motivated by his apparently unrivaled speculative spirit, his policies were in fact consistent with utilitarian notions of conservation that he recognized as in keeping with his long-term profit motive.

The railroad issues that arose in the first decade of the twentieth century were rooted in the land-use regime Congress had established decades earlier. In the middle of the nineteenth century, federal land grants to railroads were a critical component of the government’s effort to conquer its newly expanded public domain. Stephen Douglas orchestrated the first such grant to the Illinois Central in 1850, made possible by his compromise to grant lands in a checkerboard pattern as a way to pay for the subsidy. The granting of public lands to railroads escalated during the Civil War with Congress’ passage of the Pacific Railway Act of 1862, which chartered and granted lands to the Union Pacific and the Central Pacific to aid in the construction of a railway from a point on the Missouri River in Nebraska to a point on the Pacific Ocean at or near San Francisco, and to the Leavenworth, Pawnee and Western Railroad for the construction of a southern branch through Kansas. This policy continued in subsequent years with similar grants to aid in the construction of transcontinental railways to the north and south of the Union Pacific-Central Pacific line. In all, the federal government granted roughly 130 million acres to railroads (37 million of which were granted to railroads via the states) from 1850 to 1871.

Railroad land grants shared several common features (as amended, if not originally): "rights-of-way" easements for the construction of the railways, including the right to use materials in the vicinity for construction and maintenance of the lines; the delineation of place limits within which the railroads' grants were contained (these ranged from ten miles to forty miles on each side of the railway); checkerboard provisions whereby the railroads' grants contained only alternate sections; the exclusion of mineral lands (other than coal and iron) and lands already settled, claimed, or reserved pursuant to federal laws; and the provision for indemnity.

7Pacific Railway Act of July 1, 1862, 12 Stat. 489, Statutes at Large, 37th Cong., 2d sess., ch. 120.
strips outside of the place limits within which the railroads could select lands in lieu of excluded place lands. In addition, some grants contained restrictions on the timing and manner of the railroads' disposition of lands to which they had received patents.8

As part of this general land grant policy, Congress in 1866 granted several million acres to Oregon for the construction of a railroad from Portland southward to the California border, where such road would connect with another being built from Sacramento. Oregon was directed to designate a company to construct the railroad and to receive a land grant consisting of alternating sections of public lands within ten miles of the railway as a subsidy to offset its operating expenses. Three years later, after the grant's specified time limit passed without any companies taking the required steps to avail themselves of the grant, Congress renewed the grant but added conditions to ensure that land was sold to settlers, not speculators. Based on the new conditions, the railroad receiving the grant was required to dispose of the land only to "bona fide settlers," in parcels no larger than 160 acres, and for no more than $2.50 per acre. Together, these conditions were commonly referred to as the "homestead clause." It was under this regime that Oregon & California acquired the rights to more than three million acres stretching in a checkerboard pattern from the Coast Range to the Cascade Mountains and from Portland to the California border.9

The Southern Pacific acquired control of the Oregon & California and its land grant in 1887, shortly after which the railway was completed. From that time until 1901, when Harriman acquired control of the Southern Pacific and its constituent railways, including the Oregon & California, the company pursued a policy of disposing of its lands quickly to develop the country and to build up long-term business for the road. Beginning in 1901, Harriman introduced new policies to oversee the railroad's use and disposal of the land grant. Although the various land departments of the constituent railroads had previously enjoyed much autonomy within the Southern Pacific system, Harriman sought to centralize authority and to develop a comprehensive land use plan,

8See Samuel Dana, Forest and Range Policy: Its Development in the United States (New York, 1956), 36–37, for a succinct summary of the legislative acts that created the land grants.
9Oregon & California Railroad Co. v. United States, 238 U.S. 393, 409 (1915).
whereby any of his railroads’ lands would be used to benefit his entire system.\textsuperscript{10}

Harriman’s strategy required an extensive review of the Southern Pacific’s policies of land disposal up to that point. Regarding the Oregon & California land grant, the records showed that the railroad had disposed of 813,000 acres with little regard for the homestead clause. In fact, only 127,000 acres were sold in compliance with that clause, while more than half were sold in parcels of more than two thousand acres. The average sale price was about five dollars an acre, double the maximum allowed.\textsuperscript{11} A large portion of the 813,000 acres was sold after 1895, when lumber companies and investors became interested in Oregon’s vast timber resources primarily for speculative purposes. From 1895 to 1901, the company disposed of 363,000 acres to only thirty-eight buyers, with prices ranging from five dollars to forty dollars an acre.\textsuperscript{12}

Although the homestead clause had little influence on the railroad’s decisions regarding disposal of grant lands, the grant’s other measure meant to ensure rapid settlement—its checkerboarding provision—heavily constrained the railroad’s activities. One of the principal purposes of checkerboarding was to ensure that lands along the railroad were settled and developed rather than held in monopoly by the railroad or any successor in interest. This system, though, as applied to non-agricultural lands, had the effect of making it difficult for any entity to use the land for any purpose. The timberlands of Oregon, for example, were primarily, if not exclusively, valuable for their timber, but lumber operations required a solid body of land in order to extract timber at a profit. The Southern Pacific long recognized this fact, as did Harriman’s land commissioner, Charles W. Eberlein, who complained that the checkerboard pattern of the railroad’s grant made it virtually impossible for the railroad to dispose of the land, since timberlands could not be sold in a “piece-meal” fashion.\textsuperscript{13}

\textsuperscript{10}Charles W. Eberlein, whom Harriman dispatched to San Francisco to oversee the land departments, later reported that Harriman’s control was so tight that Eberlein was required to send all applications for purchase of timberlands to New York for Harriman to review and decide on a course of action. Transcript of Record, Supreme Court of the United States, no. 492, October term, 1916, \textit{Oregon & California Railway Co. v. United States} [hereinafter referred to as “Transcript”], available at \textit{The Making of Modern Law: U.S. Supreme Court Records and Briefs} 2329, 2399, 2746, http://gdc.gale.com.


\textsuperscript{12}Ellis, “Oregon and California Railroad Land Grant,” 260–61.

\textsuperscript{13}Orsi, \textit{Sunset Limited}, 381; Transcript, 2328.
Harriman indeed found that the railroad's long-followed, pro-development policy of selling timberlands cheaply only encouraged speculation. This was both because the annual rise in value of the timber exceeded the taxes and interest payments required to retain the land, thus making it profitable simply to hold the land, and because there was not much of a market for the grant's timber, due to its relative inaccessibility as compared to the still-plentiful forests of Washington and California. Accordingly, only "a very, very small fraction" of the timberlands that the Oregon & California sold, including those it sold either directly or indirectly to lumber companies such as the Booth-Kelly Lumber Company, had been milled even by 1912. Based on these experiences, Eberlein ultimately concluded that "anybody that comes in and wants to buy all the timber in [multiple] townships of land [had] no immediate intention of doing anything with it."14 Rather, the lands were simply "held for the rise."15

In 1903, citing the fact that the remaining lands were primarily heavily timbered and unsuitable for settlement, Harriman ordered the termination of all timberland sales in lands encompassed by the Oregon & California grant.16 At the National Irrigation Congress of 1907, held in Sacramento, California, Harriman justified his decision to withhold the lands from sale based on the need for conservation. He insisted that his companies were not "holding those lands for speculation" but instead were holding them "to protect [the people] in the future." Considering that "ties are the foundation of the transportation line," he stated his intent "to have a reserve with which we can maintain these great transportation lines for those that come after, that they may not accuse us of wast-

14 Transcript, 2342–44.
15 Ibid. As another example of this phenomenon, Eberlein discussed the example of T.B. Walker's handling of his timberlands in northeastern California: "They bought out timber concerns and mills and shut them down and they have existed all this time simply upon the increase in the growth of the timber which, as I have told you, is large enough in timber of certain age to more than equal the taxes and interest on the investment; and in this particular case it must be remembered that this timber was sold by the Railroad on conditions that never were duplicated that I know of in this country." Transcript, 2351–52.
16 This policy was not limited to the Oregon & California land grant but rather applied to all lands of the Southern Pacific and Central Pacific as well. See Orsi, Sunset Limited, 123–25.
ing the resources which we had at our command." Harriman's 1907 speech was consistent with a statement he made to a newspaper reporter that same year:

The Southern Pacific will sell land to settlers, but not to speculators. We can tell a speculator from a settler as well as anyone. The agricultural land we will sell, but the timber-land we will retain, because we must have ties and bridge timbers, and we must retain our timber for future supply. The Southern Pacific has an insufficient amount of timber now, and we have had to buy large tracts, looking to the future supply of ties and material. Yes, we will sell to settlers, but speculators will get none.

Harriman's goal, in other words, was to prevent harmful speculation and to conserve the timber for future railroad use.

At first glance, Harriman's conservationist justification seems inconsistent with the dominant brand of conservation represented by President Theodore Roosevelt and Gifford Pinchot, neither of whom ever advocated massive curtailing of development. Rather they advocated managing forests with the goal of promoting more efficient and prolonged development without sacrificing present yield. At the meeting of the American Forestry Congress in 1905, immediately after which management of forests was transferred to the Department of Agriculture under the newly renamed Forest Service, Roosevelt assured pro-development westerners that the government's policy was "consistent to give to every portion of the public domain its highest possible amount of use." Pinchot added that "[t]he administration of the forest reserves is based upon the general principle . . . that the reserves are for use. They


18Transcript, 4267. According to Orsi, this statement may have been a lie, based on the fact that the initial sale order applied to all lands, and very few sales occurred on any lands during Harriman's tenure. See Orsi, Sunset Limited, 124–25.

must be useful first of all to the people of the neighborhood in which they lie." On their face, Harriman's policies appeared to violate this simple rule of conservation.

Assuming that Harriman's no-sale rule thwarted development, it would indeed seem that his policies contradicted the very conservationist principles he attempted to evoke. However, it is not at all clear that his policy impacted development at all. As of the time when Harriman issued his no-sale order, there were not many settlers on the land, even after decades of efforts to attract farmers from the East. Moreover, as the railroad's land commissioner Eberlein reported, almost all of the lands in the possession of lumber companies were simply being held, likely because of their inaccessibility and distance from markets. That the lack of development was due more to physical and economic geography than to Harriman's decisions would later be confirmed by both government reports and the government's own experiences once it reacquired the lands in 1916.

Given these realities, which Harriman and his men appreciated long before Congress did, Harriman's termination of land sales can be seen not as anti-development but as a recognition that the market system, in this instance, had failed—and would likely continue to fail—to promote the rational, efficient use of the land's natural resources. This rationale was thus consistent with the conservation movement, which was, above all—as Samuel P. Hays has articulated—a scientific movement advocating that scientists take the lead in determining natural resource use rather than leaving such questions to political or economic forces. Harriman was both a benefactor and a consumer of the emerging sciences of conservation.

Harriman had already demonstrated his personal support of the natural sciences when he arranged and funded a maritime expedition to Alaska in 1899. What began as a vacation for him and his family was radically transformed when Harriman conceived of inviting an entire community of scientists to explore and document the coastlines of Alaska. The expedition included biologists, botanists, geographers, geologists, and zoologists, as well as several artists and intellectual writers. Scientists and intellectuals who accepted Harriman's invitation to participate included John A. Muir; C. Hart Merriam, chief of the U.S.


Biological Survey; William E. Ritter, president of the California Academy of Sciences; Henry Gannett, chief of the U.S. Coast and Geodetic Survey; George B. Grinnell, editor of *Forest and Stream*; and Bernhard E. Fernow, former chief of the Department of Agriculture's Division of Forestry.\(^{23}\) In the decade following their time together on what was referred to as the “Harriman Expedition,” Muir and Harriman maintained a regular correspondence and formed what environmental historian Donald Worster has labeled “an improbable bond” based on a “mutual understanding . . . [of] the value of an efficient railroad system and on the wisdom of establishing national parks.”\(^{24}\) Worster recently argued that, from the expedition until Harriman's death a decade later, Muir saw Harriman “as a well-meaning friend and potential ally of the conservation movement.”\(^{25}\)

Harriman was also a consumer of conservation science. In 1902, he personally applied to the Bureau of Forestry for experts to be dispatched to Arden House, his 15,000-acre estate in Orange County, New York, to advise him on how to conserve the estate’s 8,000 acres of dense forest.\(^{26}\) On receiving Harriman’s request, the bureau sent nine men instead of the normal two to develop a working plan for improving Harriman's timber. The foresters reported being excited at the opportunity to use “ingenious methods” for examining the abilities of various species of trees to bear shade, to reproduce, and to withstand damage from forest fires.\(^{27}\) The nine forestry students completed the necessary fieldwork between April 1 and June 15, during which time they created a forest map of the entire tract and compiled, according to the Department of Agriculture’s annual report, “a careful study of the forest, by which its character, condition, present stand, and future yield were ascertained.”\(^{28}\)

There is also evidence that Harriman was motivated not just by a form of utilitarian conservation but also by a preservationist ethos. After visiting Harriman’s New York estate, Muir, for one, concluded that Harriman indeed loved the forest and its

\(^{23}\)See “The Harriman Expedition,” *Los Angeles Times*, August 1, 1899.


\(^{25}\)Ibid., 362–63.

\(^{26}\)In 1898, as head of the Division of Forestry, Pinchot had issued “Circular 21.” This document offered to assist private landowners to develop plans for forest management and fire protection, provided that the owners paid all expenses. Thomas R. Cox et al., *This Well-Wooded Land: Americans and Their Forests from Colonial Times to the Present* (Lincoln, NE, 1985).

\(^{27}\)“To Improve the Harriman Forest,” *New York Times*, April 20, 1902.

wildlife and considered it something to cherish and conserve, at least when consistent with economic development. Beyond preserving his own timbered estate, Harriman's desire to leave certain places alone was also demonstrated in 1905 when he lobbied in support of the Sierra Club's efforts to incorporate the Yosemite Valley into the national park that then surrounded it. Later, in his 1907 speech before the National Irrigation Congress, he showed an aesthetic concern for the preservation of Oregon's natural beauty. He argued that "Oregon ought to be the country's playground. There's a vastness of fine scenery there."\(^{29}\)

Through his words and actions, Harriman was able to convince Muir of his concern for nature beyond its mere economic value. In spring 1909, when Muir was visiting Harriman and his family in Pasadena, California, Muir was asked how he, "a nature lover, [could] happen to be visiting a cold-blooded financier." He answered, reportedly while fighting back tears, that "Mr. Harriman has a heart. People may not know it, but he loves the flowers and the trees. He loves nature and human nature."\(^{30}\)

\(^{29}\)"Magnate Wins Applause for Funny Speech," *San Francisco Call*, September 5, 1907.

Importantly, the people of Oregon also took Harriman at his word. While historians have questioned Harriman’s motives in ordering the termination of land sales, Oregonians believed his stated rationale, and this is precisely why they became so angered. Harriman’s no-sale order and his subsequent explanation enraged a wide cross-section of the public, particularly in the affected localities of Oregon. Encouraged by prominent lumber companies in the state, local residents accused Harriman of undermining Oregon’s development by locking up its natural resources. While the backlash against Harriman undoubtedly fed off a populist distrust of railroads as malevolent monopolies that threatened to hold local populations hostage to their economic whims, people also linked Harriman to what they saw as an equally menacing force: the eastern conservation movement. In the weeks following his 1907 speech at Sacramento, the Oregonian accused Harriman of desiring “to make a reserve out of the whole of Oregon.” In fact, said the paper, “he counts it his reserve now.”

31 Excerpted in “Mr. Harriman’s Apology Not Accepted,” San Francisco Call, September 17, 1907.

Architect William H. Holabird, E.H. Harriman, and John Muir (left to right) posed together at Harriman’s lodge in Pelican Bay, Oregon. (Courtesy of John Muir Papers, Holt-Atherton Special Collections, University of the Pacific Library, MSS04.F25-1386. Copyright 1984 Muir-Hanna Trust)
The *Oregonian* questioned not just Harriman’s motivations, but those of all who purported to be concerned with conservation: “This state is plastered from one end to the other with timber speculators in syndicates and as individuals. All pretend to be saving for the nation a wood supply. The truth is they are keeping out settlement and maintaining a wilderness in order at some future day to gratify their lust for wealth.”32 The *Oregonian* believed that the state needed, above all, “the clearing up of forest land” near the railroads so that it could “be used for agriculture and for sustaining a larger population.”33 To the people along the Oregon & California line, whether Harriman epitomized the speculator or the conservationist was immaterial, since the conservationist was merely a new form of speculator. Both were seen as equally threatening to the rapid development of the region.

Based on Harriman’s apparent refusal to sell much, if not all, of the remaining land grant, Senator Benjamin R. Tillman of South Carolina introduced, and Congress quickly passed, legislation authorizing the attorney general to institute proceedings for the forfeiture of the railroad’s unsold lands. Attorney General George W. Wickersham complied and filed suit in September 1908 against the railroad, one of its creditors, and many individuals and companies who had purchased lands in violation of the grant’s terms.34 Although the no-sale order precipitated the lawsuit, the many sales the railroad made prior to 1903 in violation of the homestead clause served as its legal justification.

32“Mr. Harriman’s Apology Not Accepted.”
33Ibid. Historian Roy M. Robbins argues that the West during this time was not anti-conservationist at all but instead was opposed to government intervention based on the government’s past promotion of land theft, including most notably the Forest Lieu Land Act of 1897. Roy M. Robbins, *Our Landed Heritage: The Public Domain, 1776–1936* (Lincoln, NE, 1962), 338–40. Carlos Arnaldo Schwantes, however, insists that western resistance was based on a rational fear that the conservation ethos, despite Roosevelt’s assertions to the contrary, would only serve to tie up resources and inhibit growth. Schwantes, *The Pacific Northwest: An Interpretive History*, rev. and enl. ed. (Lincoln, NE, 1996), 221.
34In 1912, Congress passed the Forgiveness Act, 37 Stat. 320, which dropped the government’s claims against individuals and companies that had purchased large tracts of land in good faith and without knowledge of the grant’s homestead clause forbidding such sales. This legislation was passed in no small part because the lawyers at the Department of Justice had convinced members of Congress that the individuals who purchased the affected 524,000 acres were “small fry” settlers and were so numerous that litigation would be virtually unending, meaning also that the land would be tied up for decades. It was later revealed that several of the purchasers were lumber companies and other interests that had purchased tracts in excess of 10,000 acres, and many of these “innocent purchasers” had been indicted—and some convicted—in the land fraud trials of 1905–1907. See *O & C Land Grants*, 203. The Forgiveness Act allowed innocent purchasers to keep title so long as they paid the government $2.50 per acre, even though some of the land was worth as much as $500 per acre.
Seeming to contradict the Harriman regime’s assessment of the grant lands was the fact that, beginning in 1907 and continuing for the entire seven years of litigation, thousands of individuals filed applications with the railroad company for the purchase of quarter sections. In that year, as the political movement to force the forfeiture of the land grant gained momentum, residents of Oregon began “rushing into the rich timber country and gorging it up.”35 This movement apparently was based on the government’s indications that, once individuals offered to purchase lands at $2.50 an acre and were refused, they would then have standing to sue the railroad to force such sales and would “have a pretty good case.”36 The Wall Street Journal reported “a frenzy of excitement” in Oregon, where “thousands are leaving home and stampeding to the railroad land grants . . . to force Harriman to surrender” the land.37 By June 1907, it was reported that “in many counties every quarter section of the land held by the railroad has a claimant.”38

Although the government later used these claims as evidence that the land was indeed capable of being settled under the homestead clause—contrary to the claims of Harriman and his railroad—it appears that the vast majority of the applicants in fact had no intention of homesteading on their claims. In his extensive overview of the Oregon & California land grant, David Maldwyn Ellis concluded that “these so-called settlers were speculators or dummies for speculators who hoped to make good their title to valuable timberlands at a nominal sum.”39 Indeed, “practically all” of the 14,000 to 15,000 applications to buy land from the railroad company during this time period, according to Ellis, “were speculative in character,” a fact that was revealed over the next decade as the Department of Justice convicted nine professional locators, each representing several hundred applicants, for fraud in connection with these purported applications for purchase and actual settlement.40

36Ibid. As it turned out, they did not have a good case; the Supreme Court ultimately dismissed the claims of these prospective purchasers. Based on the fact that the grant did not compel the railroad to sell and did not even define “actual settler,” the prospective purchasers did not have any right to enforce the grant’s conditions, according to the Court. Oregon & California Railroad Co., 238 U.S. at 434–35.
37“After Harriman Road’s Land,” Wall Street Journal, June 5, 1907.
38Ibid.
40See Ellis, “Oregon and California Railroad Land Grant,” 268.
Testimony in the divestiture trial corroborated Harriman’s assessment that the vast majority of the land was unsuitable for the type of homesteading that Congress had envisioned and the grant required. In fact, in all of his work in the railroad’s land department since he was first employed in 1889, F.A. Elliott could not remember a single instance in which the railroad had sold a quarter section to a person who then actually made a home and a living on that acreage. The same apparently was true on the even sections within the grant; Homer D. Angell, a surveyor for the railroad and the government, observed that “lands acquired by homestead from the government on the timbered areas are never occupied for any appreciable period after title has been acquired.” In many cases, those who attempted to establish homesteads on these lands failed. Elliott noted that the few improvements that had existed on these lands in the 1880s had, by the first decade of the twentieth century, “grown up to brush.”

Regardless of the wisdom of congressional policy, the federal government at first appeared to have the law on its side. In 1913 the district court ruled in the government’s favor by decreeing the unsold grant lands forfeited and quieting the government’s title to such lands. The railroad, however, appealed this decision on several legal grounds, including that the homestead clause constituted not a condition subsequent justifying forfeiture, but rather a set of restrictive and unenforceable covenants, and alternatively that the government had waived its right to enforcement of the provision through its years of acquiescence. In delivering the opinion of the Supreme Court, Justice Joseph McKenna agreed with the railroad that the homestead clause lacked the required technical language to constitute a condition subsequent touching the railroad’s property interest, but he also disagreed with the railroad’s contentions that the conditions were unenforceable. He held instead that the grant’s conditions constituted both contractual covenants and laws, and thus were strictly enforceable.

As to the appropriate remedy, however, the Court agreed with the railroad’s contention that the land invited “more to speculation than to settlement.” It therefore declined to order the railroad to sell the remaining lands pursuant to the terms of the grant or merely to enjoin the railroad from violating the grant any further. Instead, apparently in recognition that the

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41 Transcript, 2727.
42 Transcript, 2774.
43 Transcript, 2727.
homestead clause was unworkable as applied to the remaining grant lands, it enjoined the railroad from "any disposition of them whatever or of the timber thereon, and from cutting or authorizing the cutting or removal of any of the timber thereon," and it directed Congress to provide by legislation for their disposition in accordance with such policy as it may deem "fitting under the circumstances." In disposing of the lands, Congress was required to secure to the railroad "all the value the granting acts conferred upon the railroads."45

In deciding how to dispose of the lands, some in Congress insisted that the lands were still amenable to the type of settlement that Congress originally had contemplated, despite all the evidence to the contrary. Representative Willis C. Hawley from Oregon, for example, claimed to have received "a large number of letters from men . . . stating that there have been people living on these lands, with good houses and good improvements, who settled on the lands and made their improvements in good faith and are living there and have been making a home for a number of years on the land."47 "All through the grant," he insisted, "with the exception of comparatively small areas, there are farms of agricultural lands."48 Representative Clifton N. McArthur, also from Oregon, however, disputed Hawley's claims. He cited a joint investigation conducted by the Interior, Justice, and Post Office departments, which found that "all but a comparatively small percentage" of the thousands of applications for the purchase of land from the railroad were "secured by so-called locators," and that there were "very few, if any, actual settlers on these lands" as of 1916.49

The interests of Oregonians weighed heavily on Congress' deliberations. Immediately after the Supreme Court delivered its opinion, the governor of Oregon called together delegates in Salem to discuss the matter. The conference attendees resolved that Congress should "enact laws defining and settling who shall be considered actual settlers . . . and what shall be considered an actual settlement, and requiring the [railroad] to perform the terms and conditions of the [grant] and to sell and dispose of said lands according to the true intent and purpose of

45Ibid.
48Ibid., 188. Clay Tallman, commissioner of the General Land Office, corroborated Hawley's testimony by estimating that as much as 75 percent of the land was suitable for settlement and cultivation.
They also declared their "unalterable" opposition to the creation or enlargement of any forest reserves in Oregon. They proposed, instead, that Congress provide for the immediate sale of grant lands under the conditions of the homestead clause, while also protecting the process from fraud. Despite the appearance of unanimity, however, McArthur contended that Oregonians were in fact divided on how the lands should be handled. He cited the fact that, immediately after the conference passed its initial resolutions, it passed a new set of resolutions directing the conference chairman to form a committee to negotiate a settlement with the Southern Pacific that could then be presented to Congress, the apparent purpose being, above all, to avoid a prolonged dispute.

The politicians from Oregon largely followed suit in arguing that Congress should provide for actual settlement of the lands. For his part, Senator George Chamberlain, whose bill dominated the debate in Congress and ultimately was passed, reported that he realized, after Harriman's speech at the Irrigation Congress in 1907, "the importance to the people of the State to have these lands brought under actual settlement by sale or otherwise so as to assist the State in its development and in the purposes of government." Although he claimed to be "nearly alone in the West ... in defending the policies of the Forestry Service" and to have been "one of the original advocates of that for the welfare of the people, with Mr. Pinchot," he argued that no more lands in Oregon, except those that were deemed necessary to protect water supplies, should be added to the forest reserves. Representative Hawley purported to relay his constituents' demands "that no part of the lands be placed in the forest reserves; that all of these lands be made available for development under proper conditions; that all lands capable of any agricultural use be disposed of for that purpose; that the just rights of the State and counties of Oregon be recognized and provided for; that provision be made for the payment of accrued taxes; and that all of these lands remain on the tax rolls." Finally, Representative McArthur insisted that what Oregonians wanted most were "actual settlers, people who will go there and make homes in the wilderness ... and build up

\[50\] Ibid., 7.
\[51\] Ibid.
\[52\] Ibid., 200.
\[53\] Ibid., 144.
\[54\] Ibid., 156.
\[55\] Ibid., 200.
communities that will be of material benefit to the development of the state."\(^{56}\)

A report submitted by the Department of Agriculture, as well as the testimony of department officials, not only confirmed the railroad’s assessment of the unsuitability of the grant lands for settlement, but also implicitly vindicated both the railroad’s policy of selling timberlands in large tracts prior to 1903 and its termination of land sales after that date. The department considered “some” of the lands to be agricultural, but it determined that “most of it was heavily timbered.”\(^{57}\) Furthermore, just as the railroad had found it untenable to sell heavily timbered lands in 160-acre legal subdivisions, the department’s report criticized any attempt to limit land sales to small legal subdivisions as “not consistent with the natural requirements of the industry.”\(^{58}\) Assistant Forester William B. Greeley testified that limiting sales by “any legal subdivision” would “likely lead to mismanagement,” and he encouraged Congress to leave it to the Interior or Agriculture department to make sales “in accordance with the topography—normally by watershed—and the natural logging factors.”\(^{59}\) He indicated that even sales in excess of 20,000 acres could be justified. Finally, the Department of Agriculture confirmed Harriman’s contention that there was little market for the immediate consumption of timber and that any purchases of timberlands would be at very low prices and only for speculative purposes. Based on western Oregon’s market position, the department reported that “it [was] obvious that vast quantities of privately owned timber must be held for many decades before it can be marketed” for consumption. Thus the department recommended holding the lands from sale, except in the few cases where local mills demanded stumpage, until such time—possibly even decades into the future—that the market conditions changed considerably.\(^{60}\)

\(^{56}\)Ibid., 201.

\(^{57}\)Ibid., 219. Regarding those timberlands deemed agricultural, Assistant Forester William B. Greeley testified that the costs of clearing timber for the purposes of cultivation—which could be as much as $400 per acre—would be “relatively heavy,” the clear insinuation being that such costs would act as an economic barrier to such development. O & C Land Grants, 240.

\(^{58}\)Ibid., 224.

\(^{59}\)Ibid., 242.

\(^{60}\)Ibid., 220–22. Of course, representatives from the U.S. Forest Service differed from the railroad’s policy in one important respect: it pushed for all of the timberlands to be held in public ownership under the jurisdiction of the Forest Service. Even this, however, was not based on a distrust of the railroad’s motives, but rather on a concern that carrying the lands would be too heavy a burden for any private party. See O & C Land Grants, 236–37.
Unfortunately, Congress disregarded many of the observations and recommendations of the Department of Agriculture in its Chamberlain-Ferris Act of 1916. This act revested the remaining grant lands in the federal government and provided for their sale as well as the disposal of the timber upon them. Rather than providing for the efficient management of the forests pursuant to conservationist principles, as government foresters had advised, the act directed the secretary of the interior to sell off the timber to the highest bidder, at which time the timberlands could be reclassified as agricultural land and opened for settlement. Moreover, Congress disregarded Secretary David F. Houston's recommendations that any sales of timberlands be in large tracts and not according to legal subdivision when it instead provided that each legal subdivision be offered for sale separately before any larger sales were made. Finally, in designating that proceeds from land and timber sales in excess of the amount owed to the railroad would adequately compensate the Oregon counties for tax revenues lost as a result of the land's being ordered forfeited in 1913 and ultimately transferred to public ownership in 1916, Congress failed to heed the department's advice regarding the lack of an immediate market for standing timber and the extent to which the immediate sale of timber would depress its price.\[^{61}\] Sure enough, sales were slow, the system Congress created proved unworkable, and the counties were on the verge of economic collapse in 1926, when Congress approved a loan to the counties in the amount of lost tax revenues and passed a new formula for distributing the revenues from the lands.

With its 1916 legislation, Congress exchanged a land regime in which the railroad had demonstrated its interest in managing the lands for long-term sustainability for one that perpetuated the federal government's nineteenth-century approach to public lands. All of this occurred despite the concerns expressed by the prior generation over the exhaustibility of the

\[^{61}\]Chamberlain-Ferris Act of June 9, 1916, U.S. Statutes at Large, 64th Cong., 1st sess., ch. 137, 39 Stat. 218. After the district court's decree of forfeiture on July 1, 1913, the railroad stopped paying taxes on unsold lands. Prior to the forfeiture, the railroad had paid a total of $1,820,000 in taxes on the land, much of which was in recent years due to the increased assessed value of the lands. In his testimony before the congressional committee considering the Oregon & California land grant, government attorney Stephen W. Williams estimated that the tax burden had increased tenfold in the previous ten years and that the railroad owed about $1.3 million in unpaid taxes for the previous three years. O & C Land Grants, 6. The Department of Justice's report recommended that the government pay the back taxes immediately, not only in fairness to the adversely impacted counties, but also to remove the "cloud upon the Government's title," which would "embarrass any attempt to dispose of the lands to settlers." O & C Land Grants, 26.
nation's natural resources and over the waste and possible irreversible damage that resulted (and would continue to result) from the government's promotion of immediate development.

The actions of Harriman and his Oregon & California railroad were consistent with conservationist principles; Harriman and other railroad officials repeatedly expressed a concern for guaranteeing a sustainable supply of timber both to guarantee a permanent supply for the railroad's operations and to facilitate the continued prosperity of the region on which the railroad depended. The myth regarding conservation portrays the battle over control of the natural environment as one pitting "the people," as represented by conservationists, against "the interests" represented by industrialists and capitalists. According to this myth, Harriman cannot be considered a conservationist because he was a capitalist who was motivated by self-interest, namely the continued economic viability of his railroad empire, in addition to any concerns he may have held for the general public welfare. This case, however, serves as a prime illustration of Samuel P. Hays' influential thesis that the Progressive conservation movement was not, in fact, a crusade of the people against the trusts, as many Progressives tried to argue. Those economic, political, and legal actors supposedly least responsive to the needs or demands of "the people"—a railroad tycoon and appointed federal bureaucrats—were the first to realize that the lands of the Oregon & California grant should be managed as forests with an appreciation of the needs of future generations, while the people and their representatives in Congress continued to push for the clearing of timberlands and the perpetuation of the homestead policy of the nineteenth century.

President Calvin Coolidge would later complain about the land-grant railroads' ability to use the law as an instrument not only to insulate themselves from prosecution for their supposed subversions of federal land-grant policies, but also to secure additional benefits contrary to the interests of the public and the government in efficiently managing the nation's natural

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resources. However, the experiences of the Oregon & California during the first decades of the twentieth century provide a far different narrative. While certainly corroborating Coolidge's lament that law had operated to inhibit effective management of natural resources, the Oregon & California's experiences show, at least in this important instance, that it was the government, and not the railroad, that used outdated laws as instruments to block conservationist advances, and it was the railroad, and not the democratically elected branches of government, that sought cooperation with the federal bureaucracy to implement management regimes that would ensure sustainable economic development, even if at the cost of short-term gains.

That Harriman had a profit motive in seeking to ensure a continuous supply of timber for the maintenance of his railroad empire should not undermine his conservationist credentials. Indeed, notable conservationists within the federal forest bureaucracy recognized that the movement depended on the willing participation of business interests. Writing just a year before Harriman's termination of land sales, for example, former chief of the Division of Forestry Bernhard E. Fernow predicted that wealthy capitalists like Harriman, "who can see the financial advantages of the future in forest properties," would quickly become the newest "class" of conservationists. Fernow thus concluded that, aside from being owned by the government, forest resources were most likely to be conserved when in "the hands of perpetual corporations and wealthy owners." Other conservationists, including Pinchot, recognized that their movement would succeed only when private commercial entities appreciated the extent to which their continued prosperity depended on the rational management of natural resources. As Roosevelt asserted at the American Forest Congress in 1905, the conservation movement—as well as America's continued economic growth—would depend not on philanthropists or the general public, but on "the men who are actively interested in the use of the forest in one way or another." Harriman agreed with Roosevelt's assessment that "the railroads must have ties," and thus he was among the first to answer the conservationists' call.

66 Ibid., 6–8.