Reclaiming the Navajo Range: Resolving the Conflict between Grazing Rights and Development

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Grazing is fundamental to Navajo identity, yet management of the Navajo range remains highly problematic. This Essay connects the federal government's devastating livestock reduction effort of the 1930s with the inability of the Navajo Nation to place meaningful limits on grazing and the power of grazing permittees. It argues that the Navajo Nation should consider reasserting the tribe's traditional understanding that property rights depend on use as a way to create space for reservation development.
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INTRODUCTION

The family grazing permit is the most important asset of many Navajo families. When grazing permittees fail to provide adequately for who should inherit their permit, grazing right contests can lead to deep family resentments and the need for court involvement. Livestock, in particular sheep and goats, are a fundamental part of the lifestyle and identity of many Diné (the Navajo word for themselves, which can be translated as "the people"). The Diné now control the largest reservation in the United States, an area larger than the Republic of Ireland, and the Navajo Nation government has significant powers over reservation life. That the tribe has this land base and survived as a people despite considerable pressure from outside groups—including other tribes, the Spanish, ranchers, and the U.S. military—is testament to the Diné character. The Diné have a long history of incorporating outside practices into their culture. This adaptivity helps explain why sheep, and grazing generally, are such a fundamental part of Diné identity.

This Essay argues that the Navajo Nation should more aggressively

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1 Navajo Nation, RDI NATIVE PEOPLES TECHNICAL ASSISTANCE OFF., U. OF ARIZ., http://nptao.arizona.edu/navajo-nation (last visited Feb. 1, 2019) ("The . . . Dine’ . . . govern the largest reservation in the United States, covering more than 27,000 square miles and extending from Arizona into Utah and New Mexico. According to the 2015 American Community Survey, more than 300,000 Navajo reside in Arizona, New Mexico, and Utah.").


3 See PETER IVERSON, DINE: A HISTORY OF THE NAVAJOS 21 (2002) ("[I]t was becoming a society noteworthy for its members’ willingness to look around the corner and over the next hill, for their curiosity about what might be gained by exploration and inquiry, and for their determination to do well. . . . Once the people acquired a few horses, they wanted or needed more horses—and more land for them. Once they obtained a few sheep, they understood the benefits of having more—and the necessity of finding a place for them.").
assert meaningful control over grazing rights and customary use rights. In some circumstances, the tribe may need to limit some of the rights held by tribal members. This is a contentious argument in part because previous efforts to reduce the land and grazing rights held by tribal members inflicted considerable suffering on the Diné. To this day, the Navajo Nation struggles with the legacy of livestock reduction, a federally imposed program that decimated Diné wealth during the New Deal. Though the federal government stepped away from active management of the Navajo range after World War II, the trauma of livestock reduction continues to paralyze land reform efforts. What began as a familiar story of external domination became a problem of tribal governance as well. This Essay connects the pain of livestock reduction with the myriad ways that grazing and customary use rights block economic development on the reservation.

Resolution of the conflict between grazing rights and development ultimately belongs to the Diné people. This Essay avoids answering whether land reform should prioritize and reflect local governance experiments at the chapter level or whether such reform should be carried out at the national level through the central Navajo Nation government in Window Rock. There are costs and benefits associated with either of these options, but what is important is that the Diné find a way to break the impasse that has existed regarding customary use and grazing rights. Livestock reduction was a cruel policy that would never have been imposed on white ranchers, but the memory of that period should not continue to cripple land reform efforts. It is an almost impossible task to locate precisely the moment when, for most practical purposes, the Navajo Nation gained effective control over the use of tribal land. Was it when the federal government backed away from livestock reduction, when President Nixon officially launched the self-

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4 This Essay focuses on an issue involving a single tribe and is inspired in part by the late Philip Frickey. Shortly before he died, Frickey applauded what he saw as the “emerging movement toward a greater legal realism in federal Indian law—a movement away from doctrinal work and toward more empirical, more grounded, more experiential examinations of tribal law and tribal institutions.” Philip P. Frickey, Address at University of Kansas Conference on Tribal Law and Institutions, February 2, 2008 - Tribal Law, Tribal Context, and the Federal Courts, 18 KAN. J.L. & PUB. POL’Y 24, 28 (2008). Navajo grazing, unlike, for example, tribal sovereign immunity or tribal labor protections, likely will not be a hot button issue before the U.S. Supreme Court anytime soon, but it does play a significant role in shaping reservation life and Navajo economic development.

5 See, e.g., IVerson, supra note 3, at 137 (discussing how the livestock reduction program indefinitely changed the Diné way of life by “caus[ing] massive trauma within the Navajo world” and “influenc[ing] attitudes toward . . . land use, . . . tribal government, education, health care, and religious observance” (alteration in original)); MARSHA WEISIGER, DREAMING OF SHEEP IN NAVAJO COUNTRY 209–10 (2009) (discussing how officers arrested, beat, and imprisoned stock-owners who defied drastic livestock reducing programs).

determination era in a Special Message to Congress,\(^7\) or much more recently with the passage of the Hearth Act of 2012?\(^8\) Reasonable minds can differ—for the Navajo Nation, the relative authority of the federal government and the tribe arguably switched during the Peter MacDonald era—\(^9\) but what is clear is that today the tribe cannot deflect blame onto the federal government for current regulatory failures or mismanagement of customary use and grazing rights. Land management problems “belong” to the tribe, and the tribe has the authority to implement a better approach.

This Essay argues that the Navajo Nation should reclaim customary use and grazing rights through policies that draw upon the tribe’s traditional emphasis on “use” as the basis of property rights. Reclaiming “use” would allow the tribe to right-size land holdings where customary use and grazing claims not supported by actual use of the land are harming the interests of the tribe. Part I describes the significance of livestock in Diné society, gives a condensed history of livestock reduction, and highlights the cultural legacy of stock reduction. Part II explores the hold grazing rights have over reservation development and sketches out some efforts that might be made to assert authority over rangeland and free up space for non-agricultural development. Part III lays out a theoretical vision for right-sizing grazing rights grounded on traditional “use” rights, relying upon traditional values to reaffirm existing property rights while requiring that those whose property claims have lapsed recognize the claims of the larger Diné community. The relatively modest hope of this Essay is to present a set of feasible paths forward that will allow the Navajo Nation to gain control of reservation land use without trampling on tribal members’ use rights.\(^10\)

I. NAVAJO PASTORAL IDENTITY AND LIVESTOCK REDUCTION

Livestock feature prominently both in Diné identity and in the history of the Navajo Nation. Extended family dynamics and gatherings often revolve around livestock in some way. Horses, goats, and sheep especially occupy a central place culturally, as can be observed in everything from the reservation rodeo circuit to the beautiful handmade woolen rugs that many

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\(^7\) Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564, 564–65 (July 8, 1970) (“The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).


\(^9\) Donald L. Fixico, American Indian Leadership in History to the Present, 29 RIKYO AM. STUD. 29, 29 (2007) (“In modern times of the twentieth century, Peter MacDonald of the Navajo guided tribes throughout Indian County into the era of Self-Determination . . . .”).

Diné produce. On the reservation, drivers know to look out for sheep moving under the watchful eyes of shepherds and sheep dogs. For many Diné families, a grazing permit is their most prized, most defining, and most contentious possession. The modern Navajo Nation government was formed in 1922 to facilitate oil leases between the Diné and outside corporations, but livestock reduction was the major crisis faced by the nascent Navajo Council. Livestock reduction left an indelible mark on the Diné people, and the Navajo Nation has struggled ever since with grazing rights because of the long shadow of that trauma.

The very survival of the Diné as a people is a testament to the ability of tribal members to build lives around their animals even in the face of significant challenges. Selective incorporation of technology and other groups into their society is a standard Diné practice. Although introduced by the Spanish, horses and sheep quickly became part of Diné life. Hostilities occasionally flared between settlers and ranchers to the East and Diné living beyond white settlement. Until recently, most histories focused on Diné raiding and theft of livestock; but, as more is written about the extent to which Indian slavery was a routine part of life in New Mexico, a full accounting acknowledges raiding on both sides of the relationship.

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11 History, NAVAJO-NSN.GOV, http://www.navajo-nsn.gov/history.htm# (last visited Feb. 1, 2019) ("The discovery of oil on Navajoland in the early 1920’s promoted the need for a more systematic form of government. In 1923, a tribal government was established to help meet the increasing desires of American oil companies to lease Navajoland for exploration. Navajo government has evolved into the largest and most sophisticated form of American Indian government. The Navajo Nation Council Chambers hosts 88 council delegates representing 110 Navajo Nation chapters.").

12 See ROESSEL & JOHNSON, supra note 6, at 45–49 (describing the "terrible sight" that was livestock reduction).

13 See generally id. (describing the impact of livestock reduction from a variety of different perspectives).

14 For example, though there were four original Diné clans, the Diné made other groups, such as the Mexican and the Ute clans, part of the tribe. SEYMOUR H. KOENIG & HARRIET KOENIG, ACCULTURATION IN THE NAVAJO EDEN: NEW MEXICO, 1550–1750 219 (2005) ("To this day, the Navajo—long settled beyond the Dinétah [the traditional Diné homeland]—have many clans of non-Navajo origin, including Ute, Apache, several Puebloans, and Mexican.").

15 See ROBERT S. MCPHERSON, SACRED LAND SACRED VIEW: NAVAJO PERCEPTIONS OF THE FOUR CORNERS REGION 61 (1992) ("Interestingly, perhaps the most influential animal to affect the life of the Diné was not native to the American Southwest but was introduced by the Spanish. Soon after their arrival, sheep became a major economic, social, and religious consideration in traditional Navajo life. People measured their status in society, the welfare of their family, and the blessings from the holy beings by taking stock of their herds."); MAUREEN TRUDELLE SCHWARZ, NAVAJO LIFEWAYS: CONTEMPORARY ISSUES, ANCIENT KNOWLEDGE 7 (2001) ("After livestock were first introduced into the region by Spanish settlers, a herding economy based on sheep and goats developed. The Navajo population and their area of settlement gradually expanded as new crops, animals, and technological innovations continued to be added to their subsistence base during the Spanish and American periods.").

16 For lengthy treatment of the Indian slave trade, see generally ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (2016). See also WEISIGER, supra note 5, at 110 ("Certainly some raids involved small bands of young men bent on acquiring horses or proving their bravery, and nascent stockowners or hungry hunters tempted by the prospect of such docile prey as sheep. But just as often, raiders avenged attacks on their kin and the capture of wives, sisters, and children.").
U.S. military, under the leadership of Kit Carson, engaged in a scorched-earth campaign in 1863 and 1864, burning Diné crops, cutting down peach orchards, and poisoning wells. The Diné had little choice but to surrender, after which they were led on a forced march to Bosque Redondo, an internment camp where they lived for four years. In 1868, the Diné succeeded in negotiating a treaty that allowed them to return to their traditional homeland within the four sacred mountains of Blanca Peak, Mount Taylor, San Francisco Peaks, and Mount Hesperus.

Upon their return, the Diné spread out. Under the terms of the 1868 treaty, the Diné received 15,000 sheep and an area of land that was too small to support the tribe. So, they ignored the 1868 reservation boundaries, moving "off-reservation" with their herds. Even the U.S. government recognized that the Diné needed more land, and—at a time when most tribes were suffering land losses through allotment—the reservation grew with the tribe through successive land grants. Herds expanded through careful animal husbandry, such that by the 1930s, the Diné had more than a million sheep. Henry Chee Dodge and his wife Nánibaa’ "owned five thousand head of sheep, controlled 131,000 acres of reservation land, and possessed the largest private bank account in nearby Gallup." Dodge was not only the wealthiest tribal member, he was also the first Chairman of the Navajo Business Council. But sheep and goats were not important only to the Diné elite; livestock was the primary form of wealth for most Diné families. Relative status was connected to herd size, and herds were one of the principle material gifts given to children upon marriage and through

17 Navajo Nation, INDIAN HEALTH SERV., https://www.ihs.gov/navajonavigation/ (last visited Feb. 1, 2019) ("Colonel Kit Carson instituted a scorched earth policy, burning Navajo fields and homes, and stealing or killing their livestock. After starving the Navajos into submission, Carson rounded up every Navajo he could find—8,000 men, women and children—and in the spring of 1864 forced his prisoners to march some 300 miles to Fort Sumner, New Mexico. Navajos call this 'The Long Walk.'").
19 Id. ("The suffering of the Navajos at Bosque Redondo continued through bureaucratic wrangling and delays until May 1868 when finally a treaty was signed with them at Fort Sumner and they were allowed to return to their homelands.").
21 Id.
23 Id.
24 Tehan, supra note 20, at 177 ("Animal husbandry has been part of the Navajo social structure since its earliest days; sheep serve as a measure of wealth and a means of exchange. The relationship between the Navajo and their sheep transcends a simple owner-object owned situation, for the Navajo is 'linked to his herds' by ties 'in which he and his family's continuity and well being, as well as his own self-image are symbolized by his herds.'" (quoting James F. Downs, The Navajo 114 (1972))).
25 Id.
inheritance. Wool, which was sold to traders, exchanged at trading posts for food, and made into rugs, provided a significant source of income across the reservation. Animals also provided security: in lean times, they protected families from starvation. For most Diné, animals were and are not merely resources but instead part of the family unit.

In the 1930s, the federal government attacked the Navajo herds and, in the process, attacked the material foundation of Diné society. The Roosevelt administration decided the Navajo reservation was suffering from an overgrazing problem and unilaterally decided to impose a livestock reduction program. Championed by the Commissioner of the Bureau of Indian Affairs during the New Deal, John Collier, livestock reduction struck at the Diné way of life. Collier was known as an Indian reformer, and his most significant contribution to Indian policy was the Indian Reorganization Act (IRA)—legislation that provided a framework for tribes to take on aspects of sovereignty that had been denied to them during allotment. But for Diné, Collier’s name remains synonymous with livestock reduction. When it came time for the Diné to vote on whether to adopt an IRA form of government, they voted against doing so, driven primarily by anger over livestock reduction.

The idea that the Navajos had too many sheep originated in reports from experts who warned that the tribe faced catastrophic soil erosion. Engineers working on completing the Boulder Dam, now called the Hoover Dam, also feared that Navajo overgrazing—which could cause silt to fill up behind the dam—threatened the dam’s utility. A U.S. Geological Survey report called the Navajo reservation “practically ‘Public Enemy No. 1’ in causing the Colorado Silt problem.” Additionally, overgrazing caused deep scars, arroyos, to form on the land and created further desertification that threatened to erode the range carrying capacity of much of the reservation. Experts used photos to show growth of these arroyos and draw attention to problems of erosion. From the perspective of Washington scientists and

26 Downs, supra note 24, at 30 (“A Navajo father is expected to give livestock and horses to his children, particularly his sons.”).
29 Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955, 972 (1972) (“During the two-year period within which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,865 Indians, including 45,000 Navajos) rejected it.”).
30 Klara B. Kelley, Navajo Land Use: An Ethnoarchaeological Study 9 (1986) (“The industrial growth of southern California required that Navajos reduce their livestock to stem overgrazing and the resulting soil erosion, which threatened to silt up Boulder Dam, the source of electricity that was to power California’s growth.”).
31 Needham, supra note 22, at 47.
32 See, e.g., J. W. Hoover, Navajo Land Problems, 13 Econ. Geography 281, 286–89 (1937) (explaining the problem of erosion due to overgrazing and providing photos of arroyo development).
policy-makers, experts had to protect the tribe from itself; otherwise Navajos would inadvertently ruin their own territory; something had to be done. That something was livestock reduction.

But for the Diné, the insistence that they reduce the number of sheep, goats, and horses on the reservation was not a minor administrative change, it was an existential threat to Diné livelihood, identity, and way of life. The Diné had been through droughts and bad spells before but felt that if they lived according to their traditional values, the hard years would give way to better ones. Tribal leaders felt that solutions to overgrazing should come from the tribe, not be dictated by Washington. But that is not what ultimately happened; the United States, aided by a thin veneer of tribal buy-in, forced a devastating livestock reduction program upon the Diné people.

Federal officials raised stock reduction as an issue before the Council in 1928, but livestock reduction was not implemented until the Roosevelt Administration. Told that they had little choice and that additional jobs and land grants to the tribe would accompany stock reduction to help offset the pain of culling the herds, the Council voted to approve a federal voluntary reduction plan in 1933. Experts of all stripes descended on the reservation. Parts of the reservation were fenced off as demonstration sites.
to show how the range could recover with proper care. Estimating that the reservation had double as much livestock as the range could support, agents began culling the herds.\textsuperscript{39} In theory, agents told tribal members they had to reduce their herds and then paid for sheep turned over to them. But the first round of livestock reduction was not terribly successful. Dinó families got rid of their least productive animals, keeping the younger sheep in order to rebuild their herds later. That is not to say that reduction was a voluntary program. After imposing a cap on the number of animals a family could have, those responsible for carrying out the reduction would force sales—by telling Navajos that they had no choice—at prices that were supposed to be fair but were below what Dinó would have willingly accepted for their animals.\textsuperscript{40} Subsequent rounds were more heavy-handed.

Livestock reduction struck the poorest Dinó families the hardest.\textsuperscript{41} The largest stock owners, such as Dodge and other elites, raised their stock to sell to outside markets, but those with smaller holdings lived with their animals, eking out a subsistence living. For the poor, each animal was part of their family, and they were living close enough to the edge to know that the loss of even a small part of their herd could have tragic consequences. The poor disproportionately owned goats, so when the federal government decided to target goats, it was also targeting the poor. Even across-the-board decisions, such as reducing every family’s herd by five sheep, involved much greater relative hardship for poorer families with smaller herds.\textsuperscript{42} A similar dynamic occurred when chapter officials implemented reduction according to pasture quality, making decisions about allowable herd sizes according to the carrying capacity of each family’s traditional use area.\textsuperscript{43} Because large stock owners controlled the best pasture land, tying reductions to land quality also tended to hurt the poor.\textsuperscript{44} Collier was not blind to these equity issues, but efforts to put caps on herd size invited challenges based on different definitions of family and ownership. Simply declaring that no one could have a herd above 1,000 head did not solve the problem because many different members of a large extended family might in fact own sheep within a larger herd. An observable herd associated with a single Dinó couple could include sheep owned—in reality or at least for the purpose of avoiding the demands of reduction—by various aunts, uncles, cousins, and

\textsuperscript{39} O. N. Hicks, \textit{The First American and His Range Resource}, 23 J. RANGE MGMT. 391, 393 (1970).
\textsuperscript{40} See KELLEY, supra note 30, at 100; WILLIAMS, supra note 37, at 39. See also LAWRENCE DAVID WEISS, \textit{DEVELOPMENT OF CAPITALISM IN THE NAVAJO NATION: A POLITICAL-ECONOMIC HISTORY} 99 (1984) (noting that “[m]uch of the reduction was effected by the government offering prices substantially above market value for Navajo stock” and explaining the market prices were relatively low because of the Great Depression).
\textsuperscript{41} KELLEY, supra note 30, at 100.
\textsuperscript{42} WILLIAMS, supra note 37, at 39.
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Id.}
Cutting through such family and cross-cultural minefields was naturally hard, and, along with the political might of the largest stockowners, it limited the ability and appetite of officials to use livestock reduction as a mechanism for advancing equity. Instead, those who could least afford to lose part of their herd bore the brunt of livestock reduction.

Livestock reduction also exacted a heavy emotional and financial toll on the Diné. Rather than go to the expense of transporting animals to off-reservation slaughterhouses already overwhelmed by Navajo sheep, agents would sometimes kill the animals in front of families still grieving over having to surrender them. Though livestock reduction took place in the midst of the Great Depression, some of the animals “were merely shot and left to rot”—a level of waste that Navajos “were incapable of understanding.” Navajos who resisted reduction by hiding or refraining from turning over their animals were imprisoned or faced other forms of judicial enforcement. The Diné intensely disliked stock reduction. In a letter written to John Collier in 1936, Chee Dodge reported, “the tribe is practically unanimous in their determination to turn [further reduction] down.” The vote of some members of the Council in 1937 in support of stock reduction inspired “[a] virtual storm of protest.” Most damaging, for a tribe that had been identified as “self-supporting” by the Meriam Report

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45 Interview with E.R. Fryer and Tribal Council Members (May 15, 1939), in “FOR OUR NAVAJO PEOPLE”, supra note 34, at 20 (describing the practice of extended family members sharing livestock in a single herd).

46 The favored definition of the U.S. government was based on residence, but such a standard worked to incentivize the breaking up of large family units. See Interview with E.R. Fryer and Tribal Council Members (May 15, 1939), in “FOR OUR NAVAJO PEOPLE”, supra note 34, at 20. Fryer explained how the Indian Service defines family for the purpose of stock reduction: “Usually we name the head of the family. If they live together and share things and operate as a family it is considered a family. They may have a son-in-law who does not own any sheep but has two or three horses. He is part of that family group if he lives with his father-in-law and shares income.” Id.

47 See WEISS, supra note 40, at 101 (“The effect of these inequities against smaller herders were such that, in the aggregate, smaller herders were reduced by 23.1 percent while larger herders were reduced by only 5.4 percent of their prereduction size.”).

48 See KATHELEEN P. CHAMBERLAIN, UNDER SACRED GROUND: A HISTORY OF NAVAJO OIL, 1922-1982 73 (2008) (discussing the goat reductions of 1934); KLARA B. KELLEY & PETER M. WHITELEY, NAVAJO LAND: FAMILY SETTLEMENT AND LAND USE 103 (1989) (“Thirty-five hundred goats from Navajo Mountain area ‘were shot and left in heaps to rot’ near Inscription House because the cost of driving them to the railroad was prohibitive.”); see also NEEDHAM, supra note 22, at 48 (“Furthermore, some BIA officials carried out reduction with marked cruelty. On occasion, agents shot animals and burned their carcasses in front of astonished families that had formed lifelong relationships with those animals.”).


50 See KELLEY, supra note 30, at 101 (“Between 1939 and 1943, the Indian Service secured court judgments against several Navajos accused of violating the grazing regulations, and those judgments broke the Navajo resistance.”).

51 Letter from Tom Dodge to John Collier (May 7, 1936), in “FOR OUR NAVAJO PEOPLE”, supra note 34, at 176.

52 WILLIAMS, supra note 37, at 29.
in 1928, stock reduction threatened to make it impossible for many Diné families to earn enough money to care for themselves. In 1940, tribal members observed, “[f]rom a tribe self-sufficient and self-supporting, the Bureau is forcing us to become depend[e]nt upon charity for our subsistence. We only desire to be financially independent and make our own way.” And in the same year, a delegate argued before the Council, “What I mean is we cannot stand any more reduction. We are all going to fall into a big hungry lot.”

Ultimately, stock reduction succeeded in pushing down the number of sheep on the reservation, but it did so by undercutting tribal economic independence and the Diné way of life. Prior to stock reduction, Navajos had more than one million sheep; by 1946, that number was more than halved to 449,000 sheep on the reservation. Prior to stock reduction, of course, the Diné were connected to the larger society and to external markets. Off-reservation demand for wool and Navajo rugs, in part, drove the growth of Diné herds. But Diné families could meet such demand in ways that largely preserved their isolation from the Bilagáana (the Diné word for non-Indians, which can be translated as “white, the other, or the enemy”) world and continued traditional ways of life. Stock reduction threw a wrench in the engine of Diné economic growth and self-sufficiency. Collier promised the Council that new employment opportunities would fill the economic holes created by stock reduction, and many Diné did find jobs working for New Deal government programs such as the Civilian Conservation Corps and the Soil Conservation Corps. But the promised jobs did not fully offset stock reduction losses, nor did such jobs continue in the post-war period.

For the Diné, stock reduction is remembered as a trauma approaching that of their earlier internment at Bosque Redondo. Families living at near subsistence levels could ill afford stock reduction, and even those who were better off suffered dramatic wealth declines. Collier’s hope was that stock

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53 Lewis Meriam et al., The Problem of Indian Administration 504 (1928).
54 Letter from Scott Preston, Julius Begay, Frank Goldtooth, and Judge Many Children to Representative John R. Murdock (Feb. 14, 1940), in “For Our Navajo People”, supra note 34, at 23–24.
55 Speech by Manuel Denetso at the Navajo Council (July 5, 1940), in “For Our Navajo People”, supra note 34, at 27.
56 Voyles, supra note 27, at 39, 52.
57 Kelley, supra note 30, at 99.
58 Needham, supra note 21, at 48.
59 Peace and Livestock, in Between Sacred Mountains: Navajo Stories and Lessons from the Land 155, 155 (Sam Bingham et al. eds., 1982) (“The cutting down of livestock is known as Stock Reduction, and people remember it with sadness the way they remember Fort Sumner.”). See also Chamberlain, supra note 48, at 83 (explaining that “stock reduction rivaled the Long Walk in its devastating consequences”).
60 See Letter from Chee Dodge to James Stewart, Land Dep’t, Indian Office, Dep’t of Indian Affairs (Apr. 20, 1936), in “For Our Navajo People”, supra note 34, at 173 (“The Indians have all been excited for the last two or three years anyway, because they didn’t know whether they were going to lose their stock, whether they were going broke or would have anything to eat.”).
reduction would protect Diné self-sufficiency by preventing overgrazing from ruining the range, but ironically, stock reduction forced the Diné into dependency.\(^\text{61}\) As Kathleen Chamberlain notes in her fabulous history, *Under Sacred Ground: A History of Navajo Oil, 1922-1982*, “[m]any Navajos lost their livelihood altogether and were forced to accept government subsidies for the first time.”\(^\text{62}\) In a 1940 letter to Senator Dennis Chavez, Deshna Clah Cheshillige complained, “Many of our people are now poor and are forced to live on relief. We do not like relief and want to make our own living and we know we can do so if we are left alone.”\(^\text{63}\) While New Deal job programs protected against the worst effects of reduction, when that sort of support disappeared in the post-World War II period, bad weather and a devastated economy left Diné not at risk of starving, but actually starving. Emergency relief came to the reservation after popular magazines published photo essays of the poor conditions on the reservation. And to this day, Diné receive welfare in a form that is not common among other places in the United States: commodities such as bread, cheese, and surplus canned goods. High poverty rates and welfare dependency cannot be attributed entirely or even primarily to stock reduction of course, but stock reduction had a devastating impact on tribal agency and independence. Backlash against stock reduction contributed to the Diné vote against the proposed IRA form of government, but rather than celebrating this example of a tribe exercising independent judgment, something Collier claimed to support, Collier arguably hardened his resolve to carry out stock reduction.\(^\text{64}\) Although Collier supported tribal governance rhetorically, for the Diné, Collier was the worst sort of Bilagáana; he may not have burned down their peach orchards, but he took away their sheep.

The stock reduction program provided clear evidence to the Diné that the United States was ultimately in charge of the reservation economy. From the time Diné returned from Bosque Redondo in 1868 until the stock reduction program, the Diné economy could be described as internally managed. Though there were of course external forces such as market demand for Diné products and pressure to not extend the reservation into

\(^{61}\) Richard Wright, *The Roots of Dependency: Subsistence, Environment, and Social Change Among the Choctaws, Pawnees, and Navajos* 313 (1983) ("Coming to the Navajos with a program promising economic rehabilitation, Collier had crippled their way of life and accelerated the onset of dependency.").

\(^{62}\) Chamberlain, *supra* note 48, at 73. See also Michael Joseph Francisconi, *Kinship, Capitalism, Change: The Informal Economy of the Navajo, 1868-1995* 58 (1998) ("Stock reduction of the 1930's reduced by fifty percent the total number of sheep on the reservation and dramatically changed the economic livelihood and social status of many families. Before the livestock cuts, Diné were self-sufficient, but following them, supplemental income from wage labor and/or welfare became sufficient.").

\(^{63}\) Letter from Deshna Clah Cheshillige to Senator Dennis Chavez (Dec. 8, 1940), in “For Our Navajo People”, *supra* note 34, at 143.

areas with non-Indian ranching interests, the Diné made independent choices regarding how to respond to those forces. As a people, they had done well even in the face of tremendous obstacles. Though the society beyond the reservation border assumed the Diné would die off and that their culture would fade, they rebuilt their herds and their population. Stock reduction changed the narrative by substituting Diné priorities with Washington edicts.  

The Diné belief that the range would recover and that the Diné should manage their own agriculture was pushed aside by New Deal bureaucrats confident that they knew better. Diné knowledge of the land tied to the tribe’s experience living between the four sacred mountains since before Spanish contact was brushed aside. The point is not that nothing should have been done to protect the reservation against overgrazing and desertification but that the stock reduction program, in part because it was externally-imposed, crippled the tribe’s ability to right itself. Similarly, the move to wage labor was already well underway—it was “clear by the 1930s that the Navajo could ‘no longer live by sheep alone’”—before being pushed by Washington. Navajos warned U.S. officials that the livestock levels envisioned in the stock reduction program would impoverish tribal members, yet the program went forward. Tribal members correctly saw stock reduction as a threat to their way-of-life. Compounding the problems that could have come from any livestock reduction program, which would have been difficult enough on its own, is that the New Deal program was done in a heavy-handed way by a foreign, historically-hostile government.

The Navajo Tribal Council convinced the Bureau of Indian Affairs (BIA) to effectively end the stock reduction program at the end of World War II, and since then, efforts to restore the range have been much less

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65 In his account of livestock reduction, former Navajo Nation Council member Henry Zah noted, “the government took away much of our stock when it increased too much, after the government had warned the Diné about the conditions of the land. This had been warned when the sheep were given. The Diné had increased their livestock, and it was thought of as if the sheep still belonged to Waashhindooh.” Henry Zah, Henry Zah, in NAVAJO STORIES OF THE LONG WALK PERIOD 156, 157 (Broderick H. Johnson ed., 1973) (Diné pronunciation of Washington in the original).
66 Weisiger, supra note 16, at 7 (“With missionary zeal, they imposed on the Navajos an experimental program based on the emerging sciences of ecology and soil conservation, while disparaging local knowledge and ignoring the importance of long-established cultural patterns.”).
68 See Letter from Scott Preston, Julius Begay, Frank Goldtooth, and Judge Many Children to Representative John R. Murdock (Feb. 14, 1940), in “For Our Navajo People”, supra note 34, at 23 (“282 sheep units is not sufficient for even the bare existence of a moderate size Navajo family without additional income, and such a policy will mean the impoverishment of the entire Navajo Tribe.”).
69 See Franciscosi, supra note 62, at 50 (“Stock reduction was perhaps one of the most poorly managed programs of the New Deal era. To begin with, it was imposed upon the Diné from the outside, and, in spite of the proclaimed good intentions, clearly represented the colonial nature of reservations in the U.S.”).
70 Kelley, supra note 30, at 102.
ambitious. Grazing, while still important culturally and still part of tribal identity, became a matter of secondary importance with the rise of the wage economy after the war. Spurred along in part by the termination era policy of encouraging tribal members to leave reservations under the Indian Relocation Act of 1956, many Diné found work off-reservation. The inability of the Navajo range to provide a suitable livelihood for the entire tribe was an additional contributing factor. These push-and-pull factors, combined with Window Rock’s almost singular focus on using extractive industry development to maximize tribal revenue over the past six-plus decades, left matters of grazing regulation and enforcement neglected.

The neglect takes a number of forms. First, because the permit system was allowed to become ossified, there has been a corresponding increase in the importance of inherited rights. Second, tribal politicians balk at pursuing land reform because of the high political cost of even proposing changing the existing system.

Though the federal government backed off after World War II, creating space for tribally-led reform, memories of the stock reduction program effectively paralyzed efforts by the tribal government to address the problems of overgrazing. Tribal members resist efforts, by the central tribal government and by their chapter, to reign in herd size or deal with the wild mustang problem. Council delegates, recognizing that reform of grazing and customary use rights amounts to the third rail of tribal politics, avoid real engagement with the issue, and tribal agency work rarely advances beyond the planning stage. Meanwhile, not only does deterioration of the

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71 See, e.g., Lynn Fuller, Desertification on the Navajo Reservation: A Legal and Historical Analysis, 8 STAN. ENVTL. L.J. 229, 258 (1989) (“Navajo governmental authorities were politically unwilling or unable to enforce the grazing regulations . . .”).
73 See, e.g., Fuller, supra note 71, at 231–32 (discussing the extreme desertification of Navajo lands due to overgrazing by livestock and the impacts on the Navajo people).
74 See id. at 258 (explaining that “[c]onceptual development efforts focused on exploiting non-renewable natural resources on the reservation” and that “[t]he tribal government in Window Rock did not take seriously the need for improving range productivity”). For a lengthy discussion of Navajo natural resource exploitation, see generally Ezra Rosser, Ahistorical Indians and Reservation Resources, 40 ENVTL. L. 437 (2010).
75 See Riggs v. Estate of Attakai, 9 Navajo Rptr. 119, 121 (Navajo 2007) (“By placing the grazing permit with Sista Riggs, there is assurance that the land and herd will remain with the family, and that the grazing permit will remain intact . . .”).
76 See Fuller, supra note 71, at 231, 280 (explaining that political pressures have resulted in ineffectual and abused range-management controls).
77 See JULIE NANIA ET AL., CONSIDERATIONS FOR CLIMATE CHANGE AND VARIABILITY ADAPTATION ON THE NAVAJO NATION 99 (2014), http://cires.colorado.edu/outreach/system/files/projects/tribes_eye.pdf (discussing the resistance by the Navajo to address feral animals, especially mustangs, that contribute to overgrazing of the range).
78 See Gary D. Libecap & Ronald N. Johnson, Legislating Commons: The Navajo Tribal Council and the Navajo Range, 18 ECON. INQUIRY 69, 69–70 (1980) (“Because of high enforcement costs [for] small herds and high political costs for elected officials, the Tribal Council since 1956 has not enforced grazing regulations.”).
range and desertification of the reservation continue, but non-agricultural development also remains bottled up, trapped by the hold the existing system has on unused land.  

II. GRAZING RIGHTS AND CONTROL OF THE LAND

The Navajo Nation requires that tribal members have a grazing permit in order to graze their animals on the Navajo range. Measurements in the system are based on sheep units, with one horse, mule, or burro equal to five sheep; one cow equal to four sheep; and one goat counted as one sheep unit. Grazing permits are limited geographically, and permittees cannot have more than ten horses or more than 350 total sheep units in theory. However, when the tribe conducted a livestock inventory of select grazing districts in 2001, there were 403,138 sheep units found even though the number of permitted sheep units in those districts was only 285,346. Because these figures did not include feral or penned animals, even these elevated figures do not reflect the actual number of sheep units in these districts. Grazing regulation and enforcement generally falls upon district grazing committees. Their authority extends to the question of whether tribal members can fence portions of the range. The Navajo Nation Code directly incorporates language from the 1957 Navajo Reservation Grazing Handbook, which lists as one of the purposes of the grazing regulation “[t]he adjustment of livestock numbers to the carrying capacity of the range in such a manner that the livestock economy of the Navajo Nation will be preserved.” The regulations allow for the issuance of new permits to tribal members over age eighteen whenever the district’s carrying capacity has not been exceeded. Finally, though there are grazing fees associated with the use of non-trust land owned by the Navajo Nation, tribal members are not

80 See Mark Schoepfle et al., Navajo Attitudes Toward Development and Change: A Unified Ethnographic and Survey Approach to an Understanding of Their Future, 86 AM. ANTHROPOLOGIST 885, 895, 901 (1984) (explaining that the survey found the Navajo people identified the loss of the grazing permit, and thus access to their land, as the most severe threat and that the Navajo will not support development if it interferes with tradition).
81 NAVAJO NATION CODE ANN. tit. 3, § 781(A) (2010); see also NANIA ET AL., supra note 78, at 101 (“In order to graze [livestock] on the range, a Navajo grazing permit is required.”).
82 NAVAJO NATION CODE ANN. tit. 3, § 706(D) (2010).
83 Id. § 781(C).
84 Id. supra note 78, at 101.
85 Id.
87 Id.
89 NAVAJO NATION CODE ANN. tit. 3, § 703(C) (2010); see also 3 N.T.C. § 283 (1962) (citing pages 8 and 9 of the 1957 Navajo Reservation Grazing Handbook in the history for subsection (c), which states, “[t]he adjustment of livestock numbers to the carrying capacity of the range in such a manner that the livestock economy of the Navajo Tribe will be preserved”).
charged grazing fees for permitted use of trust land.\textsuperscript{91}

The cultural significance of grazing, coupled with limits on the issuance of new permissions, makes grazing permits a highly valued possession on the reservation.\textsuperscript{92} Conflicts involving grazing permits, between both neighbors and family members, are frequent and often heated. The Navajo Supreme Court, in \textit{Begay v. Keedah}, established five factors for determining who should be awarded a contested grazing permit: first, animal units in grazing permits must be sufficiently large to be economically viable; second, land must be put to its most beneficial use; third, the most logical heir should receive land use rights; fourth, use rights must not be fragmented; and fifth, only those who are personally involved in the beneficial use of land may inherit it.\textsuperscript{93}

Although standard stories of Indian versus non-Indian uses of land tend to focus on the extent to which non-Indians prioritize beneficial use, as these factors show, Navajo law emphasizes economic viability, beneficial use, and concern with the risks that come from overly fragmented rights. The fifth \textit{Begay} factor demonstrates a departure from off-reservation understandings of property because, for Diné, ownership interests in grazing permits are dependent upon personal use.\textsuperscript{94} Factor five’s use requirement does not square easily with non-Indian property rights, which largely accept the severability of use and ownership.\textsuperscript{95} But by including use as a prerequisite for being awarded a contested grazing permit, the Navajo Supreme Court affirmed traditional Diné practices, which emphasize use as the basis of property rights.\textsuperscript{96} As the Court noted in \textit{Begay}, “[a]nother aspect of traditional Navajo land tenure is the principle that one must use it or lose it.”\textsuperscript{97}

When the inheritance of grazing rights came before the Navajo Supreme Court again in 2007, the Court reaffirmed traditional Diné understandings of property, even where they break from non-Indian notions of equality.\textsuperscript{98} In

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} § 709.
\item \textsuperscript{92} See Estate of Navajo Joe, 4 Navajo Rptr. 99, 99 (Navajo 1983) ("[A] grazing permit is one of the most important items of property which a Navajo may own.").
\item \textsuperscript{93} 6 Navajo Rptr. 416, 421 (Navajo 1991); see also \textit{In re Quiet Title to Livestock Grazing Permit No. 8-487 Formerly Held by Martha Francis, No. SC-CV-41-09}, slip op. at 6–7 (Navajo Dec. 29, 2011) (summarizing the five factors articulated by \textit{Begay v. Keedah} when determining whether to award a grazing permit).
\item \textsuperscript{94} See \textsc{Raymond D. Austin}, \textsc{Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance} 190 (2009) (explaining that Navajo policy for land-use permits is to grant permits to “individuals who will make the most beneficial use of land,” which “equates to the use it or lose it rule”).
\item \textsuperscript{95} See \textit{id.} (explaining the difference between Navajo land use policies and property law in the Anglo-American legal system).
\item \textsuperscript{96} See Riggs v. Estate of Attakai, 9 Navajo Rptr. 119, 120–21 (Navajo 2007) (emphasizing the importance of Navajo Nation policies regarding personal land use and prevention of fragmentation when awarding land use permits).
\item \textsuperscript{97} \textit{Begay}, 6 Navajo Rptr. at 421.
\item \textsuperscript{98} Riggs, 9 Navajo Rptr. at 120–21.
\end{itemize}
2002, the Navajo Nation Council passed *Diné Bi Beenahaz'äänii*, or, in English, The Foundation of the Diné, Diné Law, and Diné Government. Though Navajo Fundamental Law, as it is also called, does not include provisions that expressly address how courts should resolve conflicts involving land rights, it emphasizes tradition and kinship (*k'e*). Applying the *Begay* factors in a subsequent case, the Navajo Supreme Court added a preference for women when it comes to grazing permits. The Navajo Supreme Court ruled that the *Begay* factors had to be interpreted in light of Navajo Fundamental Law, which recognizes that “Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas.” To outsiders, such overt sexism might seem jarring, but matrilineal control over the homestead and overgrazing is very much a part of Navajo culture. The gender-modified *Begay* factors remain the law today. These cases highlight both the challenge of determining what to do with grazing rights following the death of the previous permittee and the importance of grazing rights in defining land rights more generally on the reservation.

Though, formally, grazing rights involve merely the right of permittees to graze their animals on tribal trust land, permittees typically understand their grazing rights as providing them an ownership interest in the underlying land. “[Grazing] permittees view themselves as the de facto owners of the land and therefore believe they have the right to decide how the land is to be used. The permittees pass their rights from generation to generation, and they are often conservative.” Though, at times, the tribe has tried to impose limits on the power of permittees to determine how “their” land is used, the tribe has largely gone along—except when such claims conflict with the interests of extractive industry—with permittees’ expansive understanding of the nature of grazing rights. What this means in practice is that development proposals that threaten, or seem to threaten, the rights of permittees often die on the drawing board. Even though a particular project, say a new school or store, might use only a small amount of land relative to the reservation’s seemingly endless open land, grazing permittees

100 For more on Navajo Fundamental Law, see Kenneth Bobroff, *Diné Bi Beenahaz'äänii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 TRIBAL L.J. 4 (2005), which explains *k'e* as the Navajo clan system that maintains healthy bloodlines and avoids incest; *k'e* is considered the “foundation of all laws.”
101 Riggs, 9 Navajo Rprr. at 120.
102 *In re Quiet Title to Livestock Grazing Permit No. 8-487 Formerly Held by Martha Francis*, No. SC-CV-41-09, slip op. at 7 (Navajo Dec. 29, 2011).
103 See Riggs, 9 Navajo Rprr. at 120 (“Navajo Fundamental Law . . . defines the role and authority of Diné women in [Navajo] society. Traditionally, women are central to the home and land base.”). For more on gender-based governance in Indian communities generally, see Angela R. Riley, *Tribal Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 842–44 (2007).
104 DAVID LISTOKIN ET AL., *HOUSING AND ECONOMIC DEVELOPMENT IN INDIAN COUNTRY: CHALLENGE AND OPPORTUNITY* 335 (2006) (internal citation omitted).
as a class often thwart such projects. Opposition by a single permittee can derail a project irrespective of the extent to which the project responds to recognized community needs. Multiple legal and political factors empower grazing permittees to block development.

Grazing permittees currently can exploit the "raw" status of most reservation land to block development. Because most reservation land has not been zoned, it remains "raw" land, meaning that any proposed change invites a fight with those who prefer the status quo. If each locality used zoning to set aside some areas for residential or business development, grazing permittees would have less ground to contest development proposals. They could, of course, contest the initial zoning decision and the appropriateness of development generally, but zoning would front-load such debates, making planning permission less contentious for individual entrepreneurs or tribal members seeking permission for their particular proposals. Zoning also would help depoliticize the process of approving development proposals. In many rural chapters, families with the longest, deepest connection to the area have the most political power. Rivalry at the family or clan level can lead chapters, using grazing rights as cover, to reject development proposals—regardless of the merits of the proposal—if they come from the "wrong" family or clan. Zoning could provide a check on the power grazing permittees have over all development.

In some respects, the secondary interest in land tied to grazing provides permit holders greater ability to maintain the range undisturbed than if they owned the land outright. Land ownership typically comes with rigid boundary lines that serve to define the space over which owners enjoy presumptive control. Off-reservation landowners enjoy broad exclusionary and development rights within the four corners of their individual plot, but they have much more limited authority when it comes to what happens beyond their property boundaries. Grazing rights are different. The territory over which a grazing right attaches is often defined loosely, based on informal understandings of family claims to the range rather than formal boundaries. Most significantly, it is common for land to be subject

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105 See Diné Policy Inst., Land Reform in the Navajo Nation: Possibilities of Renewal for Our People 36 (2017), http://hooghancollege.edu/institutes/docs/Land%20Reform%20In%20Navajo%20Nation.pdf ("Grazing permits and culture instill ideas of property and the authority to hinder development."); see also id. at 47 ("Grazing permittees are given the authority to decide whether development occurs within their area and community.").


to multiple grazing and customary use claims, with different families claiming an interest in the same area of land. Grazing rights are also amorphous enough to support even long dormant claims. Even though it might have been years since sheep grazed over a particular part of the range because grazing permittees had been keeping their sheep closer to their homesite, they could plausibly move their animals to that part of the range in the future. Any land that is withdrawn for development is a loss not only to the family or families with grazing rights over that part of the range, but to all families who use the land and rightly fear that territory within their grazing district might have to be adjusted as a result. In turn, those seeking development permission may face objections not just from those with secondary land rights directly at stake, but also from grazing permittees whose rights are not directly implicated. Consequently, the secondary nature of grazing rights arguably enables permittees to control a larger area than they would if the rights were explicitly tied to land instead of grazing.

Commentators agree that, as a practical matter, grazing permittees enjoy broad veto power over reservation development. Permittee approval is required in order for projects to go forward. How tribal members experience permittee power can be seen in Louise Litzen’s struggle to open a laundromat near Diné College in Tsaile, Arizona:

For eleven years, she has navigated in good faith through a maze of processes to obtain a business site lease. Some of her neighbors own grazing permits on land surrounding Diné College, much of which has not been used for grazing for generations. The refusal of any of these individuals to waive their grazing rights can single-handedly prevent Louise from opening her business.
Litzen's story is not unique. To get a business site or homesite lease requires first getting approval from grazing or chapter officials. Those officials, fearful of trampling on the rights of permittees, typically require all grazing rights permittees in the area (including those with nearby rights whose land is not directly impacted) to sign off on any development proposal. This arrangement results in pervasive hold-out problems. Rights holders with petty disagreements or grievances can block even the most community-centered forms of development, locking up land even where the grazing utility of the land is marginal at best.

Though the grazing permit system initially was federally imposed, today the Diné have essentially complete authority over grazing and thus over the general direction of reservation development at the community level. This authority is exercised through hyper-local decision-making institutions and structures. Local chapter officials, grazing committees, and democratic processes in each chapter are involved in even relatively small changes that might affect the range. Proposals to move from elected grazing officials towards enforcement of grazing regulations by paid professional staff have been floated by the central government, but, so far, such a transition has not happened. Partly as a consequence, permittees hold disproportionate political power. Grazing rights holders are actively engaged in chapter politics. They attend meetings, serve on committees, and vote to protect their interests. They are often older and more tied to the existing power dynamics in the community than younger Diné who may live and work off-reservation. They also tend to be relatively conservative, protective of their grazing rights, and reluctant to see their community change. Such a state of affairs means that even fairly routine proposals—to create a formalized car repair business or small restaurant—involves the whole community. Entrepreneurs cannot rely upon background rules or zoning regulations to provide them with a presumptive right to develop a parcel of land; instead, grazing permittees typically exercise their power such that the default is to block development. In rural chapters, the status quo of strong grazing rights reigns supreme, choking off other forms of development.

III. REINSERTING A USE REQUIREMENT FOR GRAZING RIGHTS

What should be done to check the extent to which grazing rights permittees can block other forms of land use? This Essay does not give a full answer to that question. One of the biggest sticking points in Diné politics today is whether local decision-making should drive policy or whether the central government in Window Rock should be in charge. Traditionally, the different levels of government have had different spheres of primary responsibility. For example, extractive industry fell under the purview of Window Rock while local institutions handled grazing. But tribal members often discover that the lines between local and national authority can blur, and spheres often overlap in frustrating ways. When tribal members seek
permission to use land for a business venture or even when they try to secure a homesite lease, for example,\textsuperscript{115} it is all but inevitable that they will confront multiple hurdles. Chapter politics and the Window Rock bureaucracy can hamper even determined efforts by individuals to obtain formal land rights. Part of freeing up portions of the range for development is resolving the conflict between the decentralization and centralization impulses that complicate Navajo Nation governance.

This Essay avoids giving an answer to whether land use should be governed primarily by chapters or primarily by the central government. Good arguments can be made on both sides of the Navajo-federalism debate. Chapters that are closer to the people in theory provide a more meaningful form of direct democracy and can offer a land use approach better tailored to the needs of their particular community. On the other hand, decentralization efforts in the past, especially the Local Governance Act of 1998,\textsuperscript{116} did not live up to their promise,\textsuperscript{117} in part because rural chapters often have a thin talent pool from which to take on the often complex management issues that come with real power. Outside consultants can fill some of the planning and accounting gaps but are a prohibitively expensive option for long-term governance. Economies of scale—how many local land departments can the Navajo Nation realistically support—also favor centralization. But governance reform is perhaps a precondition for grazing and land use reform. At some point, the Diné will decide that the costs of the current bifurcated approach—in which tribal members encounter high barriers at both the chapter level and in Window Rock—are too great and something must change.\textsuperscript{118} But, mindful that “a smothering kind of paternalism” by friends of the tribe can harm the Diné as much as direct attacks on tribal sovereignty,\textsuperscript{119} this Essay is deliberately agnostic as to whether the decentralization or centralization forces should prevail.

Where this Essay does stake a claim is on the principles that should guide land reform. By returning to the traditional Diné use requirement as central to the recognition and protection of land rights, the Navajo Nation (whether at the chapter level or in Window Rock) can right-size grazing

\textsuperscript{115} For discussion of the Navajo Nation’s 2016 effort to reform the homesite lease approval process, see Ezra Rosser, Right-Size Use Rights: Navajo Land, Bureaucracy, and Home, in \textit{Creating Private Sector Economies in Native America: Sustainable Development Through Entrepreneurship} (Robert J. Miller et al. eds., forthcoming 2019).

\textsuperscript{116} \textsc{Navajo Nation Code Ann. tit. 26} (1998).

\textsuperscript{117} See Andrew Curley et al., \textit{Local Governance and Reform: Considering 20 Years of the Local Governance Act} 18–21 (2016), http://hooghane.dinecollege.edu/institutes/DPI/Docs/2016-09%20LGA2FinalPDF.pdf (discussing structural flaws in the Local Governance Act).

\textsuperscript{118} For a recent study exploring governance reform at the chapter level, see Michael Parrish, \textit{Local Governance and Reform: Local Empowerment} 23–28 (Jen Byers ed., 2018), http://www.dinecollege.edu/wp-content/uploads/2018/04/Local-Governance-and-Reform-Local-Empowerment.pdf (listing recommendations for governance reform as a result of the study).

The grazing permit system, though initially imposed on top of existing land holdings, arguably transformed Diné understandings of property rights in land. While use continues to be the basis for assertions of a right over land, the inverse—that land rights can be lost through disuse—has been lost. Families continue to base their interest in land on past (customary) use, but the traditional understanding that land rights depend on use—that rights can be lost through non-use after initial acquisition—is under pressure. Families whose right to a particular area of land is based on having used the land in the past often assert an interest in land that they have not used in years. Complicating matters further, the same area can quickly become subject to the claims of neighboring families who start using the same land for grazing or other purposes after observing that the prior family appeared, through non-use, to have abandoned their interest in the land. The grazing permit system introduced into even the most remote parts of Diné society a more fixed understanding of property rights in land, rights that depended primarily on formal recognition in the form of a permit and only secondarily upon use. Lessening the hold grazing permittees have over land, including the problems of overlapping claims and of general resistance to non-agricultural development, will not be easy. But returning to the traditional understanding that use is not only a precondition for acquiring land rights but also for maintaining an interest in the land would help free up land for development.

As a descriptive matter, the authority that grazing permittees exercise over chapter-level land use decision-making is typically wielded by an older generation that seeks to maintain the vast majority of tribal land, even land in prime locations, such as grazing land. Such protection of the status quo harms would-be entrepreneurs, typically younger members of the tribe, as well as Diné who move to a different part of the reservation and seek land for a homesite. But ironically, strong assertions of the need to protect grazing rights and the traditional sheep-centric way of life arguably reflect more the Anglo-American emphasis on ownership than the traditional Diné use-dependent approach to property rights.

Anglo-American law is certainly concerned with use, but the focus is the exclusionary rights of owners and not the possibility that there could be a dynamic relationship between use and rights. Put differently, the grazing

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120 See Shoemaker, Transforming Property, supra note 10, at 63 (“To the extent a reservation community may choose to pursue the goal of revitalizing at least some traditional values around land and land tenure, many tribal governments are also focusing on nurturing those Indigenous traditions that have persisted.”).

121 For more than a decade, academics have been debating just how important exclusion is to property law. Such debates show little sign of abating, and it is not worth rehearsing the merits of each side here. See Ezra Rosser, The Ambition and Transformative Potential of Progressive Property, 101 CALIF. L. REV. 107, 115–26 (2013) (providing an overview of progressive property); Katrina M. Wyman, The New Essentialism in Property, 9 J. LEGAL ANALYSIS 183, 192–203 (2017) (providing an overview of the new essentialism definition of property). But it can safely be said that exclusion is central to Anglo-
permit system pushed reservation land use governance towards non-Indian notions of relatively fixed ownership interests.\textsuperscript{122} Anglo-American property law is not indifferent to non-use, but it is fair to say that property doctrine struggles with non-use and abandonment, erring on the side of strong ownership interests.\textsuperscript{123} The common law goes so far as to prohibit the abandonment of real property.\textsuperscript{124} Of course, there are exceptions—such as ways in which rights are undermined through non-use—but the exceptions found in Anglo-American property law provide imperfect solutions for the challenges presented by Navajo grazing rights.

The most direct way in which Anglo-American property law deals with non-use is through the doctrine of adverse possession. Adverse possession works to transfer title from an owner who has slept on their rights, through non-use and failure to guard against intruders, to an adverse possessor who has earned a right to the property by adversely possessing the property continuously for a statutory period.\textsuperscript{125} The doctrine thus prioritizes use over non-use and, through the statutory period, establishes when non-use (coupled with non-enforcement of the owner’s right to exclude) can result in loss of property. But many people, including judges, dislike the idea that title should be given to an adverse possessor. The whole thing feels too much like theft, especially when the adverse possessor knew from the start that the

American concepts of property, see Merrill, supra note 107, at 740–52, even though not all scholars would agree that it is the core of property, see, e.g., Gregory S. Alexander, The Complex Core of Property, 94 CORNELL L. REV. 1063–66 (2009) (proposing a social-obligation theory of property and arguing that “the core [of property ownership] is more complex than exclusion alone”).

\textsuperscript{122} Tellingly, though property can be held in a variety of forms, fee simple absolute enjoys pride of place in how Americans understand property. Though many Americans will be tenants for extended periods of their lives, words such as “ownership,” “property rights,” and “land rights” generally bring to mind the fee simple form of ownership rather than more complicated ownership forms in which title is split between different parties or varies across time. For more on the place of fee simple absolute in American property law, see Lee Anne Fennell, Fee Simple Obsolete, 91 N.Y.U. L. REV. 1457, 1466–68 (2016); Katrina M. Wyman, In Defense of the Fee Simple, 93 NOTRE DAME L. REV. 1, 6–12 (2017).

\textsuperscript{123} Arguably, the branch of property theory that emphasizes productive labor theory could provide a foundation for meaningful explorations of the non-use/rights dynamic that is the focus of this Essay. There is a large amount of literature on productive labor theory, which emphasizes productive use of land, an obligation not to waste resources, and a requirement that others in the community have equal opportunity access to community resources, but contemporary property scholars treat it somewhat dismissively as a part of the now disfavored natural rights approach to property law. See Eric R. Claeys, Labor, Exclusion, and Flourishing in Property Law, 95 N.C. L. REV. 413, 439–42 (2017) (highlighting the features of productive labor theory). Productive labor theory fits uncomfortably alongside a discussion of Navajo land reform given how John Locke’s writings were used to justify dispossession of Indians who were seen as not making adequate use of the land. See, e.g., Matthew Yglesias, If Your House Is Built on Land Expropriated from its Indigenous Inhabitants—You Didn’t Build That, SLATE (Sept. 19, 2012), http://slate.com/business/2012/09/lockean-property-rights-and-native-americans.html (elaborating on the inconsistency between Lockean property theory and Native American dispossession).


\textsuperscript{125} Adverse Possession, BLACK’S LAW DICTIONARY (10th ed. 2014).
land was not his or her property.\textsuperscript{126} Courts, consequently, are reticent to follow the doctrine; rather than sign off on adverse possession-based transfers, they often find excuses to protect the original property owner.\textsuperscript{127}

Adverse possession arguably has limited import on the Navajo reservation because the doctrine is about more than just non-use. It also requires entry and use by an adverse possessor. In the Navajo context, the adverse possession doctrine could facilitate productive transfers of land between people with grazing rights, from an inactive to an active user of the range, for example. But the majority of Diné cases are marked by only one side (non-use) of the two-sided adverse possession relationship (non-use by the original rights holder coupled with use by an intruder). Consequently, the traditional adverse possession doctrine does little to clear the Navajo range of underlying grazing rights claims. A modified version of adverse possession that required only non-use might work; the Navajo Nation could justify such a modification by the fact that the tribe holds ultimate title (in trust with the federal government) to the land. One could argue, for example, that land not withdrawn from the range "belongs" in some way to all tribal members. There is a collective interest in freeing up rangeland for development, or at least in checking the veto power enjoyed by grazing rights holders, and a modified version of adverse possession might serve this interest. On the other hand, part of the beauty of the adverse possession doctrine is that it places the burden of proof on the adverse possessor. If the doctrine changed so that non-use alone was enough, then the tribe itself would bear the burden to establish that the grazing permittee had failed to use his or her portion of the range for the statutory period. Such a modification would change adverse possession from an Anglo-American doctrine that forces transfers between private parties into a tool of the Navajo Nation to strip tribal members with grazing rights of those previously recognized rights.

If the goal is to claw back dated, unused grazing rights, Anglo-American law offers a more direct mechanism—tax liens—that could theoretically accomplish much the same. Off-reservation, when a property owner fails in his or her obligations (the main one being the payment of property taxes) to the state, the solution is not some version of adverse possession by the state, but instead a lien on the property.\textsuperscript{128} Property taxes encourage—and, in

\textsuperscript{126} Lee Anne Fennell, \textit{Efficient Trespass: The Case for "Bad Faith" Adverse Possession}, 100 NW. U. L. REV. 1037, 1053 (2006) ("[C]ourts and commentators often regard the bad faith claimant as a thief.").

\textsuperscript{127} For the seminal article on how courts deal with "bad faith" adverse possessors, see Richard Helmholz, \textit{Adverse Possession and Subjective Intent}, 61 WASH. U. L.Q. 331 (1983).

\textsuperscript{128} See \textit{Lien}, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "lien" as a "legal right or interest that a creditor has in another's property, lasting . . . until a debt or duty that it secures is satisfied" and defining "tax lien" as a "lien on property, and all rights to property," imposed by the federal, state, or local government for nonpayment of taxes).
practical terms, may require—productive use of property. Enforcement through a tax lien allows the state to reclaim property when owners fail to pay their property taxes.\textsuperscript{129} Another way to think about this ability of the state to recapture land through tax liens is as a collective claim of non-use that disciplines owners and, like adverse possession, punishes those who do not live up to the basic requirements of ownership. Superficially, with the exception of isolated fee simple properties located within the larger reservation, tax liens would seem to have little relevance in the Navajo Nation. After all, the Navajo Nation and the U.S. government hold most of the reservation land in joint trust. Tribal members typically have only use rights to the land. But the Navajo Nation can certainly impose a system of user fees that make grazing rights conditional on payment. In the event of nonpayment, the tribe could reclaim rangeland, checking the power permittees have to block all forms of development.

In theory, fees enforced through tax liens offer the Navajo Nation an effective way to free up the range, but the politics of imposing fees would likely derail any proposal as it advanced beyond the planning stage. Given the poverty of the reservation, fees would have to be set at amounts that are low relative to off-reservation standards. But even a relatively low fee could convince tribal members to disclaim those portions of their customary use areas that they do not actually use. After all, few people will want to pay for something if they see no benefit in the payment, no matter how small the per acre fee. Of course, if the tribe were more aggressive, if it set user fees closer to the costs of herding, including environmental damage and governance costs, then more land could be freed from grazing rights claims. However, and this is the challenge, the imposition of \textit{any} fee is likely to be politically dead on arrival if raised in the Navajo Nation Council. The weight of memory from livestock reduction is just too great. Even if they were set artificially low, user fees would be an extra burden on those Diné families already living close to subsistence levels. Just as the seemingly neutral culling requirements of the New Deal disproportionately harmed the most vulnerable, so too would Diné families experience user fees differently depending on their relative wealth. Families with outside income tied to formal sector employment likely would be less impacted than families more dependent on grazing. Taking a broader view, tax liens were one of the mechanisms through which Indians were dispossessed of their land following allotment. Enforcing grazing fees would be quite different from tax liens imposed by non-Indian governments in that the land would stay within the tribe; nevertheless, this history of Indian land loss likely would

\textsuperscript{129} Of course, sometimes the state does not want to take on the obligations of ownership or does not want to lose part of its tax base, as it does when land moves from private hands to state hands. See Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d 233, 235 (Pa. Super. Ct. 1995) (describing how the landowners attempted to sell, gift, or abandon property to a city civic association to avoid paying delinquent property taxes, but the city declined to accept the property each time).
limit the ability of the Navajo Nation to institute a meaningful grazing fee system.

Fortunately, the Diné need not adopt an approach based on Anglo-American law; instead they can revitalize their traditional practice of treating land rights as use-dependent. For while modified versions of adverse possession and tax foreclosure could help the Navajo Nation diminish the power grazing permittees currently enjoy, the Diné tradition of insisting on use arguably provides a better solution in terms of both political feasibility and cultural match. Reservation land, though largely free from off-reservation fee simple ownership claims, is subject to strong ownership claims tied to past use. In *Dreaming of Sheep in Navajo Country*, a comprehensive and beautifully written exploration of Navajo grazing practices and history, Marsha Weisiger notes:

Matrilocal residence meant that most pastures and springs became associated with particular matrilineages. Certainly Diné did not conceive of land—unlike stock—as something people “owned”; it was communally held, and unused land was available to whoever preempted it. But practically speaking, families tended to graze their livestock in the same general areas year after year, so that over time, they acquired generally recognized, though often overlapping, use-rights to particular areas.\(^{130}\)

The challenge is squaring the sense of ownership—which enjoys community support—with the idea that “unused land” is generally available to others who can use it. What should give when these generally recognized rights to particular areas conflict with Diné traditional land use practices? Traditionally, as the Diné Policy Institute’s 2017 report, *Land Reform in the Navajo Nation*, highlights, “There was rarely a permanence to any one family’s control of land. If a family moved on, another family could move in and occupy the land.”\(^{131}\) There is no simple answer to this conflict between tradition and generally recognized use-rights. Land rights have ossified, and there is little incentive for Diné families to make land concessions from their customary use and traditional grazing area for the greater good of the tribe. At some point, a choice has to be made and the tribe has to put its thumb on the scale. Though the tribe could improve how

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\(^{130}\) *WEISIGER, supra* note 15, at 94 (footnote omitted).

\(^{131}\) *DINÉ POLICY INST., LAND REFORM IN THE NAVAJO NATION: POSSIBILITIES OF RENEWAL FOR OUR PEOPLE* 8 (2017), http://hooghan.dinecollege.edu/institutes/docs/Land%20Reform%20in%20Navajo%20Nation.pdf. *See also KELLEY & WHITELEY, supra* note 48, at 84 (“Navajo individual tenure differed from the American capitalist form of private ownership in two ways, both holdovers from communal tenure. Anyone could take land from someone who claimed it but did not use it, and land in general could not be bought or sold.” (citation omitted)).
the range is governed and how development proposals are dealt with through selective incorporation of aspects of Anglo-American property law, ultimately, a better option would be to revitalize the traditional Diné emphasis on use.

Making land rights use-dependent once more will not be easy. Some tribal members will experience a loss if told that land they considered “theirs” is no longer theirs to control because the land has been unused for a long time. To revitalize the traditional use-dependent understanding of rights over land, the tribe might need to make compensating payments or allowances to tribal members who suffer a loss when the range is freed from dated grazing permit-based claims. But as tempting as it is to focus only on the loss that grazing permittees may experience, it is worth keeping in mind the hidden losses the current system is imposing on the tribe as a whole.

CONCLUSION

Given the trauma of livestock reduction, it is no wonder that both the Navajo Nation and the federal government are reticent about trying to tackle, once again, the problem of overgrazing. The original problem that motivated the livestock reduction program during the New Deal has not gone away—creeping desertification continues to be a problem—but revisiting grazing (or even making headway on related issues, such as the need to cull the wild horses that roam across the reservation and destroy vegetation) has been a political non-starter. There are significant costs associated with the ongoing neglect of land reform as it relates to the Navajo range. The current system is not working. Not only does overgrazing continue, but grazing enforcement problems abound, non-agricultural development opportunities are being lost because of grazing permittees’ veto power, and very little land is available without a fight. Ultimately, the Diné will decide what Navajo land governance looks like. That the Navajo Nation now has the power to

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132 See Katz, supra note 107, at 289–90 (arguing that property rights can best be thought of in terms of owners’ exclusive agenda-setting authority).

133 The problem of wild horses, not owned by tribal members, is not new nor is it unique to the Navajo reservation. The Meriam Report highlighted the problem in 1928: “Worthless Horses. Many reservations are now overrun with worthless horses. These consume much grass that could be utilized by cattle and sheep. Yet the Indians love horses and are often reluctant to get rid of them.” MERIAM, supra note 53, at 507.

134 See Robert J. Miller, Sovereign Resilience: Reviving Private Sector Economic Institutions in Indian Country, 2018 BYU L. REV. 1331, 1374 (2019) (“Indian country seems to have a surplus of one infrastructure need: available land. Yet even here, Indian entrepreneurs often encounter serious problems in acquiring the infrastructure of sites to lease to operate businesses. Many reservations have lots of seemingly empty space, but preexisting grazing rights, for example, and other issues actually limit where businesses and storefront establishments can be established or built.”).

135 For more on what land reform requires of tribes, see Jessica A. Shoemaker, Complexity’s Shadow: American Indian Property, Sovereignty, and the Future, 115 MICH. L. REV. 487, 549 (2017) (“The process of making Indian property law more adaptive—more in the spirit of tribal sovereignty, in line with self-determination goals, and consistent with an indigenous land ethic—must itself be
set the agenda itself is itself a significant victory considering the history of heavy-handed federal involvement in even relatively local land use decisions. Bringing back the tribe’s traditional use-dependent understanding of the land rights tribal members enjoy would help the Navajo Nation regain control over the range and would create space for the Diné to take more advantage of growth opportunities that respond to the needs of all tribal members.

implemented in an iterative (and adaptive) way. This requires participatory local processes to define the problem, set tribal community objectives, assess the land tenure baseline, and formulate models of reform that are iteratively tested as they are deployed.”