

1970

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Recommended Citation

Nielsen, Darwin B. and Wennergren, E. Boyd (1970) "Public Policy and Grazing Fees on Federal Lands: Some Unresolved Issues," *Land & Water Law Review*: Vol. 5 : Iss. 2 , pp. 293 - 320.

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LAND AND WATER LAW REVIEW

VOLUME V

1970

NUMBER 2

In this article Mr. Nielsen and Mr. Wennergren have summarized the evolution of public land policy in the United States and have revealed how and why past policy decisions are highly relevant to the present efforts of the federal agencies of the Public Land Law Review Commission. The main issues discussed center around grazing fee regulations.

PUBLIC POLICY AND GRAZING FEES ON FEDERAL LANDS: SOME UNRESOLVED ISSUES

*Darwin B. Nielsen**
*E. Boyd Wennergren***

BEGINNING with the early debates to protect the forests, public land policy has not had a quiet history. Its evolution has often been catalyzed by heated debates, both public and private. In part, the problems can be traced to overlapping divisions of responsibilities. Congress, the Forest Service in the Department of Agriculture and the Bureau of Land Management in the Department of Interior have all at one time or another established or strongly influenced public land policies. Recently, the Bureau of the Budget has exerted an increasing influence, especially in the matter of user-charges or fees. The establishment of the Public Land Law Review marked a particularly significant effort to deal with present issues.

A major issue that has consistently pervaded public

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policy discussions has revolved around user-charges or fees. The reason is obvious. User-fees represent an available source of liquid wealth to society for the use of these resources, therefore the level of the fee is important. But determination of these fees has been complicated by changing philosophical and legal concepts as well as by economic considerations. The philosophical concepts underlying the purposes or goals of public land usage have changed as the needs of our nation have changed. Once settlement and development of our vast land resources were in the national interest. Today we find intense, multiple competition for what has become a scarce resource. After encouraging settlement through liberalized land disposal programs such as the Homestead Act, we moved through an era where conservation and stability were emphasized. We are now confronting competition for lands and a need for public revenues that seem to suggest a new philosophy—collecting full economic value for all uses. Fee levels and policies that were consistent with a liberalized land use philosophy, seem in conflict with today's perceived realities.

Instead of fairly straight forward economic question in the transition to higher user-charges, however, the present situation is confounded by the aggregate effects of past public land policy. Economic conditions established under these past policies and unknowingly subjected to economic laws by rationally motivated users have generated economic and legal consequences of unforeseen magnitude.

In this paper we have tried to summarize the evolution of public land policy in the United States and to focus upon how and why past policy decisions are highly relevant to present efforts of federal agencies and the Public Land Law Review Commission. The focal issues will be related to questions of grazing fee regulations. Much of the federal land endowment can be grazed, and its use for this purpose has a long history. But perhaps more important, grazing fees have been important to the historical evolution of public land policy. In a sense, the questions now being asked about the fees exemplify the basic issues, and the historical interdependence

of economics and law as they relate to current public land issues.

HISTORICAL BACKGROUND OF PUBLIC LAND GRAZING FEES

Grazing fees for agricultural use of public lands were initially assessed by the Forest Service in 1906.

The minimum fees for summer grazing were set at 5 to 8 cents per head for the summer season for sheep and 20 to 35 cents per head for cattle and horses. The annual rate was 35 to 50 cents per head. The regulations further provided that as the condition of the range improved and the demand for permits increased, the grazing charges would gradually be increased.¹

This action followed about twenty years of legislative effort to launch a coherent public land policy. The first comprehensive bill to reserve and protect forests on the public domain was unsuccessfully introduced in 1871. But the following year the first withdrawal of land for public use was made and Yellowstone Park was established. In 1891, Congress gave the President power to establish forest reserves by proclamation, but this effort was ineffective because no means were provided for subsequent administration of lands so designated. The Sundry Civil Appropriation Act of 1897 reaffirmed the power of the President to create reserves and defined the types of land that could be set aside.

No public forest reserve shall be established, except to improve and protect the forests within the reservations, or for the purpose of securing favorable conditions of water flow, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of land more valuable for the min-

1. *Hearings on Grazing Fees on Public Lands Before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. 5 (1969).*

erals therein, or for agricultural purposes, than for forests. . . .²

It is interesting to note that at this early date agricultural uses and mineral uses were considered of value for the public good. Shortly after the passage of this act, jurisdiction of the forest reserve was placed with the Department of Agriculture and the first grazing fees were assessed. But even with the imposition of grazing fees, Congress and the Forest Service were primarily concerned with protection, improvement, administration, and extension of the forest.

Although imposition of grazing fees on forest lands raised fewer protests from user groups than one might expect, the authority of a governmental agency to charge for public land use was eventually challenged in the courts. The right was finally upheld by the Supreme Court when it granted to the government the power to make rules and regulations for its own land (including the imposition of user-fees).³

The Forest Service attempted to operate under the concept of a "reasonable charge" in situations involving exclusive use of any resource on the forest reserve. But user-charges became a controversial issue in 1907. Estimates by Pinchot, head of the Forest Service, projected self-sufficiency for the agency by 1912. Instead of gaining support for the user-fee schedules proposed, his projections fanned some of the first flames of controversy over the nature of public land goals. "In general the tone of the debate was that the purpose in creating the reserve land had been to protect the forests, not to exploit them for revenue."⁴ Congressional opposition to user-charges was general and some of the questions posed are especially interesting relative to today's public land issues: "Is the federal government going into a profit-making business? Is it the policy of the federal government to convert its control over forests, grazing lands, coal mines, etc., into money making schemes?"⁵

2. PEPPER, *THE CLOSING OF THE PUBLIC DOMAIN* 17 (1951) [hereinafter cited as PEPPER].

3. *United States v. Girmard*, 220 U.S. 506 (1911).

4. PEPPER, *supra* note 2, at 93.

5. 41 CONG. REC. 3188, 3199, 3200 (1906-7).

In spite of the controversy over the so-called commercialization of the forest reserves and claims that user-charges were an intrusion by the federal government into the field of business, grazing fees increased by 50 percent between 1906 and 1916. However, such increases were generally justified on the basis of need to cover rising administrative costs. Grazing fees were never commensurate with comparable private lease rates. A significant economic consequence of this "pricing" policy that has had continual relevance to the problems of public land management, became manifest around 1916. In the early 1900's grazing permits (the authorization to use Forest lands) were first observed to have value to the rancher over and above the fee charges by the government, *i.e.*, ranchers were willing to pay the fee plus an additional amount to gain access to the permit. It was reported during that period: "the grazing privilege became so valuable that it figured in sales contracts for lands adjacent to the forest whose owners held grazing permits."⁶ Thus, control of grazing privileges on forest lands has been valued by ranchers as a capital asset for over 50 years.

Administrative Aspects

The first 10 years of experience in assessing grazing fees on public forest lands established several facts. First, the courts supported the government's right to make user-charges on public lands. Second, fee levels were geared to offset the administrative costs of managing the lands in the interest of protection and preservation. Low grazing fees also furthered the goal of encouraging settlement of the remote West. Consequently, grazing fees were less than comparable commercial rates charged for private grazing lands. Third, control of forest grazing acquired a capital asset value that was represented by the grazing permit.

From 1916 to the passage of the Taylor Grazing Act in 1934 efforts were continued to establish a meaningful public land policy. Pressures to increase fees were exerted by Congress and/or the Department of Agriculture and resisted

6. PEFFER, *supra* note 2, at 186.

by user-groups. The 1920's produced considerable controversy, and study. The Rachford Report,⁷ completed in 1924 under the auspices of the Department of Agriculture, was perhaps the most notable research of the period. It became the focal point and basis for a revised fee system in the early 1930's.

The method of calculating grazing fees was changed in 1931, based on studies of National Forest grazing values conducted during the 1920's. Forage quality, accessibility, water resources, proximity to market and livestock handling costs were considered. Basic premise of the study was that private land data on range values, or rental rate on private rangelands could be used to determine the use value of National Forest range. Base fees varied from area to area, depending on local private lease rates and other local factors.

Base fees established in 1931 were adjusted annually by formulae expressing the relationship between the previous year's average price for beef cattle or lambs in the western states and prices in established base periods.⁸

Permittee tenure and security were also issues during this period. Annual grazing permits, with the associated uncertainty related to annual permit availability and allowable grazing numbers, presented difficult management problems even in the short run. Establishment of 5-year permits were part of the fee increase "package" that took shape between 1916 and 1918. Permit tenure was extended to 10 years sometime during the late 1920's, likely as a result of the reappraisal of public land problems which followed the Rachford investigations.

The livestock industry also sought some degree of program stability and tenure security as protection from vacillation that might occur as different individuals assumed the office of Secretary of Agriculture. According to Peffer:

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7. Rachford, Range Appraisal Report (1924) (unpublished report to U.S. Department of Agriculture).
 8. U.S. DEPARTMENT OF AGRICULTURE, DEPT. OF THE FOREST SERVICE, REP. NO. 3, *GRAZING FEES ON NATIONAL FOREST RANGE: PAST HISTORY AND PRESENT POLICY* (1969).

It (the livestock industry) wanted a reasonably definite system upon which to base its operations and did not want to have to readjust itself every five years, or more often, to a new edict by the Forest Service or by Congress . . . the industry felt that it could no longer base its future on the promises of an official who might be succeeded at any time by one of opposite view.⁹

Controversies over the legal status of grazing on the national forests also generated investigations, hearings, and considerable emotion. Senator Stanfield's bill proposed establishing grazing as one of the primary purposes for which the forests were created. Conservation groups reacted strongly and entered the debates as active participants. The Society of American Foresters said,

The effect of the constant contact with grazing as an industry and as a user of a resource contained within national forests has produced, . . . a tolerance for grazing and a desire to adjust it to forest production which in effect has already elevated it to the dignity of a coordinate use with forestry and an end in itself.¹⁰

Other conservation groups argued for complete expulsion of livestock grazing from the forests and proposed essentially singular recreation and wildlife uses as prevailed in the national parks. One should keep in mind that these arguments were being made in the mid-1920's. Competition for use of public lands is obviously as old as the concerned, organized, vested interests.

Basic Issues of Control

The controversies over fee levels, use priorities, and the gamut of related problems remained somewhat secondary, however, to the issue of federal control of public lands, especially public domain lands, in the late 1920's. First, there were questions of whether these lands should remain in government ownership, be given to the states, or be allowed to

9. PEFFER, *supra* note 2, at 189.

10. *Id.* at 195.

move into private ownership. Second, if they remained properties of the federal government, should the Department of Interior or the Department of Agriculture administer them?

In 1929, Interior Secretary Wilbur proposed that all public lands within individual state boundaries, excluding national parks, national monuments, or national forests, be given to the states willing to assume management responsibility for the surface rights of such lands. He even suggested that the states might eventually control the present national forests.¹¹ President Hoover concurred in the proposal and recommended that a commission be established to investigate the advisability of turning the remaining public domain land to the states in which they were located.¹²

The reactions revealed the apparent indifference of eastern representatives to these lands. Their reactions ranged from the position that states should pay for the lands, to one that the lands were not worth possessing. Neither these representatives nor the general public raised a strong voice to incur sustained federal ownership. More surprising reactions, however, came from the Western States within whose borders lay the lands and whose rights to amounts of comparable lands had already been established by their school and other grants. Most states did not want the lands unless they also received the mineral rights. Governor Dern of Utah expressed the feeling of many western states when he said, "The states already own, in their school grants, millions of acres of this same kind of land, which they can neither sell nor lease, and which is yielding no income. Why should they want more of this precious heritage of desert?"¹³ Conservation groups continued their expressed opposition to any move to transfer these lands to state ownership. The movement to give these lands to the states lost its momentum and eventually ceased. But it is interesting to postulate in this area of increasing land values and criticism of past land policy (especially state land disposal policy), that a key factor

11. 62 CONG. REC. 3570-71 (1929).

12. *Id.* at 3572.

13. *Hearings on Granting Unreserved Lands to State Before the Senate Comm. on Public Lands and Surveys*, 72d Cong., 1st Sess. (1931-32).

in the demise of the movement was not the reluctance of the Western States to prosecute their interests but their outright opposition to the proposal.

Another issue that was evident during this period, and which has pervaded discussions of public land policy in all time periods, is the question of the purpose or objective of federal land management. The so-called issue of commercialization of the national forests had already been expressed in the early 1900's and had drawn considerable opposition. Evidence persists that the general goal of land management during subsequent years was to insure the preservation of those lands that were productive and capable of providing necessary resources for future generations. In the 1925 Yearbook of Agriculture, the Secretary of Agriculture said:

The Department believes that the production of livestock has a permanent and valuable place in the national forests and that every reasonable form of security should be given the livestock producer in making the most advantageous use of this public resource. Legislation establishing a permanent place for grazing in the national forests would be desirable, in order that this important economic service may be freed from even the remote danger of sudden and drastic change in the more essential policies concerning the use of the range.

I favor a provision of law that will authorize firm contracts or licenses for periods of ten years, to be binding upon the government as long as their conditions are met, and under which the requirements to be observed by the range users, possible reductions in the numbers of livestock, and the provision for grazing fees shall be specifically set forth. The essential point is that while the users of the ranges should be given a permanent and definite status and stabilized as far as possible, this use of the national forest must be fitted into and harmonized with the entire plan for the conservation of public resources.¹⁴

It is interesting to note that conservation of the resource and stability of the industry were the central themes of this

14. U.S. DEPT. OF AGRICULTURE, YEARBOOK OF AGRICULTURE 87-89 (1925).

attempt to recognize the interests of the users and still exert the fundamental power of the federal agency. Any inference that the lands had a role in producing revenue for the government or that society was entitled to a full or fair return of value of obviously absent.

Legislation and Control of Public Domain Lands

Enactment of the Taylor Grazing Act in 1934 authorized, for the first time, fee charges on public domain lands administered by the Department of the Interior. Prior to that time, fee assessments and most debates about public land policies had centered on Forest Service lands. The Taylor Grazing Act and its subsequent amendments, might be considered a "landmark" document in public land policy for several reasons. First, it prescribed the initial user-charges for public domain lands. Secondly, it defined in more detail than any previous legislative action, the management functions of the federal agency. Third, it gave legislative sanction to a philosophy of land management that emphasized the public welfare aspects of land use as opposed to the philosophy that would promote "commercialization." In retrospect it would appear, however, that Congressional intent for the role to be played by public domain lands was essentially unchanged from the role set for Forest Service lands.

The preamble to the Act set the philosophy that prevailed for more than 20 years: "To stop injury to the public grazing lands by preventing overgrazing 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."¹⁵

Fee Levels

Authorization to assess grazing fees was given the Secretary of the Interior under provisions and amendments to section 3 of the Act:

15. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934), as amended (codified in scattered sections of 43 U.S.C.).

The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock . . . upon the payment annually of reasonable fees in each case to be fixed or determined from time to time, and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes, . . . So far as consistent with the purposes and provisions of this chapter, 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 chapter shall not create any right, title, interest, or estate in or to the lands.¹⁶

One can find little evidence in the language of the Act, subsequent amendments to the Act, or events of the next 20 years that signal any basic change in the fundamental philosophy of Congress or the government agencies relative to the intended role of these lands. The Act clearly emphasized that resource protection, development, and stability of the livestock industry are to be paramount consequences of the Act. In addition, it defined that the permit to graze could not create a right, title, etc., in the lands.

The subsequent amendment of the Act in 1947, seems to have reaffirmed the so-called "social" aspects of public domain land usage. Under the sponsorship of Representative Barrett of Wyoming, the following statement was included in the Act: "and in fixing the amount of such fees the Secretary of the Interior shall take into account the extent to which such districts yield public benefits over and above those accruing to the users of the forage resources for livestock purposes."¹⁷

This wording suggests that the users of grazing districts were not expected to pay the full value of the commodity they consume. The clause would tend to legalize the grazer's contention that "paying a fee for revenue . . . is contrary to the fundamental principles on which this country was built."¹⁸

16. Taylor Grazing Act, 43 U.S.C. § 315(b) (1964).

17. *Id.*

18. PEPPER, *supra* note 2, at 276.

It might further suggest that Congress intended that the Secretary should establish fees at whatever levels thought desirable to maximize the social product of the lands, with the implied condition that the fees make the program "self-sufficient." In fact, Clawson argues: "The Taylor Grazing Act was amended in 1947 to state more clearly the principle that grazing fees were to be based on the cost of administration."¹⁹

Subsequent attempts to increase fee levels produced debate, conclusions, and individual positions that tend to support this claim as well as the general thesis that the philosophical base of public land goals remain unchanged from that contained in the Taylor Grazing Act and expressed by previous agency policies, i.e., non-commercialization.

The initial grazing fees for lands under the Taylor Grazing Act (\$.05 per animal unit month (AUM)) were intentionally kept low to avoid imposing undue financial burdens on the industry during the depression. Fee increases proposed in the early '40's on the basis that government was not receiving compensation equal to privately leased lands met with considerable opposition. "Secretary Ickes is said to have thrown his weight on the side of the grazers. His position was that it would be inconsistent to increase fees while the government was subsidizing the industry."²⁰ Senator McCarren of Nevada contended that fees were set to cover only administrative costs, not the value of the forage. It is difficult to conclusively document this "pricing" philosophy in the Taylor Grazing Act or in any other official proclamations of either Congress or the federal agencies. But several conditions suggest the importance of this idea in the determination of fee levels. First, there is evidence that non-monetary matters were expressly important to the federal agencies in determining fee levels. Second, statements of individual congressmen suggest their support of this philosophy. Third, while the Taylor Grazing Act was being considered, support was given to keeping public domain

19. CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USES AND MANAGEMENT* 222 (1957).

20. PEFFER, *supra* note 2, at 261.

lands under the Department of Interior because cost of management would be minimal and fees could be kept lower.²¹ Fourth, while amended several times since its enactment, the basic focal point of the Taylor Grazing Act has remained unchanged.

The problems and controversy of public land policy were not arrested by enactment of the Taylor Grazing Act. Fee debates continued and fee levels increased. The history of fee increases during the period 1936-68 is summarized in Table 1.

Table 1. Interior Department Grazing Fees from 1935-1968²²

Year	Fee \$/AUM	
	Cattle	Sheep
1936-46	\$.05	\$.010
1947-50	.08	.016
1951-54	.12	.024
1955-57	.15	.030
1958	.19	.034
1959-60	.22	.042
1961-62	.19	.034
1963-65	.30	.060
1966-68	.33	.066

In 1951, the issue of administrative costs or economic self-sufficiency of governmental agencies administering public lands was dealt with more directly. Congressional approval was given to the following:

It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organization, partnerships, corporations, or business-

21. *Id.* at 263.

22. 1969 *Hearings*, *supra* note 1, at 6.

es), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible²³

Regarding the establishment of use fees, Congress said:

and the head of each Federal agency is authorized by regulations (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided*, That nothing contained in this title shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price. *Provided further*, That nothing contained in this title shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.²⁴

But with the effort to deal with the concept of economic self-sufficiency seemed to illustrate a growing problem with this idea. As the government agency took on more and more functions consistent with the growing concern for implementing the multiple use concept of land management, isolating the costs of administering a particular use such as grazing became more difficult and less easily defended. By 1954, the philosophy of fee determination attempted once again to relate grazing fees to the market prices for the user's products. According to Foss, in 1954,

The National Advisory Board Council agreed to a fee system based on the combined prices of cattle

23. Act of Aug. 31, 1951, ch. 376 tit. v., 65 Stat. 290.

24. *Id.*

and sheep in the markets of the 11 western states. If cattle prices averaged \$.17 per pound and sheep \$.15 per pound during a given year, the average of the two, or \$.16 in this case, would be the grazing fee per AUM during the following year.²⁵

In spite of the fact that cattle and sheep prices were implemented into the fee setting system, there is no reference or inference that the system would result in fees which represent "full forage value." This basic system has prevailed in the establishing of Bureau of Land Management (BLM) fees since 1954.

Current Grazing Fee Controversy

The current grazing fee controversy had its inception in the audit reports of the Comptroller General about 1958. According to Rader:

These reports noted that different methods were being used by the various federal agencies to establish fees and that charges made by some agencies were substantially below what was deemed to be the market value of public grazing as reflected by lease rates on private lands.²⁶

In October, 1959, Representative Aspinall of Colorado called these reports to the attention of the Department of Agriculture and urged critical study of the inter-agency fee policies. An Interdepartmental Grazing Fee Committee with participants from the Departments of Agriculture, Defense, and Interior began investigations concurrently with a study by Bureau of the Budget personnel.

The Bureau of the Budget report was published in 1964, and stated principles and guidelines for all federal agencies in establishing grazing fees. Three fee principles, as enunciated by the report, are of special interest.

25. Foss, *The Determination of Grazing Fees on Federally Owned Rangeland*, 41 J. FARM ECON. No. 3 (1959).

26. Rader, *The U.S. Forest Service—Bureau of Land Management Grazing Fee Study—Policy Implications* (undated and unpublished report to U.S. Department of Agriculture, Economic Research Service, Farm Production Economics Division).

First, a uniform basis should be used by all Federal Agencies in establishing fees. Second, fees should be based on the economic value of the use of the land to the user, taking into account such factors such as quality and quantity of forage, accessibility and market value of livestock. Economic value should be set such that the government gets a fair return and there is equitable treatment to the users. Competitive bidding should be used where feasible or fees should be set such that they are comparable to fees charged on comparable state and private rangelands. Third, a lesser amount may be recovered where full payment would significantly impair a federally-sponsored program.²⁷

(One might suspect that the third point was deemed necessary in light of the extreme clarity of points one and two.)

This statement of principles represented a radical departure from prior philosophies of user-charges as expressed in the Taylor Grazing Act and elsewhere. Notable by its absence, except for possible inference in the third point, is any mention of the concepts of preservation, stability or social values. The statement is a strong commitment to extracting full economic values even to the point of initiating competitive bidding. The statement is provocative in another respect, not so because of its content, but because of its source. The Bureau of the Budget had been given or had assumed a role in clarifying public land user-charge procedures. In the process, they attempted an unprecedented definition or redefinition of the goals and objectives of public land policy. The conflicts between the Bureau's statement and that of the Taylor Grazing Act, are all too obvious. One might also ask about the Bureau's source of legal authority and responsibility for making public land policy and for establishing criteria for user-charges. Nevertheless, the Bureau's efforts apparently were instrumental in fostering the current re-evaluation and study of agency policy on public lands.

27. U.S. BUREAU OF THE BUDGET, NATURAL RESOURCES USER CHARGES STUDY (1964).

AN ECONOMIC IMPLICATION OF GRAZING FEES

Throughout the numerous debates and the historical evolution of public land use policy and philosophy, an economic consequence of some significance has occurred. The permit to use the public ranges has gradually acquired a marketable value because of the consistent failure of the government to seek full forage value through the fee mechanism. The consequence of this well-documented policy, is to place the question of this "intangible" permit value in a central position as further methods for determining user-charges are debated. The existence of such an "intangible" and yet real permit value generates crucial questions for those implicated in the policy, economic and legal aspects of public land usage.

An Economic Model for Grazing Fees

As part of the investigative work initiated by the Interdepartmental Grazing Fee Committee in the early 1960's, an economic model was developed to explain how forage is valued on public lands.²⁸

The basic premise of the model argues that the forces of supply and demand operate to establish range forage prices just as they do in any other product market. If this is true, the value of public and private grazing per AUM should be the same within given market areas, assuming, of course, that public and private ranges are substitutes for each other. The logic of this assertion is as follows:

Each rancher knows about what he can afford to pay for an *additional* animal unit month (AUM) of grazing for a particular season and a given quality forage. If rational and economically motivated, he would be willing to pay up to the price that is equal to the value added to ranch production by the addition of one AUM of grazing. This is referred to as the marginal value product of grazing (MVP). If we let:

28. JENSEN & THOMAS, DETERMINING GRAZING FEES ON NATIONAL FORESTS: RANGE AND RANCH PROBLEMS, POLICY IMPLICATIONS AND ALTERNATIVES FOR FUTURE ECONOMIC RESEARCH IN THE USE AND DEVELOPMENT (WAERC Report No. 9, 1967); ROBERTS, DISCOVERING GRAZING VALUES, 20 J. RANGE MANAGEMENT No. 6, at 369-75 (1967).

P_1 = value of public grazing per AUM

P_2 = value of private grazing per AUM

and we assume that public and private grazing are substitutes for each other, ranchers will be willing to pay equal amounts for the two types of grazing up to the point where: $P_1 = P_2 = MVP$. If the administered grazing fee for public grazing use (F_1) is less than P_1 and P_2 , it is also less than the MVP of the public grazing.

If F_1 is less than the MVP of the grazing, the rancher who has control of the grazing is realizing a product surplus value additional to the grazing fee cost. Since control of grazing is embodied in the grazing permit, the product surplus becomes a marketable item through transfer of the grazing permit. As ranchers bid for control of the grazing permits, the authorization to graze public lands takes on value. This permit value reflects the capitalized surplus product value and can fluctuate as the supply and demand conditions change.²⁹

It follows, therefore, that if the public and private grazing have equal value per AUM, the total costs associated with each should also be equal. The costs of private grazing include the private lease rate plus other user non-fee costs such as death loss, herding or fencing costs, moving costs, etc. Public grazing costs include the fee plus user non-fee costs of the same general classifications as for private grazing. In both cases, the types and levels of non-fee costs may vary. The total public grazing cost also includes the grazing permit costs and it is the fluctuation of this cost which should, in the presence of a competitive market, keep the costs of public and private grazing equivalent. The postulate can be advanced therefore that the permit value should be equal to the capitalized difference between the total cost of public

29. The Forest Service and the BLM have commensurability requirements that must be met before a rancher can qualify for a grazing permit. For a rancher to meet this requirement he must have enough private land resources to provide feed for the permitted livestock while not on the federal lands. Whether institutional barriers to a free market are significantly limiting competition has been tested in other areas with different results, see: GARDNER, *Transfer Restrictions and Misallocation in Grazing Public Range*, 44 J. FARM ECON. No. 1 (1962).

grazing and the total cost of private grazing. Stated symbolically,

$$P_v = \frac{(P_2 + E_2) - (F_1 + E_1)}{i} \quad (1)$$

where:

P_v = permit value

P_2 = private lease rate

E_2 = other private user non-fee costs

F_1 = public grazing fee

E_1 = public user non-fee costs

i = relevant rate of interest

Given this relationship, it follows that the value of the public forage is a function of the fee, non-fee costs and the permit value. Symbolically stated,

$$V = F_1 + k(P_v) \quad (2)$$

where:

V = value of the public forage with a given fee system

F_1 = public grazing fee

P_v = permit value per AUM

k = capitalization rate

This model was tested empirically in Utah in 1966. It was found that the cost differential between total public and private costs, capitalized at about a 4 percent rate of interest, equalled the average permit value. Four percent was considered a reasonable, and if anything, a conservative rate of interest. Thus, the conclusion was reached that a reasonable amount of competition exists given the transfer restrictions and that a relatively free market exists for public grazing. If the competitive market does not exist, there is no reason to expect the capitalized differential between public and private costs of grazing to equal the average permit value.

A numerical application of the model may help clarify some points. The data used in this example are from one of

the initial summaries of the 1966 Forest Service grazing fee material. Data were gathered to provide estimates of the fee and non-fee costs on public and private land and on market values of grazing permits. Substituting these data into equation 2:

$$\frac{\$25.35}{i} = \$5.32 - \$4.26$$

$$i = .0418$$

where:

\$25.35 = average permit value

\$4.26 = ($F_1 + E_1$)

\$5.32 = ($P_2 + E_2$)

.0418 = i = capitalization rate

The value of the forage per AUM is:

$$V = \$.51 + .0418 (\$25.35)$$

$$V = \$1.57$$

where:

V = value of the forage

\$.51 = average grazing fee per AUM

.0418 = capitalization rate

\$25.35 = average permit value

This means that fee charges should be increased from \$.51 to \$1.57 if the government is to realize the full economic value of the grazing forage.

The obvious relationship between the level of grazing fees and the permit value has important policy implications. In general, the model suggests that any conditions that alter the differential between the cost of public and private grazing would be reflected in changing permit values. Perhaps of greatest policy concern is the implication that increased fee levels would produce decreased permit values. In fact, one would postulate that a fee of \$1.57 per AUM would eliminate the total permit value, assuming all other factors

remained unchanged. In fact, it is only at the fee level where the permit value is zero that the government is getting full market value. As long as ranchers are willing to pay each other for the permit the government is not extracting all of the forage value through the fee.

While the nature of this relationship is important to fee policy, so is the historical evolution of the permit value. As early as about 1900, there are indications of a value attached to grazing permits. And, as suggested earlier, the present values are a consequence of economic principles implemented by grazing fee policies that did not historically attract full market values—policies that have been followed in essentials from the initial assessment of user-charges. It seems, therefore, that holders of grazing permits issued in the early years, did realize certain capital gains when permit values appreciated, based on the added forage value they controlled. The generation of this capital value resulted from what might be termed “economic law.” The initial permit holders realized this value because they gained control of public grazing based on prior use and location of their base properties or water. Present permit holders, however, who paid current market prices for permits have paid the “full forage value” through the combination of fee charges and permit costs.

A critical and central issue of the current fee controversy depends upon this point. What is the potential effect of increased fees on the wealth position of present permit holders? Is this impact of legitimate or legal concern to the governmental agencies?

The importance of the permit value to the users can be illustrated by two examples. First, the permit’s recognized commercial value is evidenced by its acceptance as collateral by lending institutions.

Secondly, the Forest Service and BLM permits currently held by users in the Western United States have an estimated value of \$343 million.³⁰ “Full value” fees would presumably

30. NEILSEN & ROBERTS, POSITION STATEMENT ON CURRENT GRAZING FEE ISSUES AND PROBLEMS 3 (Utah St. U. Ag. Econ. Series No. 3, 1968).

impose losses of this magnitude on users in the aggregate. Ranchers' annual incomes would also decrease by an amount equal to the increase in grazing fees. In addition, one might expect secondary community losses due to the multiplier effects associated with rancher incomes. On the other hand, federal and local county revenues would increase by an amount equal to the increase in fees. Spending of these monies in local areas would also have positive secondary effects.

The legality of the permittee's right to the grazing permit and to compensation for losses resulting from public fee policy is now being resolved at several levels. BLM Director Rasmussen set forth the position of his agency in early 1969:

Giving the permittee credit for the interest on the permit value in computing fees would recognize that the permit gives the operator a proprietary interest in the public lands. This is clearly prohibited by the express provisions of Section 3 of the Taylor Grazing Act that 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 right, title, interest, or estate in or to the lands. Court decisions confirm the fact that the privilege of grazing on public lands cannot become a property right against the sovereign and is withdrawable at any time without payment of compensation.

He further commented:

The Interior Solicitor has stated that, "To base the fee on a credit which represents a return on the market value of a grazing permit as though it were an interest in land like a lease, is directly in conflict with Section 3 of the Taylor Grazing Act since it would recognize what the law prohibits— a proprietary interest in the public grazing lands. The concept of permit value itself represents an appropriation by the holders of permits of a part of the public's equity in the public lands. In the case of privately owned lands, it is the owner of the land who

is realizing the return on his ownership equity, as witnessed by the difference in grazing fees between privately owned and federally owned lands. To allow the permittees the credit on permit value they contend for, would be to permit the permittee rather than the owner of the land, i.e., the public, to realize the return on the lands' value.³¹

If one accepts the idea that recognition of the permit value gives the permittee a proprietary interest in or to the land, it follows that the permit value cannot be allowed under the provisions specified in the Taylor Grazing Act. However, there are differences of opinion on this point. Hooper defines this "proprietary interest" or "possessory interest" as a "leasehold interest."

The subject of leasehold valuation is clarified by an understanding of the bundle of rights theory in real estate appraisal. Stated simply, when an individual or agency owns real property, the ownership embraces a great many rights such as the right to occupancy and use, the right to sell, the right to lease, and other benefits of use associated with ownership. A property owner who leases his real estate transfers one of the rights in his bundle to the tenant, namely the right of occupancy and use.³²

The grazing fee issue has already been challenged in the courts. Two court cases have been heard, one in the U.S. District Court for the District of Utah, and one in the U.S. District Court for the District of New Mexico. The New Mexico case covers all of the points of the plaintiffs and the decisions were similar. Therefore only the New Mexico case will be presented in some detail.

Judge Bratton's memorandum opinion contained these essential points.³³

The plaintiff, Pankey Land and Cattle Company, attacks the new fee schedule as a violation of the requirement that grazing fees be reasonable, im-

31. *Hearings on Grazing Fees on Public Lands Before the Subcomm. on Public Lands of the House Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969).*

32. HOOPER, POSSESSORY INTERESTS: IMPLICATIONS FOR DECISIONS CONCERNING GRAZING FEES (Utah St. Un. Econ. Res. Center Study No. 4, 1968).

33. 115 CONG. REC. S10719 (1969).

posed explicitly upon the Secretary of the Interior by the Taylor Grazing Act, 42 [sic] U.S.C. § 315 (b), and imposed implicitly upon the Secretary of Agriculture by 16 U.S.C.A. § 580 (1). It is claimed that the new fee schedules, based as they are upon the fair market value of forage without taking into account the capital investment in the permit and in range improvements, are confiscatory and unreasonable.

The plaintiff further argues that, even if the new fees do not violate statutory mandates and do not amount to a taking without compensation in contravention of the Fifth Amendment, the new fees are still illegal in that they violate the Secretaries' own regulations.

In answer to all the plaintiff's claims, the defendants, Secretaries of Agriculture and Interior, point out that the lands involved are committed to administration by the respective Secretaries and that each has authority to issue regulations with regard to these lands, subject only to judicial review for acting illegally or abusing the discretion thus vested in him. It is asserted that no abuse of discretion or illegal action was involved in failing to include the capitalized value of the permit as a cost of operating on the public lands.

The defendants reply to plaintiff's claim that the new fee schedule is confiscatory by pointing out that a permit is not a property right and that its tenure is uncertain and subject to withdrawal or to drastic curtailment (in the number of AUM's) at any time that forage conditions may so require.

Judge Bratton further opinions:

It is the failure to include such an item upon which plaintiff bases its claims of confiscation, unreasonableness, and alternatively, violation of the new regulations. While plaintiff's claims are stated in different manners and are presented with varying approaches, in reality they are all one basic claim, namely that the actions of the Secretaries were beyond any discretion committed to them by Congress

[sic] and hence contravened the statutory standards and were illegal.

The provisions of the Taylor Grazing Act and the enabling Agriculture act must be read together with the 1952 Act. So viewed, the Secretaries are directed by Congress to establish fees which must be reasonable, fair and equitable, taking into consideration direct and indirect cost to the Government, value to the permittee, the public policy or interest served, and which fees shall be self-sustaining to the full extent possible. In addition as, to the BLM lands, the Secretary shall taken into account the extent to which such districts would yield public benefits over and above those accruing to the users of forage resources for livestock purposes.

The record clearly indicates that exhaustive studies and evaluations preceded the fee schedule changes. The 1966 Western Livestock Survey was a comprehensive effort. It cannot be said that the Secretaries did not seek information on which to base their judgments or that they did not consider the various policy factors as directed by the Congress.

That in their conclusions the Secretaries do not agree with one item which plaintiff claims should have been considered as an element of cost in operating on the public domain cannot be held as a matter of law to reflect an action in excess of statutory authority Further, they maintain that to require the capitalized cost of permits to be included in cost of operation would automatically freeze the grazing fees at their present level, prohibiting any increase based on comparison of costs of operating on private versus public lands. On the record in this cause their view cannot be held as a matter of law to be arbitrary.

The statutes clearly indicate entrustment to the Secretaries of wide areas of judgment and discretion in setting fees which would fall within the range of the various factors which the Congress directed should be considered. *See Secretary of Agriculture v. Central Roiz Refining Company.*, 338 U.S. 604 (1950).

What has been said is decisive of all the claims of plaintiff in this case. It has not been shown that the Secretaries have failed to consider all of the factors as directed by Congress. They have acted within the area of discretion and judgment committed to them by law in promulgating the new regulations, *see Rigby v. Rasmussen*, 275 F. 2d 681 (10th Cir. 1960), and thus there is no legal remedy here available to plaintiff. The relief which it desires can only be obtained through congressional or executive channels.

This opinion shall constitute the Findings of Fact and Conclusions of Law of the Court. A judgment binding on the class represented by plaintiff will be entered dismissing the actions.

Pankey's attorneys have filed an appeal in U.S. Court of Appeals for the Tenth Circuit in Denver, Colorado. The appeal brief states the core issue as follows: "whether federal administrative agencies which have a measure of rate control may set fees which have a built-in element that will destroy a recognized property value; and whether, despite this effect, they are immunized from effective judicial review and remedial action." Several specific legal arguments were listed in the brief.

Fees which preclude any return on investment in ranch property are unreasonable and confiscatory.

(1) The Secretaries do not have unfettered power to impose unreasonable and confiscatory fees without judicial scrutiny and remedy.

(2) The reasonableness of the fees must be independently reviewed by the Court on the basis of their economic impact upon the affected industry.

(3) Appellees deliberately, unreasonably and arbitrarily ignored a major cost of ranching in setting fees.

(4) The proposed fees (1.23) will not leave sufficient revenue or equity in livestock ranches to allow service and repayment of ranch debts.

(5) The proposed fees will not allow a reasonable return on investments in ranch property.

(6) The proposed fees will not provide a rate of return comparable to that available to ranches using private lands.

(7) The fees confiscate privately owned range improvements.³⁴

About the time that the court cases were being heard, Congress scheduled hearings on the fee problems. Both the Senate and House of Representatives Subcommittees on Public Lands of the Committee on Interior and Insular Affairs held hearings in late February and early March of 1969. An adequate review of the testimony in these hearings would be much too long for this paper. However, at least one significant event resulted from the hearings. A resolution was passed by the Committee on Interior and Insular Affairs, U.S. Senate that

requests and calls upon the Secretary of the Interior and the Secretary of Agriculture with other officials of the Executive Branch of the government to undertake and complete not later than December 1, 1969, a comprehensive review of the grazing fee schedules imposed by the order of January 14, 1969. Said review shall include consideration of whether the public interest and equity, as well as the purpose and intent of the Congress as expressed in the Acts cited above, are reflected in the criteria and methods which were used in the setting of said fee schedule.³⁵

The Secretaries were directed to respond on this matter to Senator Jackson, Chairman of the committee. In a letter from Secretary Hickel to Senator Jackson in response to the above request, Secretary Hickel stated:

The requested review has been completed by this office. As noted in the resolution, the questions raised before the committee, considered in connection with the language and legislative history of the Taylor Grazing Act, cast doubt upon the propriety of the 1969 fee schedule. They may not have taken into account consideration of the full purpose and

34. GRAZING FEE INCREASES: WHERE DO THEY STAND TODAY, 51 AM. BEEF PROD. No. 5 (1969).

35. 115 CONG. REC. S10718 (1969).

intent of Congress as established in the Taylor Grazing Act and in Title V of Public Law 137, 82nd Congress (65 Stat. 290).³⁶

Secretary Hickel has since placed a one year moratorium on further fee increases pending issuance of the findings of the Public Land Law Review Commission. This commission report is due on June 30, 1970. Secretary of Agriculture Hardin issued a similar one year moratorium in January, 1970.

The task assigned the two Federal Supervising Agencies is a difficult one. First, they have been instructed to establish user-charges on an equivalent basis. Secondly, they are functioning under different enabling legislation and pressures from various sources, i.e., the Forest Service is not bound by the Taylor Grazing Act, which does direct the BLM. Both are being pressured by the Bureau of the Budget, whose role in influencing policy issues is not entirely clear. Third, they must confront the issue of permit values and whether a governmental policy that led to the emergence of economic values that constitute "out of pocket" cash costs to most permit holders could be legally eradicated or significantly reduced without compensation through a change in fee policy. Fourth, they are enmeshed in the consequences of a historical public land policy that has never truly clarified the issues or (especially) the objectives of public land use.

Hopefully, the court cases currently in process will generate some basic legal positions of a clarifying nature. The efforts of the Public Land Law Review Commission (PLLRC) are now in the spotlight. But in retrospect, one can only conclude that the ultimate responsibility for clarifying the issues of public land policy rests in the Congress. It is their action, following efforts of the PLLRC and the regulatory agencies, that will determine whether or not the historical controversy about public land usage and user-charges will continue in the same unstructured arena.

36. BLM GRAZING FEE DELAYED, 59 NAT'L WOOL GROWER No. 6 (1969).