

# Land & Water Law Review

---

Volume 6  
Issue 1 *Symposium: An Analysis of the Public  
Land Law Review Commission Report*

---

Article 5

1970

## The Public Land Law Review Commission: An Overview

Milton A. Pearl

Follow this and additional works at: [https://scholarship.law.uwyo.edu/land\\_water](https://scholarship.law.uwyo.edu/land_water)

---

### Recommended Citation

Pearl, Milton A. (1970) "The Public Land Law Review Commission: An Overview," *Land & Water Law Review*: Vol. 6 : Iss. 1 , pp. 7 - 31.

Available at: [https://scholarship.law.uwyo.edu/land\\_water/vol6/iss1/5](https://scholarship.law.uwyo.edu/land_water/vol6/iss1/5)

This Symposium is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

# LAND AND WATER LAW REVIEW

VOLUME VI

1970

NUMBER 1

## THE PUBLIC LAND LAW REVIEW COMMISSION: AN OVERVIEW

*Milton A. Pearl\**

IN its report and recommendations to the President and the Congress,<sup>1</sup> the Public Land Law Review Commission sought to provide guidelines for the retention and management or disposition of the public lands in accordance with the congressional policy, enunciated in the Act<sup>2</sup> establishing the Commission, to the effect that "the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public."

The Commission took cognizance of the fact that the spirit of the legislative objective, which also guided the sponsors of the legislation, required an attempt to assure fairness and equity in all phases of the administration of the public lands whether in management activities or disposition actions.

The need for a review in the spirit and with the objective stated above became imperative as demand for the limited land and its resources increased during the 1950's and the early 1960's. More and more members of the public were looking to public lands to satisfy both active and passive recreation aspirations.

---

\* Director, Public Land Law Review Commission, Washington, D.C.; A.B., 1934, New York University; J.D. 1936, New York University; Member of the Federal and American Bar Associations.

1. PUBLIC LAND LAW REVIEW COMM., ONE THIRD THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970), is available from the Superintendent of Documents, Government Printing Office, Washington, D.C., 20402, at \$4.50 per copy. [Hereinafter cited as REPORT].

2. 43 U.S.C. §§ 1391-1400 (1964), as amended, (Supp. IV, 1969).

Copyright© 1971 by the University of Wyoming

Of the unappropriated public domain, the Bureau of Land Management found that it had no authority to manage lands for these purposes and could not, therefore, obtain appropriations for development of even basic facilities required to regularize the use. Preservationists feared that pristine portions of national forests, set aside by administrative action as wilderness, wild, and primitive areas, might be opened up for incompatible uses or development if not granted statutory protection.

At the same time, the Secretary of the Interior and the Bureau of Land Management found themselves without authority to make unappropriated lands available for development on terms that would assure security of tenure. There was no general sale act under which lands could be made available for industrial, commercial, or residential purposes. In some instances, the need was met by obtaining acts of Congress authorizing sales for expansion of existing communities.<sup>3</sup> The townsite laws,<sup>4</sup> which constitute the basic authorization to make public lands available for such purposes, were not suited to the modern-day needs of a growing population.

Similarly, the settlement laws that had been instrumental in the development and growth of the southern and midwestern public land states, i.e., the Homestead Act of 1862,<sup>5</sup> the Desert Land Act of 1877,<sup>6</sup> the Stock Raising Homestead Act of 1916,<sup>7</sup> etc., had likewise become obsolete. In part, this occurred because lands suitable for settlement under these acts had dwindled to the point where, in some areas, there was none left at all. Minimal acreages were available in some places, and continual disputes arose over the suitability and unsuitability of other areas.

Mostly it appears that the obsolescence was caused by changing public attitudes which were reflected in administra-

---

3. *See e.g.*, the Acts of May 14, 1956 (70 Stat. 156) and of July 22, 1963 (77 Stat. 88) making lands available to the City of Henderson, Nevada; and the Act of Oct. 5, 1962, authorizing sale of the lands to the City of Needles, California.

4. 43 U.S.C. §§ 711-731 (1964).

5. Act of May 20, 1862, (12 Stat. 312), (codified in scattered sections, 43 U.S.C. § 161 (1964)).

6. 43 U.S.C. §§ 321-339 (1964).

7. 43 U.S.C. §§ 291-301 (1964).

tive decisions made without benefit of revised statutory policy. But they did have strong support of large segments of the public. Further, some of the conditions of the settlement laws were not geared to the realities of the mid-20th century.

Many conflicts arose in other areas of land management and disposition. Executive branch withdrawals and reservations, based on asserted inherent and implied authorities irritated potential users, sometimes engendered local and state opposition, and, after appeals for congressional support, introduction of legislation for statutory limitation on the authority of the Executive.<sup>8</sup>

In 1958, legislation was enacted decreeing that thereafter there could be no withdrawal of public lands in excess of 5,000 acres for defense purpose without an Act of Congress.<sup>9</sup> Contemporaneously, the Secretaries of the Interior and Agriculture entered into an agreement with the Chairman of the House Committee on Interior and Insular Affairs to advise the Congress of nondefense withdrawals in excess of 5,000 acres prior to their consummation.<sup>10</sup> This agreement was renewed by succeeding Secretaries and the practice continues to this date.<sup>11</sup>

Even though the Antiquities Act of June 8, 1906,<sup>12</sup> authorizes the President to set aside as national monuments lands containing objects of historical interest, there was built up in Congress a group having a strong view that no such major areas; *e.g.*, in excess of 5,000 acres or affecting third-party interests, should be set aside without an Act of Congress. In any event, the Secretary of the Interior had agreed to "con-

- 
8. Under U. S. Const. Art. IV § 3, Congress is granted exclusive authority to establish rules for the regulation and disposition of Federal property, including the public lands. For a discussion of this general subject and the conflict between the executive and legislative branches, see Charles F. Wheatley, Jr., *Withdrawals and Reservations of Public Domain Lands*, (Study Report, 1969). (All reports prepared as a part of the research program for the Commission are being published and offered for sale by the Clearinghouse for Federal Scientific and Technical Information of the Department of Commerce. See listing which forms part of appendix to this article.)
  9. 43 U.S.C. §§ 155-158 (1964).
  10. Notification, sometimes referred to as "consultation" was thereafter also, of course, afforded the Chairman of the Senate Committee on Interior and Insular Affairs as a matter of comity.
  11. This procedure was given recognition in H.R.Rep. No. 2521, 87th Cong., 2d Sess. (1962)
  12. 16 U.S.C. §§ 431-433 (1964).

sult" with the congressional committees before any large-scale withdrawal was effected. Consultation by the executive branch with the legislative did not, however, mean that the Executive would be immobilized by objections from individual members of Congress or from the Chairman of the Interior and Insular Affairs Committee.

Examples that serve to demonstrate this are: Establishment of the C & O Canal National Monument and the withdrawal of approximately 11 million acres of public lands for three wildlife refuges and game ranges in Alaska during the Eisenhower Administration, and the addition of approximately 300,000 acres of land to the National Park System for the establishment of the Marble Canyon National Monument, Arizona, and the enlargement of the Arches and Capitol Reef National Monuments in Utah, and of the Katmai National Monument in Alaska during the Johnson Administration.

Another and continuing source of dispute between members of Congress and those in the executive branch revolved around congressional intent in various statutes. Most public land statutes are devoid of legislative guidelines, a fact that was later to be brought out in the research program carried out by or under the direction of the Public Land Law Review Commission staff. The discretionary power claimed by the departments and agencies is, indeed, theirs.

However, when administrators sought to reinforce the exercise of discretion by developing a line of reasoning based on congressional intent, there were inevitable disputes as to what the intent had been. Superimposed on this basic difference of opinion, there has been the practice of exercising discretion in case-by-case adjudication of public land matters, thereby limiting effective congressional oversight before controversies between the government and its citizens arise.

Although there were many other problems brought to the attention of the committees concerning public land laws and their administration, it was, in the author's opinion, the need to adjust the executive-legislative relationship that was the paramount issue which, as a practical matter, paved the

way for a comprehensive review of the public land laws. The myriad other problems that did exist and still plague us will be detailed and examined in conjunction with the analysis of the Commission's recommendations.

### FRUSTRATIONS OF THE 1950'S AND 1960'S

In the time frame referred to above, *i.e.*, the 1950's and the early 1960's, several bills were introduced designed to modernize the public land laws. Some of these came about as a result of executive communications and some as a result of local or regional conditions, while others were advocated by members of Congress to achieve one or more specific objectives.

The Committees were frustrated in trying to address themselves to individual items on a fragmented basis. The interrelationships of the various aspects of public land policy made it essential in each instance that they look beyond the legislation pending at any one given date. At the same time, the legal jungle that had developed made it impossible for the author, responsible at that time to advise the House Interior and Insular Affairs Committee on technical aspects of public land law, to provide the Committee with definitive statements as to the law applicable in many situations.

In 1961, the Senate passed a bill for the establishment of a Wilderness Preservation System.<sup>13</sup> The Public Lands Subcommittee of the House Interior and Insular Affairs Committee held a series of hearings, starting October 30, 1961, on the act passed by the Senate and the several bills that had been introduced in the House. The amended bill subsequently reported by the House Committee contained, in addition to provisions for a Wilderness System, a proposed statutory framework governing the withdrawal and reservation of public lands, including a requirement that, except for specific situations, withdrawals in excess of 5,000 acres for any purpose could not be effected without an Act of Congress.<sup>14</sup>

---

13. S. Rep. No. 174, 87th Cong., 1st Sess. (1961).

14. H. R. Rep. No. 776, 87th Cong., 2d Sess. (1962).

When Congress adjourned in 1962 with no action having been taken by the House of Representatives on the aforementioned wilderness bill, the Chairman of the House Interior and Insular Affairs Committee wrote to the President of the United States, suggesting the need for a broader review and inviting the submission of the President's views to the next Congress. Following preliminary discussions between Committee and Administration personnel, the President responded, shortly after the start of the 88th Congress, concurring in the need for a comprehensive review of the public land laws.<sup>15</sup>

The President had designated Secretary of the Interior Udall and Secretary of Agriculture Freeman to represent him in discussions with the Chairman of the House Committee; the principals, in turn, designated Assistant Secretary of the Interior Carver, Assistant Secretary of Agriculture Baker, and the author to work on details. Many avenues were explored and agreement finally reached that the most effective means of providing a comprehensive review would be through the establishment of a statutorily authorized commission on which presidential appointees and members of Congress would sit and be advised by representatives of those having a major interest in the retention, management, and disposition of the public lands.

#### COMMISSION ESTABLISHED

The Act of September 19, 1964,<sup>16</sup> established a Commission of 19 members: 6 appointed by the President of the United States, 6 each from the Senate and House Committees on Interior and Insular Affairs, evenly divided between the majority and minority parties, appointed by the President of the Senate and the Speaker of the House of Representatives, respectively, and a nineteenth member chosen by the 18 appointed members to be the Chairman.<sup>17</sup> Thereafter, the Commission organized July 14, 1965, and unanimously elected a Chairman, Vice Chairman, and Director.

---

15. The exchange of correspondence is contained in House Interior & Insular Affairs Comm., 88th Cong., 2d, App. B (Comm. Print No. 39, 1964).

16. 43 U.S.C. §§ 1391-1400 (1964), *as amended*, (Supp. IV, 1969).

17. The composition of the Commission is set forth in an accompanying insert.

The author, as Director, was charged with the responsibility of forming a staff and formulating, developing, and completing a research program to produce the legal and factual background required by the Commission as a basis for its conclusions and recommendations.

Given the short-range life of the Commission and the need for specialists in a restricted field, formation of a staff presented many obstacles not encountered by those with whom we were competing for the same skills and talents. However, within five months after assuming the author's task on a full-time basis, we recruited the nucleus of our staff, including the senior members.

Assisting the Commission and the staff were an Advisory Council<sup>18</sup> and representatives of the Governors of the 50 states.<sup>19</sup>

### PLAN OF ACTION

In order to analyze public land laws and respond to the charge from Congress to make recommendations for the future, we determined that it was essential to examine every facet of the lands and their resources, as well as the manner in which the laws are administered. We, therefore, designed a program based on the principle of testing all policy against a standard of the effect that such policy has or might probably have. Specifically, this meant determining for each area the existing law and the effect of that law as it had actually operated and then to set up alternative policies and, for each of the alternatives, project the probable effect thereof. We then prepared, as much for our own benefit as for those with whom we would be working, a statement of the objective, functions, and operations that was to remain as the basic guide.<sup>20</sup>

We engaged in a period of problem identification before designing the elements of the research program. In this stage, as in every stage of our work, we consulted regularly with members of the Advisory Council and the governors' repre-

---

18. See REPORT at vi, vii.

19. *Id.*, app. C.

20. *Id.*, app. D., Attachment No. 2.



sentatives. In addition, regional meetings were held throughout the country to obtain the views of the public.<sup>21</sup>

Recognizing that we could not recruit, some for extremely short periods, technicians representing all of the disciplines that would be required, we decided to utilize consultants and contractors for the bulk of the research work. But to assure that we received what we thought was necessary, we decided that it was essential for us to prepare the study plans that became the specifications for the reports.<sup>22</sup>

Dividing the program into separate subjects made it manageable. It was a matter of convenience without ever losing sight of the concept that it was necessary for the Commission to examine all aspects of public land law and their interrelationships.

When a manuscript was received, it was immediately made available to all members of the official family who were asked for comments. As soon as possible thereafter, that subject was discussed in open meetings of the Commission with the Advisory Council and governors' representatives participating.

The staff prepared what we called a policy evaluation paper for each subject as the basis for Commission consideration. These papers, which formed the basis for initial tentative decision-making by the Commission, contained factual data drawn from various sources and statements of policy questions that needed to be considered, together with alternatives. For each alternative, there was some discussion of the impact or probable impact.

When the subject was discussed by the Commission, frequent reference was made to views of the Advisory Council and governors' representatives as expressed in the meetings or in comments that had been submitted earlier.

The staff project officer, who had either performed research or supervised a contractor, was generally assigned responsibility for presentation to the Commission of the subject

---

21. *Id.*, app. D., Attachment No. 3.

22. For listing of manuscripts prepared, see *id.* app. D., Attachment No. 4.

on which he had worked. The members of the senior staff, all of whom had an input in the development of each policy evaluation paper, joined in the discussion with the Commission and were questioned about various aspects of the law and facts.

While the research program had made a law by law review, Commission consideration was an overall policy with continual reference to the interrelationships among the subjects.

We believe that the manner in which policy was analyzed and presented to the Commission for review assured the thorough examination that was required of every facet of public land policy or possible policy. We had taken nothing for granted, we had no preconceived ideas, and we made certain that the Commission was presented with the opportunity of making decisions and, ultimately, recommendations that would leave no question as to what the Commission considered to be the maximum benefit for the general public.

#### MAXIMUM BENEFIT FOR THE GENERAL PUBLIC

In responding to the charge that it recommend policies keyed to the maximum benefit for the general public, the Commission endorsed the effort of the research program to develop criteria by which to assist it in ascertaining the measurement of that elusive standard. In suggesting the study, we knew, just as the Commission knew when it endorsed it, that there could be no positive black and white answers, no scientifically designed method. Nonetheless, we and the Commission pursued the project and are gratified with the progress made in identifying the factors to be given weight in seeking a balanced maximum benefit for the general public.

The Commission identified six<sup>23</sup> interests that in the aggregate constitute the attitudes of the general public. Each of these six categories of interest has its own aspirations, responsibilities, or needs which are discussed fully in the report. In arriving at positions and recommendations, these were weighed

23. The six categories of interest are the national public, the regional public, the federal government as sovereign, the federal government as proprietor, state and local governments, and the users of public lands and their resources.

and a balance sought. One of the obvious benefits of such approach is that in each instance you can see whose ox is gored—whether any will benefit or be burdened.

Having found the device useful in its own decision-making, the Commission recommends, as one of its basic precepts, that the interests of these six categories should be given consideration whenever public land decisions are made, thereby assuring to the extent possible that the maximum for the general public is achieved.

### PROBLEM AREAS

The examination of existing policy and its effects showed that in broad outline problems of the public lands, in addition to the matters involving the executive-legislative relationship discussed above, fell into the categories of intergovernmental relationships, *i.e.*, relationships between the Federal government and state and local governments, and relationships with users: Between the Federal government and users, among users, and between users and potential users.

In the discussion that follows, we will examine the Commission's underlying precepts and then its implementing recommendations as related to the three categories of problems set forth above.

### UNDERLYING PRINCIPLES

The Commission *Report* opens with "A Program for the Future" which is described as being "An introductory summary of the Commission's basic concepts and recommendations for long-range goals, objectives, and guidelines underlying the more specific recommendations in the individual chapters of the report."<sup>24</sup>

Its very first recommendation<sup>25</sup> is that there should be a reversal of the statutory policy of large-scale disposal of public lands and that future disposals should be conducted only after explicit determination that the lands involved will

---

24. REPORT, *supra* note 1, at 1.

25. *Id.*

achieve maximum benefit for the general public in non-Federal ownership. The Commission expresses its own opinion that at least for the present most public lands will not serve the maximum public interest in non-Federal ownership.

These determinations by the Commission are among its most significant. They are based on the Commission's earlier determination that Federal ownership of public lands is not by itself a justification for permanent retention in Federal ownership; while at the same time, it determined that there is good reason why the bulk of the public lands should be retained in Federal ownership. Had the Commission decided that all the public lands should be retained and managed by the Federal government, or that the Federal government should divest itself of ownership of all the public lands, the remaining task would have been much easier. But this earlier decision to permit some public lands—even if it turned out to be a relatively few acres—to be disposed of meant that procedures would have to be evolved to permit implementation of such policy.

In recommending disposition of some public lands for limited purposes, the Commission noted that in many instances there is general agreement that land within a national forest could best serve the public interest by being transferred to non-Federal ownership.<sup>26</sup> After observing that the only means of accomplishing such purpose at the present time is through a cumbersome exchange of lands, the Commission recommends that statutory authority be extended for the limited disposition of national forest lands, but only where (1) the lands will be used for a public purpose, and (2) they would be utilized for a higher use than in continued Federal ownership.<sup>27</sup>

### THE EXECUTIVE-LEGISLATIVE RELATIONSHIP

As a beginning towards identifying the lands that will meet the tests for retention or disposition, the report, based on a finding that generally areas set aside by executive action have not been given the same attention as those reserved by

---

26. *Id.*, 5.

27. *Id.*

statute, recommends an immediate review of executive branch set-asides "to determine the type of use that will provide the maximum benefit for the general public in accordance with standards set forth [in the] *Report*."<sup>28</sup>

The Commission, at the same time, expresses its conclusion that Congress has largely delegated its plenary constitutional authority over the public lands to the executive branch and that, as had been alleged by competing interests, even the express delegations that Congress made were often lacking in standards or meaningful policy determinations to guide the administrators. While recognizing that there is need for some administrative flexibility, the Commission concluded further that this does not justify the absence of legal standards and guidelines. Accordingly, another of the basic tenets set forth is that Congress should, in the public land laws, establish policy and prescribe guidelines for the executive agencies.<sup>29</sup>

A corollary basic tenet is then set forth that Congress should assert greater authority in the field of withdrawal, reservation, and set aside of public lands and enumerate the actions that will require legislation and those that may be accomplished under authority delegated to the Executive.

In these ways, the Commission comes to grips with the conflicts that had made the executive-legislative relationship a matter of overriding importance in the field of public land law and administration. These recommendations and others throughout the *Report* are based on a premise, adopted as part of the consensus reached, that, under the Constitution, Congress should exercise its responsibility to make policy.

The *Report* does not seek to place greater responsibility for the conflicts on either the executive or legislative branch. Rather, it finds both branches to have contributed to the difficulties and suggests recommendations appropriate to carry out the premise stated above.

---

28. *Id.*, 2.

29. *Id.*, 3.

30. The *REPORT* represents a consensus with a few separate views and a clear statement that the absence of separate views does not necessarily mean that all members are unanimously agreed on all implementing detailed recommendations.

Accordingly, throughout the *Report*, recommendations are made for the establishment of statutory guidelines with regard to specific subjects. In addition, the *Report* finds that in both the executive and legislative branches there is a need for organizational change to permit each to exercise its responsibilities more effectively. The merger of the Forest Service of the Department of Agriculture with the Department of the Interior is recommended;<sup>31</sup> also recommended is the centralization in one Committee in each House of Congress of jurisdiction over public land programs.<sup>32</sup>

### INTERGOVERNMENTAL RELATIONSHIPS

Because real property taxation traditionally has been a major source of revenue to finance local government, the tax immunity enjoyed by Federal lands was bound to be a cause of irritation. This was particularly true as the cost of local government increased. Accordingly, and because it had determined that there would be no large-scale disposal of public lands, the Commission examined the potential impact of its decision.

Revenue sharing programs had been put into effect so that states and local governments would receive a portion of receipts obtained by the United States from the sale of public lands and their resources.<sup>33</sup> Adding to the general difficulty was the fact that varying percentages of revenues were shared by the Federal Government leading to a claim of uneven treatment among the states.

The Commission found, however, that there was no relationship between the burdens of Federal ownership of land and the revenues derived from those lands.

Against this background, the Commission took into consideration the fact that additional millions of acres of land once deemed destined for private ownership would now remain in Federal ownership. Therefore, the basic precept was adop-

---

31. *REPORT*, at 3.

32. *Id.*, 6.

33. For an analysis of existing programs, see EBS MANAGEMENT CONSULTANTS, INC., REVENUE SHARING AND PAYMENTS IN LIEU OF TAXES, (PLLRC study report, 1968).

ted that the Federal government should, without regard to the revenues generated therefrom, compensate state and local governments for the burden of Federal public land ownership.

Because the standard method by which land owners support local government is through property taxation, it was deemed appropriate and, for that matter, necessary, to have Federal payments relate to regular property taxes. Recognizing, however, that some benefits flow from ownership of some public lands, the Commission recommends a public benefits discount.

Repeatedly, we were told by state and local agencies that they had no voice, or at best an inadequate voice, in the formulation of Federal policy for the use of public lands. This, despite the fact that many uses, *e.g.*, a new recreation area, resulted in a requirement for added local services such as roads or police protection. Government agencies maintained that all actions were coordinated with state and local governments but pointed out that the Federal government was not and could not be bound to follow the desires of such other units of government.

While our study of regional and local land use planning<sup>34</sup> bore out the inadequacy of coordination between the Federal agencies and state and local governments, it also brought out the fact that in many places there was no recognized or authorized planning group with which effective consultation could take place. The Commission's recommendations are addressed to both of these factors which will be discussed in detail in another part of this symposium.

At this point, it is merely pointed out that the Commission *Report* speaks out strongly, first as part of its underlying principles and later in implementing them, for planning in which state and local governments would have a significant role.

Water has always been the key to the development and use of the West. We learned long ago that the desert could be made to bloom, that livestock would die, and that people and

---

34. HERMAN D. RUTH & ASSOCIATES. (PLLRC study report, 1970).

industry would flourish or perish depending on the water supply. It is no wonder that controversy over water, which caused divisions between neighbors, would also be a major cause of division between the national government and state and local entities.

Unlike the eastern states, where ownership of land carried with it rights to water under the riparian system, the water-short West adopted the appropriation system under which prior use creates a priority of right and a failure to use water will result in the loss of that right. It is obvious that any differences or hint of differences over the order of priority will be a focal point for dispute.

This is exactly what happened when the Supreme Court, in a series of cases, held that the reservation of public domain lands for specific purposes carried with them the implied reservation of sufficient unappropriated water as needed for the reasonable use to support those reservations without regard to state law.<sup>35</sup>

Even though Federal departments and agencies had previously complied with state appropriation procedures, it was only natural that they should now rely on their right to use water based on the reservation or withdrawal of public lands. The states were predictably anxious to overturn, or at least limit, the application of the Reservation Doctrine.

The confusion and uncertainties that stem from the Reservation Doctrine will be examined in detail in separate papers presented as part of this conference. Suffice to say at this point that even though there was no immediate damage to anyone, the Reservation Doctrine is a threat to harmonious Federal-state relationships until such time as the confusion and uncertainty are removed.

The Commission recommendations are offered in the belief that these uncertainties can thereby be settled equitably—with no “victory” for any of the parties but most of all with fairness to the citizens who, until the 1963 decision in *Arizona*

---

35. See particularly *F.P.C. v. Oregon*, 349 U.S. 435 (1955), known as the Pelton Dam decision and *Arizona v. California*, 373 U.S. 546 (1963).



*v. California*,<sup>36</sup> could not be charged with knowledge of the impact of the land reservations or the water rights they obtained under state law.<sup>37</sup> This is in consonance with the underlying premise set forth by the Commission that in the functioning of our system "The Federal Government protects the rights of individual citizens and assures that each one is dealt with fairly and equitably."

Another conflict between the states and the Federal government arises from the absence of a formal delineation of the respective roles of the governmental units with regard to fish and wildlife management and habitat. Traditionally, game population has been regulated by the states while the Federal government managed the habitat on its public lands. The Department of the Interior Solicitor prompted latent state concern to surface when he held that "regulation of the wildlife populations on federally-owned land is an appropriate and necessary function of the Federal government when the regulations are designed to protect and conserve the wildlife as well as the land . . . this authority is superior to that of a state."<sup>38</sup>

The Commission's recommendations seek a balance but, in keeping with the basic premise of a strong Federalism, advocates the Federal supremacy in the event of a deadlock but then only on a finding of overriding national need. In addition, the *Report* recommends increased Federal-state cooperation and formal statewide agreements to coordinate fish and wildlife programs on the public lands.<sup>39</sup> Cost sharing on an equitable basis is also recommended.<sup>40</sup>

Other areas of conflict between Federal and state governments involve oil and gas conservation regulation, the existence of Federal enclaves where states have ceded legislative jurisdiction to the Federal government and satisfaction of outstanding land grants to some of the public land states.

---

36. *Id.*

37. The conference papers on water resources appear at 89.

38. 71 Interior Dec. 469, 473, 476 (Dec. 1, 1964).

39. *REPORT* at 159.

40. *Id.*, 173.

Each of these is recommended to be solved within the framework of the basic principles and premises enunciated as a foundation for relationships between the Federal government and other levels of government: Maximum coordination with the state and local governments with the Federal rule allowed to become the one that governs if there is a clear need. So, the states would not have authority to regulate oil and gas production on public lands or on the Outer Continental Shelf under the Commission's recommendations; legislative jurisdiction over Federal lands would, in most instances, not be acquired from a state and where previously obtained would be retroceded; and an equitable 10-year program would be adopted to clean up all unsatisfied land grants except the grants to Alaska, which under the Alaska Statehood Act,<sup>41</sup> may be selected up to 1984.

A final aspect of conflict between Federal and state and local governments has been the lack of uniformity and the absence of definitive criteria concerning the terms on which Federal properties are made available for use by state and local governments.<sup>42</sup> Based on a finding that the interest of all will best be served by encouraging state and local governments to assume responsibility for programs they can administer, the Commission recommends, as one of its principles, statutory provision of flexible mechanisms, including transfer of title at less than full value, in order to permit state and local governments to obtain the interest in land necessary to permit them to make the investment needed to meet program requirements.<sup>43</sup> Implementing recommendations would eliminate the distinctions between categories of lands and make the same standards applicable throughout the country.

### USER RELATIONSHIPS

The Commission's proposed solutions to the problems in the broad field we call "User Relationships" are founded on

41. See § 6, 72 Stat. 339, *as amended*, 48 U.S.C. 9026 (1964).

42. For example: Leaving Alaska aside, public domain land, 90 percent of which is in the 11 most western states, may presently be obtained at \$2.50 per acre in limited acreages for recreational purposes; but surplus acquired lands, mostly in the East, can be obtained by state and local governments only on payment of 50 percent of fair market value.

43. REPORT at 5.

the twin premises that the government treats its citizens fairly and equitably and that the major interests described above are all given consideration, with none given favoritism, so that maximum benefit for the general public is assured. But, before enunciating how these objectives would be achieved, the Commission set forth some additional underlying principles.

Throughout the testimony and communications received by the Commission, there were allegations made that the procedures utilized by the land management agencies were generally unfair to users and protesters alike. The Commission's review resulted in the conclusion that at best the regulations and procedures were cumbersome with no assurance of objective, impartial review of field-level determinations.

Accordingly, in the fifth of its eighteen basic principles the Commission recommends that there should be a statutory requirement that public land management agencies establish comprehensive rules and regulations after receiving all points of view. Taking cognizance of some of the testimony offered by witnesses, the recommendation includes a statement that provision should be made "for a simplified administrative appeals procedure in a manner that will restore public confidence in the impartiality and fairness of administrative decisions."<sup>44</sup>

There are several implementing recommendations designed to carry out the basic premises and underlying principle set forth above. The recommendations are comprehensive and cover the need for rulemaking, the use of advisory boards, statutory guidelines for adjudication procedures, processes on appeal, and effective judicial review. However, as in other areas where there will be detailed discussion by a panel, we will not duplicate the recommendations in this paper.

In discussing intergovernmental relationships, we noted that the need for effective meaningful land use planning is recognized by the Commission. Such planning is even more urgent to assure full citizen participation and satisfy the de-

---

44. *Id.*, 3.

sire, frequently expressed to us, that users and potential users should be consulted before land use decisions are made.

The basic principle recommended by the Commission focuses the need for statutory goals and objectives for planning with a view to obtaining the maximum number of compatible uses. The Commission then suggests an extension of the multiple-use doctrine to provide land managers with guidelines so that where one particular use "can contribute maximum benefit . . . that use should be recognized as the dominant use, and the land should be managed to avoid interference with fulfillment of such dominant use."<sup>45</sup>

The recommendations for explicit planning lay the foundation for much of the other recommendations made by the Commission. They set forth a blueprint for integration of government lands with the non-Federal public and private lands under sound principles of land use. A discussion of the planning aspects is also the subject of a separate paper and need not be examined here in greater detail.

The Commission from the outset had been concerned about the impact on the environment from any and all uses and nonuses. In our research program, we contemplated collection of information and data, legal and factual, relative to this vital aspect. During the period of our study, there came the growing awareness of the public to the importance of this subject.

The law today is virtually devoid of statutory standards for protection or enhancement of the environment on or near the public lands. This, the Commission's recommendations would reverse and provide a pattern of constraints equally applicable to all users. None would be able to degrade with immunity.

In one of its most far-reaching recommendations, the Commission sets forth a basic principle that would underlie all actions and be applicable to all lands. Designed to provide the highest standards of environmental quality in the use of the public lands, the Federal Government, as a landowner, would

---

45. *Id.*

be setting a good example for landowners throughout the country. The recommendation states:

Federal statutory guidelines should be established to assure that Federal public lands are managed in a manner that not only will not endanger the quality of the environment, but will, where feasible, enhance the quality of the environment, both on and off public lands, and that Federal control of the lands should never be used as a shield to permit lower standards than those required by the laws of the state in which the lands are located. The Federal licensing power should be used, under statutory guidelines, to assure these results.<sup>46</sup>

Throughout the *Report*, there are both major and subsidiary recommendations to support this basic principle. In all there are 51 additional specific recommendations covering all aspects of public land activity, including uses for resource development in every field, *i.e.*, mining, timber cutting, park use, fish and wildlife, etc. All of these will be discussed in the separate papers submitted by the panel on the environment.

Noting the diversity of fee structures now in existence and the lack of guarantee in the pricing of goods and services, the Commission recommends as a basic principle the establishment of statutory guidelines to provide generally the payment of full market value to the United States for its land and their resources, except that something less than full value should be obtained where there is no consumptive use.<sup>47</sup> For those who obtain use of the public lands under Federal Government ownership, the Commission recommends that there be greater assurance of a firm tenure and security of investment.<sup>48</sup>

These latter recommendations are coupled here because of their relationship. Many citizens expressed the belief that the United States was not receiving fair value, while many other users submitted proof of hardship caused by uncertainty of either the term of occupancy or availability of future supply. The research program supported both of these asser-

---

46. *Id.*

47. *Id.*

48. *Id.*, 4.

tions because of variations in law and the absence of statutory guidelines.

One of the significant aspects of this principle is that all users should pay some fee. This is extended in the implementing parts of the report to recommend nominal fees for recreation users and for those who hunt and fish on Federal public lands—nominal because they are nonconsumptive. This is seen as a matter of equity so that all users are treated with some degree of uniformity.

The specific fee structures will be treated separately in the panel discussions of range resources and mineral resources in connection with which there has been much public attention. The fees in other areas are no less significant and in all areas—except recreation and hunting and fishing—market value is to be the standard.

The Commission, in taking the position that the Government should, indeed, receive value, asserted the responsibility of the Government to respond accordingly and recommended security of tenure and of investment similar to that which would be afforded by a private landowner. Taking cognizance of the need to preserve the government's superior right to cancel a lease or permit, the Commission further recommends that in such instances, "the user . . . be equitably compensated for the resulting losses."<sup>49</sup>

In consonance with its basic conclusion that a review of all the public lands will establish that some will serve the maximum benefit for the general public in non-Federal ownership, it became necessary for the Commission to set forth its proposed guidelines as to the types of lands that might be sold and the general terms and conditions to be applicable to their sale. As indicated above, there had been, prior to the time of establishment of the Commission, no general disposal law. Simultaneously with the creation of the Public Land Law Review Commission, a temporary Public Land Sale Act<sup>50</sup> was enacted authorizing the sale of public domain lands for resi-

---

49. *Id.*

50. 43 U.S.C. §§ 1421-1427 (1964).

dential, commercial, agricultural, industrial, or public uses. This Act, as extended, will expire December 22, 1970.

The Commission, in its series of basic recommendations, advocates statutory authority for the sale at full value of public domain lands necessary in connection with mining activities and where suitable only for dry-land farming, grazing of domestic livestock, or residential, commercial, or industrial uses.<sup>51</sup> A specific recommendation is made for authorizing legislation to encourage serious examination of the public lands for use in the expansion of existing communities or the development of new towns and cities.<sup>52</sup> The actual designation of such areas would result from a thorough examination in the review of all uncommitted public lands and in accordance with coordinated planning under the comprehensive rules and regulations that would underlie all public land actions.

While the Commission supports a delegation of authority to the Secretary of the Interior for the sale of lands for the expansion of existing communities, it recommends that proposals to make land available for new cities should be considered by Congress on a case-by-case basis.<sup>53</sup> This is deemed essential for many reasons.

First, we have no overall national policy relative to the establishment of new cities although a bipartisan National Committee on Urban Growth Policy predicted the need for 100 new cities of 100,000 each and 10 of larger size to be built by the year 2000.<sup>54</sup>

Second, the lack of recent experience in the utilization of public lands for this purpose makes it imperative that the Congress give consideration to the impact that such projects would have and, particularly, the impact on the environment. In addition, it is possible, in the words of the *Christian Science Monitor*,<sup>55</sup> that "Federal land could be used for pilot, exem-

---

51. REPORT, 4.

52. *Id.*, 5.

53. *Id.*

54. NATIONAL COMMITTEE ON URBAN GROWTH POLICY, THE NEW CITY, 1969 (a report published for Urban America, Inc.). See also URBAN AMERICA INC., DANIEL W. COOK, AND CONSULTANTS, PROBABLE FUTURE DEMANDS ON THE PUBLIC LANDS FOR NEW CITIES AND URBAN EXPANSION. (PLLRC report, 1970).

55. *Christian Science Monitor*, Boston, Mass., June 29, 1970, at 11, col. 2.

plary projects—for creating new communities which maintain the balance of nature. . . .” a notable objective for which it would be difficult, if not impossible, to establish advance statutory guidelines in the absence of experience.

One of the sources of difficulty at all levels and among all interested parties has been the distinction between “public domain” and “acquired” lands.<sup>56</sup> Each statute referring to public lands has had to carry with it a definition or one would not know what was meant since in many areas, the term “public lands” has become synonymous with the term “public domain lands”. In the definition of public lands concerning which the Public Land Law Review Commission was required to make recommendations, there are both public domain and acquired lands.<sup>57</sup> In our research program, we examined the laws and their impact relating to all lands, except those excluded by statute, that had relevance to the lands defined by the Act.

The Commission found no logical basis for what it called the “artificial distinctions between public domain and acquired lands” in both legislation and administration, and recommended that these distinctions should be eliminated.

We noted under the executive-legislative relationships, the need expressed by the Commission for consolidations of jurisdiction in both branches of government. These recommendations also have significance in user relationships because the Commission found that differences, contradictions,

56. The *public domain* lands are those that were acquired by the Federal Government through cession, purchase, etc., were never used for non-federal purposes, and have never left federal ownership; the term *acquired* lands is used to designate those lands that have been acquired by the United States from non-federal owners within the United States even if such lands may have originally been public domain that passed into non-federal ownership before being reacquired by the United States.

57. The only lands specifically excluded were Indian reservations which, for the most part, have been carved from the public domain; the legislative history of the Commission's Organic Act reveals that it was not intended to include revested Oregon and California railroad land grants or the reconveyed Coos Bay-Wagon Road lands; some acquired lands were not mentioned either during consideration of the legislation or in the statute, which generally includes in its definition all public domain lands and all national forests and wildlife refuges and game ranges without regard to the character of the lands involved, together with the disposition or restriction or disposition of mineral resources in lands under the control of the United States in the outer continental shelf. (See Act of Sept. 19, 1964, Publ. 1. No. —, § 10, 78 Stat. 928 (codified at 43 U.S.C. § 1391 (1964) as amended (Supp. IV, 1969)).



and duplications in policies and programs are not only inefficient and uneconomical but have been the source of much of the confusion that citizens have in dealing with the Government in public land matters. Further, it was noted, that the existing division of responsibility is in large measure the cause of the uncorrelated public land laws that gave rise in part to the creation of the Commission.

These are the broad outlines of the basic principles and recommendations. Many recommendations, in addition to those cited, are made to implement them. They include a plan for a start on classifying lands for varying degrees of environmental quality, means whereby programs that are business enterprises are run on a business-like basis, modification of the mining laws to eliminate deficiencies and abuses of the 1872 law, provide for improved administration of the Outer Continental Shelf, better guidelines for the establishment and maintenance of public land areas devoted to outdoor recreation use, equitable settlement of issues involving trespass and disputed title,<sup>58</sup> acquisition, disposal, and exchange authorities would be simplified and made more equitable.

All in all there are 405 specific recommendations; 18 underlying principles; 137 major numbered recommendations; and 250 subsidiary recommendations. The number alone testifies to the fact that the Commission came to grips with problems in every facet of public land policy.

Now, with 5 years of study and the expenditure of some \$7 million, we are ready to go forward towards revision of the public land laws. The *Report* of the Public Land Law Review Commission can be a starting point for the legislative process as well as for the revision of regulations. The Commission has not asked for unanimity. It does ask for understanding.

Since everyone agrees that revision is needed, the only question is to select the precise means. The data are in the manuscripts of the research program, the consensus of a group

---

58. In a departure from existing law, the Commission would extend to good faith occupants of federal land the doctrine of adverse possession; citizen could bring quiet title suits with the Federal Government as defendant; and the defenses of equital estoppel and laches would lie available against government suits trying title or for ejectment.

of diverse backgrounds is in the Commission report. These can, should, and will be utilized in the months and years ahead as we seek the legislative changes that must take place. Let us all remember that it may take several years to effect basic changes; but let us not forget that we do have a point of departure.

## APPENDIX

CHAIRMAN: Honorable Wayne N. Aspinall

APPOINTED BY THE PRESIDENT OF THE UNITED STATES:

Laurance S. Rockefeller, New York City, New York  
Philip Hoff, Burlington, Vermont  
H. Byron Mock, Salt Lake City, Utah (Vice Chairman)  
Robert Emmet Clark, Tucson, Arizona  
Dr. Maurice K. Goddard, Harrisburg, Pennsylvania  
Mrs. Nancy E. Smith, San Bernardino, California

APPOINTED BY THE PRESIDENT OF THE SENATE:

Henry M. Jackson, Senator from Washington  
Clinton P. Anderson, Senator from New Mexico  
Alan Bible, Senator from Nevada  
Gordon Allott, Senator from Colorado  
Len B. Jordan, Senator from Idaho  
Paul J. Fannin, Senator from Arizona

APPOINTED BY THE SPEAKER OF THE HOUSE OF REPRESENTATIVES:

Walter S. Baring, Representative from Nevada  
Roy A. Taylor, Representative from North Carolina  
Morris K. Udall, Representative from Arizona  
John P. Saylor, Representative from Pennsylvania  
Laurence J. Burton, Representative from Utah  
John Kyl, Representative from Iowa

Director: Milton A. Pearl