Of Grants and Greed

by James Long

This article won the 1994 John M. Collier Award for Forest History Journalism.

It's a chapter of American history that private timber companies and many politicians would just as soon leave closed.

It has to do with corporate greed, government bumbling, and a lingering question about the ownership of more than a million acres of former public lands in Washington, Idaho, and Montana. And perhaps billions of dollars in timber revenues. E. Kimbark MacColl, the Portland historian, nudged the story awake again in his keynote speech at President Clinton's April 2, 1993 timber summit in Portland, Oregon.

The controversy began during the last century after Congress gave an enormous land grant to the organizers of the Northern Pacific Railroad Co.

The grant set the stage for the biggest transfer of public property into private hands in U.S. history. Eventually, the railroad would receive some 40 million acres, or more than enough land to form a state the size of Michigan with enough left over for Rhode Island.

The grant obligated the railroad to use the property to build and operate a rail link from the Great Lakes to Puget Sound.

A dozen years ago, Northern Pacific's descendants began shuffling what remained of the grant, about 1.4 million acres, to nonrailroad companies that began clear-cutting old-growth forests, some of the largest remaining on private land in the Northwest, and exporting many of the logs to Japan.

Critics said the railroad had no right to do this, and the land should revert to the public.

John Osborn, a Spokane physician and director of the Inland Empire Public Lands Council, has been trying for 10 years to get Congress to take a new look at the grant.

He believes that trying to understand the region's timber problems without understanding the Northern Pacific grant is like trying to understand the origins of the Grand Canyon without having heard of the Colorado River.

"Anyone who flies over the Northwest can see the results" of the grant, says Osborn, referring to the checkerboard patterns of clear-cuts that reflect the way Congress laid out the Northern Pacific grant in the original law in 1864.

"The grant," says Osborn, "is the defining piece of legislation for the Northwest. It predates three of the four states. It was enormous not only in area, but in the long-term implications for our region. If you look at log exports, at the maps of clearcutting, at the political links between companies and politicians, you eventually trace it back to a single law, and that is the Northern Pacific land grant." The easiest way to understand the Northern Pacific grant is to walk through it.

Congress passed a law in 1864 authorizing a group of promoters to organize the railroad and promising them a subsidy of public land to establish a rail link from Lake Superior to Pacific tidewater.

Northern Pacific was promised a right of way 400 feet wide from Duluth, Minnesota, to Tacoma, Washington. For each mile of track it built, it would receive 20 square miles of public land through the state of Minnesota, then 40 square miles per mile for the rest of the distance, which totaled some 2,000 miles. In some places, the grant zone reached out 60 miles on either side of the track.

Still, the grant wasn't a gift. It was a federal law and also a contract with Congress. And, unlike most federal laws, this one was signed and returned by the railroad's board of directors, who accepted all the conditions before Abraham Lincoln added his signature.

Mainly, the grant obligated Northern Pacific to use the land to build and operate the railroad. But relations between Congress and the Northern Pacific were stormy. Congress repeatedly accused the railroad of fraud and of failing to meet other conditions, such as selling land, under certain circumstances, to settlers or small buyers.
Above: An 1883 United States map defines the areas within which the federal government made railroad land grants.

Left: This 1914 map shows land ownership in southwestern Washington state. The "checkerboard" division of land ownership held no relationship to natural ecosystem boundaries, and continues to make difficult settling disputes over access and management priorities.

Both maps are from the 1913-14 Report of the U.S. Bureau of Corporations on the Lumber Industry. All photos accompanying this article are from the Forest History Society archives.
At least twice, Congress took back property from the railroad—some 3 million acres in all.

As recently as the 1980s, the Congressional Research Service conducted a legal study of the grant that concluded lawmakers could repossess more land, quite possibly, if they chose to do so. The purpose of the study had been to determine whether Burlington Northern Railroad, the immediate successor to Northern Pacific, forfeited the land grant by transferring it in 1981 to Burlington Resources Inc., a nonrail affiliate.

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Dorgan pointed to the final paragraph of the grant law that said Congress was giving the property to "promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure..."

Workers preparing the first cargo of halibut caught in Puget Sound for shipment via the Northern Pacific Railroad, September 20, 1888.

Burlington Northern had shuffled the lands away as part of a maneuver to turn itself into a holding company, Burlington Northern Inc., to fend off corporate raiders.

The railroad itself became just a stripped-down cog in the new conglomerate while assuming virtually the entire conglomerate debt of about $3 billion.

Saddled with the debt, Burlington Northern Railroad went on a cost-cutting spree, partly by cutting service to small farm towns in South Dakota and Montana.

Sen. Byron Dorgan, D-S.D., then a member of the House, asked the Congressional Research Service to look into whether the railroad’s divestiture violated the grant.

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There was no expiration date. So Dorgan turned to the Congressional Research Service for an opinion on the law and got a 4-page study from Pamela Baldwin, a legislative law expert in the American Law Division.

Baldwin’s report said the railroad might well have broken the grant. She said the law seemed to tie the land to the operation of the track, but that it wasn’t crystal clear just how long the obligation was supposed to continue.

She said it was possible that the obligation was binding “only for as long as was necessary for the fundamental purpose of the legislation, e.g. the settlement of the West, to be achieved.”

However, she said it was also possible that the tie between the railroad and the former public land was “such an integral part of the agreement that termination of the operation may warrant a revesting of title in the United States to whatever lands still...”
The Baldwin study also pointed out that Congress in this century has taken back land from a railroad for ignoring the conditions of an old grant. This was the Oregon & California Railroad land case.

Southern Pacific Railroad had bought the O&C, a land-grant railroad, in 1887. The grant had required O&C—now the Southern Pacific—to sell 160-acre parcels to settlers for $2.50 an acre.

Congress Authorizes Suit

But Southern Pacific quit selling the parcels in 1903, complaining that the 1869 grant law was no longer practical.

The Oregon Legislature pushed a case to the Supreme Court, and Southern Pacific lost.

The court informed the railroad that federal laws did not expire on the shelf like outdated dairy products, and that the railroad should have asked Congress to change the 1869 grant instead of disregarding it.

Congress then returned some 2.8 million acres of former O&C lands to the public domain. Southern Pacific got a few million dollars in compensation, but the reverted lands since 1916 have earned more than $1 billion for 18 Oregon counties and the federal treasury.

Soon after the O&C case, the federal government began an effort to revoke the Northern Pacific grant spurred by the railroad’s attempt to claim land in federal forest reserves. Those reserves became national forests and parks.

After being forced to give up millions of acres that it had obtained improperly, Northern Pacific combed back through survey maps looking for properties it might have missed during construction of the railroad.

And it found some.

In 1906, the railroad claimed 5,600 acres of prime timber near Bozeman, Montana, which the Interior Department approved before realizing the land had been set aside for the proposed Gallatin National Forest.

The government sued to get the land back, but Northern Pacific won in the Supreme Court. The court said the grant was a contract and that the government had to give Northern Pacific a full 40 sections per mile, even if the land had to come from a national forest.

Northern Pacific promptly filed claims for another 2.9 million acres, much of it in national forests, touching off a political explosion.

President Calvin Coolidge in 1924 ordered his staff to investigate, and Congress froze any further land transfers while it conducted a hearing.

History of Bilking Government

More than 5,000 pages of testimony established that the railroad had repeatedly bilked the government, and that its belated claims on national forests had often been due to a deliberate practice of delaying taking title so it could avoid paying property taxes.

Congress passed a law in 1929 reaffirming its authority over the grant and ordering the Justice Department to sue Northern Pacific to clear up the complex legal issues surrounding the grant. The case dragged through the U.S. District Court in Spokane for nine years, ending with a special master’s report heavily favoring the railroad.

But Northern Pacific didn’t fare as well on appeal. On December 16, 1940, the U.S. Supreme Court said the trial court had erred by refusing to let the government introduce evidence of fraud.

Also, the court took the unusual step of reserves judgment on six key issues on which it could not agree.

With one justice standing aside because he had helped investigate the railroad, the Supreme Court deadlock 4-4 on whether Northern Pacific had met legal requirements for preserving its charter, and whether the railroad forfeited the grant by failing to auction property to small buyers, as required, when it twice went broke.

The case was sent back to Spokane, but the railroad offered a settlement and the Justice Department agreed, to the irritation of U.S. District Judge Lewis Schwellenbach.

Schwellenbach said the parties weren’t settling just another lawsuit, but one that Congress had ordered filed by federal law. He said Congress had spelled out questions it wanted answered, and that the lawsuit hadn’t really answered them.

Schwellenbach was uneasy that the Justice Department hadn’t gotten Congress’ permission to accept the railroad’s offer.

“Congress has not authorized the settlement,” Schwellenbach pointed out and said it would be “in no way binding on Congress.”

But he went ahead and signed on August 28, 1941.

By that time the country was sliding into World War II, and nobody had time to worry about an old railroad land grant.

After a world war and most of the Cold War had passed, the land grant controversy seemed forgotten until Dorgan got upset about Burlington Northern’s rail closures and asked for the legal opinion that Baldwin wrote in 1981.

Dorgan showed Baldwin’s study to some other members of Congress at the time but got no encouragement.

“It’s like I was an ant pushing a cement truck up a steep hill,” Dorgan remembered. “The railroads have a lot of allies. And you’ve got to find allies who are willing to take on a fight against the railroads and against the institutions. It’s hard to find people who are interested in waging that fight. I talked to one of the senior members of Congress who would have to be involved in that—this is back in 1982-83, and he said, ‘I guess you can go ahead and start climbing, but it’s a hill you’re not gonna climb very far.’”

Burlington Northern Railroad is still a big-time player in Washington. Its political action committee and individual Burlington executives contributed $236,408 to at least 188 congressional candidates in 1991–92.

To look after its interests in the Capitol, the railroad retains no less than eight lobbyist and consultant groups including Steptoe & Johnson, a gilt-edged Washington law firm whose
political clients range from Aluminum Company of America to Nippon Steel and the Turkish Republic of Northern Cyprus.

In 1983, Burlington Northern got a surprise interpretation of the grant from the 9th U.S. Circuit Court of Appeals.

A group calling itself the Citizens Committee to Save the Land Grant Railroads had brought suit on issues similar to those Dorgan raised. A trial judge dismissed the case, saying the court lacked jurisdiction and that the plaintiffs had no standing to sue.

The 9th Circuit agreed but said it was affirming the dismissal “on a different basis.”

Judge Betty B. Fletcher, who wrote the opinion, declared that the Northern Pacific grant had “set no limitations on the power of the corporation to dispose of the lands and proceeds of the lands...once the railroad has been completed.” She said “the language of the act suggests that Burlington received the lands as a quid pro quo for building—but not for maintaining—the railroad.” Although the Supreme Court could overturn Fletcher, few people think it’s likely that the land grant could ever be unscrambled now in court.

“At this point the main avenue of correction of the problems would be some kind of legislation,” said Daniel E. Smith, the plaintiff’s lawyer in the Seattle case.

That was the state of affairs when Burlington Resources Inc. spun off Plum Creek Timber Co. as a limited partnership in 1989, stuffing it with the surface rights to 1.4 million acres of the remaining grant.

Plum Creek sold most of the partnership units to outside investors, while Burlington Resources held a sliver of interest and controlled the partnership indirectly through a management company.

Last January, Burlington sold its interest to SPO Partners, a private group that had been Plum Creek’s biggest investor.

Saddled with a $325 million spinoff debt and the profit expectations of partners who invested another $250 million, Plum Creek in 1989 began toppling trees at a rate that stunned many Northwest residents.

Clear-cuts in Snoqualmie Pass were so dramatic that Rod Chandler, then the Republican congressman representing the district, labeled Plum Creek as “Darth Vader.”

The company’s own prospectus revealed that it was cutting timber at two to three times the sustained yield rate.

But Plum Creek has pulled in its horns since then, reducing the size of its clear-cuts and hiring Jerry Franklin, a noted University of Washington forest ecologist, to install “new forestry” practices on some of its land.

Not Darth Vader?

“We never thought we deserved the Darth Vader rap,” said Terri Rockwell, a Plum Creek spokeswoman. “A lot of the clear-cuts we were credited with weren’t ours.”

Plum Creek is now down to 1.2 million acres, having sold 164,000 acres near Yellowstone Park last year to a Portland timber syndicate after refusing an offer from the Nature Conservancy.

Osborn, the Inland Empire Public Lands activist, agrees that Plum Creek Timber has tried to make some amends after a free-cutting startup.

But he laments, “You can’t put the old growth back up on the stumps or bring back the railroad logs from Japan.”

When Baldwin did her research for Dorgan, Burlington Resources hadn’t yet spun off Plum Creek as an independent company, nor had SPO partners taken control from Burlington Resources.

And she is curious, as she answers the phone in her Washington office, that someone is still interested in the land grant.

She hesitates for a long moment over the question of whether the spinoff would give Congress any more reason to review the grant than it had in 1981 when Burlington Northern Railroad reorganized and began abandoning track.

“Lord only knows what a court might do with that,” she said.

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