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A Review of the Recommendations of the Public Land Law Review Commission Directly Affecting Users of the Public Grazing Lands

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LAND AND WATER LAW REVIEW

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A REVIEW OF THE RECOMMENDATIONS OF THE PUBLIC LAND LAW REVIEW COMMISSION DIRECTLY AFFECTING USERS OF THE PUBLIC GRAZING LANDS

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INTRODUCTION

FIVE years of intensive and dedicated study and analysis of practically every major facet of the Federal Public Lands and an expenditure in excess of seven million dollars have culminated in the *Report*¹ of the Public Land Law Review Commission. This *Report*, containing one hundred thirty-seven major recommendations and a multitude of sub recommendations, signals one of the most significant and historic developments in the annals of the laws and the administration of these public lands. With the exception of the Commission's recommendations on the Outer Continental Shelf, all recommendations of the Commission directly or indirectly affect users of the public grazing lands. This review, however, will

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1. PUBLIC LAND LAW REVIEW COMM., ONE THIRD THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970). [Hereinafter cited as REPORT].

be directed primarily to the recommendations contained in the Range Resources section of the *Report*.²

Since more of the public lands are used for grazing of domestic livestock than for any other economic activity,³ the Commission's recommendations have properly taken cognizance of and underscored the principles embodied in the laws and policies formed in the past which were designed to promote conservation of natural resources and to stabilize the livestock industry dependent upon these lands.⁴ Woven throughout the fabric of the *Report* is the pressing need for statutory guidelines in all areas of public land retention, management and disposition. In this regard, the Commission has correctly suggested the disposition of those public lands principally valuable for grazing and has justly recognized the need for improved security of tenure for permittees; the establishment of a reasonable and equitable grazing fee formula, taking into consideration the value of the grazing permit and other relevant factors; compensation of a permittee when his grazing permit is prematurely cancelled or its use restricted by governmental action; and the promotion of regional economic growth.

DISPOSITION OF PUBLIC LANDS CHIEFLY VALUABLE FOR GRAZING PURPOSES

Following a general guideline for a suggested future program,⁵ the Commission has proposed a review and classifica-

2. *Id.*, 105-118.

3. *Id.*, 105.

4. The REPORT states that the public lands account for about 3% of all forage consumed by livestock in the United States and that in the 11 Western states these lands supply approximately 12% of the total forage. These figures are somewhat deceiving, as the REPORT accurately notes, and might lead one to conclude erroneously that grazing on the public lands is relatively insignificant. In the first place, animals under six months of age were apparently not included in these figures. Secondly, what is of primary significance is the number of mother cows and ewes that graze on the public grazing lands, for it is from these animals that come the cattle and lambs that are marketed. Although no figures on the number of these mother cows are available, it has been estimated that approximately 25% can probably be found in the 11 western states. Thirdly, without use of the public grazing lands for one month or three months of a year, a large number of operators in these states would be unable to continue their ranching enterprises. Furthermore, the western livestock industry is "an important source of range livestock for feeder lots throughout the West and Midwest." *Id.*, 105.

5. *Id.*, 4-5.

tion of all public grazing lands and an identification of those lands which are principally valuable for grazing.⁶ This the Commission has defined as those public lands used chiefly for grazing that "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 public lands."⁷ Lands so classified and the disposition of which would not result in loss of public use values would then be sold at appraised full market value, with holders of existing base properties given a preference right to purchase the land and pay for it over a period of years, if desired.⁸ The Government would also have the right, under this proposal, to reserve reasonable and specifically defined easements over the land so sold for purposes of public ingress and egress to retained public lands and to restrict use of the disposed land to grazing purposes for a reasonable length of time.⁹

Disposition of such public grazing lands would redound to the benefit of both the permittee, who would be left to manage his land in a free enterprise economy, and to the Government, which could receive welcome revenues and reduce its costs of administration of such lands. Furthermore, it is doubtful that under the criteria established in the *Report*, any major disposition of the public grazing lands would result from the implementation of this recommendation.

GRAZING OF DOMESTIC LIVESTOCK ON RETAINED PUBLIC LANDS

The Commission recommends that public grazing lands not classified for disposition be retained and managed for

6. *Id.*, 115-116.

7. *Id.*, 115.

8. No mention is made in the REPORT regarding preference rights of persons who hold permits under new eligibility standards allocated to them as a result of forage increases above past grazing levels and who have acquired these rights at public auction. Fairness would appear to dictate that these persons also be given a preference to acquire such grazing lands classified for disposition which are covered by their permits.

9. The REPORT does not delineate the duration of the restriction for use of disposed land for grazing purposes which the Government may place on this land. However, it is indicated that such use restriction should not last forever because of needs which may be brought about by future changes in land use practices. *Id.*, 115-116.

grazing and other purposes. If the retained public land was found to be chiefly valuable for grazing, then grazing would be classified as the "dominant use"¹⁰ under the Commission's proposal. This is most significant since it would mean that permittees of such lands would be assured that these lands would not be shifted to another use while grazing was the dominant use and that grazing would be granted priority in the event of conflict with other uses. Even if grazing was not the dominant use, it would still be permitted, under the Commission's recommendation, on the public lands available for grazing, as long as it did not interfere unduly with the dominant use of these public lands. The Commission also recommended that grazing of domestic livestock be excluded from so-called "frail lands"¹¹ where required to protect and preserve the natural environment.

While there are sound bases for these recommendations of the Commission regarding grazing domestic livestock on retained public lands, it would seem that in most areas, as in the past, grazing and other uses can coexist and, under proper management techniques, continue to complement each other. In the case of "frail lands", it would be appropriate to recognize that some of these lands have become frail, not by overgrazing, but as a consequence of climatic conditions, such as droughts. Whenever present grazing on the public lands, classified as frail, is terminated,¹² the permittee who has used these lands should be given a preference right to graze his animals on increased forage production land¹³ for which he may qualify. Similarly, a like preference right to such increased forage production land should be considered

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10. In explaining the "dominant use" concept, the Commission said that where land, in "an area managed for many uses, can contribute maximum benefit through one particular use, that use should be recognized as the dominant use, and the land should be managed to avoid interference with fulfillment of such dominant use." *Id.*, 3.
 11. The REPORT gives as examples of "frail lands", the more arid regions of the West and the steep mountain areas having shallow soils and a short growing season. *Id.*, 106-108, 116.
 12. In some instances, a change of climatic condition or future scientific advances could render these "frail lands" available once more for grazing. When this occurs, grazing on these lands should again be allowed.
 13. The term "increased forage production lands" is defined to mean those public grazing lands which are in excess of recent levels of forage use by present permittees or which may in the future represent forage exceeding levels of permitted use. *See* REPORT, 108-109.

for other qualified permittees whose grazing allotments are reduced or eliminated by virtue of the dominance of another use.

THE NATURE OF GRAZING RIGHTS ON THE PUBLIC LANDS—THEIR ALLOCATION AND TRANSFER

Even though grazing on the public lands has been variously described as a "privilege" and not a "right,"¹⁴ the *Report* recognizes that a grazing permit confers something of value, as have the courts,¹⁵ and quantifies the permit as establishing certain described "rights", subject to particular restrictions.¹⁶ In order to stabilize the livestock industry by protecting present permittees, the Commission's recommendations call for allocation of grazing rights up to recent levels of use on the basis of existing eligibility requirements.¹⁷ Pursuant to the Commission's proposal, forage beyond this level of recent use, as well as future increases in forage production, would be subject to allocation at public auction among qualified applicants,¹⁸ with a minimum price established for the value of this forage.

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14. See, e.g., 43 U.S.C. § 315b (1964); 36 C.F.R., § 231.3(b) (1970); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938); *Oman v. United States*, 179 F.2d 738 (10th Cir. 1949); *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960); See generally 2, University of Idaho. THE FORAGE RESOURCE, II 185-189. (PLLRC Study Report, 1969).
 15. See, e.g., *Red Canyon Sheep Co. v. Ickes*, *supra* note 14, at 315; *Oman v. United States*, *supra* note 14, at 742; *McNeil v. Seaton*, *supra* note 14, at 934-935.
 16. See generally REPORT, 105-118.
 17. THE REPORT states that guidelines should be established to specify the obligations to present permittees, but unfortunately the REPORT does not elaborate on what those guidelines should encompass. *Id.*, 109. One suggestion made in the REPORT is that the average level of actual use during the last five years establish recent levels of use for Permittees. *Id.* If implemented, this suggestion could unduly penalize permittees in areas where drought or other similar conditions prevailed during part of this five-year period. Average permitted use over a somewhat longer period of years would seem to be a more equitable standard to employ in setting such guidelines.
 18. In calling for a modification of the commensurability and base property requirements for future users of the public grazing lands, the Commission suggests that new eligibility standards be established. *Id.* The principal requirement suggested by the Commission is the operation of a bona fide ranch in the "area" of the public grazing land. *Id.* Unfortunately the term "area" is not defined, nor are more specific guidelines set forth in the REPORT enumerating what these new eligibility requirements should be. In this regard, restricting the allocation of this increased forage production to persons operating bona fide ranches in geographical proximity to the public grazing land would further the policies of promoting regional economic growth and of giving needed stability to the grazing industry.

To present permittees who have expended significant sums of money and effort to increase forage on their permitted lands, this proposed allocation policy would be patently unfair unless equitable adjustments were made. Furthermore, this allocation policy would appear to discourage rather than encourage permittees to increase forage production on these public grazing lands. In addition, federal agencies might, unless appropriate statutory guidelines were established, have the tendency to classify some public lands under grazing permits as being "increased forage production land" and then sell it to the highest qualified bidder in order to increase the revenues in the Government coffers.

Once grazing rights have been allocated, the Commission recommends that permittees be able to graze their livestock on the public lands consistent with the forage produced on these lands and without any restriction as to the number of animals grazed, as long as specified range conditions are maintained. This practice would seem to be in conflict with the Commission's suggestion for offering lands producing increased forage to qualified applicants at public auction. Although grazing to the productivity standard would probably be welcomed by a number of permittees, it could generate a number of serious conflicts and problems between permittees and the Government agency administering these lands over grazing capacity and the condition of the range. Under the Commission's proposal, if the administering agency thought there was overgrazing or deterioration of the forage resource, it could either reduce the number of livestock on the land or, in some cases, even cancel the permit.

The suggestion of the Commission to allow grazing rights to be fully transferable upon the request of the permittee is most meritorious and should facilitate and expedite the transfer of such rights by permittees as well as reduce some of the heretofore attendant costs of such transfers.

STABILITY OF TENURE FOR PUBLIC LAND GRAZIERS

Stability of tenure is one of the most important factors to permittees. In recognition of the concern expressed by

permittees for greater stability of tenure, the Commission has suggested that a fixed term for grazing permits be prescribed by statute,¹⁹ that the permit terms specify with particularity the range conditions which will cause use changes, and that the kind of public purposes for which a permit may be cancelled be described in the permit.

Greater specificity in the provisions of a permit is absolutely essential and should enable the permittee to make more efficient use of the permitted lands, as well as to provide sufficient assurance to justify making needed range improvements during the term of the permit. Additionally, this will allow permittees to formulate more flexible plans for their livestock operations and to secure adequate sources of borrowing.

No reference is made in the *Report* as to whether, or on what terms, permittees would have the right of renewal or be granted a preference to renew permits when they expire. Equity would suggest that permittees, especially those holding present grazing rights as well as, perhaps, those who are permittees of increased forage production land, be given a preference to renew these permits at the end of their term.

Except in limited circumstances,²⁰ permittees have not been compensated in the past when their permits were cancelled, withdrawn or their use restricted. This has led to gross inequity,²¹ which the Commission has appropriately recognized and suggested be corrected so that a permittee will be compensated for the loss suffered when the grazing land covered by the permit is diverted to other public uses, including

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19. The *REPORT* fails to suggest what might be a proper term for grazing permits. Depending upon the renewability of the permit, the permit term should be of sufficient length to provide security of investment for graziers and recovery of expenditures made by them in connection with the permitted land.
 20. Compensation may be provided for cancellation of the permit when the permitted land is acquired for national defense projects, 43 U.S.C. § 315q (1964); and, with respect to loss of improvements, when the land is sold to a third party, 43 C.F.R. § 4115.2-5 (a) (7) (i) (1970), or when it is allocated to another permittee, 43 U.S.C. § 315c (1964).
 21. Compare *United States v. Cox*, 190 F.2d 293 (10th Cir. 1951), *cert. denied*, 342 U.S. 867 (1941), wherein no consideration was given for the value of the permitted land when the permit was cancelled coincidental with the condemnation by the Government of private base properties, and *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951), wherein consideration for loss of the permitted land was given when the permit was not cancelled before the private base lands were condemned by the Government.

disposals to third parties. As envisioned by the Commission, the loss sustained by the permittee would be measured by the value of range improvements and the value of the lost grazing right represented by the permit, taking into consideration the value of the base properties²² with and without the permit.

Compensation for reduction in use or cancellation of a grazing permit should not, however, be predicated upon and limited just to the public lands wherein grazing is classified as the dominant use, as indicated in the Commission's recommendation, but should instead extend to all grazing permits.²³ Of course, where grazing is not the dominant use, the value of the permit would be less and therefore the resultant loss suffered by the permittee upon cancellation of the permit could be compensated for in a commensurate fashion.

INVESTMENT IN RANGE IMPROVEMENTS AND ESTABLISHMENT OF GRAZING FEE STANDARD

Continuation of the present policy of having Government funds expended to restore and rehabilitate deteriorated public grazing lands, but in accordance with prescribed statutory guidelines, is recommended by the Commission. On other public grazing lands, the Commission suggests that investments to improve grazing be made based upon economic guidelines established by statute and recommends that the cost of range improvements "be shared between the Federal Government and users on the basis of identifiable benefits to each." Here, it is proposed by the Commission that financing of this investment by the Government come not from earmarked funds,

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22. If a permit covering increased forage production land were cancelled, there would apparently be no "base" property in the commensurability sense, and in such case, the value of the permit would probably be determined by reference to what it would bring if sold on the open market. In addition, consideration could also be given to the diminution in value of the nearby operating ranch which formed the basis for issuance of the permit.
 23. To all permittees, the grazing permits they hold will have a value. The amount of value will, of course, vary depending upon the type of permit (*i.e.*, pre-existing use permit or a permit covering increased forage production lands acquired at public auction) and its worth to the permittee. Thus, in fairness, compensation should also be extended to these permittees for the value of their permits which are cancelled or grazing rights restricted even though grazing is not the dominant use. Otherwise, this might lead to the tendency to reclassify dominant use public grazing lands to some other use.

as under present law, but from the general fund of the Government. This proposal has considerable merit, but it will only be workable if the Congress appropriates adequate funds,²⁴ and if precise statutory guidelines define the benefits accruing to the permittee and the Government.

The *Report* further provides that the amount invested by the permittee in these range improvements²⁵ should be credited to his account and applied against grazing fee payments.²⁶

Probably of greatest significance to many permittees is the Commission's proposal that a grazing fee standard be statutorily set and be based upon "fair market value". As conceived by the Commission, this is not the same as the value of private grazing land, but instead is the price which would be paid for grazing livestock on the public lands considering all the advantages and disadvantages of using these lands as compared with private grazing lands. Fee schedules would also vary from area to area in order to reflect variances in the quality of public range land and forage yield.²⁷ Although not stated in the *Report*, appropriate fee adjustments should also be made to reflect forage allocated to support wildlife.²⁸ Similarly, the grazing fee rate should be modified to reflect

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24. Whether funds available from governmental sources would be sufficient to meet the need for range improvements and maintenance appears somewhat uncertain. See THE FORAGE RESOURCE, *supra* note 14, at § 26-27. To restrict range improvements to such a cost-sharing arrangement in these circumstances could be deleterious. Moreover, the permittee who is assured of security of tenure and investment would usually stand to benefit from paying for such improvements, as long as the increased forage which results is not auctioned off to third parties.
 25. Many aspects of range maintenance, such as repairing fences, plugging ditches, repairing water facilities and cleaning water tanks, are performed as a matter of routine by the permittee. The value of these important services properly fit into the formula for ascertaining benefits and the sharing of costs.
 26. Amounts which have been expended by or attributed to the permittee for range improvement expenditures and which have been credited against the grazing fee account of the permittee should, of course, not be considered as a compensable item if use of the improvement is taken over by the Government or sold with the land to third parties.
 27. A variable grazing fee formula similar to the one adopted by the U. S. Forest Service has generally been regarded by permittees as being desirable. Moreover, concern has been expressed that the fee should reflect the *quality* of the forage, since an Animal Unit Month (AUM) of one type of forage is frequently not as valuable as an AUM of a different type of forage from the standpoint of the number of pounds gained by livestock grazing on the forage and the nutritional value of various types of forage.
 28. REPORT, 108-109.

a lower level of use where grazing of domestic livestock is not the dominant use.

Besides utilization of the foregoing factors in establishing the proposed grazing fee formula, the Commission justifiably recommends that an equitable allowance also be given to the capitalized value of grazing permits presently held by ranchers.²⁹ To be equitable to other permittees, it would seem that they too should be accorded the same recognition for their permit values. Some will have paid value for their permits when acquired at public auction, others when obtained in a transfer under the Commission's concept of free transferability of grazing interests.³⁰ In this regard, it should be recognized that the permits held by all permittees, however and whenever acquired, will have a value and that the capitalized value of these permits should qualify for inclusion as one of the factors in any grazing fee formula which is established.

Not all users of the public grazing lands may endorse the grazing fee formula proposed by the Commission; however, this recommendation presents a fair and equitable standard which, if modified slightly as previously outlined to include

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29. No reference is made in the REPORT as to a proper capitalization rate, although it is assumed such rate or the method of its determination would be reasonable, based upon prevailing economic conditions and provided for by statute. It should be noted that recent studies performed by economists of the American National Cattlemen's Association reflect that if consideration were given to all the variable cost factors for grazing domestic livestock on the public lands and if a reasonable capitalization rate for the permit value were used, permittees using U. S. Forest Service land were in fact paying "fair market value" for forage consumed by their livestock prior to the 1969 grazing fee increase, and permittees using Bureau of Land Management land would be paying "fair market value" if grazing fees were increased on the average of about 11 cents per AUM.
30. The Commission's proposals that permits be freely transferable in the market place and that increased forage production permits be sold at public auction will determine permit value. With regard to permit value generally, the statement is made that permit value is affected by the fee rate charged and that increased grazing rates will tend to decrease permit values. REPORT, 118. While this is true, it does not portray the complete picture. Regardless of one's point of view, the grazing fee rate should not be raised so high that grazing on the public lands will not produce an economic return to the permittee. In other words, permit values exist because of the carrying capacity represented by the permit and the fact that the permittee can derive income from use of the permit. As correctly pointed out in the REPORT, much of the public grazing land would have little value if not operated as a unit with private base lands; and as a converse, the private base lands would have little value if not operated as a unit with public grazing lands. As for the depressive effect of the 1969 grazing fee increase and formula which did not give any consideration to permit value, it has been concluded that such fee and formula would abolish most, if not all, of the established value of the permit and would make the "average" ranch operate at a loss position. See THE FORAGE RESOURCE, *supra* note 14, at S61-62.

all permittees, should prove acceptable to most permittees. Implementation of this recommendation should be given the highest priority and further grazing fee increases now proposed by the Government agencies postponed.

UNIFORMITY OF PUBLIC GRAZING LAND POLICIES

The recommendation by the Commission that governmental policies relating to the use of public lands for grazing purposes generally be uniform for all classes of these lands is most desirable. If implemented, this recommendation would result in having permittees and the administrative agencies involved operate under one set of rules rather than a multitude of diverse rules, as under present law, with respect to grazing on the public lands, and should therefore result in more harmonious operation and administration of these lands.

CONCLUSION

While there will undoubtedly be criticism from some quarters of the Commissions' recommendations regarding grazing of domestic livestock on the public lands, the Commission has drafted a "consensus" report on this subject which is most laudatory. This *Report* has presented a blueprint for use of the public grazing lands in a more efficient manner so that both the public and the users of these lands will derive the highest good. Widespread support should be given to assure that the basic goals and concepts of the Commission as contained in the *Report* are implemented at the earliest date.