Land & Water Law Review

Volume 4 | Issue 2 Article 4

1969

Section 3 Rights under the Taylor Grazing Act

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LAND AND WATER
LAW REVIEW

VOLUME IV 1969 NUMBER 2

Congress enacted the Taylor Grazing Act in 1934. In the following article the author describes the basic mechanics and qualifications necessary for obtaining the use of public lands under Section 3 of the Act. Mr. Ragsdale also considers whether one gets a legally protected right after having obtained a Section 3 permit, and if so, the nature and extent of the protection which the courts will give such right.

SECTION 3 RIGHTS UNDER THE TAYLOR GRAZING ACT†

*Calvin E. Ragsdale**

I. INTRODUCTION

ALTHOUGH the Taylor Grazing Act[1] is a major piece of land use and conservation legislation, it has not been explored very extensively by legal scholars.[2] Most authors who have considered the Act analyze it in terms of political, as opposed to legal, considerations. One author has put it thus:

> The practice of hiring an attorney by both individual ranchers and by livestock groups to represent them in discussions and actions with the BLM is an intriguing aspect of the BLM-rancher relationships. The contravening power of the ranchers versus the BLM is political power, not legal. Do the ranchers not know this; or do they just feel more comfortable

† This study was financed by a grant to the Land and Water Law Center from the United States Steel Foundation.

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1. 48 Stat. 1269 (1934), *as amended*, 43 U.S.C. §§ 315-315g, 315l-315m, 315n-315p (1964).
2. Only one law review article appears to be exclusively devoted to the Act: Kingery, *The Public Grazing Lands*, 43 DENVER L. J. 329 (1966). The Act has received a great deal of non-legal analysis. *See, e.g.*, Calef, Private Grazing and Public Lands (1960); Clawson & Held, The Federal Lands: Their Use and Management (1957); Foss, Politics and Grass (1960); The Public Lands (Carstensen, ed. 1968) for treatments of the Taylor Act, as well as treatment generally of land law history in the United States.

> after retaining an attorney? Perhaps the attorney is retained simply as a spokesman for the ranchers.[3]

The implication seems to be that the grazing permits held by livestock owners do not represent cognizable legal rights, but merely represent a beginning point for a political power struggle between livestock owners and the Bureau of Land Management.[4] The authors who have treated the Taylor Act seem to have virtually ignored any analysis of "rights" which the holders of permits issued under the Act might expect to be protected. This article will examine two questions: 1) Does the permit which a livestock owner obtains represent a cognizable legal right; and 2) if it does represent such a right, what is the extent of the right?

Notwithstanding the lack of treatment of the legal effects of the Act, much has been written with regard to the pre-Taylor Act history of the public domain, the passage of the Taylor Act, and its early administration.[5] The historical aspects of the Act and its early administration will not be reviewed here. Although attitudes at the time of the passage of the Act (principally those of conservationists) have probably influenced the nature and extent of the Taylor right, the extent of such influence is not within the scope of this paper. To consider the above questions, it is necessary to examine the Act generally.

II. THE ACT GENERALLY

It has been said of the Taylor Act that "It was intended to reverse policy completely with respect to the unreserved public domain from free, unregulated, common use to leased, regulated, exclusive use."[6] The purposes of the Act as stated by Congress are set forth in two places in the Act: the Preamble and Section 2.[7] The preamble of the Act states that

3. Calef, Private Grazing and Public Lands 138, n.8 (1960) (hereinafter cited as Calef).
4. The Bureau of Land Management is a division within the Department of Interior. It was created by combining the Land Office and Grazing Service and is charged with administering most, but not all, federal lands. The Bureau of Land Management will be also referred to in this article as Bureau or BLM.
5. *See* generally the texts cited *supra* note 2. For a good short history, *see* Kingery, *The Public Grazing Lands*, 43 DENVER L. J. 329, 329-33 (1966).
6. Calef 57. *See also* Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938).
7. 48 Stat. 1269-70 (1934).

it is an Act "(t)o stop injury to the public grazing lands by preventing over-grazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes."[8] Section 2 of the Act sets forth these purposes in slightly different language, by giving the Secretary of the Interior a broad grant of power "to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement and development of the range. . . ."[9]

To implement these purposes, the Taylor Act provides for the creation of grazing districts made up "of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his [i.e. the Secretary of Interior] opinion are chiefly valuable for grazing and raising forage crops. . . ."[10] A limitation was originally placed on the number of acres of land which could be placed in such districts,[11] but a subsequent amendment eliminated this limitation.[12] Those lands within grazing districts are commonly referred to as "Section 3 lands."

The Act provides that Section 3 lands are to be administered by the Secretary of the Interior through a system of preference permits, under such rules and regulations as are necessary to accomplish the purposes of the Act.[13] Section 3 authorizes the Secretary of the Interior to issue permits for the grazing districts "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the

8. 48 Stat. 1269 (1934).
9. 48 Stat. 1270 (1934).
10. 48 Stat. 1269 (1934) (bracketed material added).
11. 48 Stat. 1269 (1934).
12. 43 U.S.C. § 315 (1964).
13. § 2, 48 Stat. 1270 (1934).

payment annually of reasonable fees in each case to be fixed or determined from time to time. . . ."[14]

In granting such permits, however, the Secretary is limited by the *proviso* of Section 3. Permits can only be issued to citizens of the United States, to those who have filed the necessary declarations of intention to become citizens, or to groups, associations, or corporations authorized to do business in the State in which the district is located. Further, preference is to be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights, owned, occupied, or leased by them. . . ."[15] Further, the Section provides that "no permittee complying with the rules and regulations laid down by the Secretary . . . shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."[16]

14. § 3, 48 Stat. 1270 (1934).

15. § 3, 48 Stat. 1270 (1934). This particular provision would seem to go a long ways toward the elimination of the hated transient ("tramp") sheepman by cutting off his access to the public domain through the requirement of ownership of land and water. It was rare that the transient sheepman owned any land or water rights. Instead, he depended on the public lands for his entire operation. It should be noted that shortly after the passage of the Act and its implementation by administration through the Grazing Service, the "tramp" sheepman ceased to exist in the Western states. *See* Calef 52, 61, 68.

16. § 3, 48 Stat. 1271 (1934). This provision immediately suggests to the literal reader an excellent way to protect this permit. In fact, Calef has suggested:

> One provision of the act made it virtually impossible to revoke a permit if the permittee did not violate the rules established in the act and in the *Federal Range Code* . . . Since cancellation of a permit would inevitably impair the value of a grazing unit, any rancher who was granted an original one-year permit could make himself invulnerable to cancellation by merely pledging the unit as security for a small loan. Calef 70.

Calef is inaccurate on at least two points. In referring to one-year permits, he seems to be referring to the license which is granted in lieu of the long-term permit until such time as an adjudication of the range can be had. The Interior Department determined early that the provision of Section 3 of the Taylor Act did not apply to temporary licenses, but only to permits, which are by definition the result of adjudication. Alford Roos, Grazing Decisions (hereinafter cited as G. D.) 38, 40 (1958) 57 I. D. 8 (1938) (dictum, but later applied in Charles H. McChesney, G. D. 693 (1958), 65 I. D. 231 (1958)).

Further, in the case of LaRue v. Udall, 324 F.2d 428 (D. C. Cir. 1963), the Court dealt a blow to this portion of the Act. In LaRue, the federal lands on which appellant had grazing permits were exchanged for lands owned by North American Aviation in a different grazing district. This was done under § 8 of the Taylor Act and effectively eliminated the appellants' use of the land or of any other federal lands. The appellants urged that "if the Secretary may not refuse to renew a permit when the

Section 3 also provides that the permit shall be of a duration not to exceed ten years. This is "subject to the preference right of the permittees to renewal in the discretion of the Secretary . . ., who shall specify from time to time numbers of stock and seasons of use."[17] The Secretary is authorized, under certain circumstances (severe drought, other actual causes, general epidemic and disease) during the life of the permit to reduce, remit, refund or authorize postponement of payment of grazing fees. Finally, the section provides: "So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands."[18]

Section 8 of the Act provides that the Secretary of the Interior may accept gifts of land within a district, or that he may exchange federal lands for privately owned or state owned lands, the Secretary's discretion in such exchanges being restricted somewhat by the provisions of the section as to notice to be given, value of lands, and location of lands. Acceptance of gifts of land is authorized "where such action will promote the purposes of the district or facilitate its administration. . . ."[19]

The Act also authorizes the Secretary, in his discretion, to classify lands in the grazing district which are determined to be more suitable for agricultural crop purposes than for

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permittee's grazing unit is pledged as security for a *bona fide* loan, 'he can hardly bring about the same result indirectly by terminating a permit prior to the expiration of the term**.'" *Id.* at 431.

The Court stated:

> [T]he provision . . . is one of the factors to be considered by the Secretary in the establishing preferences between conflicting applications for permits on the federal range. By no means should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and maintain a vested interest therein which will prevent the United States from exchanging it under § 8 (b). *Id.* at 431.

This would seem to limit the availability of the provision fairly sharply to the very narrow instance where there was a dispute between two livestock owners over the same lands, and then would simply seem to be "one of the factors to be considered by the Secretary . . ." The Congressmen who enacted the Taylor Act would no doubt be surprised to hear to what their extremely explicit language has been reduced.

17. 48 Stat. 1271 (1934).
18. 48 Stat. 1271 (1934).
19. 48 Stat. 1272 (1934).

grazing purposes, and to open them to homestead entry in tracts of land not greater than 320 acres. Such lands are not so opened until after they are classified. If an individual applies for entry on lands, and the Secretary makes a classification, the applicant shall have preference right to entry when the lands are opened under the section.[20] The language of this Section was changed somewhat by a 1936 Amendment.[21] The Secretary is now authorized, in his discretion, to examine and classify lands which come under Executive Orders 6910 and 6964 or which are within a grazing district which are more valuable for crops or more valuable for any other purpose than for grazing and to open such lands for entry under the applicable public-land laws.[22]

Sections 14 and 15 deal with "isolated or disconnected tract(s) or parcel(s) of the public domain."[23] Section 14 authorizes the sale of such tracts, not exceeding 760 acres, in the Secretary's discretion, upon notice as provided and subject to certain preference rights to purchase in owners of lands contiguous to the tract put up for sale.[24] Section 15 authorizes the leasing of such tracts "to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe."[25] Such lands are to be in tracts of not less than 640 acres. In the administration of the Taylor Act, such leased lands are referred to as "Section 15 lands."

One of the unique aspects of the administration stems from Section 9, although the actual provision for it is an amendment to the Act in 1939.[26] Section 9 provided that "The Secretary . . . shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen. . . ."[27] Presumably acting under this authorization, local

20. § 7, 48 Stat. 1272 (1934).
21. Act of June 26, 1936, § 2, 49 Stat. 1976 (1936).
22. 43 U.S.C. § 315f (1964).
23. 48 Stat. 1274-75 (1934).
24. 48 Stat. 1274 (1934).
25. 48 Stat. 1275 (1934). The rules applicable to § 15 lands were amended in 1968. They appear at 33 F.R. 11516 (1968). While § 15 lands are not within the scope of this paper, the new rules are such that much of what is said herein with reference to § 3 rights may now be also pertinent to § 15 lands.
26. Act of July 14, 1939, 53 Stat. 1002, as amended 43 U.S.C. 315-1(a) (1965).
27. 48 Stat. 1273 (1934).

advisory boards were established by the early regulations of the Grazing Service. This practice was then codified by the above amendment. As amended, the Act provides that there shall be an advisory board of local stockmen in each district. The board shall be made up of not less than five nor more than 12 members, exclusive of wildlife representatives. Each such board must have one wildlife representative appointed by the Secretary in his discretion. Other members shall be recommended for appointment by the Secretary by the users of the district through election under the rules and regulations promulgated by the Secretary. After the nominating election, no such nominee shall take office until appointed by the Secretary[28] and taking oath of office. Members may be removed, after due notice, by the Secretary if, in his opinion, such removal would be for the good of the service.

Essentially these boards are to offer advice to the district manager regarding the matters affecting the administration of the districts. The district manager is charged with requesting the advice of the advisory board "in advance of the promulgation of any rules and regulations affecting the district."[29] Exception is provided to this where, in the judgment of the Secretary, an emergency exists. The board is given the responsibility of offering advice and recommendations with respect of certain administrative actions of the district, including offering advice and making recommendations on each application for a grazing permit within its district. Where the application is that of one of the board's members, such member is prohibited from participating in the advice and recommendation.

The politics inherent within this system are discussed by Calef and Foss in their studies. In most cases, the board and the dstrict manager are in agreement.[30] Where they are not, however, the district manager's decision prevails, as the board is merely advisory. It is said that in most instances the district manager makes a real attempt to obtain the

28. Election is an automatic appointment. Interviews with BLM personnel, Rawlins, Wyoming, Grazing District, July, 1967.
29. § 18(b) 53 Stat. 1003 (1939), 43 U.S.C. § 3150-1(b) (1964).
30. Interviews with BLM personnel, Rawlins and Lander, Wyoming, Grazing Districts, July, 1967.

advice and recommendations of the board and gives their opinions weight in his decisions.[31]

These are the provisions of the Taylor Act proper. Other statutory materials which apply to and affect the administration of grazing districts and rights which a livestock owner obtains to the use of district lands will be referred to in the following sections, where appropriate.

Essentially, the Taylor Act seems to be a vehicle for implementing the policy of Congress to regulate the use of federal lands. It might be described as the earliest attempt at a resource use concept by Congress. To implement this regulation of the range, Congress provided for a system of regulated grazing use of federal lands, such regulation to be administered locally through grazing districts, with the advice and recommendations of the local users. The regulated use would be implemented by the granting of exclusive use permits to livestock grazers who met the qualifications provided in the Act and the regulations of the Secretary.[32] The Act provided that these did not give vested rights in the land, but were privileges. But the question remains, what was meant by privileges?

III. IS THERE A "RIGHT"?

The determination of whether there is a "grazing right" lies in an analysis of the case law concerning the Act. The BLM refers to the livestock operator's use as a privilege and BLM personnel correct those who refer to the use as a "right". The courts have used both terms and seem to have had no difficulty determining, to their own satisfaction, that the holder of a permit or license has something which the courts will protect, whether it be referred to as a right or a privilege.

Early in the rather sketchy court history of the Taylor Act, it was determined that the use represented by a permit would be protected by a court. This seems to make the privilege-right controversy between users and the BLM one of semantics rather than substance. This is not to say that

31. *Id.*
32. The Secretary's regulations are set forth at 43 C.F.R. § 4110 (1968). These are also known as the Range Code.

there are not real disputes as to the extent of the right. It is to say, however, that what the user receives is a right which will be protected by the courts within the confines of the Act and other applicable rules. It is a dispute over the extent of the right and not the existence of a right.

One of the earliest cases considering the Taylor Act is *Red Canyon Sheep Co .v. Ickes.*[33] In *Red Canyon,* the Court enjoined the Secretary of the Interior from making a proposed exchange of certain grazing district lands for a tract of land within the confines of a National Forest. The proposed exchange, when consummated, would have transferred the federal lands within the grazing district, on which lands the Red Canyon Company had a grazing license, to the owner of the lands with the National Forest, in exchange for the lands within the National Forest. Such an exchange would have eliminated Red Canyon's use of the lands in the grazing district.

The Secretary's primary defense against the complaint of the user was that the permit holders "lacked any interest to maintain the suit in that they had no vested interest in the lands and did not show themselves entitled to a patent."[34] Although two alternative defenses were offered, this paper's concern is with the primary defense, which, in its simplest statement, was whether Red Canyon Sheep Company had a grazing right in the lands in question.

The Court answered the question affirmatively in rather plain language:

> [I]f the Secretary determines to set up a grazing district including lands upon which grazing has been going on, then those who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are entitled *as of right* to permits as against others who do not possess the same facilities for economic and beneficial use of the range.[35]

This determination by the Court is the most general and favorable to a livestock permitee or licensee in the history of the

33. 98 F.2d 308 (D.C. Cir. 1938).
34. *Id.* at 312.
35. *Id.* at 314. (emphasis added)

Act. It is significant, perhaps, that the cases construing the Act since *Red Canyon* have cited the case with approval and then proceeded to limit the rule in it by a steady narrowing of the extent of the right. Nevertheless, the case can be cited for the proposition that the permitee or licensee has a right which is cognizable and protected by the courts. The only question is the extent of the right, and the other cases considering the Taylor Act have been concerned with this aspect. They will be discussed *infra.*

Further indications that the use obtained is a right can also be found. It seems to be of significance that the use represented by the permit or license is a valuable asset.[36] However, the fact that the right is valuable has not prevented courts from allowing appropriation of the right by the Federal government.[37]

In addition, it is rather common to consider the value of such rights in sales of ranch properties and to capitalize them into the sales price of a ranch property (as well as indirectly into the tax burden of the owner of fee lands supporting such rights). The Act itself seems to recognize this in its restriction as to loans.[38] Further, there is provision for almost automatic transferability of the right, both as an appurtanancy to the base property and also as a separate right in itself.[39] This transferability aspect of the right will be discussed *infra.*

IV. THE TOOLS OF ADMINISTRATION

The basic device used to define the right which a user obtains is the grazing permit (or license).[40] The permit sets out the quantitative use which a livestock owner obtains on specific lands owned by the government. The use is measured in animal unit months,[41] such that a user obtains the use of

36. *See, e.g.,* the statement in Oman v. United States, 179 F.2d 738 (10th Cir. 1949).
37. *See* cases discussed in part V.B.3 *infra.*
38. § 3, 48 Stat. 1270-71 (1934).
39. *See* discussion of this aspect of the right in part V.C. *infra.*
40. Technically, a permit seems to be a long-term use of more than one year but less than ten years after an adjudication of the lands. A license is a short-term year to year "permit" for the use of lands on which grazing rights have not been adjudicated under 43 C.F.R. § 4111.3-2(b) (1968).
41. These are referred to as AUM's by the BLM. An AUM is the amount of forage which a cow or horse will consume in one month or which five sheep or five goats will consume in one month. 43 C.F.R. § 4110.0-5(m) (1968).

a certain number of animal unit months of grazing on the particular federal lands involved. There are various types of permits and licenses, but the most important ones used are: the adjudicated permit; the license; and the exchange of use agreement.[42]

Perhaps the best way to analyze these rights is to consider the processes of obtaining one. The procedure for the first two types is similar and will be considered together. The approach regarding changes of use is sufficiently different to warrant separate consideration.

In order to obtain a permit or license, the livestock owner must personally meet the requirements set forth by the Act and the Range Code regarding citizenship, livestock business, and qualifications to do business in the state concerned.[43] Further, he must own or control base property which meets the requirements of the Range Code, and offer such property as the basis for his permit or license.[44] All of this information is supplied the District BLM Office on application forms supplied by the office. Such applications must be received each year before a date set by the District Manager for the filing of such applications. Those filed on the date or subsequent thereto "may be rejected for that year unless satisfactory justification for the belated filing is shown."[45]

All of the applications are first presented to the district advisory board for its advice and recommendation.[46] The advisory board makes its recommendation regarding the granting of the permit, and if such advice is adverse to the applicant, the board is required to set forth its reasons for the adverse recommendation. The District Manager is then free to accept the board's recommendation or reject it. If the decision of either the Board or Manager, or both, is adverse to the applicant, the manager must serve notice on the applicant giving the reasons for such decision and giving the

42. This is an agreement between the BLM and a private landowner for administration of the landowner's lands by the BLM in exchange for free use of BLM grazing lands. Although it is not technically a permit, it is a commonly used tool for granting a grazing right to a user.
43. *See* 43 C.F.R. § 4111.1-1 (1968). *See also* § 2 of the Taylor Act.
44. 43 C.F.R. § 4115.2-1(e) (1968).
45. 43 C.F.R. 4115.2-1(a)(1) (1968).
46. This is subject to the *proviso* that if the applicant is also a board member, he cannot participate in the consideration of his application. 43 C.F.R. § 4115.2-1(a)(2) (1968).

applicant an opportunity to protest the decision. If the protest is approved, and the manager agrees, then this is the end of the matter and the applicant gets his permit. If the protest is disapproved, then the applicant is given the opportunity to appeal the decision through the appeals system of the BLM.[47]

As a usual thing, all of these applications are presented to the Board at one meeting. One writer describes one such meeting and seems to express disappointment in what he observed.[48] His disappointment seems to be similar to that of the average person who attends his city council meeting. The reasons are perhaps the same. Most of the board members have spoken to one another and to the District Manager before the meeting is held, and most decisions have been made before the meeting. The meeting is merely a formality where the formal decisions are made and recorded. In this give and take, the manager with political acumen is often successful; the manager whose political acumen is lacking often has difficulties with his board.[49]

Originally, the principal reason for the advisory board seems to have been to serve as a fact finding board regarding the prior use requirements of the Act. It still does this, but this function has been overshadowed by the further, perhaps more important, function of being a sounding board for the District Manager in his administration of the district. Administratively, it is more desirable for the District Manager to have the board on "his side", than to have it against him. This is because the boards are usually made up of the more influential livestock operators who have political connections which can be troublesome to the manager. If the board agrees with him, he is less likely to have trouble in administering his district. Further, as a result of the large number of applications, the rather vague rules regarding qualification, and

47. 43 C.F.R. § 4113.2-3 (1968).

48. FOSS, POLITICS AND GRASS 109-116.

49. Author's conclusions based on interviews with BLM personnel of Rawlins and Lander, Wyoming, Grazing Districts and on CALEF, PRIVATE GRAZING AND PUBLIC LANDS (1960) and FOSS, POLITICS AND GRASS (1960). It should be noted that the author's conclusions differ rather considerably from those of Foss. Foss' study, however, was more oriented toward the political side of Taylor administration and could very well be more valid. The author's conclusions are based on a less extensive study than Foss' or Calef's.

the expertise of the local personnel of the BLM, the Board has become more of a sounding board for policy, rather than a fact finding board.[50]

Once a livestock owner has his permit, he then has the right to use the number of animal units specified in the permit, on the lands specified in the permit, during the season of use specified in the permit. The permit is subject to various limitations, and can be withdrawn, reduced or cancelled for various reasons, which will be discussed *infra.*

Use under the permit, of course, assumes that the livestock operator has paid the fee for such a permit. The fee is calculated in terms of animal unit months and is announced each year in the Federal Register.[51]

Essentially, the permit is simply a tool used in the administration of the act to set forth the quantitative right which the BLM has determined to grant the user. It represents the right to such use, much in the same way in which a water permit represents an individual's right to use water. The more difficult question is exactly what, precisely, is represented by this permit, that is to say, under what conditions can it be withdrawn, what are the responsibilities attached thereto, what are the conditions made a part thereof, and similar questions.

The exchange of use agreement is somewhat different in nature. The Range Code provides:

> Exchange-of-use agreements may be issued to any applicant having ownership or control of non-Federal land interspersed and normally grazed in conjunction with the surrounding Federal range for not to exceed the grazing capacity of such non-Federal land, without payment of grazing fees, provided that during the term of the agreement the Bureau shall have the management and control of such non-Federal land for grazing purposes.[52]

The exchange of use provision seems to be the result of the checkerboarding of lands often found in public land states.

50. *Id.*
51. The author has been unable to find the specific formula on which such fees are calculated.
52. 43 C.F.R. § 4115.2-1(h) (1968).

In such a situation, the landowner agrees to put his land under BLM administration in exchange for the use of federal lands in his livestock operation. However, the user is limited to using such lands (including his own) only during the grazing season set by the District in which such lands lie. He receives, however, the use of the number of animal unit months represented by his private lands without charge.[53] The practical necessity for such a provision can be seen in the checkerboard situation where private lands and public lands are interspersed roughly as every other section. The private owner can not fence his own lands without fencing the Federal lands. He cannot graze his own lands without trespassing the federal governments' lands. If the federal government puts other users in the area, they will trespass the private owner's lands, and the private owner has no recourse against the federal government.[54] So the solution is to allow the private land owner to put his lands under BLM administration, and allow the Bureau to administer such lands in exchange for the use of a number of animal units equal to the forage value of the private lands. The provision seems to have settled the problem, to a degree.[55]

The procedure for obtaining such an agreement is somewhat different from that of obtaining a permit or license. So far as can be determined from the regulations, the procedure seems to be an *ad hoc* one whereby the private owner or the district manager suggests to the other the possibility of such an arrangement, and they proceed to negotiate such an agreement, somewhat as any other contract, except that certain provisions are not subject to negotiation. The theory breaks down somewhat, however, when one turns to practice. The District Manager only uses the agreement form furnished by the Department of Interior. The form is the end of negotiations. The owner has his choice of exchange of use, the granting of which is in the discretion of the District Manager,[56] or of fencing his lands in such a way that Bureau

53. The calculation of the number of AUM's represented by the private lands, is, of course, the BLM's.

54. United States v. Morrell, 331 F.2d 498 (10th Cir. 1964).

55. *But see* Morrell & Sons, 72 I.D. 100 (1965), in which the livestock operator did not agree that the problem was solved and in the process of dispute, lost other of his grazing rights.

56. *Id.*

lands are still accessible, or of not using his lands. Since the making of such an agreement is in the discretion of the District Manager, the appeals route is a difficult one when such an agreement has been refused.

V. THE NATURE OF THE RIGHT

The right which an operator receives is subject to a great many limitations, ranging from those on the quantity of the right to those on the actual maintenance of the right itself. These limitations are to be found in the Act, the Range Code, the Interior Decisions,[57] and the court cases interpreting the Act and the regulations thereunder. This paper shall first consider those of an administrative nature, which usually go to the extent of the right, or the quantity of the right, and secondly, those which can destroy the right.

A. *Adminisrative Limitations on Obtaining and Keeping a Right. (Range Code)*

The first limitations which a prospective applicant faces are those criteria for obtaining a right. These are limitations in the sense that the applicant must meet these criteria in order to obtain the right, and if at some future date, he no longer comes within them, he loses the right.

The first requirement which the applicant must meet is is that he comes within the citizenship standards of the Act[58] and of the Range Code.[59] These are specific and there are very few questions which arise with regard to them. Other criteria, however, raise questions of fact determination and interpretation.

The second requirement which the applicant must meet is that he must have base property on which to base such a right. Base property is the subject of a great many regulations and decisions of the Interior Department. In the grazing situation, they come down to, simply, the ownership or control of water or land, depending on the nature of the

57. All of the Interior decisions prior to 1958 dealing with the Taylor Act have been gathered in the volume entitled Grazing Decisions, published by the United States Government.

58. § 3, 48 Stat. 1270 (1934).

59. 43 C.F.R. § 4111.1-1 (1968).

district.[60] This base property must be sufficient to support the applicant's livestock operation during that part of the year when the public range is not available.[61] The BLM determines the number of livestock which an operator's base property can support.[62] Loss of base property, of course, will result in loss of grazing rights, to the extent of the loss of base property, unless such rights can be transferred to other base property.

Another requirement is that the base property also had to support livestock on the public range prior to the passage of the Taylor Act during certain priority periods. If the number of livestock which were grazed on the public range was less than the amount which could be supported by the base property, this lesser number was used, for the reason that use of the range was one measuring tool. This amount, however, was rarely less than the commensurability amount, principally for the reason that no one was really sure just how many livestock he had been running on the range during the priority periods. As a result of changes over the years, this determination has become somewhat less important although it was still viable enough to protect one operator when the district in which he was grazing attempted to put into effect a special rule changing the priority period. As to him, it was ruled that the special rule did not apply, since he had met the priority, and it would not be equitable to change the period as to him.[63]

60. Provision is made in the Range Code for land base districts, water base districts and combined districts. In land base districts, land is the measuring unit on which the right is based; in water base districts, water is the measuring unit. In those Districts which by special rule have been designated land and water base districts, both are the measuring unit according to the formula adopted as part of the special rule.

61. This is usually referred to in terms of days, e.g. the Rawlins and Lander, Wyoming Grazing Districts are both 100-day districts, which means that the base property of the applicant must support for 100 days the livestock of the applicant which are placed on the public domain.

62. This determination is based on information received from the livestock operator in his application and is subjected to various factors and formulas contained in the BLM Manual. The BLM Manual is the paper management and information system of the Bureau in all its aspects. It supplements all of the Regulations of the BLM. It is a ten volume work, constantly changing. A full, up-to-date, copy is available in any BLM District or State Office.

63. McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960). The victory was not all that great for Mr. McNeil, since he had a greater quantitative right under the proposed priority period than he did under the original period. McNeil v. Udall, 340 F.2d 801 (D.C. Cir. 1964).

The next determination which must be considered is the carrying capacity of the range. No matter how many livestock the operator may be able to support and no matter how many he may have formerly grazed on the public range, if that number is greater than the carrying capacity of the range, as determined by the BLM, then the carrying capacity is the measuring fact. This amount is determined by the use of various estimating techniques ranging from the fairly primitive to the reasonably scientific.[64]

Thus, the applicant must meet and maintain several criteria for his right: he must have base property, the base property must support the Animal Units for which he receives a permit, the base property must have been the basis for use of the range prior to the Taylor Act (unless the right has been transferred from such property to the present base property), and the carrying capacity of the range in the particular allotment, unit, or district must be sufficient to carry the applicant's proposed livestock. If he meets the above criteria, the applicant may receive a permit (i.e. have an adjudication of grazing use, which is represented by the permit). If he receives a permit, it will be subject to a great many more limitations.

The Range Code[65] sets forth fourteen conditions to which every permit or license is subject. Many of these go to day to day administrative housekeeping and range management conditions and will not be discussed here. All permitees and licensees are also subject to the Rules of the Range[66] which again are general rules for adequate administration of the range. However, it should be cautioned that violation of these conditions might be sufficient (and are always bases) for reduction or cancellation of the permit.[67] In fact, any violation of the Act, or of the regulations or of the conditions of the permit is sufficient for reduction or cancellation of the permit.[68]

64. These various techniques are set out in the BLM Manual in the section corresponding to the Range Code (C.F.R.) section 4110.0-5. The reasonableness of their accuracy is dependent upon the technique's susceptibility to statistical proof.
65. 43 C.F.R. § 4115.2-1(e) (1968).
66. 43 C.F.R. § 4112.3 (1968).
67. 43 C.F.R. § 4113.1 (1968).
68. 43 C.F.R. § 4113.1 (1968).

Section 4111.4-2 of the Range Code[69] authorizes the District Manager in a district to increase permits where the grazing (carrying) capacity has been increased.[70] Section 4111.4-3 of the Range Code[71] authorizes the District Manager to reduce permit numbers.

It can be seen that the Range Code provides for a permit subject to the decisions of a local administrator regarding fact determinations and their interpretations. It might be added that these determinations are in the discretion of the local District Manager. While such decision may be appealed through the administrative structure of the Department and while the decision of a District Manager might be modified at a higher level, such would seem to be the exception rather than the rule.[72]

The case law has affected the extent of this aspect of the right somewhat, although the nature of the cases makes it difficult to trace the limits precisely. Many of the cases which have come before the various courts have been involved with the Federal Tort Claims Act, rather than with actual judicial review of the decision of the Interior Department in the administrative law sense. Here, this paper will consider those cases which affect the administrative actions of those acting under the Taylor Act, whether such cases be judicial review of administrative action or independent tort claim actions.

The earliest case considering issues under the Taylor Act within the scope of this article is the case of *Red Canyon Sheep Co. v. Ickes.*[73] The case involved several questions, one of which is discussed *infra.* The question with which this article is here concerned is whether the local manager can

69. 43 C.F.R. § 4111.4-2 (1968).

70. The author found one example of the exercise of this authority in one allotment of the Shell Creek Unit of the Rawlins, Wyoming, Grazing District. In the two Districts in Wyoming which the author considered, this was the only example of such exercise at that time.

71. 43 C.F.R. § 4111.4-3 (1968). The exercise of this authority seems more common than the exercise of the authority to increase. This is probably due to the accuracy of the assertion that most students of the Grazing Districts, across the Western States have made, to wit: That the original determinations made of carrying capacity during the late 1930's were greatly overestimated.

72. Particularly with respect to a determination by the District Manager as to actual quantity of use as opposed to a determination to cancel or withdraw a permit.

73. 98 F.2d 308 (D.C. Cir. 1938).

refuse to give a person a right, where such person qualifies under the Act and the Range Code. The language of the case is such that it would appear that the manager must grant the application if the applicant meets the requirements. The Court stated that where such is the case, the appellant is entitled "as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range."[74] The case emphasizes that one of the purposes of the Act is to define the right which a livestock operator obtains in order that he can depend on it and plan on it. There is some question, however, as to whether this is still the law (even in the District of Columbia Circuit). Later cases involving the Taylor Act as its administration comes within the Tort Claims Act have come to a somewhat different conclusion.

In the case of *Oman v. United States*,[75] the Court had before it an appeal from a decision in the District Court which sustained the United States' motion to dismiss the complaint on the grounds that it failed to state a cause of action and that it was not a claim within the jurisdiction of the Court. The decision of the Tenth Circuit reversed and remanded the case for trial.

The facts of the case as alleged in plaintiff's complaint were that the plaintiffs had a grazing permit upon certain lands and that theirs was an exclusive right to graze the lands in question. The plaintiff's predecessors in interest in the fee lands which were the basis for plaintiff's grazing rights had grazing permits on the same federal lands, such permits being based on the property which had been transferred to the plaintiffs. This resulted from the failure of the BLM to cancel the predecessor's permits. On the basis of these alleged facts the plaintiffs urged that the employees of the United States encouraged the use of the lands to the detriment of the plaintiffs' exclusive grazing right, thus damaging plaintiffs.

The case leaves open the question of whether the granting of new permits to the transferees (i.e. the plaintiffs) is in

74. *Id.* at 314.
75. 179 F.2d 738 (10th Cir. 1949).

the discretion of the District Manager but does find that there is no discretion as to cancelling them as to the predecessors in interest due to their loss of ownership of the base property. As to the further question of whether this is the type of right which a Court will protect, the Court used some very broad language. It stated:

> In the case at bar . . . there was no attempt to revoke, but instead an outright interference with the plaintiffs' grazing rights while their permits remained outstanding and unrevoked. As long as the permits were unrevoked, the grantor would have no more right to interfere with their exercise than would any third party. In fact, by the very terms of the Taylor Act, the grantor (defendant) had not merely a duty to refrain from the invasion of plaintiffs' grazing privileges, but an affirmative obligation to adequately safeguard them.[76]

In other words, the Court would seem to be saying that while the question of whether the District Manager has to grant a right is still open, when he does so grant a right (permit or license), even the grantor can not interfere with the exercise of that right wrongfully so long as the permit or license is outstanding. On remand, however, the plaintiffs again lost since the District Court held that they did not in fact have an exclusive right on the lands in question and the Court of Appeals affirmed.[77]

The next case which bears on the questions considered in this article was that of *Chournos v. United States*,[78] another Torts Claim Act case. In this case, the plaintiff, a large sheep operator, had obtained a large number of checkerboard acres from Southern Pacific. Prior to his purchasing these lands, the grazing district had administered them as a part of the district through an agreement with Southern Pacific, whereby the rentals paid went to Southern Pacific. After acquiring the lands, plaintiff was informed that he had created a problem which could only be solved by his entering into an exchange of use agreement with the district or by his leasing the land to the district. The exchange of use

76. *Id.* at 742 (Court's footnotes omitted).
77. Oman v. United States, 195 F.2d 710 (10th Cir. 1952).
78. 193 F.2d 321 (10th Cir. 1951).

arrangement was agreed upon, and exchange of use and crossing permits were issued to plaintiff.

Plaintiff failed to renew his exchange of use agreement, and as a result was denied trailing privileges across the federal lands which it was necessary he cross in order to use his own lands. Plaintiff filed an application for an exclusive grazing permit on the federal lands contiguous with his lands. This was denied, and he lost on appeal to the Department. The parties attempted to work out some sort of arrangement, but were precluded on the one hand by plaintiff's desire to control his own lands, and on the other hand, by the BLM's refusal to grant trailing permits or to grant him an exclusive right to graze the federal lands contiguous to his. Here, things stood, when plaintiff brought his sheep into the area and grazed them on federal land (as well as on his own). The BLM brought trespass charges against plaintiff. Conferences followed, plaintiff agreed to enter into an exchange of use agreement, the trespass charges were settled, and the same permits as before were granted.

Plaintiff then brought this action, urging "that under the provisions of the Taylor Grazing Act he is, as a matter of law, entitled to grazing permits upon adjacent and contiguous lands and to crossing permits to move his sheep from one range to another; that the representative of the United States, for the purpose of coercing plaintiff into surrendering control of his lands to the district refused to issue such permits; and that such refusal and coercion were unlawful and together constituted a tort within the meaning of the Federal Tort Claims Act."[79] The Court very simply states:

> The purpose of the Taylor Grazing Act is to stabilize the livestock industry and to permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings. To carry out this purpose, the Act and the Range Code authorized by the Act contemplate that the officials, with the advice of an advisory board composed of permit holders within the district, shall exercise their judgment and discretion in granting permits, and in determining the extent to which lands within the district shall be grazed. A livestock owner

79. *Id.* at 323.

> does not have the right to take matters into his own hands and graze public lands without a permit. If there is dissatisfaction with the action of the officials in the granting of permits, or as to other decisions, the livestock owner's remedy is by appeal as provided for in the Act and the Code. . . . It seems clear to us that the granting or rejection of the applications here was within the discretionary function of the range officials as contemplated by Sec. 2680 (a) of the Federal Tort Claims Act. . . .[80]

This language would seem to make the granting of a permit discretionary on the part of the District Manager, subject to the review provided for by the Department of the Interior. And yet the language as to this would seem to be mere dictum, since the court's actual holding is that the act of the official is discretionary for purposes of the Federal Tort Claims Act. The actual question of whether the act is discretionary in terms of the Taylor Act has not really been considered. Notwithstanding this, the case would seem to at least support an argument that the granting or denial of permits by the District Manager is in his discretion. If it does support such an argument the only redress is in those cases where it is determined that he has exceeded his discretion and acted arbitrarily and capriciously, which is rather difficult to prove under extremely good circumstances.

The next case of significance was in the District of Columbia Circuit Court of Appeals. In *McNeil v. Seaton,*[81] the Court was presented with a question of whether a special rule adopted by a grazing district could be applied to one who had received his right under the original priority period. McNeil had received a permit under the priority period provided for in the Act and the Regulations thereunder in 1936. In 1956, a special rule was promulgated for the district changing the priority period from the five years preceding June of 1934 to a period consisting of the five year period preceding January of 1953. The Court held, that, as to McNeil, the rule could not be applied in derogation of any right which he had obtained under the first priority period. The language of

80. *Id.* at 323-24 (Court's footnotes omitted).
81. 281 F.2d 931 (D.C. Cir. 1960).

this Court perhaps best summarizes the status of a Taylor right as it now stands:

> It is clear that permittee *as against the United States* may acquire no "right, title, interest, or estate in or *to the lands*" (emphasis added) as Section 3 provides, and the Government for its own use may without payment of compensation withdraw the permit privilege. Otherwise, consistently with the purposes and provisions of the Act, "grazing privileges recognized and acknowledged shall be adequately safeguarded." It would seem beyond preadventure that when the Secretary in 1935 created Montana Grazing District No. 1 which included lands upon which this appellant then was grazing, he and others similarly situated "who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range."
>
> What particular *number* of stock a preference applicant might be entitled to graze must depend upon circumstances, having in mind the orderly use of the public lands, the possibility of overgrazing, the forage capacity of the base property, available water and other factors pertinent to such a complicated administrative problem. Subject to such considerations and others specified in the Code, the extent of the appellant's grazing privileges was to be determined.
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> * * * * *
>
> "Preference *shall be given*" to those like appellant who come within the Act. This appellant not only was engaged in stockraising when the Act was passed, but he qualified under the Range Code as and when first promulgated. He was entitled to rely upon the preference Congress had given him: to use the public range as dedicated to a special purpose in aid of Congressional policy. We deem his rights—whatever their exact nature—to have been "protected against tortious invasion" and to have been "founded on a statute which confers a privilege." Accordingly this appellant was entitled to invest his time, effort and capital and to develop his stockraising business, all subject, of course, to similar preferences to be accorded in the affected area to others comparably

> situated. We see no basis upon which, by a special rule adopted more than twenty years after appellant had embarked upon his venture, he may lawfully be deprived of his statutory privilege.[82]

This, too, was an empty victory, since it was later determined that McNeil had more rights under the new priority period than under the original one.[83]

Thus, on the cases, it would seem that the right which an applicant might receive is subject to the administrative determinations of the BLM, but that those decisions are subject to review to determine whether the BLM has neglected to protect the right granted against invasions by third parties or by the Federal government, where the permit is still outstanding. Nevertheless, the permit is subject to withdrawal by the Federal government, without compensation, where necessary for governmental purposes. This is the next subject to which we shall turn, the ultimate limitations on the right, that is, those areas where the permit holder can lose his right, notwithstanding that he has a permit outstanding. We shall also consider the common provisions for loss of right in the Range Code, other than for violations of the Code, discussed *supra.*

B. Some Ultimate Limitations on the Right.

The ultimate limitations on the right fall into three different categories: non-use of the right; failure to offer base property; and changes in use by the Federal government. We shall examine these in turn.

1. *Non-use.* Non-use refers in one sense to the permit which a permit holder can obtain when he wishes to use less than the number of AUM's to which he is entitled but wishes to protect the right from cancellation. It may be obtained by application to the District Manager for the following reasons: conservation and protection of the Federal range, annual fluctuations in livestock operations, or financial or other reasons beyond the control of the licensee or permittee.[84] Obtaining this type of permit will protect the permit from

82. *Id.* at 934-35, 937 (Court's footnotes omitted).
83. McNeil v. Udall, 340 F.2d 801 (D.C. Cir. 1964).
84. 43 C.F.R. § 4115.2-1(e)(11) (1968).

cancellation, although it is still subject to that section of the Range Code[85] which provides that failure to make use of the right for any two consecutive years can result in revocation. The section seems to place the exercise of this revocation in the discretion of the District Manager.[86] Non-use for two years consecutively without any sort of application for same from the BLM can be the basis for a reduction or cancellation of the right.[87]

2. *Failure to offer base property.* The failure to offer base property in an application for a license or permit or renewal thereof for two consecutive years can result in the loss of the base property qualifications which serve as the basis for the right.[88] Once such qualifications are lost, they are lost forever, unless another right can be transferred to them.

3. *Changes in use by the Federal Government.* On the basis of the case law, this seems to be the most significant area in which a permittee can lose his permit. Here, we use the term changes in use to indicate any determination, however made, that the land will no longer be used for grazing. Several cases have dealt with this problem.

The earliest case to deal with this problem was the *Red Canyon Sheep Co.* case[89] discussed supra. There, it was determined that the Secretary had not made the proper determination and that he was therefore enjoined from exchanging the land with another party to the detriment of the plaintiff user. However, the Court refused to make the injunction permanent on the grounds that there were possible ways in which the Secretary might make a proper determination and therefore exchange the lands, and that until those facts were before the Court, it would not permanently enjoin the Secretary, but would only enjoin him from acting as to the facts presented.

85. 43 C.F.R. § 4115.2-1(e)(10) (1968).

86. It was mentioned in the interviews at the Rawlins and Lander, Wyoming, Grazing Districts that the BLM considers non-use permits to be tools for short-run changes, and that the consistent use of a non-use permit may be used as evidence that the number of AUM's granted by the regular permit is too great.

87. 43 C.F.R. § 4115.2-1(e)(9)(i) (1968).

88. 43 C.F.R. § 4115.2-1(e)(9)(i) (1968).

89. 98 F.2d 308 (D.C. Cir. 1938).

The next case involving Taylor lands was a condemnation case. This was the case of *United States v. Cox.*[90] In this case, the United States was condemning lands in New Mexico, which included the appellants' ranches and the lands which their permits covered. These lands were to be used for war purposes by the United States. In the lower Court, witnesses were allowed to base their evaluation of the value of the ranches on the carrying capacity of the ranch times the unit value of the calf crop, plus the value of the improvements. The jury was finally instructed to the effect that the government was taking only the fee land and that it should determine only the value of such land, but in doing so, it could take into consideration as an element of value, the accessability and availability of the lands covered by the grazing permits. The government did not object to this instruction at the trial level, and indeed, offered one substantially the same. But the Court determined that this was not an acceptable measurement of the value of the lands confiscated for the reason that the permit rights which the individuals owned were privileges subject to withdrawal at any time without compensation, and that by calculating in this fashion, the individual owners were being compensated for their grazing rights. In distinguishing this case from the companion case decided the same day *United States v. Jaramillo,*[91] the Court determined that in *Cox,* the permits were no longer outstanding at the time of the condemnation, since they had been condemned along with the fee lands. Therefore, they had been withdrawn, and the determination of the value of the ranches in *Cox* should be determined without the added value of the appurtenant rights. In *Jaramillo,* on the other hand, which involved Forest permits, the right had not been condemned, was still outstanding and therefore the value of Jaramillo's ranch could be determined with the availability of the right included as part of that value.

Thus, it worked out as follows. Those individuals who had their entire ranch and Taylor grazing rights condemned (i.e. who lost their rights) could obtain compensation only to the extent of the worth of their fee lands without the Taylor

90. 190 F.2d 293 (10th Cir. 1951).
91. 190 F.2d 300 (10th Cir. 1951).

grazing rights attached. Those individuals who only lost part of their ranch and retained their forest permit rights, (and therefore lost no rights) could have the value of that part of the ranch which they lost calculated with the right considered as a part thereof. The person who lost his right got no credit for the right; the person who lost no right was compensated for a right he did not lose. It is difficult to determine how a court could come to so basically an inequitable result, denying compensation to those who lost something, but giving compensation to those who do not lose anything. This is particularly true where the Court making the determination presumably has some familiarity with the area of the country in which it is sitting and should be able to understand the nature of the right which is involved. Where the Court wishes to make a decision which will cost the United States the least amount of money, however, it seems able to do so with no difficulty, notwithstanding the school of thought which urges that the sovereign should pay for that which it takes (even if it is only an expectation in a privilege conferred by the sovereign.) Further, it is difficult for this author to see (as it was for Judge Phillips, who dissented in the *Cox* decision) the difference between the *Jaramillo* and *Cox* cases, The Court could distinguish them; this author can not.

The next case involving this type of permit loss was that of *LaRue v. Udall.*[92] In this case, the federal government determined to exchange a large block of land in Nevada Grazing District No. 3 for that owned by a private owner in Nevada Grazing District No. 2. Appellants had permits on the lands in Grazing District No. 3, and the exchange would destroy their entire operation. The Court sympathized with the appellants, but found against them pointing out that the Secretary had the power under Section 8 of the Act to exchange lands when to do so would be in the public interest. The appellants contended that public interest as used therein meant public interest in grazing and conservation which will be benefitted thereby. They urged that the exchange with North American Aviation for purposes of giving them a missile testing range was not the public interest which Section 8

92. 324 F.2d 428 (D.C. Cir. 1963).

covers. The Court said that if this is what Congress meant, that this is what Congress should have said. Since it did not and since there is nothing elsewhere in the Act which would preclude such an exchange, "nothing in the other sections of the act suggest that private interests may not acquire public land being used for grazing purposes to the detriment of those licensed to use the land."[93] The Court also found the powers of the Secretary under Section 7 of the Act persuasive here as to the intent of Congress.

Chief Judge Bazelon filed a concurring opinion, in which he determined that the Court had approved the Secretary's determination that the Taylor Act was a multiple purpose statute. On this basis he was forced to concur since he did not find that the Taylor Act was a multi-purpose act. From the legislative history of the Act, he determined that the Taylor Act was limited to the regulation of grazing on public lands and to conservation purposes, and that to make an exchange under Section 8 of the Act, it would be necessary to find that the public interest in grazing or conservation would be benefitted by the exchange. As the Secretary had found that grazing would be benefitted by the exchange, in that the consolidation of land would enable more efficient administration, he concurred in the result of the Court's decision.

It is interesting to note that neither the Court's opinion nor the concurring opinion felt it necessary to consider the *Red Canyon* case, which would appear to be at least partly in point. However, the determination by the Court would seem to be consistent with the *Red Canyon* case, since in *LaRue,* the Court decided that the action of the Secretary was valid, and in *Red Canyon,* it was determined that the action was invalid. In *Red Canyon,* an exchange was enjoined on the grounds that the lands had been withdrawn by an Executive Order of 1934 withdrawing all lands within Taylor Grazing District, and that any land which could be exchanged under the Act on which the proposed transferee and the Secretary were depending had to be unreserved and unappropriated. The Executive Order had reserved and appropriated

93. *Id.* at 431.

the lands in question. Section 8 of the Taylor Act was not mentioned in the opinion, although the Court left open the question as to whether the Secretary could reclassify the lands in question under Section 7 of the Act and then exchange them (i.e. by reclassifying them, they would no longer be reserved and appropriated and thus no longer protected by the Executive Order.)

C. Transferability of the Right.

Probably one of the primary indications that what the permittee receives is a right is the fact that provision is made for transferring the right, either as an appurtenance to the base property or to entirely new base property. However, this transferability aspect does have some limitations.

The Range Code provides that in the instance where base property is transferred, the right follows it, unless the grantor of the base saves the right by transferring it to other property of his which qualifies as base property.[94] It is, however, necessary for the transferee to file documentary evidence of the transfer and an application for grazing permit with the District Manager of the District within 90 days of the transfer in order to qualify for this.[95] Further, the District Manager can deny the application if he finds that the transfer, or a different vesting in any manner, of a leasehold interest in land or water "may result in interference with the stability of livestock operations or with proper range management. . . ."[96] It is necessary that he refers this determination to the advisory board for their advice and thereafter, if he still thinks it will be detrimental as per the above, he may then deny the permit. However, as to transfers in fee, the transfer of the right would seem to be automatic under § 4115.2-2 (a) (1) which provides:

> A transfer of a base property or part thereof . . . will entitle the transferee, if qualified under § 4111.1-1, to so much of the grazing privileges as are based thereon.[97]

94. 43 C.F.R. § 4115.2-2 (1968).
95. 43 C.F.R. § 4115.2-2(a)(2) (1968).
96. 43 C.F.R. § 4115.2-2(a)(2) (1968).
97. 43 C.F.R. § 4115.2-2(a)(1) (1968).

The section also provides that, except under certain conditions, the permit previously existing shall automatically terminate. The transferee must still give notice, however.

The second type of transfer of the right is where the permit transfers base property qualifications to new base property (i.e. changing the underlying basis for the right.).[98] In order to effect such a transfer, the owner or controller of the base property applies for such a transfer of qualifications by filing application with the District Manager. If the District Manager approves, then the transfer is made. If the land is encumbered or if the controller of the base property is not the owner, the approval of these other persons will also be necessary for the transfer.

It should be noted that in either case, the District Manager can deny the application for transfer (although the transfer following the transfer of fee base property would seem to be automatic) if he finds that the transfer would interfere with the stability of the livestock operations or with proper range management. The question of whether a transferee is entitled to a permit has never been answered by a court, although it was aluded to in *Oman v. United States*,[99] and the question seems to be still open.

It is rather common[100] to have one individual transfer base property requirements to the base property of another individual, which would seem to be a sale of the grazing right itself. This would seem a pretty odd incident of the type of privilege which the BLM insists the permit is.

VI. CONCLUSIONS

It would appear that while there is a grazing right under Section 3 of the Taylor Act, it is rather a precarious right, both as to the numerical quantity of the right and as to the retention of the right itself. It seems fairly clear that while the permit is outstanding, the permittee is entitled to protection from interference with his use. However, the difficulties of withdrawing the permit are not too great. While

98. 43 C.F.R. § 4115.2-2(b) (1968).
99. 179 F.2d 738 (10th Cir. 1949).
100. Interviews with personnel of Rawlins and Lander, Wyoming, Grazing Districts.

the Act did much to stabilize the livestock industry as compared to the time prior to the Act, there is still a great deal of unpredictability involved in the right.

Further, the broad language of the Court in the *LaRue* case would seem to bode ill for the rancher. If the Taylor Act is a multi-purpose act, then the public interest to which it refers is not the public interest of grazing and conservation, but perhaps the total public interest of the Multiple Use Act. If this is so, then exchanges such as made in *Red Canyon* (enjoined) and in *LaRue* (approved) can be made on any basis whereby the Secretary of the Interior determines that some public benefit may be served thereby, with a minimum of review by the Courts, and, it would appear in light of Judge Bazelon's concurring opinion in *LaRue,* in derogation of the expressed intent of Congress to limit the Secretary's power to alienate lands. Further, he can make this decision without any real reclassification as presumed by Section 7 of the aylor Act, but with the mere determination that the exchange would further some interest of the public, whatever it might be. While it would appear that Congress has not given the Secretary this authority under the Taylor Act, the majority opinion in *LaRue* indicates differently, at least in the District of Columbia Circuit.

It would appear the Land Law Review Commission should attempt to better define the right which a user obtains and the processes by which the user can lose such a right. Notwithstanding that the right is a privilege as to the Federal government, it would seem that the language of the Court in *McNeil v. Seaton*[101] regarding the right of the user to invest his time and effort would be apropos here. Indeed, Congress has recognized this in establishing a compensatory scheme for such rights when such are taken for defense purposes.[102] If it is a compensable right for defense takings, it would seem that it should be a compensable right for all takings where the user has invested his time and effort in expectation of the continuation of the right. Since many livestock enterprises are worthless without the grazing right, the destruction of grazing rights often completely eliminates the operation, with

101. 281 F.2d 931 (D.C. Cir. 1960).
102. 43 U.S.C. § 315g (1964).

little or no compensation being given to the operator. Presumably, if the Federal government needs the lands, it should pay for the right which it has thereby destroyed. If the Courts are unable to see their way clear to such an equitable and just result in cases involving the destruction of the right under the law as it exists, Congress should clarify its already fairly clear language and make this point so crystal clear that the Courts can not misinterpret the meaning.