

# Land & Water Law Review

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

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Article 6

1970

## Discussion: Introduction and Overview

Symposium

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### Recommended Citation

Symposium (1970) "Discussion: Introduction and Overview," *Land & Water Law Review*: Vol. 6 : Iss. 1 , pp. 33 - 45.

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# LAND AND WATER LAW REVIEW

VOLUME VI

1970

NUMBER 1

## DISCUSSION: INTRODUCTION AND OVERVIEW

**Supplemental remarks concerning the purpose, direction,  
and scope of the Commission and its Report.**

**General explanation of problems facing the Commission.  
The future of the Report as regarding possible  
implementing legislation.**

MR. MOCK: I want to lay down just a few general thoughts as a challenge. We need to consider where we go from here, what the real basic principles, and the real basic problems are that we must face in the implementation or the defeat of the recommendations of the Public Land Law Review Commission. The main thing that I am asking is that you follow the general practice of psychiatrists: first examine yourself before you become the advisor to those who consult you. This must be done so that your recommendations can be weighed in light of the national interest as distinguished from your personal interests.

Secondly, I am saying we have made proposals that are of a consensus. The implementation of this report is going to take the best efforts of everyone. I think we have to keep our eyes on the fact that, whether we like it or whether we do not, the public is going to assert its responsibility as individuals, whose lands these are, to have a voice in the administration of these lands just as they are now necessarily insisting that they have a voice in related problems: the environment, civil affairs, property rights, and living conditions. The public is going to have this voice, and I think our challenge is to run ahead of the public and try to get to the head of that parade.

MR. PEARL: One of the things that the Commission had as an objective in all of its work was to seek and obtain the simplification of this morass of public land laws. Conceding that the memorandum which I wish to quote to you is not typical of everything that has been done in the bureaus, I think it is symptomatic of some of the problems that have contributed to this morass of public land laws. This was an information memo that was put out by the Bureau of Land Management in October, 1962. The subject is the relationship between case counting and case serializing.

There is a certain amount of confusion existing about the relationship between landowners, case counting, and the monthly case work reports; and the practice of serializing cases for reference purposes. As we have said from time to time, we cannot serialize this encounter. The statement reveals the misunderstanding about the character of the serializing processes. The purpose of the assigning of the serial number to a file is to facilitate the filing in following up on it. In a theoretical sense the serial number is just the file reference. As a practical matter, there has been a close relationship between the serial numbers and case counting because of the obvious fact in the past nearly all serialized cases were counted. It does not mean that we have to count all the serialized cases. Increasingly, we are serializing what might be called, for want of a better word, non-count cases. All this means is that you do not count them in the monthly case work reports listed in the Director's office. The land office itself is free to keep count of them in any way it wishes, and by all means has an obligation to give them the same file control as any other serial case.

I think that if we can dispel the atmosphere that is conducive to production of this type of memorandum, we will accomplish something. I am confident that the work which has been done by the Public Land Law Review Commission and its recommendations will lead to new public land laws which will do just that.

The first recommendation that the Commission makes in its *Report* is that the present policy of large scale disposal

that is on the statute books must be reversed. The Commission also makes another finding at the beginning of its *Report*. This is one of the earliest findings or conclusions the Commission made. This finding was that not all the public lands should be retained in federal ownership merely because they were federally owned. The Commission also decided at that time that not all public lands should be disposed of. Keep in mind that there were people who were pressing this on the Commission. Testimony was heard from various people; some said keep all the public lands because you have them, and others said get rid of them all. Now if you belong to the school that thinks that all the public lands should either be disposed of or retained, then you have a basic disagreement with the Commission's underlying premises, and you cannot agree with anything else that follows. You will find fault with various recommendations because the premises of the Commission's *Report* is that there must be an examination made of the public land to determine the public interest test: which lands shall be retained and managed and which shall be disposed of? At the same time the Commission says that, in its opinion, only modest disposals will be made at this time and that only comparatively few lands will serve the public interest in non-federal ownership.

If you are going to have any lands in non-federal ownership, you have to establish the means by which to accomplish it. Some of the criticism that has been leveled at the Commission's *Report* has been leveled at the means to accomplish the goals, when in effect the people leveling this criticism do not agree with the goals. If you do not approve of the recommendations, recognize that and just say that you disagree with the basic premises. Now, if you agree with the basic premises, we can see how the Commission has treated everything that needs to be treated. For example, one of the organizations at one time said to the Commission:

You do not need to study these various things because all you have to do is decide, without any further study, that all the land is going to be retained in public ownership; then it is just a question of going ahead and attending to the management of it. Get all the

law books and statute books cleared by repealing all the disposition acts and the job would be done.

However, we start with the premises that there are some lands that may serve the public interest in non-federal ownership.

The Commission was faced with the problem of determining what the public interest is, or in the words of the statute establishing the Commission: "What is the maximum benefit for the general public?" With these nice, high-sounding words the Commission should make recommendations keyed to this congressional policy. The public land of the United States will be retained and managed or apparently disposed of in order to best serve the general public. We undertook, by study, to find some criteria by which the Commission could be of assistance in determining what is the maximum benefit to the general public. We concluded that it is the aggregate of the six interests which are discussed in the *Report*, that is, the national public, the regional public, the Federal Government as sovereign, the Federal Government as proprietor, state and local government, and the users of public lands and resources.

The Commission suggests that land value decisions in the future be based on this type of approach. If you apply this test you can determine, at least to some degree, what public interest will be served and what maximum benefit to the general public is likely to be served by disposal of the land. If you should find out by applying this procedure that it would be to the best interest of the United States, generally, to dispose of federal lands, then we should go ahead and dispose of them. This is the second hangup that people might have by saying that you are recommending disposal of certain types of lands. Well, the Commission is recommending the disposal of lands only if they meet this test after going through a procedure of coordination and planning right from the start. This is one of the key recommendations which the Commission made, one of the foundation recommendations, if you will.

The planning process started before anything was put out for comment. We stated the coordination process on an advisory level, locally and nationally, and coordinated with all

people who were interested and, of course, included local and state government agencies. Planning became a very important thing that carried through every step of the way. The Commission recommended that there be rule making and that land management agencies be required to go through the process of rule making, and unless they put in implementing regulations in accordance with the law, they would be subject to being stopped from going forward with any program. By the time we get to the regulation stage of defining the use of the land or how it is going to be managed or disposed of, all of these processes will have been first adhered to, and all views will be known and everyone will have an opportunity to be heard. These are the basics.

Another basic which the Commission mentioned in one of its early chapters carries throughout the whole *Report*. This is the concern for the environment which the Vice-Chairman previously discussed. The Commission had a concern for environment before it became a popular cause and the Commission was thinking always in terms of this in connection with all these subjects. In our research programs we had called for some information, or at least we thought we did, in the individual commodity studies on the impact of the environment. We got very even results, and we thought it would be a rather simple thing to have, after the commodity studies were completed, an environmental study which would primarily pull together information from other studies. This did not work out quite the way we planned, and it was necessary to have a much larger study in environment than had been contemplated. In addition to the basic recommendations the Commission made in the portion on programs for the future is the recommendation that the United States should use its authority to protect environment not only on the public lands but off the public lands. In addition to that general recommendation, there are 51 specific recommendations running through the *Report* for the protection and enhancement of the environment.

Since the subject of timber is not on the program, I would like to just mention one aspect of the timber problem where

environmental control is very important. The Commission has recommended that if a pulp mill or lumber mill is in violation of anti-pollution laws, the federal government should not sell any of its timber to that company for use in that particular plant. Now the Commission has said in its judgment that this proposed recommendation should not extend to other than the primary processor; for example, if the company was in violation 2000 miles away, and the products of the public land were not going to go to that plant, but to a plant that was in accordance with pollution standards, then that is all right. I mention this because I think that this is a rather basic and far-reaching recommendation.

The paper which I submitted is organized on the lines of three types of problems that we of the staff thought that everything, more or less, fell into. After we had finished looking at this we found out that the big problems that were causing the public land difficulties were: (1) the executive and legislative relationship, (2) intergovernmental relationships which, of course, includes the federal government, states, and local government, and (3) user relationships, that is, the federal government and the user, users with each other, and users with potential users. If you analyze the subject in these categories, we think all the problems that were covered can be categorized in this way, and we can get a profile view of the recommendations which the Commission made.

In the executive-legislative area the Commission has made the recommendation for a greater voice for Congress. Let it be understood Congress is not ready to take over the management of public laws as was intimated in a couple of newspaper articles I saw. No, what the Commission has done is to criticize the Congress for not having fulfilled its responsibilities under the Constitution to make rules and regulations for the management and disposition of the public lands. The Commission throughout the *Report* and in all its recommendations suggests the establishment of statutory guidelines, not details, but guidelines. The Commission suggests that where there is a delegation of authority it should be spelled out, and this, for example, is in the withdrawal, reservation, and classifi-

cation procedures. Large scale withdrawals would be made by Congress, but there would be a specific delegation so that the executive and the public would know the types of withdrawals that could be made by the executive.

In the intergovernmental relations area one of the first things that the Commission dealt with, just because it happened to come that way in our program, was a matter that has been of great concern, that is, the impact of federal land ownership on state and local governments. The Commission found here that revenue-sharing programs bear no relationship to the burdens public land ownership has on the jurisdictions in which they lie. The Commission recommends a payment in lieu of tax system with a public benefit discount. Payments would not be the same as if the property were on privately owned land. The Commission also recommends greater and continuous coordination between the federal governments, even to the point of suggesting regional commissions along the line of the water commissions although not necessarily as a part of the water commission set-up. Generally, the Commission says give the state and local government a greater role, but then the Commission as one of its basic tenets and underlying principles comes out for a strong federalist position. However, when you come to the showdown stage of confrontation, the supremacy of the federal government must govern, especially when there is an overriding national need, the federal government must have the final right.

Possibly the most difficult subject for the public is the question of user relationships. As far as the relationship between the federal government and the user is concerned, the Commission advocates simplified procedures. There must be regulations that can be looked at to ascertain what the rules are. The Commission recommends a logical appeal procedure. The Commission further recommends a series of means by which lands could be classified for disposal or for retention; and then the rules for management under continued federal ownership. All of this would be done through the process of determining where the public interest lies.



In one of the many papers which were prepared for the Commission, a proposal was made that we internalize the externalities. I do not know whether the Commission has succeeded in internalizing the externalities. When I find out in further detail what it means, maybe I will know if the Commission was successful in doing that.

The Commission does not ask for unanimity. There was not unanimity in the Commission. There was only a consensus. Some of the Commissioners have indicated separate views in some instances. In other instances where they have not expressed separate views, none of the commissioners concurred 100 percent in every single detail of the *Report* and its recommendations. What is asked for is understanding. We should utilize the Commission's *Report* and backup material as a starting point from which to go forward to do the job of revising the public land laws.

**MR. MARTZ:** There were various alternatives available for the Commission in preparing a format for this *Report*. One was to look at the problems that developed in the study and make a specific response to those. Another alternative might be to try to do what these executive agencies are doing now in preparing proposed legislation. The third alternative was to state general policies that might guide agencies and citizens in making legislative proposals in the future. I wonder if you could tell us how and why the Commission selected the particular format of the *Report*.

**MR. PEARL:** I am not quite sure that I can answer that question categorically. This goes back to the legislative stage when the bill to establish the Commission was submitted to Congress. Congress recommended that the Commission be responsible for setting guidelines for future policy. When the Commission was organized, this thought was carried forward right from the beginning and the Commission really never gave any further thought, after the initial stages, to drafting legislation. This was made clear in the early stages of the proceedings that the Commission would not produce legislation, but would rather produce guidelines for future policy. This is where the questions came up later on in the Commission's

deliberations. We, from the staff's point of view, tried to be sure that nothing would be overlooked, that the Commission would be compelled to face up to every single problem that might exist. Some of the Commissioners expressed the belief that some of the material which was presented to them was in too much detail and that they should not look at a lot of detail, rather they should focus on broad policy. There was a difference in opinion as to whether particular items were specific details or broad policy. We, on the staff's side, tried to bring in as much as we could so that everything would be there to enable the Commission, on a subject by subject, item by item basis, to decide whether it was a matter of detail that could be left out or not. However, you can see that the Commission did answer quite a few pointed questions which some people might consider detail, but in the overall view are guidelines. This is what the commission considered as its charge from Congress.

MR. MARTZ: I know your concern from the start was to produce something that would be implementable and would not be put on the shelf. Are you satisfied that this objective has been accomplished?

MR. PEARL: I am. I think the Chairman is satisfied with that, the Vice Chairman is satisfied with that, and I think even some of the Commissioners who may have expressed some doubts at one time are now satisfied. I think all the Commissioners are now satisfied that this is a good beginning point.

MR. JOHNSON: If it does not breach confidences I would appreciate knowing about your viewpoint of the Commission itself, that is, whether it was made up of the type of people that you thought were representative? This asks a great deal, I suppose, but I feel that your views on this subject would be very valuable.

MR. PEARL: I think the Commission had a pretty good balance. I was asked at one time whether the predominance of Westerners on the Commission would make it impossible to come forward with good recommendations. The fear was that these Westerners would have selfish interest in the

disposition of these public lands. My answer at the time was that if we could get the Commission to arrive at a consensus with such people as Laurance S. Rockefeller and Maurice Goddard of Pennsylvania and Phil Hoff of Vermont, the Western predominance would not mean anything. If we could get consensus with these different types of people, then there would be no problem. On the other hand, if we could not get consensus, there would be no other problem either as the *Report* would be put on the shelf and forgotten. The consensus that was achieved is significant.

MR. CLARK: I think it is appropriate for me to comment on the discussion that has thus far been presented. First of all, in reference to the predominance of Westerners on the Commission, I would observe that if anyone was fundamentally opposed at all times it was the Westerners. I think the answers to the questions which have been presented are covered, first of all, by the origin of this Commission, that is, in the whole legislative background that has been referred to. And secondly, the composition of the Commission required people not from particular parties but people who would express their views. It should be noted also that there was a scarcity of people who were professionally qualified in some areas. Those of us who were without a staff were at a disadvantage in that we had to read and prepare our materials by ourselves. Therefore, we had to pick out the areas that we particularly wanted to emphasize. I think, also, the time factor irritated a great many of us on the Commission. We were all under a great deal of pressure to read a lot of material in a short time. Some of us who had more of an academic interest were somewhat irritated that we did not have more time to go over these recommendations more thoroughly. As a consequence, there are many provisions that I would like to have commented on, that I was unable to take the time to comment on. I saved my ammunition for those points I thought were more important than the others. I think other members were inclined to do this but did not do it.

My main disappointment was not with the public members of this Commission who kept the Commission going and who

had the best attendance record. It is no secret that the public members attended meetings and did the work. The main disappointment was that some of the Members of Congress not only had poor attendance, but did not do much work. Let me make it clear that I am not talking about the Chairman. I am talking about other members of Congress who had a lot to say about the *Report* later. I feel that those people are in a poor position to criticize what happened when they were not there.

MR. BARRY: You indicate that this is not a unanimous report but that it is a consensus. The preface has the signatures of the members and indicates that there was agreement on broad, general principles, but not always unanimity on the details. Now this is all very fuzzy to me. If I understand what a consensus is, it is something like this. If my wife wants to get up at seven o'clock in the morning, and I want to get up at eight o'clock in the morning, we get up at 7:30 in the morning, when nobody wants to get up. At least you work out some kind of a compromise where you both agree, but you have just told us that many of the Commission members have said there are a lot of recommendations in this *Report* that they do not approve.

MR. PEARL: No, what was meant is that none of the Commissioners approved 100 per cent of the details.

MR. BARRY: Do I understand that on each question there was a vote and the majority vote carried on that recommendation?

MR. PEARL: This is partially what happened.

MR. BARRY: If this is what happened, then nobody can be pinned down on this *Report*.

MR. PEARL: On some of these things there was a majority vote, but when we got to the process of drafting, the process was to take temperate positions. Then the second bite of the apple, so to speak, was when the draft of the chapter came before the Commission. When the draft of the chapter came before the members of the Commission, unanimity was frequently reached.

MR. BARRY: That does not mean that they accepted the recommendations?

MR. PEARL: Yes, they did at that point; however, we have no record because in those instances there were no formal votes taken. A consensus, as we use the word, is a broad, general agreement on general principles with the implementation left to be worked out in the legislative process, using the Commission's majority recommendations as a starting point.

MR. MOCK: Essentially one statement needs to be added here. While we had rather major divisions, we often had a vote when we had a quorum present and not all of the interested Commissioners were in attendance. The Chairman never allowed any of those decisions decided by a quorum to be final without reconsideration with every member of the Commission entitled to the right to come in and have another bite at it. This was a little tedious at times, but the Chairman was persistent and did not allow things to go through even though he might have preferred the original vote without allowing a reconsideration of the question with all members present. This watered down a lot of our final positions, but it gave every member a chance to be heard on these important matters. It also denied them the chance of ever saying that if they had been there they would have done something differently, because they were forced to participate.

MR. CLARK: As I have stated before I see that there is no reason for me to attack this *Report* nor is there a reason for me to defend the *Report*, but I do think in the interest of making some things a little clearer, a few observations ought to be made. First of all, my personal feelings about this *Report* are very good as far as it went. It is like some young law professors. They are good in their way, but do not weigh enough. This report is not criticized because it does not do something good but because it does not go far enough. My criticisms are in print. They are there for people to read, but there are some observations in view of this discussion that I think I ought to make.

Disappointment was expressed that we had not recommended legislation. All I can say right off hand is that if this Commission had started to recommend legislation, it would still be meeting. I can predict also that I could not sign such a report in light of the legislation that it would recommend, and I would not be alone. There would be a lot of others in the same position.

There was always a contest in the Commission between those members of the Commission who had to get elected first. There were thirteen of those members. Their first consideration was: what will the constituency say about this? Then there were some of us who said, "Listen we ought to have some goals for the future," so this *Report* does represent compromise and consensus as the director, Milton Pearl, has said. This resulted in the very practical attempt of trying to adjust the "I have to get elected" concept with the practicality of what we would be doing for the future. Some of these areas that involved environmental protection were urged very seriously by some of us, not a majority sometime, but the majority accepted them in good faith and said that we needed to do some of these things.