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## A Review of the Public Land Law Review Commission's Recommendations of Significance to Grazing

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# LAND AND WATER LAW REVIEW

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## A REVIEW OF THE PUBLIC LAND LAW REVIEW COMMISSION'S RECOMMENDA- TIONS OF SIGNIFICANCE TO GRAZING

*Joseph R. Geraud\**

### INTRODUCTION

My immediate assigned role is to present a brief synopsis of the Public Land Law Review Commission's Report with respect to grazing.<sup>1</sup> Having spent most of my young life witnessing the changes in livestock operations resulting from the passage and implementation of the Taylor Grazing Act,<sup>2</sup> and listening to my uncle comment on the competence of people trying to tell him how to run his sheep, I have had great interest in public lands, and particularly the relationship of those lands to the grazing industry.

About 1950, I became interested in public lands grazing in a more formal way, it having occurred to me that no one had ever paid much attention to public lands and grazing from a legal standpoint.<sup>3</sup> Some of the Commission's report and some of the remarks made here today take me back to 1950. At that

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1. See generally PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970). [Hereinafter cited as REPORT].
2. Taylor Grazing Act, 48 Stat. 1269 (1934), as amended, 43 U.S.C. §§ 315-315g, 315l-315m, 315m-315p (1964).
3. Since 1950, more attention has been given this consideration. See Ragsdale, *Section 3 Rights Under the Taylor Grazing Act*, 4 LAND & WATER L. REV. 399 (1969) and Kingery, *The Public Grazing Lands*, 43 DENVER L. J. 329 (1966) for examination of the operations of existing law. There have been more treatments of the public lands and grazing from a non-legal standpoint. See e.g., Calef, *Private Grazing and Public Lands* (1960); Clawson & Held, *The Federal Lands; Their Use and Management* (1957); Foss, *Politics and Grass* (1960); The Public Lands (Carstensen, ed. 1968). Some of these footnotes treat only the Taylor Act; others review public land policy generally.

time, I was attempting to define just how a person could conduct some endeavor on public lands with some assurance of being able to continue that endeavor. Of course, this is nothing more than the basic concept of property, an attempt to define the relationship between an individual and things. Put another way, I was attempting to define how an individual could define and realize his reasonable expectations concerning the public lands, based on the system of law provided.

It has always seemed to me that the realization of expectations is one of man's greatest ambitions, and that the frustration of expectations is one of man's greatest problems. If we have a society in which the basis for expectations is correctly stated, learned and developed, in order to diminish the chance of frustration through misunderstanding, I think we have a happier society, and perhaps happier individuals, no matter what an individual's particular expectation might be.

From my consideration of public land laws, I came to the conclusion that there is no way of defining expectations with respect to grazing on public land on the basis of the existing laws. This *Report* can serve as a firm basis for going ahead with the work of revising public land laws into a form such that persons can base their expectations upon a predictable system.

A review of a 352 page report that represents the consensus of a commission resulting from five years of study supported by an expenditure of over seven million dollars as an expression of concern as to what should be done with 765 million acres of land can serve only to direct attention to those recommendations of the Commission which could serve as the basis for changes or reaffirmance of current policies affecting grazing upon lands under the control of the federal government. The Commission's recommendations are already well summarized and it is felt that this review may be useful if presented from the viewpoint of a user of public lands for grazing purposes. At the outset such a user, as in the case of all other interested persons, must appreciate that the Commission's report is advisory, and that the recommendations will be effected only upon acceptance by the appropriate

branch of the federal government. If it is assumed that the *Report* will be accepted as policy guidelines for the future, it appears inevitable that some years will transpire before the recommendations can be completely placed in effect. However, dependent upon the nature of specific recommendations and their compatibility with existing law, it would be possible for federal agencies to institute changes in accord with the recommendations of the *Report*.

#### AVAILABILITY OF PUBLIC LANDS FOR GRAZING

The PLLRC Report begins with the initial principle that the current disposal policy reflected by existing statutes should be repealed, particularly in view of the fact that it has been rendered ineffective by administrative action.<sup>4</sup> The recommended policy would provide for the disposal of those lands that will achieve maximum benefit for the general public in non-federal ownership, and would retain lands whose values must be preserved so that they may be used and enjoyed by all Americans. The Commission expresses the view that while there may be some modest disposals, most public lands would not serve the maximum public interest in private ownership. However, the second recommendation of the Commission calls for an immediate review of all lands not previously designated for any specific use, and of all existing withdrawals, set asides, and classifications of public domain lands that were effected by Executive action to determine the type of use that would provide the maximum benefit for the general public.<sup>5</sup> Further, the *Report* calls upon Congress to establish national policy in all public land laws by prescribing the controlling standards, guidelines, and criteria for the exercise of authority delegated to executive agencies.<sup>6</sup> A specific recommendation is made for legislation authorizing the sale at full value of public domain lands required for certain mining activities or where suitable only for dry land farming, grazing of domestic livestock, or residential, commercial, or industrial

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4. REPORT, 1-2.

5. *Id.*, 2.

6. *Id.*, 2.

uses, where such sale is in the public interest and important public values will not thereby be lost.<sup>7</sup>

At this point in time, it does not appear possible to predict whether implementation of such recommendations would result in an increase or decrease in the numbers of acres of federally owned lands available for livestock grazing. While sales of public lands might reduce grazing acreage in specific situations, review of existing withdrawals, etc., could well reveal that lands administered by some federal agencies can accommodate grazing uses that have heretofore been prohibited. Also related to the availability of public lands for grazing is the recommendation that Congress reserve unto itself exclusive authority to withdraw or otherwise set aside public lands for specified limited-purpose uses.<sup>8</sup> Such an approach may well result in the prevention of withdrawals that needlessly limit types of uses such as grazing.

If attention is turned toward future ability of a rancher to acquire by purchase public lands deemed valuable for grazing, it would probably be sound to conclude that there would be some opportunity for such purchases. The extent would be dependent upon the enactment of Congressional guidelines that recognized a class of lands that are valuable solely for grazing with no value for any other use. The *Report* recommends that such lands be identified and sold, but notes that watershed values, wildlife and outdoor recreation are important uses of public grazing land.<sup>9</sup> In the words of the *Report*: "The basic criteria for classification should be that the lands be chiefly valuable for grazing livestock, that they have few or no other valuable uses which would not be equally, or as well, realized under private ownership, and that their disposition would not be likely to complicate unduly the management of retained lands. In identifying those lands that are to be transferred to private ownership, no distinction should be made unappropriated, unreserved public domain and Land Utilization Project lands, and Forest Service grazing lands."<sup>10</sup>

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7. *Id.*, 4-5.

8. *Id.*, 2.

9. *Id.*, 115.

10. *Id.*, 115.

When classified for sale, a preference of purchase at full market value by holders of existing base properties would be recognized. However, fixed easements for public access across such sold land would be retained, and the title conveyed would be subject to restrictions that the land be used for grazing purposes for a reasonable time. Violation would result in injunctive action against unauthorized use or reversion of the title. The intent of restrictions is to minimize land speculation.<sup>11</sup>

#### NATURE OF TENURE ON GRAZING LANDS

A basic policy recommendation of the Commission is that statutory provision be made to assure that when public lands or their resources are made available for use, firm tenure and security of investment be provided so that if the use must be interrupted because of a Federal Government need before the end of the lease, permit, or other contractual arrangement, the user will be equitably compensated for the resulting losses.<sup>12</sup> The grazing recommendations pursue this policy by recommending that the term of grazing permits be established by statute so that permittees would have assurance of use and administering agencies would have to plan land use adjustment around scheduled permit expiration dates.<sup>13</sup> Further, the permits should detail with precision the range conditions which will trigger use changes.<sup>14</sup> Whenever practicable, rangeland would be allocated on an area basis to the permittee and he would be required to maintain a specific range condition regardless of the number of animals grazed, subject to administrative authority to police range conditions and impose penalties. Additional tenurial assurance would be promoted by identifying in advance those types of land uses incompatible with grazing and which may deserve a higher priority necessitating cancellation of a permit. In the event of cancellation of a permit because of other public uses, including disposal to third parties, recommendation is made for compensation to the permittee which would take into account the value of base

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11. *Id.*, 115-116.

12. *Id.*, 4.

13. *Id.*, 109.

14. *Id.*, 109-112.

property with and without the permit in addition to compensation for improvements and severance damages related to permit value.<sup>15</sup>

The foregoing tenurial concepts would be applicable to those lands classified for grazing as the dominant use on the basis that they are chiefly valuable for grazing. The identification of grazing as the "dominant" use would provide land managers a more precise assurance to the grazer that the land would not be shifted to another use until there is a supportable determination that the lands are no longer chiefly valuable for grazing.<sup>16</sup> In addition, the *Report* recommends that control be asserted over public access to and the use of retained public grazing lands for non-grazing uses in order to avoid unreasonable interference with authorized livestock use.<sup>17</sup>

#### ALLOCATION AND TRANSFER OF GRAZING RIGHTS

The above use of the phrase grazing "rights" is a deviation from the historical governmental position that grazing is a "privilege" and not a "right." However, the Commission's recommendations clearly give grazing a status that is clearly more than a privilege. If the PLLRC Report recommendations were to be adopted, the allocation of grazing rights would initially recognize existing eligibility requirements up to recent levels of grazing use.<sup>18</sup> Such recommendation is based upon the stabilization of the grazing industry which has been achieved under current laws and practices. However, the report includes a conclusion that there has been an overcommitment of land to support recognized dependent properties as a result of increased forage production from public lands.<sup>19</sup> It is recommended that increases in forage production beyond the level of present actual use should be allocated through the operation of the market among qualified applicants without regard to base property and current commensurability ratings. The basic qualifications anticipated for such an allocation would be the operation of a bona fide ranch in the

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15. *Id.*, 112-114.

16. *Id.*, 116.

17. *Id.*, 116-117.

18. *Id.*, 108.

19. *Id.*, 108.

area in which the public lands are located, which would not bar presently qualified users from participating in a public auction.<sup>20</sup> Such a disposition of increased forage is consistent with recommendations pertaining to transfer of grazing privileges on public lands.<sup>21</sup>

The Commission recommends that policies should be flexible so as to attain maximum economic efficiency in the use of forage from the public land and in the support of regional economic growth.<sup>22</sup> The present system of grazing allocations is based upon land ownership patterns and public land grazing used present at the initiation of the system. The *Report* recognizes the importance of maintaining existing patterns of grazing, but recommends a more flexible policy that would allow grazing privileges to be fully transferable upon request of the permittee, who would be reacting to a market in which those who can make the most efficient use of grazing permits would have an opportunity to acquire them.

#### CHARGES FOR GRAZING

In what may be considered one of the more popularly debated areas affecting grazing upon public lands, the *Report* recommends that "a proper statutory basis for grazing fees on land retained in Federal ownership would be 'fair market value.'"<sup>23</sup> However, as pointed out, fair market value for public land grazing is not necessarily the same as the value of private grazing land. Factors to be considered are variances in operating and economic situations and differences in the quality of public range land and forage yield. A uniform fee is not viewed as equitable for all federally owned lands.<sup>24</sup> Another recommendation of the report results from a recognition of the fact that past administrative practices have permitted the price paid for base properties to reflect a value for grazing permits dependent upon such properties.<sup>25</sup> As a result, the Commission recommends that an equitable allow-

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20. *Id.*, 108-109.

21. *Id.*, 106.

22. *Id.*, 106.

23. *Id.*, 117.

24. *Id.*, 117-118.

25. *Id.*, 112-113, 118.



ance should be afforded to current permittees for permit values in establishing grazing fees.<sup>26</sup> As the *Report* points out, a portion of the public land would be relatively worthless after the expiration of some period of time unless operated as a unit with base properties.

#### RANGE MAINTENANCE AND IMPROVEMENTS

As a basic recommendation, grazing privileges should be consistent with the productivity of public lands and prohibited where necessary to protect and conserve the natural environment.<sup>27</sup> Similarly, forage necessary for support of wildlife in a particular area should be taken into consideration incident to allocation of grazing privileges.<sup>28</sup> In the case of deteriorated public grazing lands, the *Report* recommends enactment of statutory guidelines for the allocation of funds for for range improvement purposes which would be based upon economic guidelines and require sharing of costs involved between the Federal Government and users on the basis of identifiable benefits to each. Further, the earmarking of particular funds for such purposes is opposed.<sup>29</sup>

#### GENERAL ADMINISTRATIVE CONTROL OF GRAZING

The Commission's Report basically sets forth policy guidelines and calls for the development of specific implementing provisions through legislative action by Congress. The recognition and protection of public interests in public lands which may be classified for grazing is the subject of many other recommendations. As a basic principle, the Commission acknowledges that it has not set forth what may be called a definition of "the maximum benefit for the general public," but instead, it recommends that a definition be sought by the Federal Government taking into consideration the interests of the national public, the regional public, the Federal Government as sovereign, the Federal proprietor, the users of public lands and resources, and the state and

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26. *Id.*, 118.

27. *Id.*, 106-107.

28. *Id.*, 108.

29. *Id.*, 114.

local governmental entities within which the lands are located.<sup>30</sup> Such an approach clearly leaves with each of the named publics the task and opportunity to present its interests in the development of implementing procedures and detailed standards which may be adopted by Congress. The door is left open for all concerned to develop the extent and nature of administration of all uses upon public lands. However, whatever the nature of administrative control that may be forthcoming, the Commission recommends that policies applicable to the use of public lands for grazing purposes generally should be uniform for all classes of public lands.<sup>31</sup>

#### GENERAL CRITIQUE

It appears that the Public Land Law Review Commission has recommended significant policy changes that will affect grazing upon public lands when implemented. From the viewpoint of all users of public lands, including the grazing industry, the call for review and study of public lands to determine what uses should be made of them poses immediate questions as to how such a tremendous task will be undertaken and what specific criteria may be adopted for the final classifications involved. As in the case of any interest group, the grazing interests can look to making specific representations to Congress as to specific criteria that will identify those retained public lands valuable for grazing.

In general it appears that the Commission's recommendations pertaining to the nature of grazing privileges would give a much improved tenurial status to the holder of such privileges and serve to give much greater assurance in the wisdom of investing and working in enterprises dependent upon use of public lands. Although the recommendation for auction of permits applicable to increased forage might appear to be self defeating if the increase is the result of cooperative effort by the permit holder, it does offer opportunities for increasing overall efficiency and expansion. Similarly, the recommended greater flexibility in transfer of existing

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30. *Id.*, 6-7.

31. *Id.*, 118.

permits should be welcomed and supported by the grazing industry.

The *Report* gives recognition to certain factors for the establishment of grazing fees that have not heretofore been accepted and which do appear to be equitable. Basically, aside from the question as to what public lands will remain or become available for grazing, the Commission's *Report* presents recommendations that give strong support to reaffirming and more concisely establishing grazing on public lands in a manner that will be compatible with other uses.

#### CONCLUSION

Much effort has gone into the *Report's* Recommendations. Clearly, it is a consensus report and there are alternatives for which arguments could be made. However, it does present a cohesive and reasoned approach from which Congress can proceed to make provision for the future use of the public lands. At this time, support from all concerned persons should be given to seeking implementation of the report.