The magisterial PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) is a treasure trove of information on all the topics considered in this chapter. It builds on the prior definitive source, BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924). Another, even older source, is particularly valuable on acquisition and disposition: THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS (1884). Other sources drawn upon by chapter 2 include ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1970 (1942), and VERNON CARSTENSEN (ED.), THE PUBLIC LANDS (1962).

A. Acquisition of the Public Domain

1. From the Original Colonies

2. From Foreign Nations

3. From Indian Tribes

Felix Cohen was the leading authority on Indian law in the twentieth century, and many of his original articles, such as Original Indian Title, 32 MINN. L.REV. 28 (1947), remain important sources of commentary. His HANDBOOK OF FEDERAL INDIAN LAW continues to be updated and is the best source for beginning research on any issue related to Indian title. For additional information on Johnson v. M’Intosh, see Eric Kades, History and Interpretation of the Great Case of Johnson v. M’Intosh, 19 LAW & HISTORY REV. 67 (2001).


Practical accommodations of Indian rights on federal lands is covered by Martin Nie, The Use of Co-Management and Protected Land Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands, 48 NAT. RES. J. 585 (2008).
B. Disposition of the Public Domain

1. Disposition

2. State Lands and Trust Doctrines

Public Trust Doctrine:

Professor Huffman has been a persistent critic of the expansion of the public trust doctrine to include modern environmental concerns. He argues that the public trust doctrine is simply a run-of-the-mill easement under state property law to accommodate navigation and fishing. James L. Huffman, A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 EnvTL. L. 527 (1989). Professor Pearson is skeptical that the public trust doctrine will ever be a viable part of federal public land litigation. He argues that the courts will not second-guess Congress’s implementation of its trust responsibility for federal lands, and concludes that the public trust notion “empowers the political branches of government to implement substantive choices despite objections in the judicial branch.” He contrasts this with the doctrine’s operation in state law, where it “empowers the judicial branch to overturn substantive choices made by the political branches. …Night, meet day.” Eric Pearson, The Public Trust Doctrine in Federal Law, 24 J. Land, Resources & EnvTL. L. 173, 176–77 (2004).


Public Trust Doctrine Around the World: Several countries around the world have even extended the public trust doctrine to non-traditional resources that have little to do with channels of navigation and commerce. In India, for example, the public trust doctrine is not confined by the “navigable waters” limitations recognized in the United States; rather, it covers all natural resources including the general environment. See M.C. Mehta v. Kamal Nath, 1 SCC 388 (1997). And the decisions of the Indian Supreme Court reflect ecological and moral values – not just legal principles based on commercial production and property regimes. Likewise, in Oposa et. al. v. Fulgencio S. Factoran, Jr., et. al., (1993) 224 SCRA 792, the Supreme Court of the Philippines tethered the public trust doctrine to the fundamental constitutional right “to a balanced and healthful ecology in accordance with the rhythm and harmony of nature.” It thus based the public trust doctrine on the moral and ecological values of the Filipino society, stating that preserving the “rhythm and harmony” of nature necessitate the “judicious disposition, utilization, management, renewal, and conservation of the country’s forest, mineral, land, waters, fisheries, wildlife, off-shore areas, and other natural resources” so that their “utilization be equitably accessible to the present as well as future generations.” And in South Africa, the legislature enacted the National Environmental Management Act, which expressly incorporated the public trust doctrine by declaring that the State is a “custodian holding the environment in public trust for the people.” Notably, all these evolutions stem from the same Roman law system that provided us with our own version of the public trust doctrine.

*State Trust Lands:*


Some statehood enabling acts not only set out detailed restrictions, but went further to require the new state to put identical restrictions in its state constitution. For an illustration of the politics behind this process, see John Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 7–27 (1988). See also Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004). The state constitutional restrictions lead to state
Supreme Court decisions also strictly enforcing the terms of the federal land grants, as a matter of federal law (the enabling acts) or of state law (similar restrictions expressed in the state constitution or statutes). See, e.g., Oklahoma Educ. Ass’n, Inc. v. Nigh, 642 P.2d 230 (Okl. 1982).

Roger D. Billings, The Homestead Act, Pacific Railroad Act and Morrill Act, 39 N. KY. L. REV. 699 (2012), covers the history of all three of these important disposal programs.

3. Grants to Private Parties

Grants for Reclamation
On Powell’s campaign to reform public land law, see WALLACE STEGNER, BEYOND THE HUNDREDDTH MERIDIAN (1954); WILLIAM DEBuYS, SEEING THINGS WHOLE: THE ESSENTIAL JOHN WESLEY POWELL (2001).

The reclamation program is critically examined in the late Marc Reisner’s now-classic work, CADILLAC DESERT (1993).

Grants to Miners
The standard reference sources are RODMAN W. PAUL, MINING FRONTIERS OF THE FAR WEST, 1848-1880 (1963); and RODMAN W. PAUL, CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST (1947)

Grants to Railroads

C. Reservation, Withdrawal, and Reacquisition
Federal condemnation procedures are summarized in Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984), involving a Park Service acquisition to expand Big Thicket National Park in Texas.

William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738 (2013), describes the history of changing constitutional approaches to federal condemnation power.
1. The Emergence of Withdrawal and Reservation: Forests and Scenery


2. Mineral Resources


3. Range Resources

Similar state statutes to the one prohibiting ranchers from grazing sheep on land that had been grazed by cattle (the source of dispute in Omaechevarria v. Idaho) were adopted by Arizona and Oregon. For a brief history of those statutes, as well as a summary of the litigation that followed, see 70 A.L.R. 410 (Originally published in 1931). See also, John J. Hasko, Cattle v. Sheep: The Idaho Experience, 3 The Crit: Critical Stud. J. 79 (2010).