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OUTDOOR RECREATION AND THE PUBLIC LAND LAW REVIEW COMMISSION REPORT

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IT is indeed a privilege and pleasure to respond to the request that I comment upon the remarks of Professor Ralph W. Johnson regarding the recreational aspects of the Public Land Law Review Commission Report and briefly upon the report itself. In many respects, I agree with and indeed underscore the comments of Professor Johnson.[1] In other respects, I disagree. In all respects, he is to be complimented for his analysis and critique of the Commission report as it relates to recreation on the public lands. Of considerable interest to me is the fact that two people can arrive at such divergent conclusions with respect to the over-all thrust of the Commission report; at least with respect to one subject area. Possibly that divergence can be attributed to the nature of my assignment; possibly to a lack of depth of understanding of all aspects of the Commission report; and possibly to an unconscious bias regarding specific uses of the public lands. If the latter, it occurs to me that the Commission report is truly, as Professor Johnson suggests, an attempt to say all things to all people.[2] If indeed, as it appears, reasonable men can differ in their conclusions with respect to the over-all thrust of the Commission report, I suggest that the future holds little hope of implementation of the Commission's recommenda-

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1. *See*, p. 283 of this volume for Prof. Johnson's remarks.
2. *Id.*

tions. Congress might better be persuaded of the validity and importance of the Commission's recommendations, however meritorious each may be, if each interest group were not able to find support for its position within the *Report.* Specifically, I refer to Professor Johnson's conclusion that the losers in this case are the people who want to preserve the federal domain forever in a wild state.[3] Although I recognize that there are many specific recommendations regarding resource development in the *Report,* nevertheless, my reading of it led me to the conclusion, contrary to that reached by Professor Johnson, that if the recommendations of the Commission are implemented, we can expect an increased number of wilderness areas, increased emphasis on dominant recreational aspects of multiple use land (thereby effectively eliminating many other uses), increased acquisition of recreational lands, and devotion of more land to recreational purposes, as well as increased administrative controls within the areas of authority of the various agencies charged with the responsibility of administering the public lands for recreational purposes, or partly for such purposes. For example, the Commission recommends that a comprehensive inventory of public lands which might qualify under existing standards of national parks, monuments, historic sites, wilderness areas, scenic and wild rivers and national trails be commenced as soon as possible;[4] that these lands be assigned a priority for protection pending designation under established procedures, and that they be temporarily withdrawn until formal designation.[5] The Commission then suggests the identification of new areas for inclusion in the National Wilderness Preservation system and says "There is nothing in the Wilderness Act to preclude additions to the National Wilderness Preservation System of lands not previously identified for review."[6] It then proposes that new areas not previously identified for review be inventoried and added to the Wilderness System. The Commission also recommends that the limitation upon the

3. *Id.*
4. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1970), at 199. [Hereinafter cited as REPORT].
5. *Id.*
6. *Id.*

number of acres which may be conveyed to a political subdivision and to a state during any one calendar year under the Recreation and Public Purposes Act[7] be expanded, and that lands, when qualified as having recreational value, be transferred to states and political subdivisions unless the Federal Government has an overriding need for the land.[8] No reference is made to the needs of other users.

Although the Commission states that a policy of recreation site relocation should be adopted to permit more flexibility in the resolution of conflicts between recreation and other resource uses and suggests that long and short term shifts in site uses might be made of recreation facilities, thereby providing alternative sites in the vicinity which would avoid serious restriction upon or the elimination of other uses in the area affected (a principle which appears extremely difficult of administration), the general thrust of Chapter 12 of the *Report* is, nevertheless, on expanding recreational uses and restriction of conflicting uses. The Commission concludes that ". . . recreation[al] management and development on theses retained Federal Lands should be primarily the kind which supports more extensive types of activity such as hiking, back-country camping, nature study, bird watching, riding, cycling, hunting, and fishing . . . This will require the construction and maintenance of more extensive trail systems, trail camping shelters and water supplies, and back-country camp sites and sanitary facilities."[9] The Commission argues that, with proper planning and appropriate use management, extensive recreational uses could be integrated with timberland management and harvesting programs, watershed management, livestock grazing, some occupancy uses and mineral development; however, it failed to recommend policies upon which such multiple development might be based, leaving such determinations to the land management agencies.[10] The Commission recommended that all nonconforming uses in national parks, monuments and historic sites be prohibited by statute,[11]

7. 43 U.S.C. § 869 (1964).
8. REPORT at 201.
9. *Id.*, 202.
10. *Id.*
11. *Id.*, 205.

and that areas requiring intensive development and high rates of capital investment should be designated as recreation dominant use zones, and then states, "Where other potential resource uses arise in these locations, recreation value would be given preference whenever conflicts occur. The extent to which other uses are permitted in the area would be determined by their compatibility with the recreation facility uses."[12] Next, the Commission recommends that Congress authorize and provide guidelines for restricted use zoning of multiple use public lands to protect scenic values, stating that the enjoyment of scenery accounts for a significant amount of current recreational use in the public land areas of the United States.[13] Again, the Commission states, "public land sites with high quality outdoor recreation potential should be inventoried and classified in advance of development. Recreation use values should be given primary consideration in permitting future uses of the site resources and the nearby area."[14] There are, however, no standards for determining what lands may qualify as "high quality outdoor recreation areas". With this kind of emphasis on scenic values and dominant recreational use zones, it appears difficult to say that the Commission report does not place an emphasis on recreational development as opposed to the development of other uses such as mineral resources, timber and the like.

We are cautioned that "recreation use should be regulated to minimize conflicts with the natural conditions and with other uses of public lands";[15] however, this statement is limited in the *Report* to the discussion of the problem of deterioration of the environment and the recreation facility by overcrowding and does not relate to the "other uses" of the public lands to which I have been referring.

A significant factor in any full scale report on national recreational land use policies is, it would appear, the manner in which the policies of the various agencies administering public lands for recreational and other purposes fit into an

12. *Id.*
13. *Id.*
14. *Id.*, 206.
15. *Id.*

over-all nation-wide recreation plan. The Bureau of Outdoor Recreation Organic Act required the establishment of a national recreation plan by May 28, 1968.[16] Unfortunately, that plan has not yet been written or adopted. The Organic Act also required that all agency programs conform to such National Recreation Plan. Presently each agency can adopt its own recreational programs, decide within the agency to allocate lands to recreation without reference to any other agencies, in some instances, without public hearing or Congressional action, and without consideration of the recreational policies of other agencies administering similar lands within the area.

The Commission recommends that the system of recreation land classification recommended by the Outdoor Recreation Resources Review Commission[17] should be improved upon and adopted by Congress as a classification system required to be used by all agencies.[18] It further recommends that the Bureau of Outdoor Recreation should be required to develop and submit to Congress, within two years, standards for evaluating and investing in outdoor recreation development on public lands. The Commission states that it is concerned that standards be provided as soon as possible to replace the current concept of meeting "projected demands" for recreation developments and then implies that there is something wrong with the public lands having been treated as a "free good" which tends to expand the developments for recreational purposes.[19] The Commission concludes that this is not a good basis for allocating scarce tax dollars to alternative uses of the public lands, without giving any reasons for its conclusion. The factors which the Commission recommends be considered in federal recreation investments are: expected use rates, investment and administrative costs per unit of expected use, expected net impact on regional economies, the opportunity cost of other uses of the land that will be foregone, and impacts on the environment and comparisons with alternative developments.[20] The Commission further suggested that the Bureau

16. 16 U.S.C. § 4601 (1964), *as amended*, (Supp. IV, 1970).
17. REPORT, Recommendation 85, at 213.
18. *Id.*, 213.
19. *Id.*, 214.
20. *Id.*

of Outdoor Recreation's statutory authority be strengthened and that the Counsel on Environmental Quality give a high priority to reviewing and recommending to the President the most advantageous organizational location for the coordinating functions now vested in the Bureau of Outdoor Recreation.[21] Why the Commission felt that it could not make a recommendation regarding executive branch structure is not disclosed.

Although there are obvious objections to the creation of another agency with over-all authority over administration, acquisition and disposition of public lands, it seems advisable that one agency such as the Bureau of Outdoor Recreation be vested with over-all nation-wide recreation authority, thereby hopefully eliminating duplication of effort within a particular area on lands administered by the several agencies. This is particularly important because of the differences in the authority of the various agencies and the manner in which each proceeds with respect to the development, acquisition and disposition of lands administered by it. For example, although the Wilderness Act requires a public hearing prior to the designation of a particular area as a wilderness area, no public hearings are required of agency decisions regarding park system plans.[22] It would appear advisable, consistent with a hypothetical nation-wide recreation plan, that one agency such as the Bureau of Outdoor Recreation have control over disposal policies regarding all public lands, rather than retaining disposal-retention authority in the several agencies.

In connection with its proposals regarding disposition of recreation lands (other than recreational areas having "national significance") to states and local governmental authorities, as explained by Professor Johnson, the Commission recommended disposition to a state or local governmental agency on a deed or lease basis, negotiated in each instance, by the Federal Government.[23] The Commission did not recommend a nominal price policy, nor did it recommend the pay-

21. *Id.*, 203.
22. H. RUTH & ASSOCIATES, OUTDOOR RECREATION USE OF THE PUBLIC LANDS, at 1-13, 14 (PLLRC Study Report, 1969).
23. REPORT, at 199-201.

ment of fair market value. Instead, it recommended that Congress provide the guidelines for establishing such price. The Outdoor Recreation Resources Review Commission, in 1962, recommended that such "surplus" federal land be disposed of at no cost to the acquiring state or local government, the theory being that the monies would be better spent by the state or local government in development of the lands and recreational facilities than in the payment to the Federal Government.[24] The Commission made no comment on this earlier recommendation by the ORRRC. The *Report* concludes that the lands and recreational facilities to be administered by the state or local governments or developed by them to serve local recreational needs should be financed by the state or local government; however, the Commission states that if the state or local government demonstrates an unwillingness to cooperate, federal funds should or might then be used.[25] In fact, the Commission recommends that in those instances where state or local governments cannot or will not accept a transfer or lease of a recreation area, and where the need exists, the federal government should, at its expense, establish and manage intensive use oriented recreation opportunities even though primarily of local, state or regional significance.[26] It would thus appear that a state could obtain federal assistance in the establishment of recreational facilities (if the Commission's recommendation is implemented) by the simple expedient of declining to develop the facility with its own funds.

The Commission further recommended that the Bureau of Outdoor Recreation be directed to review and empowered to disapprove recreation proposals for public lands administered under general multiple use policy if they are not in general conformity with state-wide recreation plans.[27] One difficulty with this recommendation, it seems to me, is that there is no requirement that a recreational plan conform with a nationwide recreation plan and indeed, if the recreation plan or proposal were disapproved by the Bureau of Outdoor Recreation,

24. OUTDOOR RECREATION USE OF THE PUBLIC LANDS, *supra*, n. 22, at Summ, 1-15 & 11-4.
25. REPORT, *supra*, n. 23.
26. *Id.*, 200.
27. *Id.*, Recommendation 80, at 202.

it would only be necessary that the state modify its state-wide recreation plan in order that the proposal would then conform.

No recommendation was made by the Commission regarding the difficult question of whether the Wilderness Act should be used to limit wilderness to untouched areas, or whether it should be used as a tool to restore remote, exploited lands. One of the greatest problems facing the Forest Service in the administration of the Wilderness Act is the reconciliation of its preservative objectives with sympathetic treatment of inconsistent uses. More importantly, as additional recreational land is needed and use increases, that use may well destroy the wilderness aspects of the area. The report on outdoor recreation use of the public land, prepared for the Public Land Law Review Commission by Herman D. Ruth and Associates of Berkeley, California,[28] suggested legislation to prevent crisis in environment caused by overuse on park service lands and recommended limiting or curtailing recreation or any conflicting use where it is found to be a threat to scenic beauty or natural values.

Recognizing this principle, the Commission suggests that restrictions be placed upon the use of national parks and wilderness areas in order to preserve them as they are now known. It recommends a first come- first served reservation system administered by mail.[29] Although one's immediate reaction is that such a system embodies a fair and equitable method of rationing a limited resource, it may actually prove to be discriminatory in favor of certain classes or groups of individuals. It may indeed favor those who least need the recreational facilities over those who would most benefit. There is no question that overcrowding in Yosemite National Park is destroying its purpose. On the other hand, it is desirable to restrict literally thousands of wilderness acres in many other national parks to a few back-packers because the tent camping facilities accessible only by foot are limited to one campsite with a few spaces for tents? Is it neecssary that the virgin

28. OUTDOOR RECREATION USE OF THE PUBLIC LANDS, *supra*, n. 24.
29. REPORT, at 207.

beauty of such vast areas be limited by a priority system to utilization by so few? If that is the case, certainly it will be necessary that additional recreational facilities be provided at an ever-increasing rate.

It is submitted that liimtation of visitor use should be coordinated with policies limiting the size of wilderness areas in national parks or wilderness areas set aside under the Wilderness Act, proportionate to the number of people who use those facilities, or that additional facilities be provided therein in order that the greatest number of people be entitled to use them.

The apparent overriding principle governing the recommendations of the Commission with respect to outdoor recreation, relates to the transfer of responsibility for, and title to, recreational areas of "less than national significance" to the state or local governments. This presupposes a determination by some standard not specified of those areas which are "unique and national' in character, the administration of which shall remain with the Federal Government. The Commission concludes that a great deal of additional work needs to be done to develop better working standards for classification of land for recreation purposes and recommends that the Bureau of Outdoor Recreation develop such standards. It does not, however, recommend any particular guidelines governing the application of land to recreational uses as opposed to other uses except in connection with its discussion of Recommendation 79 relating to state and local needs, wherein the Commission says "public land areas of less than national significance identified by a state-wide recreation plan as being necessary to satisfy state or local intensive recreation needs should be leased or transferred to the appropriate level of government for such purposes, *unless* overriding resource values require that they be retained and used for other than recreation purposes."[30] There are, however, no standards governing the determination of whether "overriding resource values require that these lands be retained and used for other

30. *Id.*, at 199-200 (Emphasis added).

than recreation purposes."[31] If one then looks to Chapter 7 on Mineral Resources, one would conclude that the overriding or dominant policy would be mineral resources. The Commission stated therein that it favors an overriding national policy that encourages and supports discovery and development of domestic sources of supply, including mineral resources and that a decision to exclude mineral activity from any public land area should never be made casually or without adequate information concerning the mineral potential.[32] "Mineral exploration and development should have a preference over some or all other uses on much of our public lands."[33] The Commission further indicated that mineral exploration activities, although conducted over substantial areas of land, generally require less surface area than most other land uses. Thus, it appears that the Commission has expressed a general policy in favor of the development of mineral reources. Unfortunately, however, the Commission made no reference to such policy determinations in the outdoor recreation chapter. Indeed, as discussed hereinabove, the conclusions and recommendations in Chapter 12 lead one to the conclusion that recreation is the dominant determinant. In discussing the general expansion of outdoor recreational facilities, the Commission made reference to multiple use concept; however, it made no reference to factors to be considered in determining the dominant use. Without such cross references or indications of dominant policy determinations, one wonders how a legislator or administrator is to be guided in his efforts to determine the dominant national policy with respect to the development of any segment of the public lands. Possibly this was intentional, thereby leaving to the private sector the task of persuading Congress or the administrative agency of the dominance of any particular land use policy.

The Commission should have been more forthright. Had it been, at least it would have been possible to establish that with which one disagreed and thereupon to set about justifying the basis for that disagreement.

31. *Id.*
32. *Id.*, 122.
33. *Id.*

The Commission recommended the promulgation of statutory guidelines for handling conflicts in uses of the public lands in the future.[34] It did not, however, state its recommendations for such guidelines nor the underlying policies suggested for use in preparation of such guidelines. There are no particular guidelines to govern the decisions of administrators at present; it had been hoped that the Commission, as a result of its review of all public land laws and policies, the uses to which those lands are devoted, and the needs and desires of the people, would have taken the opportunity it had to establish those policies, principles and guidelines.

34. *Id.*, Recommendation 82, at 205.