

Vol. 40, Issue 2  
Winter 2021/22

# PERCREPORTS

THE MAGAZINE OF FREE MARKET ENVIRONMENTALISM



## YELLOWSTONE

Issues of the Rocky Mountain West





“Yellowstone,” starring Kevin Costner, is one of the most popular shows on television. The action-packed drama takes place in Paradise Valley, not far from PERC’s headquarters, and follows the travails of a prominent Montana ranching family as they confront an onslaught of challenges to their way of life.

The show, now in its fourth season, has sparked renewed interest in the American West—so much so that we built an entire edition of *PERC Reports* devoted to exploring issues behind the series: How are conflicts over water rights handled in the real world? Why are endangered species so controversial? And how could something as obscure as fence law determine whether disputes between neighbors are resolved cooperatively or devolve into violent conflict?

A hit television show may seem like strange subject matter for a research institute. But PERC has long used Hollywood portrayals of the West to probe deeper into real-world problems. In 2004, Terry Anderson and P.J. Hill published the book *The Not So Wild, Wild West*, which challenged popular depictions of the “Wild West” as a rough-and-tumble place of heroes and villains. It showed how everyday people—fur trappers, homesteaders, cattle drovers, miners—often established property rights and legal institutions that facilitated cooperation rather than violence on the frontier.

This special edition of *PERC Reports* takes a similar approach. It is based on a workshop PERC hosted last summer that brought together researchers, practitioners, and policy experts—and even some “Yellowstone” cast members (see page 8)—to better understand the issues of the Rocky Mountain West.

In the pages that follow, Sara Sutherland and Eric Edwards examine how western fence law has evolved to address disputes between neighbors, with new challenges still unfolding (page 10). Edwards and Bryan Leonard explain how water rights in the West emerged to resolve competing demands over scarce water resources (page 14), sometimes peacefully, and other times not. And James Huffman describes how stream access laws in the West affect recreation and conservation (page 18), not always for the better.

Jonathan Wood shows how federal policies can turn endangered species into liabilities (page 28), and Catherine Semcer offers insights into how to make wolves more of an economic asset in the West (page 36). Andrew Morriss explores how regulations are shaped by unlikely political coalitions—sometimes called “Bootleggers and Baptists”—that are on display in the show (page 42). And Paul Schwennesen gives a historical look at Native American poverty and Indigenous land rights (page 46).

This edition concludes with a timely example of how PERC is working to help landowners enhance wildlife habitat in the real-life Paradise Valley (page 54). I hope you’ll enjoy seeing western issues through the lens of “Yellowstone” as much as we enjoyed the journey that led to this special edition of the magazine.



**PERC REPORTS**

The magazine of Free Market Environmentalism  
Vol. 40, Issue 2  
Winter 2021/22

(ISSN 1095-3779)  
2048 Analysis Dr., Ste. A  
Bozeman, MT 59718

**Executive Editor**  
Shawn Regan

**Managing Editor**  
Tate Watkins

**Art Director**  
Rachael Hundhausen

**Chief Executive Officer**  
Brian Yablonski

**Vice President of Development**  
Rupert Munro

**Vice President of Research**  
Shawn Regan

**Vice President of Law & Policy**  
Jonathan Wood

**Vice President of Marketing & Communications**  
Jack Wiezien

**Policy Director**  
Hannah Downey

**Finance Director**  
Gro Lunde

**Director of Operations**  
Sarah Lutiger

**Senior Program Coordinator**  
Colleen Lane

**Marketing & Media Manager**  
Katherine Dwyer

**Administrative Associates**  
Amy Kimmel  
Sharon Williams

**Development Associate**  
Amberlee Burrows

**Research Assistant**  
Jack Smith

**Senior Fellows**  
Jonathan H. Adler  
H. Spencer Banzhaf  
Daniel K. Benjamin  
Christopher Costello  
P.J. Hill  
Gary D. Libecap  
Robert E. McCormick  
Roger E. Meiners  
Andrew P. Morriss  
Sheila M. Olmstead  
Dominic P. Parker  
Randal R. Rucker  
Randy T. Simmons  
Thomas Stratmann  
Walter N. Thurman  
Matthew A. Turner  
Bart J. Wilson

**Senior Fellows Emeritus**  
David D. Haddock  
Donald R. Leal  
Jane S. Shaw  
Richard L. Stroup  
Bruce Yandle

**Senior Research Fellows**  
Bryan Leonard  
Kurt Schnier

**Research Fellows**  
Ben Foster  
Holly L. Fretwell  
Laura E. Huggins  
Catherine E. Semcer  
Michael 't Sas-Rolfes  
Tate Watkins

**Board of Directors**

Loren D. Bough, *Private Investor*  
Reginald Brown, *Kirkland & Ellis LLP*  
Henry N. Butler, *GMU Antonin Scalia Law School*  
Robert Clement, *Accenture (retired)*  
Christopher T. Corr, *Rayonier*  
Kimberly O. Dennis, *Searle Freedom Trust*  
James Huffman, *Lewis & Clark Law School (emeritus)*  
Kristina Kendall, *Kristi Kendall and Co.*  
Brad Levine, *Bison Capital Partners LLC*  
Kameron Onley, *The Nature Conservancy*  
Adam Putnam, *Ducks Unlimited Inc.*  
Gary Rieschel, *Qiming Venture Partners*  
K.C. Walsh, *Simms Fishing Products*  
Christopher Wright, *Liberty Oilfield Services*

Copyright © 2021, PERC. All rights reserved.  
Reproduction without permission is strictly prohibited.  
Back issues available in PDF format: [percreports.org](http://percreports.org)

The Property and Environment Research Center is a nonprofit institute dedicated to improving environmental quality through markets and property rights. Learn more at [perc.org](http://perc.org).

 TELL US WHAT YOU THINK  
shawn@perc.org

## 'OH, I'LL KEEP 'EM OUT' . . . . . 10

Good fences make good ranchers

By Sara Sutherland and Eric Edwards

## OUR LAND, OUR RIVER? . . . . . 14

Property rights to water in the American West

By Eric Edwards and Bryan Leonard

## WHOSE RIVER RUNS THROUGH IT? . . . . . 18

How stream access laws affect recreation and conservation

By James Huffman

## 'YELLOWSTONE' AND THE ENDANGERED SPECIES ACT . . 28

Incentives for species recovery need more carrot and less stick

By Jonathan Wood

## SECURING A FUTURE FOR WOLVES IN THE WEST . . . . . 36

Addressing the financial liability, creating an economic asset

By Catherine Semcer

## BOOTLEGGERS AND BAPTISTS IN 'YELLOWSTONE' . . . . . 42

The series portrays political coalitions without romance

By Andrew P. Morriss

## DISPOSSESSED . . . . . 46

Indigenous poverty, land, and property rights

By Paul Schwennesen



10



14



18



28



36



42



46

## Frontiers . . . . . 4

The 'Yellowstone' We Know

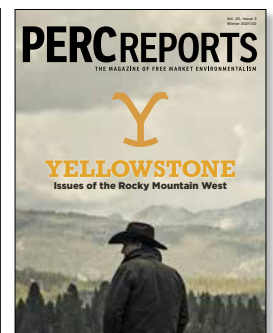
By Brian Yablonski

## A Letter from Luke Grimes . . . . . 8

## The Last Word . . . . . 54

Giving Yellowstone's Elk More Room to Roam

By Shawn Regan



To subscribe or support PERC Reports, visit [percreports.org](http://percreports.org)

Cover and table of contents:  
© **YELLOWSTONE**,  
Paramount Network



---

Characters of “Yellowstone” (left to right):  
Beth Dutton, John Dutton, Kayce Dutton,  
Monica Long, Rip Wheeler, Jamie Dutton

**YELLOWSTONE** © Paramount Network



# The 'YELLOWSTONE' We Know

Art imitating life, and life imitating art

**P**eople are watching “Yellowstone.” Lots of people. The Season 4 premiere of the blockbuster television series drew nearly 15 million viewers in one night. It is now the most watched television series in the country. It’s even been cited as a contributing factor for Montana’s modern land rush.

For the unfamiliar, “Yellowstone” gives viewers a look at the contemporary American West and features a cast of rising stars as well as veteran actor Kevin Costner. But “Yellowstone” at its core is about the landscape. It shapes the issues and plot lines covered in the series. And that’s where PERC’s interest comes in.

Set in Paradise Valley near Yellowstone National Park and Bozeman, Montana—PERC’s home—the main character of the show is the fictional Yellowstone Dutton Ranch, the largest contiguous ranch in the United States. The current patriarch of the multi-generational ranching dynasty is John Dutton, played by Costner, who has made a life starring in nearly four decades’ worth of classic westerns, including “Silverado,” “Dances with Wolves,” and “Open Range.” Defending the ranch alongside him are his children, cutthroat banker Beth, former Navy SEAL Kayce, and lawyer Jamie. Rip Wheeler is the loyal ranch manager.

The show is a case study of Old West meeting New West and the conflicts that ensue. Those out to strip the Duttons of their land and their ranching way of life include the California developer Dan Jenkins and the casino-minded Thomas Rainwater, tribal leader of a nearby Indian reservation. In the first confrontation between developer and rancher, Jenkins tells Dutton, “Progress doesn’t need your permission.” To which Dutton, in a gravelly voice, replies, “In this valley it does.”

What makes the show so compelling is that most westerns are a cliché of the West developed by people not of the West. Not “Yellowstone.” Yes, there are explosions, extreme violence, exaggerations, and moments of suspended disbelief that can elicit eye rolls from locals. But throughout it all are kernels of reality and truth. The underlying issues the show deals with are real—and often unappreciated by people not from the region. You can trace most of the plot lines to events and happenings in Montana. As Luke Grimes, the actor who plays Kayce Dutton, says, “‘Yellowstone’ is an elevated and heightened version of things that actually exist.”

There is a word for it: authentic. The show comes from someplace real. Ranchers I speak with in the actual Paradise Valley appreciate the reality under the surface. The series features issues they grapple with every day. Here in Montana, we often tell stories or hear of some incident or conflict and say, “That’ll be a scene in ‘Yellowstone.’”

A couple of years ago, PERC researchers were visiting a cattle ranch near Montana’s Crazy Mountains. Somehow “Yellowstone” came up in the introductory conversation with

the husband and wife who own the ranch, which has been in the family for more than 100 years. They indicated the show was a little outlandish for their tastes. But then, they proceeded to tell a story about three hunters going into the mountains nearby and only two coming out. An extensive search for the missing hunter was called off after the snows of winter began to fly. The incident became the subject of many suspicious theories, most focusing on the surviving hunters. Strange men showed up at the ranch months later seeking permission to hike through the family’s property to access the mountains. Ultimately, the body of the hunter was found on a hillside above the ranch, many, many miles and on the other side of the range from where the group was hunting. We all looked at each other astonished, saying that sure sounds like something out of “Yellowstone.”

The idea for a workshop based on “Yellowstone” was hatched several years ago over whiskey and wine at a Bozeman dinner with a handful of PERC board members and senior fellows. Season 2 was airing, and the conversation centered on how uncanny it was that “Yellowstone’s” creator, Taylor Sheridan, had zeroed in on so many issues that PERC researchers have covered through the years—water rights conflicts, stream access laws, weaponization

of the Endangered Species Act, wildlife compensation funds, western fence law, brucellosis transmission, and, of course, the nature of property rights. Could these insightful scenes from the show be a tool for a deeper dive into western natural resource issues? An opportunity for “Yellowstone” fans and those curious about the West to learn more about the real-life issues behind the gloss?

The answer is in your hands now. Last summer, a small group of PERC scholars and practitioners spent two days huddled up in discussion sessions focusing on scenes from the show, led by our resident third-generation cattle rancher and senior fellow P.J. Hill, whose grandfather started ranching in southeastern Montana in 1892. Thanks to our friend Cody Hyde, who does horse work for “Yellowstone” (and makes a cameo in Season 3), we were able to have Taylor Sheridan join us for a session about the issues of the Rocky Mountain West as he sees them. And then there was the big surprise: Luke Grimes,



aka Kayce Dutton, showed up along with Cody in person to participate in the first day of the workshop.

We weren't sure if the idea would be fortune or flop. In the months leading up to the workshop, several PERC scholars jumped into the project with gusto, binge watching the show to stake their claim to key scenes for their papers. Others remained politely skeptical. But if there was any doubt, the hour with Taylor Sheridan sealed the deal. Sheridan quickly proved that he was not a Hollywood captive—he grew up on a ranch in Texas and joined us virtually from his home in Wyoming. A brilliant writer and storyteller, he acutely understands the region, the land, and the culture. That's because, as he says, "a story chooses you"—a good one is the world that you know. Taylor Sheridan knows Yellowstone Country.

Embarking on a detailed discussion of cattle economics, Sheridan articulated one of the big challenges for the ranching way of life: how to make more money on less cow. Inheritance taxes are a constant threat, too. He shared personal experiences that infused the show's writing, told comical stories about visits to Yellowstone National Park, and explained that as a storyteller, he tries not to judge but to present both sides. He also informed us that over Memorial Day weekend, 11 million viewers tuned in to watch the replays of the first three seasons of "Yellowstone," with most of them on the East and West Coasts. To us, that sounded like opportunity—a common mission with Sheridan to, in his words, "educate and enlighten."

And "Yellowstone" provides a treasure chest of fodder. In one scene that resonates here in Montana, a grizzly bear is in a field off a county road digging for roots while a busload of overseas visitors has wandered too close to the bruin, which is on Dutton land, to get a better look. In fact, there is an actual remote basin outside of Bozeman where, for a couple of months a year, grizzlies come out of the national forest onto private rangeland to dig for caraway root. Like a good trout fishing hole, a place once kept quiet among locals is now being quickly discovered by wildlife watching tours.

In "Yellowstone," John Dutton sees the grizzly situation unfolding and pulls his truck over to "educate" the trespassers. He explains that he owns all of the land from horizon to horizon, and that they are too close to the bear that the tour translator said "seems friendly." One of the tourists confronts him, saying that no one should own that much land, that the land should be shared with all people. Firing his rifle in the air to scatter the tourists, Dutton replies: "This is America. We don't share land here." It was typical "Yellowstone"—capturing the sanctity of property rights felt by landowners, while also showing the disconnect of people to our natural world—a New West phenomena that we often bear witness to.

A few months after our workshop, I had the opportunity to spend more time with our new friend Luke Grimes in the real Paradise Valley. From a vantage point overlooking this historic and breath-taking valley, we discussed expeditions and settlement, cattle drives and geography, wildlife and today's ranching culture. I had the opportunity to point out a distant south-facing hillside where PERC is helping a multi-generational ranch family balance their cattle operations with elk migrations across their land (see page 54). We talked about wild horse adoptions—

another issue PERC is working on—and what it was like to ride adopted wild horses in the show. And we discussed a nearby fence line where just weeks earlier I stood talking to my neighboring rancher on horseback, who needed help with some cows that had gotten loose on our side of the fence—an example of neighborly cooperation rather than conflict. It brought it all together. The issues of the Rocky Mountain West. "Yellowstone" and PERC. Art imitating life, but at the same time, life imitating art.

---

It seemed uncanny that "Yellowstone's" creator, Taylor Sheridan, had zeroed in on so many issues that PERC researchers have covered through the years—water rights conflicts, stream access laws, weaponization of the Endangered Species Act, wildlife compensation funds, western fence law, brucellosis transmission, and, of course, the nature of property rights. Could these insightful scenes from the show be a tool for a deeper dive into western natural resource issues?



**Brian Yablonski** is the CEO of PERC.

**When you spend time in Montana** riding horses, moving cattle, and acting out the occasional gun fight, it's hard not to fall in love with Big Sky Country. After four seasons playing the role of Kayce Dutton in the show "Yellowstone," the towering landscapes and the rivers and wildlife that run through them have become part of me—it's why I've made Montana my home.

And just like the show, it's the people—the ranchers, farmers, and local communities—that make these places special. That's why, after learning about PERC last summer, I was excited to be invited to their "Yellowstone" workshop to explore the natural resource challenges faced by land managers in real life.

As I stepped foot in PERC's office, I immediately saw that they're an organization rooted in western ways of life and understand conservation on a practical level. And I learned that "Yellowstone" had apparently provided plenty of fodder for their research on topics such as water disputes, wolf reintroduction, fencing laws, and everything in between. Their approach of bringing together conservation with property rights adds up to a distinct and thoughtful perspective to issues involving land, water, and wildlife. Even in Paradise Valley—the setting for our on-screen home, the Yellowstone Dutton Ranch—they are creatively resolving conflicts between livestock and migratory elk.

Now that I'm a Montana resident, I appreciate PERC's support for landowners and ranchers who conserve the West's natural resources and keep special places intact. As someone who grew up hunting, I also value their recognition and support of sportsmen and the stewardship they make possible.



Brian Yablonski (left), Luke Grimes (center), and Cody Hyde (right) at PERC.

My experience at PERC was unique and thought provoking, and it's clear they back up their work with substance over stereotypes. I hope readers enjoy the insights in this special edition and walk away, as I did, with a deeper understanding of the issues of "Yellowstone" and the Rocky Mountain West.





---

Luke Grimes as Kayce Dutton

**YELLOWSTONE** © Paramount Network



# 'Oh, I'll Keep 'em Out'

Good fences make good ranchers

BY SARA SUTHERLAND AND ERIC EDWARDS



Disputes between neighbors make for good storylines in "Yellowstone."

**I**n Season 3 of “Yellowstone” (Episode 6), a squabble hashed out at a barbed wire fence has the air of childhood spats over siblings crossing “the line” into each other’s space. “I don’t want to see them things on our side of the fence,” Kayce Dutton tells Wade Morrow, who’s been enlisted to wrangle domestic bison on the resort property next to the Yellowstone Dutton Ranch. The ex-criminal Morrow is spoiling for a fight with the Duttons, and his latest ploy is to allow the bison to damage the fence separating the properties.

When Kayce, the current Montana Livestock Commissioner, instructs Morrow to keep the bison out of the Duttons’ property, Morrow snaps back: “It’s your job to keep ‘em from getting out. You should know that, commissioner.”

“Oh, I’ll keep ‘em out,” Kayce responds. “But you’re gonna f---ing hate the way I do it.”

Although Morrow is a convicted criminal, he does possess enough knowledge of Montana range law to be dangerous—but he is mistaken about one important detail about bison.

## Fence In or Fence Out?

Montana is what is known as a fence-out state, which means that in areas with open range, ranchers are under no legal obligation to prevent herds from meandering across property boundaries. Instead, landowners who want to keep cattle or horses off their land must build a fence themselves.

In the late 1990s in Montana’s Gallatin Valley, a fence dispute involving cattle arose as new owners of 20-acre ranchettes began to complain about cattle destroying their landscaping and muddying their yards. At the time, Gallatin County Commissioner Bill Murdock summarized Montana range law as follows: “If they don’t want cattle in there, they should fence them out or move into one of those clustered developments that we call town.”

The differences between rights to land in the city versus the country illustrate the complexity of property institutions and the ways in which they can evolve to address specific resource management challenges. Economists and legal scholars often compare property rights to a bundle of sticks. A property right is a complicated bundle of privileges or obligations, with sticks added or subtracted in different settings.

In a city, property ownership comes with the benefit that no neighbor can allow their cattle to roam onto your lawn without your permission. You also have an obligation: You cannot let your cattle roam—or more likely in many places, you are not allowed to own even a single cow.

Montana is what is known as a fence-out state, which means that in areas with open range, ranchers are under no legal obligation to prevent herds from meandering across property boundaries. Instead, landowners who want to keep cattle or horses off their land must build a fence themselves.

A homeowner in the rural countryside has a different bundle of rights and privileges. They can own cattle if they want, but their property right does not extend to preventing others’ cattle from roaming their land. Fence or not, if a cow from a neighboring ranch tramples their garden, the rancher owes the homeowner no compensation.

The costs and benefits of rigidly monitoring and enforcing property boundaries help explain why the bundles of rights differ. In a city, land is valuable, and citizens live in close proximity. It really matters if your neighbor’s fence is five feet on your side of the boundary. Homebuyers will often purchase surveys of their land to find out down to a few inches where their property boundaries lie.

In ranching country, where estates are larger and land sells for a fraction per acre of what it does in the city, the costs of enforcing strict property boundaries often exceed the benefits. Ensuring cows are always where they’re supposed to be—building fences, monitoring for wayward animals, and fixing holes—is expensive, and the damage from an occasional stray animal is small.

This calculus changes as the perceived costs and benefits shift, as it can for different types of livestock. In the aforementioned episode of “Yellowstone,” a key detail is that it is bison, not cattle, on Morrow’s side of the fence. Montana’s open range laws apply only to horses and cattle. Other livestock, including domestic bison, must be fenced in.

This aspect of the law has become relevant as more ranchers raise bison as a form of livestock. Bison can transmit a disease called brucellosis to cattle, which causes cows to abort calves, leads to fertility issues, and decreases milk production. Because

More than the range law itself, the lack of trust between neighbors and an inadequate knowledge of ranching culture by newcomers appears to have driven the Gallatin Valley fence dispute of the 1990s.

ranchers perceive a great cost of bison straying onto their land due to the risk of disease transmission, there is great potential for conflict over fencing. As a result, Montana fence law has evolved to treat domestic bison differently than other livestock.

## A Field to Study

Western fence law would appear to be an esoteric subject. A great deal of academic research, however, has examined fence liability laws because they provide a simple illustration of fundamental issues in law and economics. In his Nobel Prize winning work on property rights, economist Ronald Coase used a fence, rancher, and farmer to illustrate that creating and assigning property rights to the liability for cattle damage, whether to the rancher or farmer, leads to an efficient outcome as long as the costs of transacting between the two parties are low. In a fence-in state, the rancher is liable for damages from his herd. If those potential damages exceed the cost of building a fence, the rancher has an incentive to build a fence. If the cost of the fence is high relative to the damages his wandering cattle might cause, he would simply compensate the farmer for the damages. Conversely, in a fence-out state like Montana, the farmer is liable for any damages caused by the rancher's rogue cattle. If his damages exceed the cost of a fence, he builds it. If not, he simply allows the cattle to meander.

In both cases the outcome—whether a fence gets built—is identical. The cost of the fence, not the liability rule, determines the outcome. In discussing fences, Coase was making a broader argument that transaction costs, not liability rules, are the fundamental cause of inefficient outcomes.

Transaction costs are the costs associated with defining, enforcing, and trading property rights or writing contracts. In the farmer-rancher example, potential transaction costs

include building a fence, monitoring the boundary, and writing a contract to allow the rancher to pay for damages.

Transaction costs include the costs of monitoring and enforcing property rights. When fencing is expensive, farmers may be reluctant to grow crops near property boundaries. The invention of barbed wire, which solved the problem of cattle easily pushing over straight wire fences, offers an example of the role of technology in lowering the costs of enforcing property rights.

As barbed wire was introduced across the Great Plains from 1880 to 1900, landowners gained access to a cheaper method of keeping cattle off their land. Subsequently, agricultural investment increased, and aggregate land values grew by about 1 percent of U.S. gross domestic product.

When transaction costs are high, however, the initial assignment of property rights can matter. In these cases, the preferred legal rule is one that assigns liability to minimize the effect of transaction costs. To adjust the assignment of liability, property rights may need to be modified.

Another Nobel Prize winning economist, Harold Demsetz, observed that property rights institutions are modified to address new benefit-cost possibilities. Consistent with this hypothesis, in Montana, if a majority of landowners agrees, it can create a herd district to reverse liability and change an area to fence-in. Such a change might be sought, for example, where grain production is the dominant land use.

The legal scholar Robert Ellickson studied fence laws in Shasta County, California, where a quirk in the law allowed for ongoing reversals of liability. His important academic discovery is probably obvious to any rancher: Fences are less about legal liability and more about neighborly cooperation.

Ranchers interact with the same neighbors on a variety of issues. Cooperation on fencing is similar to the interactions of users of a common pool resource, where the work of Nobel Laureate Elinor Ostrom is relevant. She emphasized how local communities managing a common resource with high levels of trust can develop either formal or informal mechanisms to deal with issues around access and use.

This “third way” of managing natural resources can get around the high transaction costs of formally defining and enforcing strict resource access rules. On large ranches, miles of fence and interacting livestock make it prohibitively expensive to ensure cattle stay where they should. If neighboring ranchers trust each other to obey norms of proper herd



management and return stray animals, effective management can occur at low cost.

### Culture Clash

Returning to the Gallatin Valley fence dispute of the '90s, culture, social norms, and trust played key roles. Ranchette owners, often newcomers from out of state, were usually viewed with distrust, and they did not understand the legal or social aspects of open range.

More than the range law itself, the lack of trust between neighbors and an inadequate knowledge of ranching culture by newcomers appears to have driven the dispute. Warren McMillan, the neighboring rancher, summarized the issue pithily, as quoted in a *High Country News* story at the time: "Buying a house in cattle country and complaining about cattle is like buying a house in a nudist colony and complaining that people don't wear clothes."

The cooperation and social norms that generally go hand in hand with managing livestock are why we only hear about fence laws on rare occasions—and perhaps why conflict over them makes for an absorbing storyline on "Yellowstone."



**Sara Sutherland** is an environmental economist at the Sanford School of Public Policy at Duke University and a 2020 PERC Lone Mountain Fellow.



**Eric Edwards** is an assistant professor of agricultural and resource economics at North Carolina State University and a 2019 PERC Lone Mountain Fellow.



© USDA NRCS Montana



© drburtoni

Western fence law, including the way it treats different types of range animals, is the subject of a great deal of academic research.

A scenic landscape of a river valley. In the foreground, a river flows through a rocky bed, surrounded by lush green and yellowing trees. The middle ground shows rolling hills with sparse vegetation. In the background, a large, light-colored ash flow or volcanic deposit covers a significant portion of the valley floor, contrasting with the darker, forested hills. The sky is filled with dramatic, white and grey clouds.

# Our Land, Our River?

Property rights to water in the American West

---

BY ERIC EDWARDS AND BRYAN LEONARD

---

The Yellowstone River flowing through Paradise Valley

In the series premiere of “Yellowstone,” bankers and land developers sit in a dimly lit conference room above downtown Bozeman, discussing their plans for a development in the nearby Paradise Valley. As the bankers express skepticism at the legality of damming the Yellowstone River to supply water and power to the subdivision, developer Dan Jenkins disagrees. “On our land, it’s our river,” he declares. “This isn’t California, gentlemen. This is Montana. We can do whatever we want.”

Later in the episode, the Wild West ethos is on full display when the landowner upstream of the proposed subdivision—John Dutton, of the eponymous Yellowstone Dutton Ranch—dynamites an entire canyon on his land to reroute the river away from the development.

The juxtaposition of California and Montana no doubt refers to the significant differences in the stringency and complexity of environmental regulations between the two states. It also seems to suggest a wide latitude for frontier justice in the various resource conflicts that arise in “Yellowstone.”

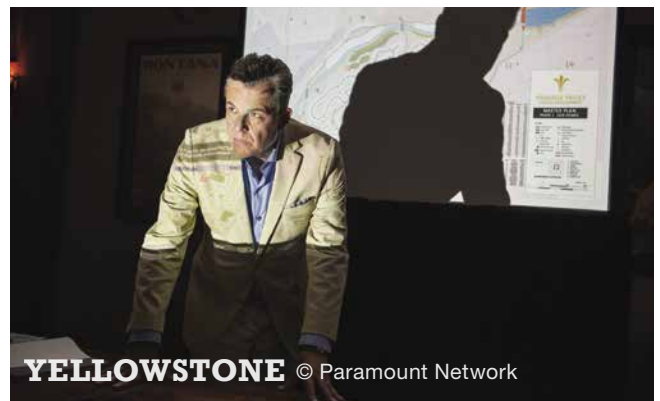
While it is true that Montana is less heavily regulated than California, it is hardly the Wild West when it comes to natural resources like water. In Montana and throughout the American West, property rights determine who can use water, how much, and under what conditions. Hence, even a light regulatory touch does not imply that there are no rules governing resource use.

In fact, neither Jenkins’s assertion that land ownership determines water ownership, nor the Duttons’ diversion via dynamite, are in line with Montana water law—or any western state for that matter. Although such scenes may be far-fetched today, historical water conflicts across the West have been as dramatic, and sometimes as violent, as the show’s portrayal.

## ‘First in Time, First in Right’

Today, Montana uses a water right system known as prior appropriation, common across western states. The system emerged in the 19th century to address conflicts over scarce water resources that accompanied settler expansion into the West.

Following the same property right allocation practices used for western agricultural land and hard rock minerals, prior appropriation rights to water are assigned through first possession, or “first in time, first in right.” Water rights are granted to a fixed quantity or flow of water for diversion from a stream, based on the date of the original claim. Those with the earliest claims, or senior rights, have the highest priority. Subsequent claimants have lower priority, or junior rights. Diversions are accommodated by rank so long as there is sufficient stream flow. During drought, water is progressively rationed by priority of right, meaning junior diversions may be halted in favor of more senior rights.



Dan Jenkins has big plans to develop Paradise Valley.

Colorado was one of the first states to articulate the prior appropriation doctrine, thanks to events strikingly similar to the first episode of “Yellowstone,” albeit 150 years earlier. In 1863, the Left Hand Ditch Company constructed a dam and a ditch to divert water from St. Vrain Creek near Boulder, Colorado, into Left Hand Creek. Several years later, during a period of low flow, Reuben Coffin and other water users from St. Vrain

While it is true that Montana is less heavily regulated than California, it is hardly the Wild West when it comes to natural resources like water. In Montana and throughout the American West, property rights determine who can use water, how much, and under what conditions.

Creek destroyed some of the diversion works, leaving armed men at the site to ensure water flowed to their farms.

In the resulting court case, *Coffin v. Left Hand Ditch Co.*, the Colorado Supreme Court ruled in favor of the company because it had diverted water and put it to productive use prior to Coffin and his co-conspirators.

Given the system of seniority used to define water rights in Montana, it seems unlikely that the Yellowstone Dutton Ranch—supposedly the first in Paradise Valley—would face any real threats from incumbent water users, even developers from California. As one of the first water users in the valley, the Dutton Ranch would likely hold the most senior water rights.



Top: Dynamite recovered from a sabotage of the Owens Valley Aqueduct. Bottom: Aftermath of the explosion of a siphon that was part of the aqueduct system.

## Beneficial Use

A common misperception in western water rights is that land and water are connected. While this is true in the eastern states, the prior appropriation doctrine severs water and land. A developer has no claim to water that belongs to a senior right holder, even if it flows through his land.

Protected by seniority and a secure property right, the fight for water in “Yellowstone” would likely play out more like the conflicts over land depicted in the show, with the Duttons holding an asset that developers would have to pay dearly to acquire. One wrinkle would be that appropriative rights require

that water be put to a designated beneficial use, such as watering cattle or crops, supplying residences or industry, or, in Montana, preserving instream flows to protect ecosystems.

Beneficial use laws allowed state governments to limit speculation and curtail excesses of water use. While the Duttons’ use of water for ranching would meet such a definition, the privileges endowed by their right to water are not unlimited. Montana, and all western states, also require water users to cause no injury to third parties, which are typically other water right holders. When the Duttons dynamited and diverted “their” stream, they almost certainly harmed other water right holders dependent upon the same source.

When water is diverted for agriculture and ranching, as little as 50 percent of senior diversions are consumed by plants or evaporation, and remaining water flows back to the stream or percolates to be available for subsequent users. During times of drought, when natural stream volumes are diminished, junior appropriators are especially dependent upon these return flows.

If a right holder can mitigate damage to third parties, however, water rights can be moved far away from the stream itself. Early in the 20th century, the City of Los Angeles diverted the entire Owens River more than 200 miles to augment the growing city’s water supply. Angry local residents dynamited the diversion works several times, but Los Angeles has retained the water rights, and its diversion, to this day.

In the real Paradise Valley, the modern equivalent of bygone conflicts has emerged. Mill Creek, a tributary to the Yellowstone River, provides water for valley irrigators and a key spawning ground for trout. When the creek went dry, Trout Unlimited filed legal objections to the water rights of irrigators, essentially claiming they were taking more water than legally allowed.

While that dispute is still playing out, appropriative rights have helped resolve other water conflicts in Paradise Valley. Farther up the valley, diverters on Big Creek entered into an agreement to curtail some of their diversions to keep water in the stream in exchange for payment. Without well-defined and transferable rights to water, such an agreement would not be possible.

## Orderly Allocation

Appropriative rights create a basis for water markets and security for investment in water-delivery infrastructure, agriculture, and other endeavors. Countries like the United States, Chile, and Australia have used markets to allocate scarce water among users and create economic gains by allowing users to voluntarily transfer water. In opening the option for water right holders—mostly irrigators—to sell conserved water, markets create incentives for investment in conservation without subsidies.





In reality, water used by John Dutton (right) would be protected by seniority and a secure property right, meaning Dan Jenkins (left) and his team of developers would have to pay dearly to acquire it.

Allowing irrigators to sell water still requires careful planning to avoid unanticipated issues. Applications for transferring rights are filed with the relevant state regulatory agency for approval. The applicant specifies the location and amount of water, duration of the contract, timing of the exchange, type of water right involved, consumptive use, and possibly hydraulic details or other legal information.

Water markets can also be used to accommodate new demands and uses for water. In many settings, surface water has value as instream flow, whether for ecosystem support, pollution abatement, or the provision of recreation. Governments and non-governmental organizations can purchase instream flow water rights to rewater riparian ecosystems, protect fish species, or provide ecologically beneficial flow regimes.

Appropriative water rights have been modified over time in most western states to allow for instream flows. As seen in the trout disputes in the real Paradise Valley, controversy may persist. When water remains instream, it is available for other right holders, junior and senior alike, to extract. The technical challenge of determining who has a right to which water requires additional costs for measurement and enforcement.

Still, such problems are being overcome. In some states, such as Oregon, instream market activity is high. Expanding the definition of a water market to include these uses allows all water users to see the true opportunity cost of water use, whether the highest-value use is for agricultural, municipal, or environmental purposes.

Significant scarcity in many areas of the West makes the conflicts over water intense. In the Wild West, such conflict led to violence. But today, armed water insurrections have been replaced by court fights and water right sales.

Appropriative rights and their associated markets provide room for bargaining, negotiation, and a more orderly allocation of water—hardly the Wild West depicted in “Yellowstone.” Montana’s limited regulatory approach might seem like *carte blanche* to the California developers in the show, but the reality is that the state’s surface water is all “spoken for” in the sense that it is fully appropriated. Far from being able to “do whatever they want,” real-world developers around Bozeman and elsewhere in Montana must work within the existing system of property rights and markets to acquire water to support their projects.



**Eric Edwards** is an assistant professor of agricultural and resource economics at North Carolina State University and a 2019 PERC Lone Mountain Fellow.



**Bryan Leonard** is an assistant professor of environmental and natural resource economics at Arizona State University and a PERC senior research fellow.

# WHOSE RIVER THROUGH IT?



Beth Dutton confronts Roarke Morris as he fishes a stretch of river that runs through the Yellowstone Dutton Ranch.

**YELLOWSTONE** © Paramount Network

# RUNS



## How stream access laws affect recreation and conservation

BY JAMES HUFFMAN

**B**eth Dutton, daughter of Yellowstone Dutton Ranch patriarch John Dutton, skids to a stop on a bridge over an unnamed river on her family’s land in Season 3 of “Yellowstone” (Episode 1). She interrupts her telephone conversation to declare, “I gotta go, some asshole is standing in our river.” She leaps from the car in her low-cut dress and high heels, yelling to a fisherman over the sound of rushing water: “You’re trespassing! Get out of our f---ing river!”

“I can’t,” responds the unperturbed, nattily attired Roarke Morris, “that’d be trespassing.”

Although by nature Beth is prone to four-letter-word outbursts, we can cut her some slack in light of the many threats faced by the Dutton Ranch, including, as we will come to learn, from Roarke Morris. The Dutton family is in what will surely turn out to be a losing battle against unremitting change. Just like the wildlife and Native Americans that once had exclusive dominion over what is now their ranch, the Duttons will be overwhelmed by the forces that have, in the real world, created high-end ski resorts such as Big Sky and the Yellowstone Club just over the mountains and spurred impending developments in the nearby Crazy Mountains. Had Beth Dutton confronted the plainly-not-a-local Roarke Morris four decades ago, she could well have believed he was fishing in her river. But in 2020 it was all bravado.

## Fishing to the Limit

Every summer, a few more than four decades ago, my mother and I had a friendly competition to see who could catch more fish in Sourdough Creek across the road from our house south of Bozeman. The daily limit was 10, and nothing under six inches. We often caught our limit. The idea that you would catch and then release a legal-sized trout was unimaginable. We ate a lot of trout during those bucolic summers of the 1950s.

It also was unimaginable that anyone would preclude my mother and me from fishing in Sourdough Creek, although we well understood that permission was required to access the creek across private property—well, across *obviously* private property. The steep strip of land between Sourdough Road and the creek seemed to belong to no one, so permission was seldom sought. We did have what I believed was exclusive permission to fish on a farm about a half mile downstream owned by a work colleague of my father's. The fishing there was particularly good.

I suppose I should confess that we fished with worms, or, rather, nightcrawlers, we plucked from my mother's garden after a good rain. With all due respect to Norman Maclean and the many fly-fishing purists who despair at the sight of a worm and worship at the altar of *A River Runs Through It*, I still fish with

worms. When the fish wins, it comes away with a far better meal than a hand-tied fly has to offer.

In my mind there was no difference between Sourdough Creek and the Gallatin and Yellowstone Rivers, except for the many more snags one encounters on a small stream. Every river, stream, and lake was there for our fishing pleasure, subject, of course, to having permission from obvious property owners. My sister's boyfriend was the son of the owners of Karst Ranch, a family connection that yielded permission (and especially good fishing) on that stretch of the Gallatin.

What I knew about property rights in those days was really about manners and respect. When you encountered a "No Trespassing" sign, you didn't enter. Although you might anticipate better fishing on the other side of the fence, you didn't resent the owner for posting the land. You just asked for permission, and if that was not forthcoming, or if you couldn't locate the owner, you moved on. Had my family owned land across which a stream flowed, I imagine my reaction to finding someone fishing without permission within the boundaries of our property would have been much the same as Beth Dutton's. (Though in my youth my mother would not have tolerated her vocabulary.) Had I been the fisherman, I would have apologized and moved on.



A public fishing access sign in Paradise Valley, Montana

Many years later when I went to law school and took an interest in natural resources and environmental issues, I learned that my early informal training in property rights was basically correct. I understood that where private property prevented access to a small stream like Sourdough Creek you could not fish except with permission. On rivers like the Gallatin and Yellowstone, private property might prevent access to stretches of a river, but if I could find a point of public access, I would launch my two-man rubber boat and fish where I pleased. The difference turned on whether I could float my boat. As I learned in law school, that is roughly the difference between the legal classification of navigable and non-navigable waters.

Although laws vary from state to state, the distinction between navigable and non-navigable waters is widely accepted as the determinant of both public access and title to the bed and banks of a waterway, though with differing tests for navigability. Under the common law public trust doctrine, individual members of the public have a right to fish in navigable waters subject to regulations the state may impose to conserve the fishery. Under the constitutional equal footing doctrine (pursuant to which new states enter the Union with the same rights as the original states), the beds of navigable waters are owned by the states unless expressly alienated. The beds of non-navigable

What I knew about property rights in those days was really about manners and respect. When you encountered a “No Trespassing” sign, you didn’t enter. Although you might anticipate better fishing on the other side of the fence, you didn’t resent the owner for posting the sign. You just asked for permission, and if that was not forthcoming, or if you couldn’t locate the owner, you moved on.

waters are owned to the center of the stream by the riparian landowners. Thus, property owners can deny not only access but also the privilege of floating over or walking on the bed of non-navigable streams.



Westslope cutthroat trout  
© Pat Van Eimeren / USFS Northern Region

Had Dutton confronted Morris before 1984, her claim that he was in her river would have been correct if the stream was not navigable, or so she reasonably would have thought.

## Navigating the Law

Had Dutton confronted Roarke before 1984, her claim that he was in her river would have been correct if the stream was not navigable, or so she reasonably would have thought. At that time the generally accepted test for navigability for access purposes was whether the waterway had been used to float logs from a harvest site to a mill. So compared to floating logs, my youthful two-man-rubber-boat test leaned significantly in favor of fishermen. But it turned out I was ahead of my time. In 1984, the Montana Supreme Court ruled that, for public trust doctrine purposes, waters that can be used for recreation, including floating small craft, are subject to the public trust, meaning that anglers like Roarke have a right to fish them.

The public trust doctrine derives from the English common law principle that the public shares a right to fish and navigate for commercial purposes in navigable waters. The doctrine was received by American states along with most of the common law. In Britain, navigable waters were defined as tidal, but given the many large rivers of North America, state courts substituted navigability-in-fact for tidal as the test for the geographical scope of the doctrine. Until the 1970s, it was rarely suggested that the public's rights under the doctrine extended beyond the historic uses of commercial navigation and fishing or to waters not navigable-in-fact.

With growing demands on the scarce water resources of the American West and the rise of the environmental movement in the late 1960s and early 1970s, law professor Joseph Sax suggested that courts could employ the public trust doctrine to achieve a variety of environmental ends. Several other academic lawyers and environmental activists followed his lead. They urged courts to extend the historic doctrine to non-navigable waters and even terrestrial resources. They also urged that members of the public should have much broader rights of use than commercial navigation and fishing.

In 1984, the Montana Supreme Court was among the earliest to take the bait. In *Montana Coalition for Stream Access v. Curran*, the high court ruled that the public has a right of recreational use in “any surface waters capable of use for

recreational purposes.” Later that year, in *Montana Coalition for Stream Access v. Hildreth*, the court reaffirmed its ruling in *Curran* while making clear that the geographical reach of the public trust doctrine was not limited by the historic navigability for title test. Thus, public rights that once existed in at most 2,000 to 3,000 miles of Montana waterways were extended to almost every river, stream, lake, and pond in the state.

Not surprisingly, many landowners were taken aback by what they viewed as a judicial expropriation of their previously recognized property rights. Their concerns were magnified when the Montana legislature subsequently recognized public rights of use to the high-water mark for camping, hunting, and other activities unrelated to fishing or navigation while also requiring landowners to provide means of portage where needed.

In “Yellowstone,” the Duttons have at times resorted to extra-legal means to get their way. But following the 1980s judicial and legislative actions in Montana, several real-world landowners sued the state for an uncompensated taking of private property. In the 1987 case of *Galt v. State*, the Montana Supreme Court invalidated some of the legislature's more egregious upland intrusions but reaffirmed its earlier recognition of expansive public rights in recreational use of Montana's waters.

By 2020, it was beyond argument that Roarke Morris was not fishing in the Duttons' river, although it is an open question whether he had violated their rights by trespassing to gain access. Understanding that he has no right to step on the Duttons' upland property, he claims to have waded five miles downstream from his family's ranch. But anyone who has waded even a short distance in a fast-moving mountain stream could reasonably question his veracity, particularly in light of his dapper, unruffled appearance.

## Investing in Habitat

An opinion survey in 2021 would almost certainly reveal that the vast majority of Montana residents believe the Montana Supreme Court got its 1984 decisions right. Montanans love the outdoors, and fishing is a major contributor to the state's revenues from tourism. But it is not clear that the dramatic expansion of public rights of access to Montana's waters has always served the interests of conservation in general or the fishery in particular. That the catch-and-eat philosophy of my youth has given way to the catch-and-release ethic of today reflects the increase in demand relative to supply. Even with hatchery stocking of streams and lakes (and putting aside questions about hatchery impact on the viability of native fish stocks), there are not enough fish to allow people like my mother and me to take home 20 in a day.



Under current stream access law in Montana, Beth Dutton does not have the right to exclude fishermen like Morris from the river.

**YELLOWSTONE** © Paramount Network

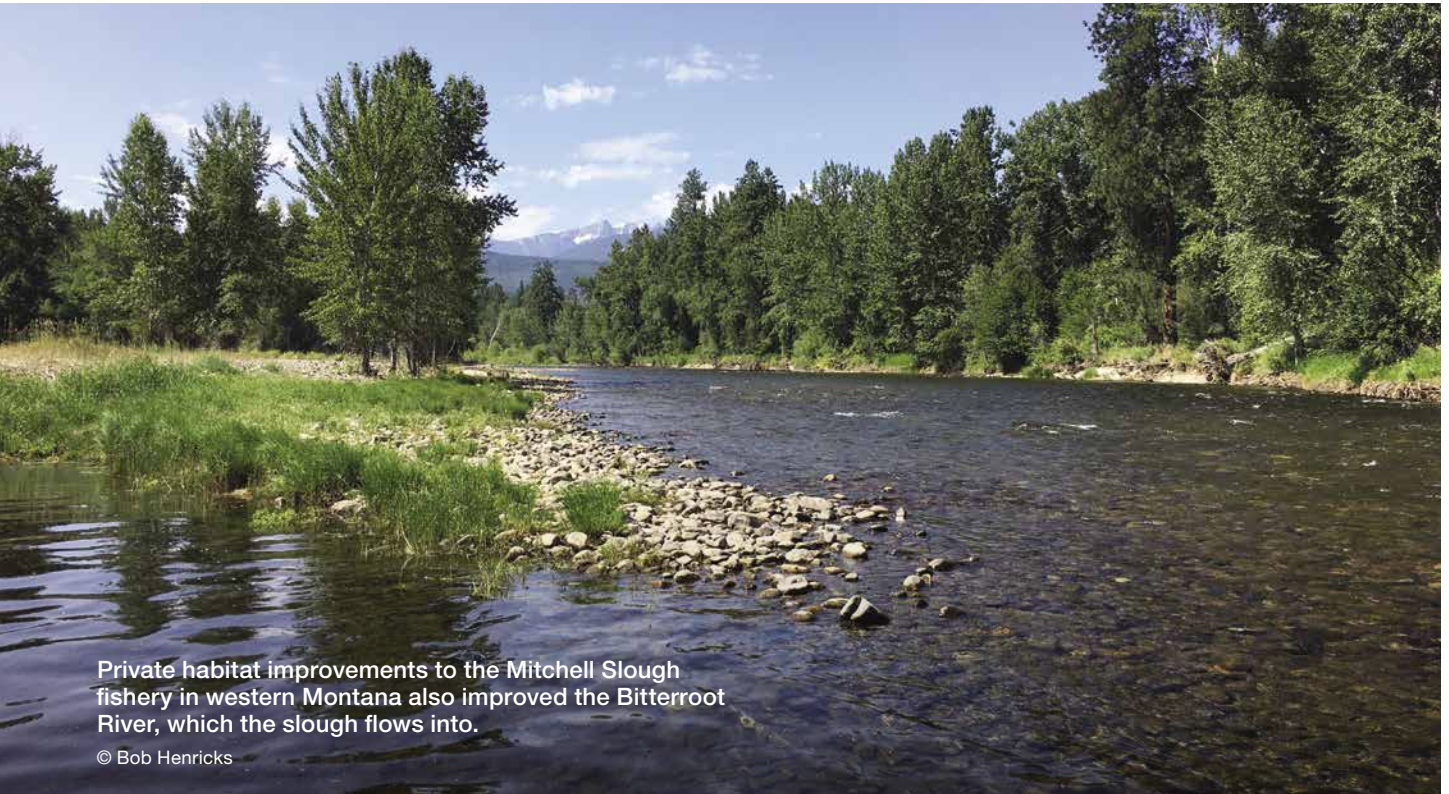
Having witnessed the Duttons' use of dynamite to divert another stream on their property earlier in the series, we might have doubts about their interest in maintaining the native fish population. But other landowners have demonstrated such interest. Illustrative are the several owners of land underlying the Mitchell Slough adjacent to the Bitterroot River in Southwestern Montana. Correctly believing that the marsh-like slough could be transformed into productive fish habitat, the landowners invested several million dollars in improvements.

No doubt the wealthy people who invested in the Mitchell Slough were motivated by the prospect of better fishing for themselves and their guests. But there should be nothing wrong with that. Few investments in private property are made without the prospect of personal gain, yet most such investments provide public benefits of one type or another. The improved fishery in the Mitchell Slough is also an improvement to the fishery in the Bitterroot River. After all, the fish are free to come and go.

In the 2008 case *Bitterroot River Protective Association v. Bitterroot Conservation District*, the Montana Supreme Court ruled that the public is also free to come and go between the

Mitchell Slough and the Bitterroot River. Now that the general public has free access to the slough, will the property owners invest further in the fishery they created? Unlikely. Would they have spent millions improving the fishery had they known the public would have a right of access? Probably not. Nor would they have invested millions in their homes had they anticipated that a court would later order them to open their doors to the general public.

It is not a coincidence that some of the best fishing in Montana is on spring-fed streams that flow across private property in the Paradise Valley. Because the only access to most of these spring streams is over private lands, landowners can charge a fee for access, thus limiting the number of fishermen at any given time. The revenues received by the property owners provide an incentive to limit fishing to what is sustainable and invest in maintaining the habitat for the future. In our new age of equity some may protest that not everyone can afford to pay rod fees—that fishing is a right, not a privilege. But there is more at stake than equity. As Garrett Hardin explained many decades ago, open and equal access to scarce resources can result in tragedy.



Private habitat improvements to the Mitchell Slough fishery in western Montana also improved the Bitterroot River, which the slough flows into.

© Bob Henricks

It is not clear that the dramatic expansion of public rights of access to Montana’s waters has always served the interests of conservation in general or the fishery in particular. That the catch-and-eat philosophy of my youth has given way to the catch-and-release ethic of today reflects the increase in demand relative to supply.

Owners of large tracts of land like the Duttons may take little interest in fishing or promoting good fishery habitat, but the fact that access to many miles of Montana streams requires a long wade over slippery rocks through fast-moving waters helps limit the pressures of a growing population. Maybe Roarke Morris did walk five miles downstream from his ranch

(meaning he has a five-mile walk home), but few people are up to that challenge—particularly with the prospect of facing the wrath of high-heeled Beth Dutton along the way. My mother and I were serious about our fish-catching derby each summer, but without permission to access Sourdough Creek across the private land of my dad’s colleague, I’m pretty confident we wouldn’t have walked even the half mile downstream for the better fishing.

I’m cheering for the Duttons to prevail in their battle to preserve their cowboy empire and the many natural wonders it protects (even if by inadvertence). But I wouldn’t wager a can of worms on them succeeding. The pressures for greater public access by outdoors enthusiasts and resort developers will only increase. But if anyone can stand athwart the advance of history, surely it’s Beth Dutton.



**James Huffman** is dean emeritus of the Lewis & Clark Law School and a PERC board member.



# What would you pay to ensure Yellowstone is properly cared for?



In 2021, Yellowstone National Park broke its annual attendance record with three months to spare. Surging park visitation translates into millions of vehicle miles on roads, countless footfalls on trails and boardwalks, and who knows how many toilets flushes.

A new short film produced by PERC, featuring Yellowstone Superintendent Cam Sholly, explores the important role that visitor fees play in helping national parks from Montana to Maine sustain record visitation. User fees are a vital tool that empower park visitors to directly contribute to the care and maintenance of the parks they enjoy. As Superintendent Sholly puts it: “Visitation goes up. That translates to more impact. It also translates to more fee revenue for the park.”

Reforms to expand and improve the fee system could generate millions more in revenue for our national parks and equip superintendents to serve visitors even more effectively.

**WATCH PERC'S LATEST VIDEO**

**“Tending National Parks: What Would You Pay?”**

at [perc.org/parks](https://perc.org/parks)

Join as a monthly member  
starting at only **\$85/month!**





**PERC** LONE MOUNTAIN SOCIETY

## Help PERC make the biggest impact by joining the Lone Mountain Society

---

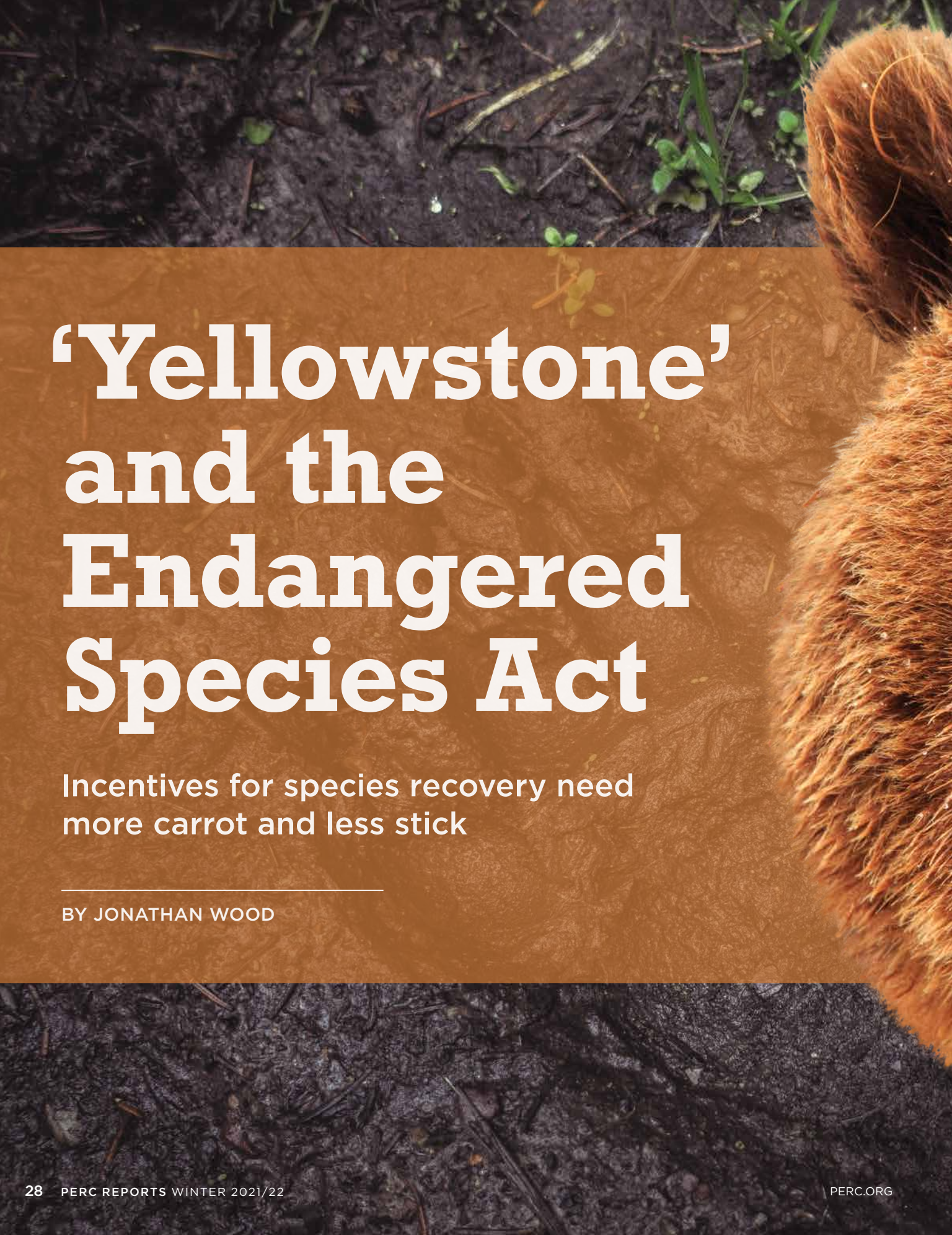
**We invite you to be a leading part of PERC's next chapter by joining the Lone Mountain Society with a gift of \$1,000 or more today.**

The Lone Mountain Society recognizes leadership in philanthropy that equips PERC to advance our mission to protect and enhance our land, water, and wildlife. As a member of the Society, you will join conservationists and outdoor enthusiasts across the country who are dedicated to developing practical solutions to conservation challenges. Through this investment, you will strengthen PERC as we continue expanding our efforts and turning innovative ideas into conservation success.

**We invite you to join us today.** To learn more, please visit [perc.org/lms](http://perc.org/lms)

<b>TRAILHEAD</b>	<b>\$1,000 – \$4,999</b>
<b>EXPLORER</b>	<b>\$5,000 – \$9,999</b>
<b>ALPINE</b>	<b>\$10,000 – \$24,999</b>
<b>SUMMIT CIRCLE</b>	<b>\$25,000+</b>





# ‘Yellowstone’ and the Endangered Species Act

Incentives for species recovery need  
more carrot and less stick

---

BY JONATHAN WOOD





After Rip Wheeler kills an endangered grizzly bear in self defense (left), a U.S. Fish and Wildlife Service officer and the local sheriff question John Dutton (right) as they investigate the incident.

**YELLOWSTONE** © Paramount Network

**N**ear the end of “Yellowstone” Season 1 (Episode 7), John Dutton catches a busload of tourists trespassing on his property to photograph a grizzly bear. After shooing away the tourists with his rifle, Dutton sends his cowboys to do the same to the grizzly to protect his cattle.

While tracking the bear later, one of the cowboys, Rip Wheeler, discovers two tourists clinging to the side of a cliff to elude the bear. Wheeler attempts to rescue them, unsuccessfully. As the tourists fall to their deaths, the grizzly roars from a few yards away and then charges Wheeler. Fortunately, he is able to reach his rifle and get off a shot before the bear reaches him. Unfortunately for Wheeler, he’s traded one problem for another.

“What a f---ing mess,” says the local sheriff as he assesses the scene in the following episode (Episode 8), clarifying that he means the dead bear, not the dead tourists. The grizzly is listed under the federal Endangered Species Act, which imposes serious penalties on anyone who harms a listed species. “When someone kills a bear,” says the sheriff, “10,000 vegans send letters to their congressmen. You should have buried that thing in a hole before I got here because I ain’t the problem—the feds are!”

“Yellowstone” highlights real anxieties many private landowners feel about the Endangered Species Act and species listed under it. Although most endangered and threatened species depend on private land for habitat or forage, the law makes these animals liabilities for landowners rather than assets. The

presence of a listed species can trigger burdensome land-use restrictions, bring unwanted bureaucracy, and reduce property values. Sam Hamilton, a former director of the U.S. Fish and Wildlife Service, summed up the problem well: “The incentives are wrong here. If a rare metal is on my property, the value of my land goes up. But if a rare bird occupies the land, its value disappears.”

Penalizing landowners who accommodate rare species encourages preemptive habitat destruction, not conservation. The effect of the law’s wrong incentives are seen in its results. While fortunately few listed species have gone extinct, a mere 3 percent have recovered over the last half century, and the service has reported that listed populations are more likely to be declining than improving. A reformed Endangered Species Act that respects property rights and rewards private landowners for their role in conserving species would work better for both landowners and wildlife.

## The Incentives Are Wrong

Many landowners are like Dutton; they value the natural beauty of their land and want to protect it for generations to come. Landowner surveys consistently reveal supermajorities who feel an obligation to be good stewards. Yet these surveys also show that the same landowners fear intrusive federal regulation, distrust federal agencies, and may even take steps to deter listed species from their land.



A key source of this anxiety is an Endangered Species Act provision that prohibits the “take” of endangered species. The Fish and Wildlife Service has interpreted this prohibition expansively to include ordinary land-use activities that have incidental effects on species or their habitats. Thus, significant consequences accompany any listed species, not just those that prey on livestock, destroy property, or threaten people. (Fortunately for “Yellowstone’s” Wheeler, the Endangered Species Act has a self-defense provision that ultimately protects him.)

The penalties for violating the take prohibition can be severe. Criminal penalties include a one-year prison term, a \$50,000 fine, and revocation of any federal permits or leases. For western ranchers, many of whom depend on a mix of private land and public grazing privileges to feed their cattle, this last penalty can threaten multi-generation businesses. Violators of the take prohibition can also face a civil fine exceeding \$50,000. And the government can seize through forfeiture property used during the violation.

Because burdensome restrictions follow listed species wherever they go, scholars have long worried that the Endangered Species Act implicitly encourages landowners to “shoot, shovel, and shut up,” an incentive reflected in the sheriff’s comment to Wheeler: “You should have buried that thing in a hole before I got here.”

Take the endangered red-cockaded woodpecker, a species that resides in old-growth pine forests in the Southeast. A 2003

Penalizing landowners who accommodate rare species encourages preemptive habitat destruction, not conservation. The effect of the law’s wrong incentives are seen in its results. While fortunately few listed species have gone extinct, a mere 3 percent have recovered over the last half century.

study found that a single colony can preclude the harvest of \$200,000 in private timber. However, because the woodpecker requires old-growth forest, landowners can avoid such losses by cutting trees before they mature. The study found that this is exactly what landowners did, accelerating clearcuts on lands close to established woodpecker colonies.

Landowners do not bear the consequences of these perverse incentives alone. Consider the dusky gopher frog, a perilously vulnerable amphibian found only in a few Mississippi ponds. In 2012, the federal government designated 1,544 acres of private forests in Louisiana as critical habitat for the frog, citing the

Two-thirds of listed species depend on private land as essential habitat. Consequently, whether private landowners are encouraged or discouraged to maintain and restore habitat significantly determines whether species decline or improve.

presence of an ephemeral pond, which is one habitat feature the frog requires. There was a problem though. The frog also relies on a certain type of open-canopied longleaf pine forest, which was absent from the property.

The only way for the land to become suitable habitat would be for the landowner to clearcut the land, plant different trees, then perform regular prescribed burns to maintain the forest in the condition the frog prefers. But, instead of giving the landowner an incentive to perform this difficult and costly work, the critical habitat designation penalized him for the pond's presence. According to the Fish and Wildlife Service, the landowner stood to lose as much as \$34 million due to the designation. Rather than encouraging habitat restoration, the critical habitat designation alienated the landowner and spurred a conflict that reached the Supreme Court.

Restoring dusky gopher frog habitat is difficult work. As PERC research fellow Tate Watkins reported in a prior *PERC Reports* article (Summer 2018), the Nature Conservancy has been working for more than a decade to restore dusky gopher frog habitat on its land in Mississippi. Even with the benefit of significant resources, scientific expertise, and deep commitment to the project, progress has been slow. After releasing nearly 10,000 frogs over the years, Nature Conservancy staff estimated the population at fewer than 50 frogs. This is significant progress for a critically endangered species, to be sure. But it has come at a cost that few landowners would bear without some reward. As one of the Nature

Conservancy employees remarked then, "It'd be cool if private landowners could do something like this and get credit for it—or at least not get penalized for it."

Two-thirds of listed species depend on private land as essential habitat. And

the majority of these are "management dependent," like the dusky gopher frog, meaning that they and their habitat will not persist without active effort by landowners. Consequently, whether private landowners are encouraged to maintain and restore habitat—or discouraged from doing so—significantly determines whether species decline or improve.

## Providing a Road to Recovery

The Endangered Species Act's take prohibition is explicitly reserved for endangered species. Congress envisioned it to operate as a last line of defense against extinction. And, in this respect, it has been a success—only 1 percent of listed species have gone extinct. But the act is intended to do more than avoid extinctions. Its other aim is to facilitate species recoveries. And in this respect the law has been a disappointment.

Part of the explanation for this result is that the law has not operated as intended. Congress designed the law so that federal regulatory restrictions would recede as species recovered and grow more stringent if species declined. According to the Senate sponsor of the act, Congress' intent was that "States . . . [be] encouraged to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction."

PERC's 2018 report "Road to Recovery" explained how the Endangered Species Act's original two-step approach can promote species recovery. Gradually reducing regulatory restrictions as species recover and increasing stringency if species decline would align the incentives of private landowners with the interests of rare species. In effect, the statute's original design provides both a carrot and a stick.

In practice, however, the Fish and Wildlife Service has favored the stick too much. In 1975, two years after Congress passed the law, the service issued a regulation known as the blanket 4(d) rule that categorically prohibits take of threatened species. While the service would sometimes depart from this approach for particular species, the general practice has been to regulate threatened species exactly the same as endangered species, which effectively blunts the act's original two-step approach.

During the Obama administration, however, the service began to shift away from the blanket rule's approach, departing from its strict prohibitions in favor of less burdensome rules for most threatened species. That implicit shift was formalized in 2019, when the service formally repealed the blanket 4(d) rule, at least prospectively. (Species listed prior to the repeal remain subject to the rule.)



Dusky gopher frog  
© Scott Threlkeld / The Times-Picayune





In announcing this reform, agency staff explained that “we anticipate landowners would be incentivized to take actions that would improve the status of endangered species with the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule. As a result, we believe these measures to increase public awareness, transparency, and predictability will enhance and expedite conservation.”

While it might seem counterintuitive that reducing regulation would encourage species recoveries, consider how the blanket 4(d) rule’s all-or-nothing approach exacerbates the Endangered Species Act’s ingrained perverse incentives. From the perspective of a landowner, there was little reason to invest time, money, and energy in recovering an endangered species. Even if those efforts succeeded, the landowner could expect no benefit when the species’ status was upgraded to threatened. The same burdensome regulations would still be imposed regardless. Indeed, some Fish and Wildlife Service officials have treated such occasions as a non-event, with one dismissing the notion that endangered and threatened are distinct classifications as a “misperception.”

Under the approach advocated in “Road to Recovery,” however, a species’ improvement from endangered to threatened status would be a cause for celebration and a key opportunity to reward states and private landowners for their roles in the

species’ recovery. While some Endangered Species Act restrictions would continue to apply to the species, including critical habitat and federal consultation requirements, the take prohibition would not. Or the prohibition might be substantially narrowed to fit the unique needs of the species, such as prohibiting activities uniquely detrimental to the species without affecting activities with minor or beneficial effects.

In this way, landowners would not only be rewarded for their past efforts, but would also be encouraged to keep the species on the road to recovery. If the species continued to improve, its delisting would put an end to the remaining federal regulations. But if progress reversed, the stringent take prohibition could return.

### An Off-Ramp to State Management

The huge stakes of decisions whether to list or delist species also increase conflict in those processes, turning ostensibly scientific questions into bitterly contested political ones. Grizzlies



The presence of endangered species such as the red-cockaded woodpecker can bring restrictions on how land can be used, encouraging preemptive habitat destruction rather than conservation.

© Chattahoochee-Oconee National Forests



**A grizzly sow and yearling in Yellowstone National Park**  
© Yellowstone National Park

The conflict over the Yellowstone grizzly's status under the Endangered Species Act seems never ending. Such protracted disputes can breed resentment and undermine the prospect of delisting as an incentive to motivate recovery efforts.

like the one in “Yellowstone” are a case in point. From a mere 136 bears in 1975, grizzly bears in the Greater Yellowstone Ecosystem have made an impressive recovery thanks to the efforts of federal biologists, state wildlife agencies, tribes, conservationists, and landowners. Today, the population numbers 700 bears, likely the ecosystem's carrying capacity, which is why bears now wander farther from the park and into more populated areas than in the past.

To recognize this impressive recovery, and to reward the effort that made it possible, the Fish and Wildlife Service began the process to delist the population of Yellowstone grizzlies in 2005. For more than 15 years, every effort to delist the recovered population has been litigated and sent back to the agency for evermore analysis. Like the wolf wars that preceded it, which ultimately required intervention from Congress, the conflict over the Yellowstone grizzly's status under the Endangered Species Act seems never ending. Such protracted disputes can breed resentment and undermine the prospect of delisting as an incentive to motivate recovery efforts.

Restoring the Endangered Species Act's two-step approach could help defuse this conflict by establishing a more gradual off-ramp toward delisting. The Fish and Wildlife Service could cede management authority to states in steps as a population reaches discrete recovery goals. This would allow states to build trust among stakeholders and demonstrate their ability to manage the species responsibly.

Trust in state management is no minor issue. The most recent volley of grizzly litigation was triggered, at least in part,



by Wyoming’s plan to authorize hunting as a management tool. Many bear activists thought a hunt was premature and did not trust state officials to manage it properly. Would the hunt be, in effect, an opportunity for local residents to take out their frustrations over the costs imposed on them by the bear, its federal status, and protracted delays in its delisting?

To date, no species that has been delisted due to recovery has ever had to return to the list. All 43 domestic recovered species have remained secure under state management. If the Endangered Species Act’s two-step process were used to create a gradual off-ramp to delisting, increasing trust in state management and avoiding lengthy disputes that breed resentment, this streak could continue even as the number of recovered species rose.

### A Step Forward or Backward

In 2021, the Biden administration announced its intention to yet again cast aside the two-step distinction for threatened and endangered species and readopt the blanket 4(d) rule. This would be an unfortunate step backward, once again pitting

listed species against the landowners on whom they depend. Experience has shown where that path leads.

Instead, the question should be how to move forward and better align the incentives of landowners with the interests of rare species. Endangered and threatened species should be assets to the landowners who provide them habitat, not liabilities. Ranchers who find themselves in the position of “Yellowstone’s” Dutton must be made better off if they manage their livestock to avoid conflict while accommodating grizzlies on their ranches. Otherwise, the reality is that some of them may resort to trying to haze them away or, worse, shooting, shoveling, and shutting up.



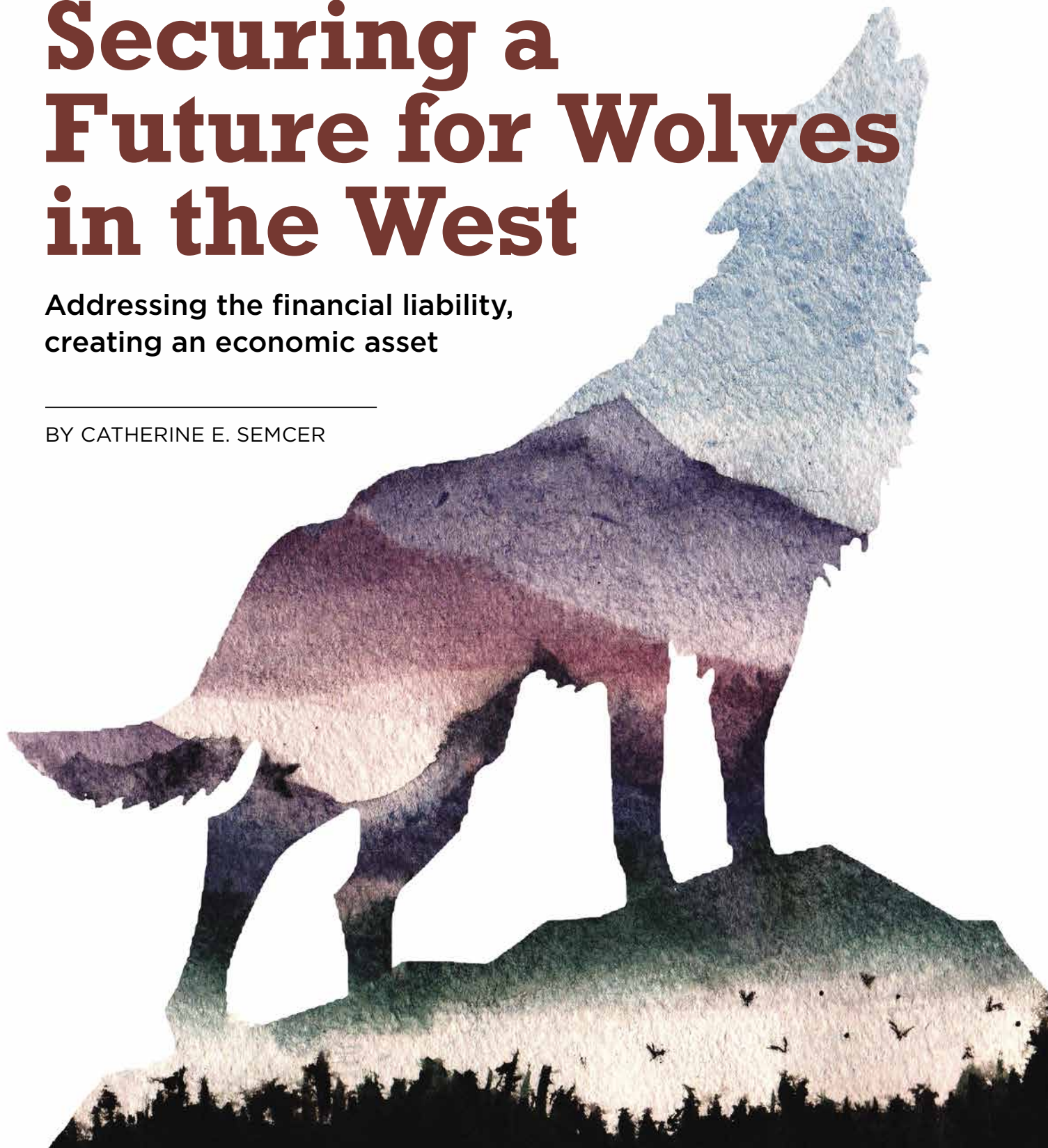
**Jonathan Wood** is vice president of law and policy at PERC.

# Securing a Future for Wolves in the West

Addressing the financial liability, creating an economic asset

---

BY CATHERINE E. SEMCER





Rancher Randy Paulson (left) shows livestock agent Steven Hendon (center) a cow killed by wolves, as Kayce Dutton (right) looks on.

**YELLOWSTONE** © Paramount Network

“That’s \$1,800 I can’t stand to lose,” rancher Randy Paulson tells Steve Hendon, a livestock agent for the Montana Livestock Association, during Season 2 of “Yellowstone” (Episode 4). Hendon is at the Paulson ranch to investigate a dead cow supposedly killed by wolves. Once Hendon confirms the loss was in fact a wolf kill, he asks Paulson whether he’s called the state wildlife agency.

“They ain’t coming,” Paulson responds, explaining that his neighbor, Jerry Hayes, has a history of hacking up his own cattle and blaming wolves in an attempt to tap into a state program that compensates ranchers for cattle lost to wolf depredation. Hayes’ history of “crying wolf” has poisoned the perception of wildlife authorities, who now hardly believe wolves are even present in the area.

Hendon assures Paulson that he’ll be compensated, then leaves to visit Hayes. Upon Hendon’s arrival, Hayes shows him a mangled cattle carcass, what he calls a wolf kill. Agent Hendon is skeptical, and a gory weed trimmer found nearby reveals Hayes’ attempt at fraud. When Hendon moves to arrest Hayes, the man’s teenage son pulls a shotgun on the agent. After the

boy refuses to drop the weapon, Hendon shoots and kills him.

The tense scene illustrates the messy realities of livestock compensation programs, which have been adopted in several western states as wolves have recovered over recent decades. In the Greater Yellowstone Ecosystem in particular, compensation programs have reduced political opposition to wolf recovery under the Endangered Species Act by shifting the financial cost of wolf damages from ranchers to the public.

When wildlife agencies compensate ranchers for livestock lost to depredation, they help address the financial liability associated with wolves. Compensation programs do not, however, create any incentive for landowners to support wolf recovery—in other words, wolves are still not an economic asset for ranchers and other property owners. For that to occur, ranchers would not only have to be made whole when they suffer depredations, they would also have to be rewarded for the mere presence of wolves.

Under a payment-for-wolf-presence scheme, increases in wolf populations would translate into larger and more widespread cash payments to livestock producers. Combined with

Ranchers who lived near the park's boundaries in Wyoming, Montana, and Idaho worried the wolves' return would harm their livelihoods through depredation of sheep and cows. Some even sued the federal government to keep the reintroduction from moving forward.

depredation compensation payments, such a dual strategy could reduce the risk of wolf presence and create a benefit from their continued recovery, thereby shifting wolves into the category of economic asset and securing their future as a part of western ecosystems.

### Wolves Return

Like elk, deer, pronghorn, and bison, gray wolves were nearly hunted to extinction in the United States to make room for European settlers and their livestock. While the large ungulates would eventually find a constituency among sportsmen

who would advocate for their recovery and conservation, wolves were slow to find any champions. The canids' potential to kill cows, sheep, and the big-game animals preferred by hunters kept wolves in the crosshairs, and their deaths were viewed as an economic and ecological good. Even Aldo Leopold, the father of the American land ethic, admitted that for a time he believed killing wolves and conservation were synonymous.

Leopold would eventually admit he was mistaken, and in 1978 the country would too. That year the multi-century effort to exterminate wolves in the lower 48 states came to an end when the country's remaining gray wolves, then largely confined to small portions of the upper Midwest, were listed under the Endangered Species Act.

Protection under the act brought restrictions on the killing of wolves. It also meant that efforts began to place wolves on the road to recovery, pulling them back from the edge of extinction by restoring populations where ecologically and politically feasible.

It would take nearly another decade before active efforts to recover wolves in western states gained traction. In 1987, the U.S. Fish and Wildlife Service, in partnership with the National Park Service and state wildlife agencies, published a Northern



© Yellowstone National Park

Gray wolf

Rocky Mountain Wolf Recovery Plan, which laid the groundwork for reintroducing the species to Yellowstone National Park.

As part of the environmental impact statement for the plan, the federal government held 61 open houses, 22 public hearings, and more than 30 presentations, and it collected more than 160,000 public comments on the idea of Yellowstone wolf reintroduction. One thing was clear from all of this input: Ranchers who lived near the park's boundaries in Wyoming, Montana, and Idaho worried the wolves' return would harm their livelihoods through depredation of sheep and cows. Some even sued the federal government to keep the reintroduction from moving forward.

Rancher concerns were not unfounded. Livestock losses to wolves had the potential to cost a rancher thousands of dollars each year. Moreover, this estimate accounted only for cattle that could no longer be sold for slaughter. It did not include costs that are more difficult to measure, such as stressed and underweight calves and the emotional toll placed on ranchers.

Out of these concerns, and in an effort to reduce the political opposition to wolf reintroduction and recovery inspired by them, the first programs to compensate livestock producers for animals killed by wolves were initiated.

## Paying to Prey

Compensating livestock producers for financial losses stemming from the presence of an endangered species was a fledgling practice in 1995 when the holding pens were opened and 14 wolves were released in Yellowstone.

Almost since the passage of the Endangered Species Act in 1973, property rights advocates had argued that implementing the law could result in a "taking" of private property under the 5th Amendment. As such, they believed that the federal government should compensate private citizens in such cases. Nevertheless, these claims had largely failed to gain traction in the courts.

It was not the federal government, however, that stepped in first to compensate Yellowstone-area ranchers for lost livestock—it was conservation organizations. Defenders of Wildlife established the first wolf compensation program, which reimbursed livestock producers 100 percent of the fair market value of a certified loss to wolves, up to \$3,000. Funded entirely by private donations, the organization paid out more than half a million dollars to livestock producers in the Greater Yellowstone area to compensate them for the loss of approximately 1,500 animals between 1995 and 2009. The program's focus then



Wolves are not exactly popular with ranchers on "Yellowstone."



Some western ranchers have used range riders (top) or fladry and electric fencing (center) to try to reduce wolf-livestock conflicts. Inside the park boundaries of Yellowstone, wolves remain top dog (bottom).

shifted to implementing conflict-avoidance tactics like range riding and fladry, and the compensation payments ended.

The end of the Defenders of Wildlife compensation program did not, regrettably, signal an end to wolves killing livestock. By 2009, wolves had begun to disperse farther from the park, with their numbers in the Greater Yellowstone Ecosystem having grown to several hundred, creating the potential for more livestock losses.

That year Congress authorized the Wolf Livestock Demonstration Project and appropriated \$1 million to the Fish and Wildlife Service to make grants to wolf-range states to compensate ranchers for stock lost to wolves. This federal program boosted state-administered programs in Wyoming, Montana, and Idaho that arose in the wake of Defenders' reorientation.

Wyoming had begun to compensate livestock producers for losses from bears and mountain lions as far back as 2003, and it added wolves to the mix. Wyoming is unique in two ways. First, compensation is limited to lost calves and sheep, with losses requiring verification by agents of the Department of Game and Fish. Second, compensation is awarded at 3.5 times the market value of the lost animals, a multiplier intended to account for missing animals that may have been lost to carnivores but whose remains were never found. Following the delisting of wolves as endangered species in 2012, claimants must also allow wolf hunting on their land to be eligible for compensation.

Idaho's compensation program pays for losses of any type of livestock but only if they exceed \$1,000 in value. (USDA Wildlife Services verifies losses.) Claimants are paid the first half of their claims immediately, and the second half is withheld until the state knows it has received enough funding from the federal Wolf Livestock Demonstration Project to cover its obligations.

In Montana, a Livestock Loss Compensation Fund is financed by state appropriations and covers not only cattle and sheep, but also horses, llamas, swine, mules, and livestock guard animals, like dogs. To be eligible for compensation, ranchers must be current on their per capita fees, a state assessment on all livestock. (They must also have wolf kills confirmed by USDA Wildlife Services.)

In total, these private, federal, and state programs have paid ranchers in Wyoming, Montana, and Idaho more than \$6.5 million since 1995 to cover the costs of livestock lost to wolves. This has been a sufficient investment to dampen political opposition to reintroduction, discourage illegal wolf killings, and pave the way for the Yellowstone wolf's delisting under the Endangered Species Act. For wolf recovery to be resilient, however, new tools will need to be employed that make wolves an economic asset to livestock producers while simultaneously limiting the economic liability they create.



## Paying for Presence

The millions of dollars in compensation payments made to livestock producers over the past quarter century have not resulted in a vocal or appreciable increase in support for a larger wolf population among rural residents of Greater Yellowstone. This is illustrated by everything from liberal wolf hunting seasons and low tag prices in states like Wyoming to recent legislation in Idaho that could set the stage for harvesting up to 90 percent of that state's wolves. Across the region, the intent seems to be to keep wolf populations depressed at a level just above the Endangered Species Act recovery target of 10 breeding pairs, a number scientists believe is just large enough to keep wolves from going extinct but too small to play their historical role in the ecosystem.

Indeed, the experience around Yellowstone corresponds with research from Wisconsin that indicates that compensation payments, while welcomed, do not improve wolves' popularity among rural residents. These findings came into stark relief last year when more than one-third of the wolves in Wisconsin were killed by hunters—nearly double the offtake authorized by the state wildlife agency.

It may be possible to increase support among rural residents for larger wolf populations by continuing to mitigate the economic liabilities wolves create for livestock producers while also exploring the potential for wolves to become an economic asset. One possible way is by offering rural landowners, not livestock producers exclusively, cash payments in exchange for wolf presence.

The Mexican Wolf/Livestock Coexistence Council is currently piloting such a program. The public-private partnership makes cash payments to landowners in Arizona and New Mexico based on a number of factors, including whether a landowner's grazing area overlaps with known Mexican gray wolf territory, the number of wolf pups in the area that survive the year, the number of livestock exposed to wolves, and the extent to which the applicant has implemented voluntary measures to avoid wolf-livestock conflicts.

Programs such as this one create more of an incentive for livestock producers and other landowners to tolerate and even desire higher wolf numbers than compensation payments alone. While the program is novel, and its ultimate success remains an outstanding question, its potential to support ongoing wolf conservation in the Southwest might inform similar approaches in the Greater Yellowstone Ecosystem.

Pay-for-presence programs are ripe for public-private partnerships that allow them to achieve necessary scales. While private capital can play a role, one possible way to harness

It may be possible to increase support among rural residents for larger wolf populations by continuing to mitigate the economic liabilities wolves create for livestock producers while also exploring the potential for wolves to become an economic asset. One possible way is by offering rural landowners, not livestock producers exclusively, cash payments in exchange for wolf presence.

public funding that has been suggested is via a "conservation fee" assessed at Yellowstone and Grand Teton National Parks. Researchers have estimated that such a fee could generate up to \$13 million annually. If such a program was put in place, a portion of the funds collected could be dedicated to a payment-for-wolf-presence scheme.

## Paying for Persistence

Compensating livestock producers for animals killed by wolves has been a key tool in the recovery of the species in the Greater Yellowstone Ecosystem. The model recognizes the financial liabilities created by the presence of the species and shifts the economic burden from ranchers to the general public. In the process, it has softened resistance to wolf reintroduction and decreased the likelihood of illegal wolf killings.

Simply addressing the costs associated with wolves, however, is not enough to deliver support for larger, more resilient populations of wolves that are capable of playing the species' historical role in the ecosystem. Ensuring a persistent wolf recovery likely requires turning wolves into an economic asset for livestock producers. Pay-for-presence programs represent a novel approach worth exploring and evaluating further to secure the future of Yellowstone wolves—and to avoid the types of scenes depicted in "Yellowstone."



**Catherine Semcer** is a research fellow at PERC.

# Bootleggers and Baptists in ‘Yellowstone’

The series portrays political coalitions without romance

BY ANDREW P. MORRISS



In their efforts to fight the Dutton family, Thomas Rainwater (left) and Dan Jenkins (right) welcome the patina of moral superiority that environmental groups can lend their cause.

“**Y**ellowstone” is a gripping drama that has won a large audience by telling stories that stay true to human nature. Precisely for that reason, the show frequently includes scenes that capture economic concepts, because economics is ultimately about explaining human action—people making choices under conditions of limited resources and uncertainty. That’s why good television producers don’t need Ph.D. economists as story consultants.

In Season 1 of the series (Episode 6), developer Dan Jenkins confers with Melanie Prescott, a hired gun he’s brought in to deal with the Dutton family, which owns the expansive ranch next to his proposed subdivision. Earlier in the season, the Duttons used dynamite to divert a waterway away from

Jenkins’s property in an effort to stymie his plans. Prescott outlines her strategy of “a thousand little cuts” to deal with family patriarch John Dutton. “I’ll reach out to environmental organizations,” she tells Jenkins, explaining that there are bound to be threatened species on his property given its proximity to Yellowstone National Park. “Was that river he moved a spawning ground for the Yellowstone cutthroat? Can we sue to place trail cameras on his property, to monitor migrating wolverines, pine martens—both endangered in this area?”

Later, Jenkins and his advisors meet with tribal chairman Thomas Rainwater (Episode 7) about joining forces against the Duttons. Rainwater offers Jenkins the chance to participate in a hotel and casino development he’s proposed. Jenkins

is skeptical and steps outside to discuss the offer with Prescott, who outlines the success of her plan to ensnare the Duttons in a regulatory morass. “I have attorneys for Clean Water Resource filing a lawsuit against him for altering the flow of the waterway,” Prescott says. “Yellowstone cutthroat trout spawns in that stream, which is a food source of the grizzly bear. That’s a violation of the Endangered Species Act, and that is a felony.”

Prescott’s strategy is an example of PERC Senior Fellow Emeritus Bruce Yandle’s “Bootleggers and Baptists” theory of regulation in action. Yandle developed the theory while working as a regulatory economist at the Federal Trade Commission. He noted that regulators often chose alternatives for which there were both “Baptist” and “bootlegger” proponents. His labels came from the odd coalitions supporting Sunday bans on liquor sales in the South, where a town’s Baptists and bootleggers both supported restrictions. The Baptists’ support was easy to understand—they were morally opposed to Sunday sales. But

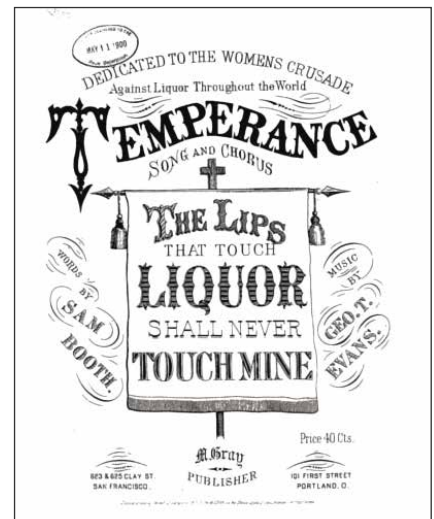
why would the bootleggers want laws forbidding liquor sales on Sundays? The answer was that the laws reduced the competition for their product.

What Yandle noted was a phenomenon of two quite different groups supporting regulatory measures: one motivated by a moral purpose and the other by self-interest. Such Bootlegger-Baptist coalitions are often tacit ones, and the regulatory Baptists may often be unaware that they have less savory coalition partners in the regulatory bootleggers. Nonetheless, even a tacit coalition can be important because it gives cover to politicians supporting a regulatory solution. They can point to the regulatory Baptists’ overt support, while the regulatory bootleggers can be relied upon to provide campaign contributions and other forms of more discreet backing. Yandle’s theory helps us explain the form regulation takes, as gaining the support of both bootleggers and Baptists requires a regulation that meets the needs of the regulatory Baptists (often through soaring language in a purpose clause)

What Yandle noted was a phenomenon of two quite different groups supporting regulatory measures: one motivated by a moral purpose and the other by self-interest.

as well as the regulatory bootleggers (typically through details hidden in dense language).

When Prescott engaged an environmental group to sue the Duttons over endangered species law, she found a group to play the role of Baptists to Jenkins’s bootlegger. While Jenkins comes across as a classic regulatory bootlegger who cares little about trout or grizzlies, the environmentalists certainly share his desire to undo the stream diversion. And having the Duttons sued for violations of the Endangered Species Act by a public interest group looks much worse for the family than simply being in a legal battle with a neighbor.



Left: Bootleggers in the South, who welcomed Sunday bans on liquor sales that lessened their competition, were frequent targets of government raids. Right: Baptists, who opposed Sunday sales on moral grounds, were some of the staunchest advocates for temperance.

The appearance of a classic Bootlegger-Baptist coalition in “Yellowstone” is evidence of how common such coalitions are in American environmental regulation. It is also consistent with the show’s overall depiction of politicians and political consultants.



The environmental group might suspect Prescott was less than pure in her motives for encouraging them to sue, but their zeal for protecting endangered species likely helped them overcome any suspicions about her motives. The group would certainly have not been happy about Jenkins’s original plan to use the river to support a power plant—the impetus for the Duttons to divert the river—so they are not natural allies. Prescott’s cleverness in getting them to act in a way that serves Jenkins’s interests is a good example of bootleggers and Baptists in action.

## Bootleggers, Baptists, and Wildlife

According to the U.S. Supreme Court, the Endangered Species Act is “the most comprehensive legislation for the preservation of species ever enacted by any nation.” The Congressional Research Service termed the act “one of this country’s most important and powerful laws.” It is also a spectacularly ineffective law, at least if measured by the number of species that have recovered after being listed under its protections. In its first 25 years, just 29 of

1,138 listed species were removed from the endangered and threatened lists. Of those, five were removed due to extinction and 14 due to data or taxonomic errors in listing them, leaving at most 10 success stories, some of which are contested.

From a perspective of saving species, two of the most serious flaws in the Endangered Species Act are that it focuses on species instead of habitat and that it makes finding an endangered species on one’s land a negative for the landowner. The latter is true because disturbing an endangered species can easily result in a prohibited “taking” under the statute, which can bring fines or other penalties. Despite these flaws, which are well known, the act has never been comprehensively revised and has had only relatively minor amendments since President Richard Nixon signed it into law in 1973.

The act’s focus on species reflected the importance of “charismatic megafauna” in mustering public support for the law as part of a raft of major environmental legislation passed in the early 1970s. Since that time, a greater understanding of the importance of habitat

means that refocusing the statute on protecting habitat would be more effective in protecting species. Similarly, the act’s failure to consider landowner incentives promotes the “shoot, shovel, and shut up” approach to finding an endangered species on one’s land, since its presence can only produce economic losses. Research at PERC and elsewhere has documented how even small positive incentives can encourage improvements in habitat for endangered species. For example, Ducks Unlimited’s Prairie Pothole program compensates farmers along migratory bird routes for leaving small wetlands undisturbed. Similarly, International Paper successfully added revenue from hunting and recreational users to its timber revenues for forests it manages to combine tree production and habitat provision.

Despite this clear evidence that the Endangered Species Act could be made more effective, there has been no serious effort to amend the statute to address these issues. At least part of the reason is that there is a Bootlegger-Baptist coalition behind not changing the statute. For the regulatory Baptists—environmental groups—the Endangered Species Act has

attained a sacred status. They fear that if it is opened for revision, an important early environmental victory will be diluted by pragmatic reforms. Even if those changes would save more species, the symbolic value of the act is too great to risk change. Thus, with a few exceptions, most major environmental groups oppose efforts to change the Endangered Species Act. A politician seeking to fix the act's flaws without the blessing of environmental groups, therefore, might be seen as a heretic, so the idea becomes politically unpalatable to even greener members of Congress.

The regulatory bootleggers are interest groups that benefit from the restrictions the Endangered Species Act imposes on potential competitors. For example, private landowners in the Northwest benefited in the 1990s when the act reduced competitive logging on public land. Similarly, a logging-environmentalist Bootlegger-Baptist coalition supported an export ban on unprocessed timber imposed by the first Bush administration. The environmentalists hoped to preserve spotted owl habitat; the lumber industry hoped to keep the logs at home for them to process.

## Storytelling Without Romance

The appearance of a classic Bootlegger-Baptist coalition in “Yellowstone” is evidence of how common such coalitions are in American environmental regulation. It is also consistent with the show's overall depiction of politicians and political consultants, who are presented in clear-eyed, cynical terms rather than romantic ones in which they selflessly serve their constituents. It starts with John Dutton's need to control the livestock commissioner office to protect his ranch and continues through Beth Dutton's recommendation to her father



Environmentalists would have no reason to ally themselves with Dan Jenkins (right) in his struggle against John Dutton (left); Jenkins getting them to act in a way that serves his interests is a good example of bootleggers and Baptists in action.

that he appoint her brother to succeed him in an effort to retain control within the family. Another example is the stark political calculus that a developer lays out for Governor Lynelle Perry later in the series—including immense growth in tax revenue if her administration permits an airport and other developments in Paradise Valley. Recognizing that such coalitions exist and spotting specific ones is important for getting regulatory policy right, since regulatory bootleggers rarely pursue the public interest. In many instances, the regulatory Baptists have no more desire to partner, even implicitly, with regulatory bootleggers than actual Baptists do with actual bootleggers.

Understanding when Bootlegger-Baptist coalitions are operating is important for understanding policy debates. In environmental law, as in any area of complex regulatory law, the devil is in the details. Bootleggers and Baptists work together more readily where the bootleggers' interests are concealed in the tedious details of regulations than

when they are clear to see. Disrupting such coalitions by shining light on those details can limit the use of regulation for rent-seeking and focus it on genuine public purposes. In short, it can help ensure that endangered species regulation is about saving endangered species rather than smoothing the way for subdivisions or hotel-casino complexes next to wilderness areas.

In setting out to tell a story that resonates with audiences, the writers and producers of “Yellowstone” sought to stay true to human nature. The show's portrayal of how regulations are shaped by implicit bootleggers and Baptists is appropriate because it feels real to the audience and advances the story. At its best, economics has that effect.



**Andrew P. Morriss** is a PERC senior fellow and professor at the Bush School of Government and Public Service and the School of Law at Texas A&M University.



---

Monica Long says that when a teacher leaves a school on a reservation, there's not a line of teachers to fill the spot—there's simply one less teacher.

**YELLOWSTONE** © Paramount Network

# DISPOSSESSED

Indigenous poverty, land, and property rights

---

BY PAUL SCHWENNESEN

**M**onica Long, a character ostensibly of Crow or Blackfoot descent, is offered an associate professorship by the president of Montana State University in “Yellowstone’s” Season 1 (Episode 5). The position is in the university’s burgeoning Native American Studies program, an effort to boost representation in an area that the president describes as “underrepresented in academia,” to which Long offers a sardonic reply: “There’s an understatement.”

The nervous laugh of the well-heeled administrator in response leadenly reminds viewers of the trope of white cultural arrogance—a recurring, though gratifyingly multidimensional, theme in the series. The trope is not exactly false, but it skirts the complexities of real, historically shaped life.

Long, who teaches at a school on the reservation where she lives, turns down the job offer. “You don’t understand,” she says. “When a teacher leaves a school on a reservation, there isn’t a line of teachers to fill my place. There’s just one less teacher. If I leave, my kids will suffer, and they’ve suffered enough already.”

Perhaps the most salient issue is the infantilizing “trusteeship” arrangement between the federal government and its “wards” in Indian Country. ... Indians are effectively prohibited from owning or investing in reservation land and homes or leveraging property for financial endeavors.

Long’s concern that taking the plum job would mean her grade school teacher position wouldn’t be filled is backed by the evidence: Reservation teaching positions have approximately double the national turnover rate, and recruiting teachers to reservation schools is notoriously difficult. The reason for this perennial shortfall is not, however, simply due to latent post-colonial discrimination—after all, similar teacher shortages plague rural, predominantly white communities as well. Rather, it is for the much more prosaic reason that for many prospective teachers, living on a poverty-stricken reservation holds as much appeal as a foreign assignment to, say, Malawi—interesting and even edifying, but not exactly a ticket to comfort and privilege. The poverty rate on reservations is double the national average, a reality that makes it disproportionately difficult to attract talent.

But where does this poverty come from? Is it inextricably woven into the fabric of Native American life—a malaise borne of colonial subjugation and crushed spirits? The argument certainly has its merits, and much ink has been spilled about the lingering effects of U.S. domination. In the kaleidoscope of variables that make modern reservations into “islands

of poverty in a sea of wealth,” however, perhaps the most salient issue is the infantilizing “trusteeship” arrangement between the federal government and its “wards” in Indian Country. This anachronistic compact puts government managers in an oversight role, charged with managing Indian lands for Indian benefit—ostensibly because, according to the federal government, Indians were too “primitive” to look after their own resources. As a consequence, Indians are effectively prohibited from owning or investing in reservation land and homes or leveraging property for financial endeavors. This system is the grizzly in the room, overshadowing claims like colonialism, racism, or a “poverty mindset” as explanatory factors for reservation hardships. Investigative journalist John Koppisch summarizes it well:

To explain the poverty of the reservations, people usually point to alcoholism, corruption, or school-dropout rates, not to mention the long distances to jobs and the dusty undeveloped land that doesn’t seem good for growing much. But those are just symptoms. Prosperity is built on property rights, and reservations often have neither. They’re a demonstration of what happens when property rights are weak or non-existent.

Simultaneously patronizing and aloof, the Bureau of Indian Affairs, under Department of the Interior administration, has a long and dubious reputation for carrying out its self-professed “moral obligations of the highest responsibility and trust.” The agency has an annual budget of over \$1.9 billion, employing some 4,500 government agents in 12 regional bureaus who are expected to “enhance the quality of life, promote economic opportunity, and carry out the responsibility to protect and improve the trust assets of American Indians, Indian Tribes, and Alaska Natives.” How well does it manage this noble, if nebulous, task? Not very well. In 1995, the *Cherokee Observer* noted pithily:



Left: A guard house at the San Carlos Apache Indian Reservation in 1880. Above: A modern view of the reservation.

© All Fronts Quiet





Big Sunflower Hill lies in the foreground

© Lon&Queta

Bureau of Indian Affairs (BIA) has distinguished itself as the most corrupt, ineffective and abusive agency in the federal government. Although the BIA now professes the greatest respect for “tribal sovereignty” and “tribal self-determination,” there is precious little evidence of genuine concern for tribal autonomy in its administration of federal Indian policy. ... By any standard, the BIA is a colossal failure as a government agency and the dead weight of its administrative wreckage represents the single greatest obstacle to the freedom, prosperity, cultural integrity and progress of Native Americans.

If the BIA achieved anything approaching its high-flown rhetoric, then we would expect the majority of Native Americans (who are free, as U.S. citizens, to live anywhere they please) to make prosperous, stable homes on reservation lands. In fact, only around one in five Native Americans chooses to do so. It seems that when people vote with their feet, they are inclined to judge government policy by its outcomes rather than its intentions. “Colonial exploitation,” in other words, may be more institutional than cultural.

In particular, federal policy vis-à-vis Native Americans creates a stultifying property rights regime driven in great part

by bureaucratic self-preservation. As PERC research fellow Shawn Regan has written, the U.S. government “holds the legal title to all Indian lands and is required to manage those lands for the benefit of all Indians.” How this arrangement formed, and how it has historically evolved, is a long story, but suffice to say: It’s complicated. One way to begin to understand it is to look at a specific example of how Indian “property rights” were established, challenged, changed, and solidified on one particular piece of land.

### Big Sunflower Hill

I happen to own 100 acres on the San Pedro River in southeastern Arizona. The property is a final vestige of our larger family ranch and includes Malpais Hill, known by the Apaches as *Nadnliid Cho*, or Big Sunflower Hill. Like all property, it has a convoluted pedigree, and like all land, it is not occupied by its “traditional” or “historical” inhabitants. It has been largely Anglo-owned since the early 1850s, but prior to that it was contested territory between ingressing Apache and Spanish colonists and the more historically rooted Tohono and Akimel O’odham. Prehistorically, it was the hunting and farming grounds of the Sobaipuri—by some accounts the



Uto-Aztecanspeaking forefathers of the famed Mexica empire. A relatively rare ceremonial ball court is still evident in one of our northern pastures. It is also near the site of one of the final, and therefore best-documented, massacres of the last years of the Anglo-Indian Wars, a devastating 1871 rampage known as the Camp Grant Massacre.

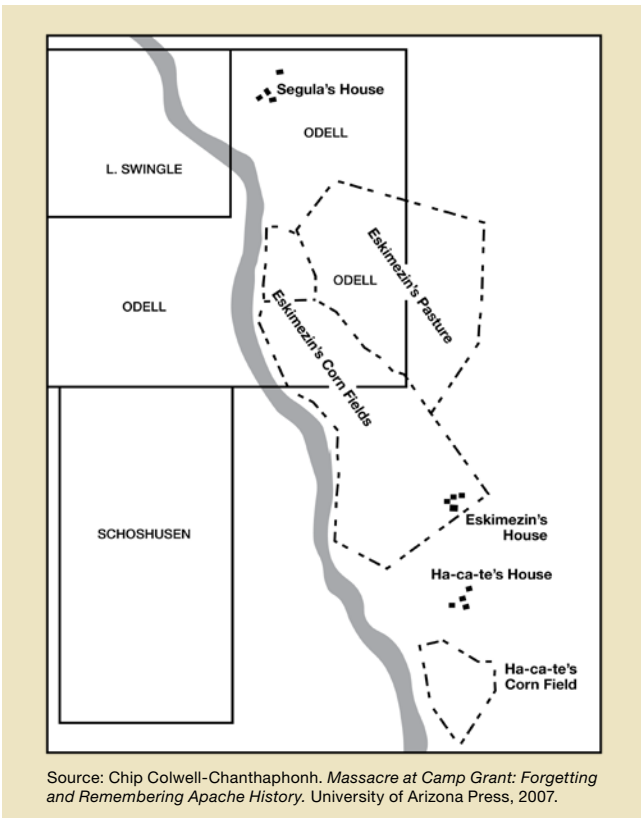
Haské ba 'ntzin, also known as Eskiminzin, was a chief of the local Aravaipa band of the Western Apache who barely survived this episode of regional violence. Once he eventually recovered, he advocated for the establishment of and removal of his people to the San Carlos Apache Indian Reservation, where he felt they would be safe from the depredations of traditional enemies.

Some time after, Eskiminzin requested permission to move *away* from San Carlos. That he was freely allowed to do so perhaps indicates part of a strategic expansion of the reservation's area—a common cause for both the Aravaipa Apache and the U.S. Army, which wanted to see “obedient” Indians rewarded. He gained U.S. citizenship in 1881. About that time, he is reported to have said: “I will go down to the Rio San Pedro and take some land where no one lives now, and I will make a ditch to bring water to irrigate that land. I will make a home there for myself and my family and we will live like the other ranchers do.”

This evidently came to pass, as land surveys from 1885 show Eskiminzin's agricultural enterprises were well established and demarcated. The small settlement was attacked six years later, probably by Mexican and O'odham enemies, who carried off corn, wheat and barley, destroyed a pumpkin crop, and took more than two dozen head of cattle. It seems that Eskiminzin was successful enough as a rancher to have incurred the jealous wrath of neighbors and enemies alike. He and the survivors fled the attack. His land, though a lawful homestead possession, was forfeit under the more ancient rules of blood and force.

The saga that occurred on this hundred-acre parcel comes garbled through time, as so many are. An account from the 1930s by a University of Arizona graduate student, for instance, states the following, complete with the prejudices of its day:

As time passed the Government tried to move all of the Aravaipa Apaches to San Carlos. Chief Eskiminzin and some of his followers objected and were allowed to stay on the San Pedro between Dudleyville and Mesaville. ... Also several Indians held land on Aravaipa Creek about four miles above the San Pedro River. The Indians were not good farmers and had great trouble getting water out of the river onto the land.



Top: Haské ba 'ntzin, also known as Eskiminzin, of the Western Apache. Bottom: Detail of an 1885 land survey record that includes Eskiminzin's (spelled “Eskimezin's” on the survey) holdings. Big Sunflower Hill is approximately in the center of the map, west of the river.



San Carlos Apache Indian Reservation

© CEBlmagery

We will never know the precise details, and to an extent they are irrelevant, since the vignette, conflicted as it is, nevertheless pushes back on some of the more popular myths and misconceptions about Native American land. For one thing, Eskiminzin’s story challenges notions of a monolithic “native sensibility” about land—clearly demonstrating that private property was not always and everywhere inimical to notions of a communal land ethos. While we should not gloss over the cultural conflicts, Eskiminzin apparently chose private agricultural initiative over government “trusteeship,” and he seemed to have prospered accordingly.

Such a story resonates to this day, with some outspoken Native Americans trying to point out that entrepreneurial self-sufficiency is in no way antagonistic to communal native values. Crow tribal member Bill Yellowtail puts it succinctly: “My reservation community will thrive in the 21st century only if we re-energize our traditions of private entrepreneurship and self-reliance.” Fully understood, Yellowtail’s comment, coupled with Eskiminzin’s story, may tell us more about modern reservation poverty than any of the 12 division heads of the Bureau of Indian Affairs.

Eskiminzin’s story challenges notions of a monolithic “native sensibility” about land—clearly demonstrating that private property was not always and everywhere inimical to notions of a communal land ethos. ... He apparently chose private agricultural initiative over government “trusteeship,” and he seemed to have prospered accordingly.

There is a coda to the Eskiminzin affair: In 1919, a land title presented by Woodrow Wilson to “Pechula, a San Carlos Apache Indian,” granted him 80 acres immediately on the southern flanks of Big Sunflower Hill. It’s unclear if Pechula was directly related to Eskiminzin, yet local rumor is that the “Pechuli” allotment was to a U.S. Army Indian Scout for

services rendered to the U.S. government. Eskiminzin's son-in-law happened to have been a respected Indian Scout (later semi-mythologized as the Apache Kid), so a connection seems probable. Regardless, the land grant came with strings attached. According to the grant:

The United States of America ... will hold the Land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years, in trust for the sole use and benefit of the said Indian ... but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law.

The current ownership status on file with the county assessor's office shows the owner of record as simply: "U.S." As has been noted by PERC scholars Donald Leal, P.J. Hill, and Terry Anderson, along with others, a thing is not really "property" until it has all of three elements: definability, defensibility, and transferability. That the heirs of Pechula are, as best I can tell, unable to access or meaningfully transfer their nominal "property" effectively locks it away, along with any of the wealth-generating potential it may have. A fire recently burned across the parcel, and while the rest of the community helped fight

the flames, no Pechula heirs showed up. It's not clear if any of them are aware of its existence.

Today, Big Sunflower Hill sits baking in the sun, oblivious to the historical dramas that swirl about its volcanic flanks. My family, as temporary custodian, dutifully pays the monthly electric bills to the BIA's San Carlos Irrigation Project—a twist of bureaucratic fate worthy of a Pulitzer. Our kids, meanwhile, find potsherds and arrowheads on "our land." But if just a small bit of probing into the history of a place reveals so much internal contradiction—and refutes so much of what is generally "known" about Indians and reservations—one cannot help but wonder how much more of the standard narrative is badly understood. The idea that Native American poverty is strictly the result of settler-colonialism seems, at best, an overly broad simplification.

## Coming Full Circle

In the "Yellowstone" scene, Long turns down the associate professorship on grounds of loyalty to her local school and the kids that depend on her. A replacement would be hard to find. The reasons are complicated but are clearly linked to poverty. Brittany Roberts, a visiting volunteer teacher on the White Mountain Apache Reservation, writes that life for her is "somewhere between teaching in a small town, and teaching abroad." She adds: "I live and work on a sovereign nation



If just a small bit of probing into the history of a place reveals so much internal contradiction, one cannot help but wonder how much more of the standard narrative is badly understood.

### San Carlos Apache Indian Reservation

© John Fowler

...serving indigenous peoples, yet so much of what I do (and how people here live) is regulated or outright dictated by the U.S. government.”

Endemic problems like alcoholism, absentee fathers, and rampant unemployment are, not surprisingly, reminiscent of the social outcomes in other examples of command-and-control political models. Reservation governance in many cases combines the worst of distant, unresponsive bureaucracy with a tendency toward local corruption. For prospective teachers, hiring preferences for tribal members makes spouse assignments hard, and school funding is generally limited because much of the property is operated by the tribe—even if the U.S. government ultimately holds the title—and is therefore tax exempt. At the end of the day, Long is right: Anyone wishing to take her place would be in a small, even ascetic, minority. Roberts also says that teaching on the rez is great “if you’re willing to trade a quiet, star-filled sky for being close to Target.” But she also notes, “Sadly, there’s a stark contrast between the abundance of natural beauty, and the lack that many people here face. When I pass the multiple burned down homes, as well as the trailers and houses with busted windows and crumbling roofs, I feel a pang of guilt.”

Guilt over reservation impoverishment is a predominant sentiment, no doubt, in most quarters of the rest of America. The poverty that plagues reservation life, however, cannot be glibly explained away under *au courant* notions of racist land dispossession alone—especially since some of America’s wealthiest individuals (like members of the Shakopee Mdewakanton, who operate various casino and gaming enterprises) *also* live on reservations. Explanations that chalk everything up to racism and land dispossession are insufficient on both historic and economic grounds. The muted national conversation on reservation poverty must be broadened. It needs to include the real harms that well-intentioned, yet counterproductive, government-mandated property schemes have on real—and really suffering—reservation members.



**Paul Schwennesen** is a rancher in Arizona, a Ph.D. candidate in environmental history, and director of the Agrarian Freedom Project. He is also an alum of PERC’s Enviropreneur Institute.

# Giving Greater Yellowstone's Elk More Room to Roam

A new agreement led by PERC is helping landowners enhance habitat for Paradise Valley's iconic elk herds



A view of the area covered by the elk occupancy agreement

**M**ontana's Paradise Valley is known to many as the home of rancher John Dutton in the hit television series "Yellowstone." But for those of us who live in southwestern Montana, Paradise Valley is known for much more. It's a place with deep-rooted ranching traditions, stunning scenic views, and abundant wildlife, located just miles from the northern boundary of Yellowstone National Park.

Today, ranchers in Paradise Valley face some of the same challenges as the Duttons—pressures to subdivide or develop,

influxes of tourists, and all of the stresses inherent to raising cattle. That can make it harder for ranchers to continue doing something they have long done for free: provide winter habitat for Yellowstone's iconic populations of migratory elk.

A new approach, pioneered by PERC and other conservation partners, aims to reward ranchers for giving elk more room to roam. This fall, PERC partnered with one Paradise Valley ranch to create a privately funded "elk occupancy agreement" that will help conserve nearly 500 acres of winter habitat for



Zane Petrich tests the wildlife-friendly fence installed on his family's ranch.

one of the valley's migratory elk herds. The agreement is the first of its kind in Montana, funded entirely by local groups interested in conserving Yellowstone's migration corridors.

"Elk herds can only be as healthy and as big as their winter range," Zane Petrich told me during a recent tour of the site at his family's ranch on the east flank of the valley. A 1.25-mile wildlife-friendly fence had just been completed—fully paid for by PERC and the Greater Yellowstone Coalition as part of the agreement—that will separate the Petriches' livestock from a parcel of their ranch that serves as important winter habitat for migrating elk.

Like the fictional Dutton family, the Petriches have ranched in Paradise Valley for generations. During that time, they have witnessed plenty of changes. Petrich describes the increase in real estate development that now dots the valley. "The winter range for elk is all getting subdivided," says Petrich. "We've always tried to take care of the elk, and do a little bit more and more as we can."

That's not always easy. Elk bring plenty of costs to landowners. They compete with livestock for forage and hay, damage fences, and attract predators. They also transmit the disease brucellosis, which causes cattle to abort their young and requires ranchers to quarantine their entire livestock herds.

The agreement stems from a series of meetings with landowners in Paradise Valley, hosted by PERC. The goal was to better understand the challenges facing ranchers in the valley. A survey conducted by PERC in 2019 revealed a need for more flexible tools to help landowners live with elk. "We had been to these PERC meetings," Petrich told me, "and I wondered if they'd be interested in helping fund something that we could do to help the wildlife." His family pitched the project to PERC, and in a matter of months, it was funded and completed.

Ranchers in Paradise Valley face some of the same challenges as the Duttons—pressures to subdivide or develop, influxes of tourists, and all of the stresses inherent to raising cattle—making it harder to continue doing something they have long done for free: provide winter habitat for Yellowstone's migratory elk.

"One of the benefits of this approach is that it's flexible," says PERC's CEO Brian Yablonski, who worked with the Petriches on the agreement. "No two agreements will look the same, so long as it works for the rancher and the elk." In the Petriches' case, he says, it involved building a fence. In other cases, it could be a short-term habitat lease or a pay-for-presence arrangement.

This flexibility means agreements can be struck quickly and without bureaucracy. "Because this is entirely voluntary and privately funded by donations, we were able to act fast," Yablonski says. "Government-led approaches would take years of paperwork." In addition to devoting a portion of their land as elk habitat, the Petriches also agreed to conduct management activities on the parcel, including controlled burning and noxious weed treatments to enhance the habitat conditions.

As we walk along the fence line, Petrich gives me a botany lesson. He points out bluebunch wheatgrass, fescue, and other protein-rich native grasses, which provide nutrients for elk in the winter time. Those grasses will be restored under the agreement. Cheatgrass, a rapid-growing invasive species, has been sprayed and will be removed. The result will be a lush area of native grasses to sustain the elk.

"The more elk that live on private land, the more their populations grow," says Petrich. "It's going to help everybody."

**To learn more about the elk occupancy agreement and PERC's Yellowstone migration initiative, visit [perc.org/ea](https://perc.org/ea)**

**Shawn Regan** is the vice president of research at PERC and executive editor of *PERC Reports*.



2048 Analysis Dr., Ste. A  
Bozeman, MT 59718

NON PROFIT  
U.S. POSTAGE  
**PAID**  
Post Falls, ID  
PERMIT NO. 32



**PERC** LONE MOUNTAIN SOCIETY

# Make your impact even bigger with a stock or cryptocurrency donation

Supporting PERC with tax-advantaged donations of appreciated securities has never been easier!  
Transferring stocks or cryptocurrency to PERC is quick, easy, and secure, and it can even  
help reduce your tax liability, increasing your impact.

Consider joining the Lone Mountain Society today with a stock or cryptocurrency donation at:

[perc.org/stock](https://perc.org/stock)  
[perc.org/crypto](https://perc.org/crypto)