Response Essay: The Personhood Rationale and Its Impact on the Durability of Private Claims to Public Property

ALEXANDRA B. KLASS*

INTRODUCTION

In his insightful article, *The Durability of Private Claims to Public Property*, Professor Bruce Huber explores the nature of private claims to the use of federal lands as well as natural resources such as oil, gas, water, and coal located in or around those lands.[1] The publication of Professor Huber's article in April 2014 could not have been timed more perfectly to coincide with Cliven Bundy's standoff that same month with Federal Bureau of Land Management (BLM) personnel over Bundy's refusal to pay more than a million dollars of grazing fees incurred over decades of Bundy's use of federal lands.[2] The significant news coverage of the Bundy dispute placed a national spotlight on the tensions between long-term private uses of federal public lands and federal land managers that have always been prominent in the West but have received much less attention in the rest of the nation.

This Response Essay proceeds in three Parts. First, it describes Huber's concept of the "durability" of private claims to public property and draws parallels to the Bundy dispute. Second, it suggests that the personhood rationale behind the doctrine of adverse possession can help explain the durability of private claims to public property. This is true even though, as every student of first-year property law learns, neither the doctrine of adverse possession nor prescriptive easement generally applies to federal lands. Third, this Response Essay applies some of these principles to the Bundy dispute to provide additional insights into why the dispute so captured the public's attention and generated such strong feelings on both sides of the debate.

I. THE DURABILITY OF PRIVATE CLAIMS TO PUBLIC PROPERTY

One goal of Huber's article is to describe how the legal and regulatory regimes governing the use of federal lands tend to protect existing use claims and to show how this framework makes it difficult for lawmakers and land managers to limit or extinguish existing private claims when federal land users, like Bundy, violate the terms of their permits or refuse to pay fees.[3] Huber explores why, even when federal land managers are given significant statutory discretion to eliminate private uses or enforce limits on private uses of public lands, officials more often choose to avoid conflict and allow established permissive uses to continue even if they conflict

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* Professor of Law, University of Minnesota Law School. I received helpful comments on an earlier draft of this Essay from Robert Glicksman.

[1] *See generally* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991 (2014).

[2] Jaime Fuller, *Everything You Need to Know About the Long Fight Between Cliven Bundy and the Federal Government*, WASH. POST (Apr. 15, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/15/everything-you-need-to-know-about-the-long-fight-between-cliven-bundy-and-the-federal-government; Adam Nagourney, *A Defiant Rancher Savors the Audience That Rallied to His Side*, N.Y. TIMES, Apr. 23, 2014, http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html?_r=0.

[3] Huber, *supra* note 1, at 994.

with current federal land policies or environmental protection values.[4] As examples, Huber uses livestock grazing permits, permits to build ski resorts, permits for hydropower facilities, oil and gas leasing, coal leasing, and continued personal occupancy on land assembled for national parks or monuments.[5] Huber describes, in the context of grazing permits, that even though the federal government expressly states in the permit that the grazing rights are subject to reduction or termination if drought or other conditions warrant, commercial banks routinely lend against the value of the permit because of the government's historical reluctance to limit or terminate such land uses.[6]

Huber states that a partial explanation for the durability of these private claims to public lands is historical.[7] Until the early 1900s, Congress's main objective with regard to public lands was to encourage settlement and resource extraction.[8] It accomplished these goals through various federal policies to facilitate land and resource development.[9] Although in the early twentieth century Congress created new policies to create national forests, parks, and monuments, and to better conserve federal lands and resources, it continued to allow access to such lands and resources, and that policy continues today.

Certainly, there have always been calls, particularly today on the right, for the government to relinquish many of its claims to public lands and to transfer those lands to states and private parties. As Huber points out, though, many individuals and corporations with present-day claims to public lands are quite content with the current system of private access to public lands.[10] So long as limits on private access are not enforced, private users of public lands receive the benefits of grazing, resource extraction, or other land uses at low cost without any of the burdens of land ownership.[11] Such private users do not pay taxes on the land, need not restore the land in case of drought or natural disaster, often have priority rights as compared to later potential users of adjacent public lands or resources, and may face less liability for the environmental impacts of their activities than if they were the fee simple owners.[12]

Private users of public lands can rely on their claims being "durable" in Huber's words because of "the awkward fit between the task of public land management and the political institutions charged with doing so."[13] Huber describes how difficult and costly it is for the federal government to monitor its vast amounts of land, particularly with no neighbors to help enforce violations, as would occur in a situation where a private landowner is surrounded by other landowners with a common interest in protecting their own private interests in the neighborhood.[14] Land managers understandably wish to avoid confrontation and violence with private users of public lands, and so they often let violations slide.[15]

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[4] *Id.* at 995.
[5] *Id.* at 994–95.
[6] *Id.* at 1005.
[7] *Id.* at 996.
[8] *Id.* at 996–97.
[9] *Id.*
[10] *Id.* at 1033.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1034.
[14] *Id.*
[15] *Id.* at 1034 n.237.

Thus, as noted above, many private users of public lands and resources actually prefer federal ownership of public lands, rather than the transfer of those lands into private or state control, because the private users receive benefits from the lands without the corresponding burdens. But Huber is quick to point out that

> all of these benefits could only be realized if they rested atop a foundation of a durable legal claim to a publicly owned resource. Crucial commercial constituencies, we may be quite sure, would not have supported federal land control nearly as quickly without assurances of the long-term security of their claims, in both law and administration.[16]

What happens when that "security" of private claims is challenged, and the federal government decides to exercise its explicit right to allow a grazing permit or other permit to expire? Not surprisingly, the holder of the private right resists. Huber uses the example of the recent litigation over oyster farming in the Point Reyes National Seashore in California.[17] When the land for the seashore was being assembled in the 1970s, Congress allowed an oyster farm to continue operating for forty additional years, at which time the permit would expire, and the seashore would be eligible for wilderness designation.[18] But eight years before the anticipated 2012 expiration of the permit, the oyster farm was sold to a new owner with full knowledge of the termination of the permit.[19] The new owner lobbied hard to extend the permit and engaged in years of litigation when the Interior Secretary refused to extend it.[20] Clearly, the owner assumed the Interior Secretary would allow the farm to continue and took action when the durability of that claim was, contrary to the norm, not upheld in that particular case.

Just as the oyster farmer in the Point Reyes case defended his right to continue his private claims to public lands, Cliven Bundy and his supporters went beyond litigation and created a major physical standoff with federal officials to preserve Bundy's claims to public lands. Throughout the standoff, Bundy and his followers continually emphasized that he and his family had grazed the land in question for over one hundred years.[21] In the oyster farming case as well, the duration of the permit was, at least in the background, an equitable reason why it was unfair for the federal government to eliminate the use after so long—even though the government always had retained the right to do so. There is also, particularly in the Bundy case, an implicit argument that in these situations the private users of public lands are more connected to the land than the federal government (or at least the federal land managers who come and go over the years). Thus, it may be that such users of federal land perceive their long-term connection with the land as the basis for the durability of their claims—so durable as to override any legal limits that may be contained in the permits themselves.

Many teachers and students of property law will recognize in this argument some of the policy reasons behind the doctrine of adverse possession. Thus, the next Part summarizes the personhood rationale behind the adverse possession doctrine and explains why, despite the federal public lands exception, the personhood rationale still provides insights into both Huber's

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[16] *Id.* at 1037–38.
[17] *Id.* at 1035.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See, e.g.*, Fuller, *supra* note 2; Nagourney, *supra* note 2.

concept of the durability of private claims to public lands and the application of that idea to the Bundy case.

II. THE ROLE OF ADVERSE POSSESSION

Adverse possession is a legal doctrine, dating back to at least sixteenth-century England and adopted in the United States, that legally transfers property from the original or "true" owner to a possessor or user of the land (the adverse possessor) if the possession is (1) actual and exclusive; (2) open and notorious; (3) adverse or hostile under claim of right; and (4) continuous for the statutory period.[22] Every state has the doctrine in one form or another and has at least one statute of limitations that sets the period beyond which the true owner of the land can no longer bring an action for trespass against the adverse possessor.[23] If the elements of adverse possession are met, the adverse possessor becomes the legal owner of the property and can seek legal recognition of that fact in court.[24] Prescriptive easements differ from adverse possession with regard to the type of interest acquired. Adverse possession is based on exclusive possession of the property and results in transfer of title to the property, whereas a prescriptive easement is based on a continuous and adverse use of the property and results in transfer of an easement to continue to use the property.[25]

In the case of federal lands, there are several legal impediments to an adverse possession or prescriptive easement claim. The first and most important, of course, is that adverse possession does not apply to federal lands at all.[26] Federal statute prohibits adverse possession of government lands except in very limited circumstances.[27] Even beyond that prohibition, in the context of private claims to public lands, the use of land is with permission of the federal government and thus is not adverse or hostile under claim of right.

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[22] *See, e.g.*, POWELL ON REAL PROPERTY § 91.02 (Michael Allan Wolf ed., 2009); Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 286 (2006).

[23] Klass, *supra* note 22, at 286–87; *see also* JESSE DUKEMINIER ET AL., PROPERTY 116–22 (7th ed. 2010).

[24] *See* Klass, *supra* note 22, at 287 n.14.

[25] DUKEMINIER ET AL., *supra* note 23, at 124 n.15.

[26] *See* United States v. California, 332 U.S. 19, 40 (1947) ("The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."); DUKEMINIER ET AL., *supra* note 23, at 150 (stating that under the common law, adverse possession does not run against the government but that some states have modified that rule by statute to allow adverse possession against some or all state lands).

[27] *See* 48 U.S.C. § 1489 (2012) (prohibiting adverse possession or prescription of federal lands and allowing title to pass only by conveyance); Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 939 n.2, 940 (1996) (noting that under some states' laws, adverse possession is allowed to run against some state lands but that adverse possession does not apply to federal lands except for limited statutory exceptions). Two federal statutes, Conveyances of Occupants of Unpatented Mining Claims and the Lands Held Under Color of Title Act permit the Secretary of the Interior to convey up to a certain acreage of land to a claimant who establishes he or she has held the tract for certain purposes for a certain period of time and has placed improvements on the land. *See* Latovick, *supra*, at 939 n.2; *see also* 3 OFFICE OF GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 13-256 to 13-258 (3d ed. 2008), *available at* http://www.gao.gov/assets/210/203470.pdf (describing law prohibiting adverse possession against federal government for federal lands except in limited circumstances allowed by statute).

So, one might ask, why even talk about adverse possession or prescriptive easements in the context of federal lands? In my view, it is relevant because one of the primary policy reasons behind the doctrine of adverse possession, the personhood rationale, may help explain the durability of private claims to public property.

In general, scholars and courts point to three policy rationales to support the doctrine of adverse possession: (1) the "limitations" rationale, based on the notion that once a true owner is given actual or constructive notice of a claim on his or her land, there is an obligation to bring a timely legal action to assert legal rights to the property to avoid stale claims and old evidence; (2) the "administrative" rationale, which views adverse possession as a means of curing minor title defects and protecting the title of the possessor, which was important in the early days of the nation when there were many errors in land records; and (3) the "personhood" rationale, which recognizes that after a certain period of time, the person in possession of the land forms a personal attachment to it that is much stronger than that of the true owner who has presumably become detached from the land—or else he or she would have brought a legal action to assert his or her rights.[28]

It is the third, personhood rationale that is most relevant for present purposes. The personhood justification was first and most famously described by Oliver Wendell Holmes, who stated:

> I should suggest that the foundation of the acquisition of rights by lapse of time is to be looked for in the position of the person who gains them, not in that of the loser. Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.[29]

Since then, many scholars have pointed to this justification for adverse possession or prescriptive easement as a primary explanation for why the law essentially allows "title by theft."[30] For instance, Joseph Singer states that the adverse possessor

> comes to expect and may have come to rely on the fact that the true owner will not interfere with the possessor's use of the property. If the adverse possessor were to be ousted from the property, she would experience a loss. The adverse possessor's interests grow stronger over time as she develops legitimate expectations that the true owner will continue to allow her to control the property.[31]

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[28] *See* Klass, *supra* note 22, at 288–90. These rationales are also phrased slightly differently as the "sleeping" theory, the "stability" theory, and the "earning" theory of adverse possession. The earning theory differs from the personhood theory in that under the earning theory, an adverse possessor builds a claim to the land because he or she has made productive use of the land in a way that benefits society. Under the personhood theory, productive use is not necessarily required. *See* DUKEMINIER ET AL., *supra* note 23, at 120–21 (discussing sleeping and earning theories of adverse possession); CHRISTOPHER SERKIN, THE LAW OF PROPERTY 56–57 (2013) (same).

[29] O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

[30] *See* Jeffry M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT'L REV. L. & ECON. 217, 217 (1986).

[31] Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 666–67 (1988) (footnote omitted); *see also* Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 739–42 (1986)

Likewise, Thomas Merrill, in explaining the various bases for adverse possession, describes the personhood rationale in terms of the reliance interest that the adverse possessor develops through the longstanding possession of property. This description in many ways describes both Huber's theory of durability of private claims to public property as well as the Bundy showdown:

> The [reliance] justification appears in several different forms. One form, having distinct echoes of a frontier society, invokes the interest in "preserving the peace." After a sufficient period of time has elapsed, so the argument goes, the [adverse possessor's] attachment to the property will be so strong that any attempt by the [true owner] to reassert dominion may lead to violence. In another form, the reliance argument draws upon the personality theory of property rights, and posits that the [adverse possessor] may have developed an attachment to the property which is critical to his personal identity.[32]

Notably, the personhood or reliance rationale focuses primarily on the actions and interests of the adverse possessor. This stands in contrast to the other justifications for adverse possession, which tend to emphasize the failures of the true owner to assert his or her claims to the property. This difference is significant in the context of continued private claims to public lands. It means that even if there is a legal rule that prevents adverse possession or acquisition of a prescriptive easement of such lands, the long-term user of the land may well develop the same attachment to the land as would be the case if the land was privately owned. Indeed, the attachment to public lands may in some cases be even more pronounced because of the lack of other neighboring private landowners and a succession of changing federal land managers over a series of decades. This may in many cases make the private claimant seem, at least to him or herself, more permanently attached to the land than the true owner, who necessarily is embodied only in the form of a constantly changing federal land manager.

Why then, in light of the personhood rationale, should we not apply the doctrine of adverse possession to government lands? As a pure legal matter, as noted above, the law prohibits adverse possession of virtually all federal public lands. But is there a good reason for the law to trump the personhood rationale underlying adverse possession that property theorists describe?

In a roundtable discussion in 1986 at the Washington University Law School, property scholars discussed this issue.[33] The scholars raised the point that if the law allowed adverse possession against the government, it might make the government think twice before taking large parcels of land out of productive use and would also reinforce the strong personhood and utilitarian arguments in favor of adverse possession.[34] Others responded, however, that there were several utilitarian reasons for treating government lands differently. These reasons include the expense associated with adequately monitoring the land to avoid adverse possession claims which would fall to taxpayers, rewarding concentrated interests (the adverse possessor), and

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(describing various rationales for adverse possession and noting that "the claim to an owned object grows stronger as, over time, the holder becomes bound up with the object").

[32] Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1131 (1985) (footnote omitted); *see also* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2473 (2001) (analyzing various justifications for adverse possession and concluding that the only rationale that provides any justification for application of the doctrine in modern times is the personhood model).

[33] *Time, Property Rights, and the Common Law: Round Table Discussion*, 64 WASH. U. L.Q. 793 (1986).

[34] *Id.* at 831–32.

penalizing the diffuse interests of taxpayers who may enjoy the land in public hands.[35] Beyond these arguments, if a majority of the public believes there are benefits to the federal government retaining and preserving large amounts of lands for national parks, open space, and management of natural resources, then it makes sense not to require the same sort of management and use on the part of the federal government that we would require of private owners with respect to these lands.

But even if we accept that there are good reasons to exclude federal lands from the adverse possession doctrine, it still may be impossible to prevent private claimants from attaching themselves to federal public land if such claims are allowed to continue for decades or even a century. Although the purpose of this Response Essay is not to resolve the issue, the next Part looks more closely at the Bundy dispute and considers how some of the facts and arguments made in this dispute fall within the personhood approach to adverse possession as well as Huber's description of the durability of private claims to public property.

III. THE PERSONHOOD RATIONALE AND ITS ROLE IN THE DURABILITY OF PRIVATE CLAIMS FOR PUBLIC LANDS

The above discussion reveals that even if we have a pure legal rule that prevents adverse possession of government lands, the personhood rationale helps explain why users of public lands may create durable claims to that land and why members of the public may support those claims. The durability of claims based on personal attachment to land, described through history by property theorists back to Oliver Wendell Holmes,[36] may also help explain why the federal government is wary of eliminating or limiting private claims to public lands—to avoid conflict—even if it has a clear right to do so. This means, however, that when the federal government does decide to assert its rights, private claimants like the oyster farmer in California or Cliven Bundy in Nevada resort to litigation, mass protest, or violence. Whether legally valid or not, from the perspective of the private user, it may make little difference that the government clearly limited private rights to use the land in the underlying oyster farming permit, grazing permit, or other legal document. Under the personhood theory, the attachment forms through the private claimants' actions rather than the government's actions or inactions.

According to news reports, Bundy and his ancestors have grazed the land in question in Nevada, near the Utah border, since his family homesteaded the ranch in the 1870s.[37] Beginning in 1993, the BLM limited grazing on approximately six hundred thousand acres of federal land in Nevada adjacent to the Bundy ranch to protect the endangered desert tortoise.[38] Bundy refused to abide by these restrictions, and ultimately the BLM revoked his grazing rights. As a result of that revocation, and Bundy's refusal to stop grazing his cattle on the land in question, he has now incurred over $1 million in unpaid grazing fees since 1993.[39] After numerous lawsuits, all of which Bundy lost, the BLM attempted to begin moving five hundred of Bundy's cattle in 2014,

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[35] *Id.* at 832–34.
[36] *See* Holmes, *supra* note 29.
[37] *See, e.g.*, Fuller, *supra* note 2; Nagourney, *supra* note 2.
[38] Fuller, *supra* note 2; *Nevada Officials Blast Feds Over Treatment of Cattle Rancher Cliven Bundy*, FOX NEWS (Apr. 10, 2014) [hereinafter *Nevada Officials Blast Feds*], http://www.foxnews.com/politics/2014/04/07/nevada-officials-blast-feds-over-treatment-cattle-rancher-cliven-bundy.
[39] Fuller, *supra* note 2; Nagourney, *supra* note 2.

over twenty years after the unauthorized grazing began.[40] This led to physical confrontations, threats of violence, and large rallies in support of the Bundy family.[41] It also led to around-the-clock national news coverage for several weeks in April 2014, particularly by Fox News, as many national conservative and libertarian politicians rallied around Bundy and criticized federal management of public lands.[42] Indeed, the dispute has once again raised long-standing tensions regarding the federal government's ownership of over eighty percent of the land in Nevada and over fifty percent in several other western states, as compared with only four percent of lands in the rest of the United States.[43] For those who favor the transfer of such lands to the states and to private parties, the Bundy dispute has provided a platform to make statements about government heavy-handedness and to question why the government would put the interests of desert tortoises over local ranchers.[44]

In the Bundy dispute, many commentators and members of the public have described Bundy as simply a "freeloader" who has obtained years of private benefit in free grazing rights from public lands that belong to all of us.[45] But many supporters of Bundy (and there remain many, even after the disclosure of his controversial views on slavery, race, and various other social issues) defend his claims.[46] Notably, there has been significant focus in virtually all the Bundy news coverage on the fact that he and his ancestors have grazed the land in question for over one hundred years. One nearby resident quoted in *The New York Times* stated: "Someone like the Bundys, they have been here for generations, before the B.L.M. was ever created, using this land to graze their animals. And the B.L.M. comes in and changes the rule. A small little rancher trying to make a living and they come in like big bullies."[47]

Of course, many would point out that grazing fees are far below market value, resulting in inappropriate taxpayer support of ranchers like Bundy even when they pay the grazing fees in question.[48] Nevertheless, both Senator Dean Heller of Nevada and Governor Brian Sandoval condemned the BLM for "heavy-handed actions" involving Bundy and other Nevada residents using federal lands.[49] According to a guest commentary in *Forbes* magazine, the government was unreasonable in demanding that Bundy not graze his lands in the springtime to protect the tortoise habitat when Bundy's family had homesteaded the land more than a century ago and had paid grazing fees until the dispute began in 1993.[50] The commentary went on to state that "[t]he

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[40] Fuller, *supra* note 2; Nagourney, *supra* note 2.
[41] *Id.*
[42] *E.g.*, *Nevada Officials Blast Feds*, *supra* note 38; *see also* Fuller, *supra* note 2; Nagourney, *supra* note 2.
[43] *See* Jim Carlton, *Grazing Limits Feed Tension in Nevada*, WALL ST. J. (May 27, 2014, 7:04 PM), http://online.wsj.com/articles/grazing-limits-feed-tension-in-nevada-1401231844.
[44] For discussions of the long history of opposition to federal government retention and management of large tracts of federal lands in western states, particularly Nevada, see CHRISTINE A. KLEIN ET AL., NATURAL RESOURCES LAW 38–41, 50–53 (3d ed. 2013); Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KAN. L. REV. 647 (1997); Carlton, *supra* note 43; Fuller, *supra* note 2.
[45] *See, e.g.*, Vickery Eckhoff, *Federal Grazing Program in Bundy Dispute Rips-Off Taxpayers, Wild Horses*, FORBES (Apr. 25, 2014, 12:55 PM), http://www.forbes.com/sites/vickeryeckhoff/2014/04/25/federal-grazing-program-in-bundy-dispute-rips-off-taxpayers-wild-horses.
[46] Geoffrey Lawrence, *Cliven Bundy Is a Racist, but Federal Ownership of State Land Is Still a Serious Problem*, FORBES (Apr. 30, 2014, 10:37 AM), http://www.forbes.com/sites/realspin/2014/04/30/cliven-bundy-is-a-racist-but-federal-ownership-of-state-land-is-still-a-serious-problem.
[47] Nagourney, *supra* note 2.
[48] *See* Eckhoff, *supra* note 45.
[49] *Nevada Officials Blast Feds*, *supra* note 38.
[50] Lawrence, *supra* note 46.

federal government, in short, chose to privilege the [desert] tortoise over the long-established livelihood of Bundy and his family."[51] As Bundy told reporters from *Range* magazine in 1999, "Every time we tried some compromise—they wanted more. It was like talking to a greedy landlord."[52]

A detailed timeline of events published in *The Washington Post* in April 2014 chronicles the decades-long fight between the federal government and Bundy over the use of the federal lands in question.[53] The timeline, as well as the other news coverage, illustrates perfectly the durability of private claims to public lands that Huber has described. In this case, the federal government did not attempt to physically remove the cattle until more than twenty years of unauthorized grazing had elapsed and Bundy had refused to comply with multiple court orders to remove the cattle. Indeed, the government delay itself may have further cemented the durability of Bundy's claim by making the government's actions seem so extreme when it might not have been if undertaken more quickly and, more importantly, by a private party rather than the federal government.

The references in the news coverage to the federal government as a "landlord," even though Bundy's legal rights to the land are far less than a tenant's, and the characterizations of federal land managers as "heavy-handed," are telling. Just as important, the dispute is not really about grazing fees, which Bundy paid for decades, but over the federal government's decision to limit grazing in the springtime for species-protection purposes in 1993. Once the government decided to place limits on Bundy's use of the land in a significant way, the government was asserting its rights as a property owner and not just as a bank receiving grazing fees. The government assertion, for the first time, of its right to limit grazing on the property directly interfered with perceived rights upon which Bundy and his neighbors had come to rely over time, regardless of whether that reliance was at all justified. Thus, it was the use conflicts between two parties both asserting property rights over the land that caused the dispute, rather than simply issues of money.

CONCLUSION

Even when the legal rules governing adverse possession or easement by prescription do not apply, the rationales behind these doctrines may remain. This is particularly true in the case of federal lands, which are exempted from adverse possession or easements by prescription but remain subject to widespread use by private parties. There are multiple explanations for the durability of private claims to public property, many of which Huber explains so well in his article. But the personhood rationale is, perhaps, another explanation for the durability phenomenon, and the Bundy dispute is only the most recent high-profile example.

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[51] *Id.*
[52] *Id.*
[53] Fuller, *supra* note 2.