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MINING AND ENVIRONMENTAL QUALITY

*Roger P. Hansen**

PUBLIC BENEFITS

IT is difficult to prepare a commentary on the "public interest" aspects of the Mineral Resources chapter of the Public Land Law Review Commission *Report*[1] out of context with the entire sweep of other related PLLRC recommendations. However, that was the most practicable approach for this brief paper.

While definitions of the "public interest" seem ever elusive, the Commission attempted early in its deliberations to establish criteria for public benefits to be derived from the public lands. This was mandated by the policy declaration of Congress in Section 1 of the Commission's Organic Act[2] which held that public lands shall be retained and managed or disposed of "all in a manner to provide the maximum benefit for the general public."[3] It is unfortunate that the Commission never came to grips with this problem. A great opportunity for some national goal-setting with respect to the future of the public lands was thus lost. Instead, the Commission abandoned the role of defining public interest to "sociologists, philoso-

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1. 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. 43 U.S.C. §§ 1391-1400 (1964), *as amended.* (Supp. IV, 1969).
3. *Id.*

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phers, and others."[4] However, the Commission claims that its work was made easier and more meaningful by establishing six categories of often conflicting "publics". It is not all clear how the convenient cubbyholing of various interest groups really helped the Commission fulfill more than certain political responsibilities.

Nevertheless, the Commission did adopt some basic "premises" on which some judgment of maximum benefit for the general public might be made:[5]

(1) No one "public" should benefit to the "unreasonable detriment" of another unless there is an overriding national interest.

(2) "Environmental values must be protected as major permanent elements of public land policy."

(3) Public lands must be made to meet expanding national needs "without degradation of the environment" and allowed to enhance the environment.

The Commission articulates some fairly clear, concise statements on environmental policy in Chapter Four[6] of the *Report*. Recommendation 16 gives formal recognition of environmental quality as "an important objective of public land management" and proposes that environment be not only maintained but enhanced.[7] In this same chapter, the Commission decries the absence of adequate statutory guidance for land management agencies regarding environmental protection and a "lack of clear policy direction"[8] in this area. The Commission then makes a critical declaration: ". . . we propose that the enhancement and maintenance of the environment, with rehabilitation where necessary, be defined as objectives for all classes of public lands."[9] The Commission then caps this by urging that the Environmental Policy Act of 1969[10] be made to apply to "*all* public land use plans and de-

4. REPORT at 6.
5. *Id.*, 7.
6. *Id.*, 67.
7. *Id.*, 68.
8. *Id.*
9. *Id.*, 70.
10. 83 STAT. 852, Pub. L. No. 91-190 (Jan. 1, 1970).

cisions, not only to those deemed by the land manager to be 'major.' "[11] (Emphasis added.)

It is important to keep the Commision's recommendations on mineral resources in mind with regard to a further statement in the chapter on environment that users be required not by administrative procedure but by *statute* to maintain and restore environmental quality *at their own expense.* "The cost of maintaing a quality environment thereby becomes an element in determining the economic feasibility of an enterprise."[12]

Thus in Chapter Four, the Commission seems unrestrained in making strong statements on environmental quality—in a broad, general context. Many fine, non-specific principles are clearly enunciated. The Commission seems slightly more concerned about the state of the environment than Paul Ehrlich and Barry Commoner.[13]

It has been observed that everybody is an environmentalist (the term "conservationist" now being old hat), until you get specific. The chapter on Mineral Resources[14] examines a specific public lands commodity with specific environmental impacts and formulates a number of specific recommendations. Some are predictably at variance with the Commissions' environmental statements earlier in the *Report.*

The General Mining Law,[15] embodied in the Act of May 10, 1872,[16] was titled, "An Act to *promote the development* of the mining resources of the United States."[17] (Emphasis added.) It was attuned to the needs of a nation still reeling from the devastation wrought by the Civil War. The South's factories, railroads, shipping and other basic industries had to be rebuilt. Also, the need to pick up the work of opening the West made the emphasis on development logical. It was, in fact, a time of real national emergency.

11. REPORT at 77.
12. *Id.*, 85.
13. Dr. Paul Ehrlich, Stanford University, and Dr. Barry Commoner, Washington University, St. Louis, Mo., are well publicized *Paul Revere-type ecologists.*
14. REPORT, at 121.
15. 30 U.S.C. § 22 (1964).
16. 17 STAT. 91 (1872).
17. *Id.*

But here, in this *Report,* prepared 100 years later when the nation's security and economy have never been stronger and America is looked on by much of the world as a great hog wallowing in a consumptive orgy, the Public Land Law Review Commission seems to adopt the same old premise: that there are overriding "National requirements" for mineral development.[18] When this chapter starts out with the declaration that the American standard of living and our national defense pivot on mineral development imperatives, the position of any environmental imperative is at best precarious.

While there may be an increasing reliance for America's mineral resources on foreign sources and imports, the fact that much of this shortage is due to massive waste and forced consumption goes unrecognized. It would seem that the pitfalls of overreliance on foreign sources would work toward promoting *discovery* of new domestic inventories. But it is inconsistent for the Commission to continue to promote *development* and a continued acceleration of consumption if the concern about failing domestic supply is all that great. The Commission's language implies little distinction in intent from the Act of 1872:

> We strongly favor . . . an overriding national policy that encourages and supports the discovery and *development* of domestic sources of supply.[19] (Emphasis added.)

Not once, by any statement or inference, does the *Report* come to grips with the problems of consumption as regards mineral supplies, dwindling not only in the United States but around the world. Not once is there any distinction made between *discovery*—the creation of an inventory—and immediate development. They are assumed, without further thought, to automatically go hand in hand in the same time frame.

The Commission neatly jumps through the "overriding national interest" loophole of its earlier injunction against benefitting one interest to the "unreasonable detriment" of another[20] by declaring: *"Mineral exploration and develop-*

18. REPORT at 121.
19. *Id.*
20. *Id.*, 7.

ment should have a preference over some or all other uses on much of our public lands."[21] (Emphasis provided by Commission.) It argues in the mold of 1872 value systems that "development of a productive mineral deposit is ordinarily the highest *economic* use of land."[22] (Emphasis added.) The clear inference from these two statements is that the overriding national interest and therefore greatest benefit to the general public is to give mining preferential treatment—as the highest economic use of land.

MINING AND ENVIRONMENT

While the Commission sets forth strong *non-degradation* policy as one of its basic premises for public benefit,[23] it very quickly retreats in this chapter to a policy of "minimizing impacts."[24] Of course, this is most realistic since mining can never be defined in terms of non-degradation of the environment. Even the best efforts at rehabilitation after mining, voluntarily undertaken by some major mining companies, cannot be defined as non-degradation. The Commission makes its position clear as to any balancing of environmetal and economic interests by saying:

> Stated another may, we believe that the environment must be given *consideration,* but regulation must not be arbitrarily applied if the national importance of the minerals is properly weighed.[25] (Emphasis added.)

Curiously, this statement is very close to that of Sam Lenher, vice president of du Pont, who is quoted as stating: "Let me caution that in our haste to proceed we do not compound our problems with stringent and unworkable laws and regulations which can have unnecessarily harsh impact on continued industrial growth."[26]

This is an insidious rhetoric. Nobody favors "unworkable laws", or regulations "arbitrarily" applied. But the

21. *Id.*, 122.
22. *Id.*
23. *Id.*, 7.
24. *Id.*, 123.
25. *Id.*
26. *Industry Cleans Up,* 56 Nation's Bus. Sept. 1968, at 57.

language of the growth imperative frequently defines many environmental quality controls in this fashion—as though strong, positive controls were always arbitrary and unworkable if they "interfered" with the conventional blundering ahead for purposes of economic development. Such language is also frequently intended to put the environmentally concerned on the defensive—to make them carry the burden of proof that what they advocate is *not* arbitrary, capricious, unworkable, wasteful, unpatriotic obstructionism.

To some, the above statement on "consideration" and arbitrariness might seem perfectly innocuous unless examined in the context of an earlier Commission observation. In the chapter on environment, the Commission, in discussing the need for federal standards for environmental quality control, rejects stadards for scenic beauty which, the Commission contends, must be valued in "subjective terms . . . not susceptible to measurement."[27] Thus, any regulation of a mining operation to protect scenic beauty or enhance the aesthetics might be interpreted by the Commission as arbitrary regulation. This is one of the many examples throughout the *Report* where the Commission gives to the environment with one hand but takes away with the other.

The mining chapter fails to give the same status to the *environmental imperative* as it does to the *economic imperative.* Nevertheless, a number of Commission recommendations to protect environmental values with respect to mining activities are praiseworthy:

—a recommendation that mineral locators give written notice of claims to the Federal land management agency having jurisdiction of the situs, rather than merely following procedures required by state law.[28]

—a recognition that "there are presently no adequate regulations defining the relative rights of the Federal Government and the locator."[29] While the statement might have included "and obligations", the

27. REPORT, at 70.
28. *Id.*, 126.
29. *Id.*, 127.

undesirable absence of adequate authority of the agency to impose environmental controls is inferred.

—a proposal that land management agencies be authorized to engage in rule making for environmental protection on *all* phases of mineral activity, including exploration, development, production and postmining rehabilitation.[30] However, the recommendation that the administrative agency have no discretion to withhold a mineral permit is another indicator of preferential treatment for mining. An agency "permit" or some equivalent is required for almost all other public land uses: logging, grazing, water development, recreation, use and occupancy, fish and wildlife projects. Only the location and development of minerals on the public lands is considered an *absolute right!*

—a recognition that administrative flexibility in environmental quality control requirements is necessary to accommodate widely varying ecosystems.[31] Those who advocate rigid, inflexible, universal "standards" for exploration, mining, development and rehabilitation for every state, area or site reflect gross ecological ignorance of the problem. Every problem must be treated individually; no two mining situations are alike. Agencies must be given wide discretion to operate within certain legislative *criteria* for environmental quality control.

There are further environmental protection weaknesses in the Commission's recommendations on mining. For example, while the Commission proposes that there be certain "performance requirements" on exploration permits to assure diligence,[32] no performance requirements, such as a performance bond, are proposed for environmental protection measures. While land management agencies would be able to review plans "up to the time commercial production commences,"[33] there is no requirement explicitly proposed for continual monitoring of the operation and subsequent rehabilitation program *after* production commences. Without this responsibility and authority, agency requirements would be almost impossible to

30. *Id.*
31. *Id.*
32. *Id.*, 126-127.
33. *Id.*, 127.

enforce. Also, the recommendation that review of all mineral development plans be the responsibility of the U. S. Geological Survey[34] ignores the pressing need for interdisciplinary, inter-departmental review and study of mining requirements with respect to environmental quality. Historically, U.S.G.S. has not had personnel qualified in enough disciplines to perform this review function.

PATENTING VS. LEASING

The PLLRC Report fails to make a convincing case for continued patenting of the non-mineralized surface. The argument that a patentee holding only a mineral interest has "no incentive" to rehabilitate or improve the land surface when production is no longer profitable ignores the Commission's own recomemndation that environmental protection must cover all phases of mining through rehabilitation. Certainly, there is no preponderance of evidence to suggest that granting of surface patents has resulted in remarkable mining rehabilitation programs, with the exception of a few particularly responsible companies.

There is one particularly obvious and enormous weakness in the Commission's argument for continuation of the patenting system. After outlining major problems with the General Mining Law from the standpoint of *industry,* the Commission nevertheless insists on the continuation of the patenting system, primarily for the reason that "operators believe they must continue to obtain title" and "industry generally prefers amending rather than replacing the 1872 Mining Law."[35]

Problems associated with tenure, *ex post facto* legislation, and unbridled agency discretion if the present system were replaced with a leasing system are dealt with adequately in the footnoted minority report of Commissioners, Clark, Goddard, Hoff and Udall.[36]

The public interest in both the economic and environmental aspects of mineral location and development does not neces-

34. *Id.,* 128.
35. *Id.,* 124.
36. *Id.,* 130-132.

sitate the continuing dichotomy between "locatable" and "leasable" minerals. Maintenance of title in the United States has a much better chance of facilitating and assuring adequate management, protection and enhancement of environmental values. While a few companies are doing a commendable job at environmental quality control, many companies can be expected to give only minimal "considerations" consistent with maximization of profit. Also, a major and growing problem of using exhausted mineral properties for subdivisions, trailer parks, vacation homes, and other uses non-conforming to the surrounding area will be mitigated or eliminated by a leasing system.

The separate views submitted by the minority Commissioners in the mining report make sense.[37] While many political, industrial and other special interests are in the vortex of the leasing vs. patenting controversy, there is no logical, persuasive legal rationale for not adopting a leasing system for all mineral development on the public lands. It escapes close analysis to determine why a leasing system is inconsistent with: orderly and needed minerals exploration and development; better environmental management; and equitable working relationships between economic incentives and the public interest.[38] The perpetuation of an outmoded, unnecessary patenting system is also in conflict with national policy embodied in the National Environmental Policy Act of 1969[39] to use all "practicable means" so that the nation may "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. . . ."[40] A leasing system is certainly a practicable means.

EXPLORATION ASPECTS

The Act of August 21, 1958[41] directs the Secretary of the Interior to "establish and maintain a program for exploration by *private industry.*" (Emphasis added.) The purpose of the Act is to "provide for discovery of additional mineral *re-*

37. *Id.*
38. *Id.*, 130.
39. 83 STAT. 852, Pub. L. No. 91-190 (Jan. 1, 1970).
40. *Id.*, at § 101(b)(1).
41. 78 STAT. 700, Pub. L. No. 85-701 (1958).

serves." (Emphasis added.) Nothing is stated in this Act about the need for immediate development.

There is every reason to support the Commission's recommendations for continuation and even intensification of mineral surveys on the public lands, both by private industry and the federal government. This would provide a more reliable national inventory of mineral resources than now exists. Any federal investment could be reimbursed from future royalties, sale or lease payments when the mineral was developed and produced. A system would also have to be devised to reimburse private exploration costs. However, what is particularly disturbing to environmentalists is the propensity to equate exploration and discovery with development. A compulsion to develop and produce as soon after discovery as possible—totally unrelated to reasonable present and future needs—is irresponsible. Until some sort of realistic "national minerals reserves" policy is established, those concerned about environment degradation will continue to oppose intensified exploration programs.

The concept of "quick" development, present in so much of the discussion about oil shale, ignores certain responsibilities to future generations. If, for example, mineral or petroleum sources are in such short supply as to require massive importation, there should be established a national policy to *conserve* minerals rather than to *promote* development. This could be accomplished by (1) greatly accelerated research and development of materials recycling; and (2) establishment of national goals and policies to curtail wasteful minerals consumption now accelerated by the conventional wisdom of the growth ethic. The first is in process; "practicable" means for achieving the second are yet to be discovered. "Quick" exploration and development, unassociated with genuine (rather than concocted or promoted) national economic or security needs, hastens short-range profits. It is inconsistent with the "long term productivity" considered in the Environmental Policy Act.[42]

42. 83 STAT. Pub. L. No. 91-190 at § 102 (2) (c) (iv) (Jan. 1, 1970).

CONCLUSION

On balance, the recommendations of the Public Land Law Review Commission on mineral resources go a considerable distance toward protecting environmental values. It will be the further job of administrative agencies and the Congress to establish criteria and standards for necessary environmental controls as well as procedures for supervision, monitoring and enforcement. It will also be up to Congress to reconcile some of the inconsistencies previously mentioned. But by failing to abandon the antiquated General Mining Law of 1872, which is irrelevant to modern realities from the standpoint of either the mining industry or the general public, the Commission refuses to walk the second mile.

While the following list is not intended to be all inclusive, it does contain a summary of recommendations that, if adopted by the Congress, would correct some of the shortcoming of the Commission's recommendations:

(1) Land management agencies should be given discretion to make either temporary or permanent withdrawals of public land from mineral location and development in order to protect environmentally sensitive areas or lands more valuable for other public purposes. Such withdrawals should be based on a thorough, scientific inventory and analysis of all resources of the area proposed for withdrawal, and subject to both administrative and judicial review.

(2) Land management agencies should be given discretion not only to establish strict standards and conditions on all phases of mineral exploration, development and rehabilitation, but also to require performance bonds to assure that such requirements are met.

(3) Exploration should be limited to that existing technology which causes the least disruption of the landscape. Rehabilitation following undeveloped exploration should be required with reasonable federal participation and cost-sharing.

(4) Oil shale development should be conditioned on: (a) a complete and comprehensive Environmental Resources Inventory and Analysis of the area proposed for development; (b) establishment of definite criteria for mining, production, refining and rehabilitation (not inflexible "standards"); and (c) codification of such requirements by special Congressional action.

(5) Environmental studies and proposed criteria, guidelines and regulations on mining should be prepared by highly qualified, interdisciplinary teams of professionals, including but not limited to mining engineers, geologists, ecologists, architects, landscape architects, regional planners, economists and lawyers. Particularly, the fulfillment of this function almost exclusively by the Bureau of Mines and the U. S. Geological Survey should be avoided.

Finally, there has been considerable discussion by the Commission in its *Report,* in this paper and elsewhere about criteria for "maximum benefit to the general public." The Commission apparently considered this an impossible task, or at least one fraught with considerable political peril.[43] The following suggested criteria, again not intended to be all inclusive, might provoke further discussion of this critical topic. Public land laws, regulations, policies and procedures, with respect to both retention for management and disposition, must for the benefit of the general public:

(1) Protect the welfare and interests of future generations by avoiding irretrievable and irreversible commitments of resources or land use decisions that foreclose future options.

(2) Avoid any use of land or water which would degrade those resources so as to foreclose any kind of economically or environmentally productive use within a reasonable time scale.

(3) Recognize that environmental imperatives sometimes outweigh economic considerations.

43. With exception of the three *premises* mentioned earlier; *see* REPORT at 7.

(4) Protect all remaining areas of wilderness value as defined by the Act of 1964,[44] recognizing the principle that wilderness values can be degraded anytime in the future but that they can never be restored or replaced.

(5) Avoid public land and resource decisions based not on quality life goals but solely on the growth and development ethic.

(6) Provide criteria for making resource management judgments that give equal consideration to non-quantifiable social values as well as to the greatest unit of output or economic return.

(7) Make resource management judgments based more on scientifically established carrying capacity of the land than on political considerations and the demands of any pressure group.

44. 16 U.S.C. §§ 1131-1136 (1964).