Land & Water Law Review

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

Article 29

1970

An Environmentalist Looks at the Public Land Law Review Commission Report

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LAND AND WATER
LAW REVIEW

VOLUME VI 1970 NUMBER 1

AN ENVIRONMENTALIST LOOKS AT THE PUBLIC LAND LAW REVIEW COMMISSION REPORT

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THE Earth as man's future habitat, the Earth as man's future storehouse and provider of sustenance—these two major concerns dominate the highly varied set of concepts which have recently come to be referred to as "environmentalist thought." Both of these concerns are underlain by a basic view of man as being in inextricable and increasingly perilous interrelation with the life support systems of this planet. This interrelation of man to his environment is further cast in the future context of succeeding generations who will inhabit and subsist, if at all, under conditions we are presently in process of establishing.

When these concepts are brought to bear on present policies, present patterns, or present specifics of resource management and utilization, they yield a further set of perceptions. These have recently become more familiar as they have received clearer articulation and more persuasive documentation. This articulation and documentation process is known to us all as "environmental alarmism."

Perhaps basic among these environmentalist perceptions is that the environment is being widely degraded and depleted, both as habitat and as sustainer. Persistent and non-persistent pollutants are introduced into the biosphere in widespread maner. Luxurious wants become "needs" at cut-rate prices in terms of environmental impact. Input-output-

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throughput patterns of production and consumption make throwaway use of non-renewables, which emerge from these cycles as pollutants and as non-degradable solid wastes. Industrial production and government agency management and construction programs go forward, justified by self-serving projections of induced demands which are based on self-fulfilling extrapolations from present subsidized per capita "demand rates" multiplied by population expansion. No thought is given either to economic constraints and disincentives on present consumption patterns, or to encouraging alternative modes of consumption.

Moreover, environmentalists regard this degradation and depletion as pervasive and ill-perceived. Technological development, whether in the form of applied technology, emergent industrial practices, or the introduction of new products, is not required to make systematic account of its long-term consequences prior to widespread implementation. Products perceived as beneficial at introduction produce latent and persistent side effects, such as DDT. Within the year, new lines of enzyme detergents were introduced in this country and market "demand" created for them through advertising, without so much as a "by your leave" from any regulatory agency and with what we must regard as either myopia or indifference towards their phosphate contents and possible health hazard by their chemically sophisticated manufacturers. Research in pure and applied technology appears to be regarded as a creative modern art form among many of its practitioners, with an *ars gratia artis* philosophy dominant and questions of "Why?" and "Is it worth it?" at best philistine gaucheries and at worst sacrilege. The glorification of a mixed aesthetic of ingenuity, competence, and efficacy in the production of ad hoc solutions to problems at hand virtually preempts any consideration of collateral, detrimental effects over the long run. A corollary article of environmentalist doubt, incidentally, applies to the credo that technology will or can be our unfailing saviour from any peril into which it may inadvertently thrust us. This tenet is highly dubious both as an abstract proposition, and in a wide variety of specific applications. Note the ubiquity and persistence of many

pollutants and patterns of consumption. Note further the cumulative effects of lag time between the introduction of technological innovations and detection and effective regulatory response, DDT again providing a classic example. Finally note the very real limits on both public and private motivation and resources to accomplish reversal of any technologically "progressive" status quo.

Further, environmentalists view this degradation and depletion as either actively supported or at least left unchecked by present institutional structures. Perhaps we need a technological-environmental equivalent to the Food and Drug Administration.[1] In the private sector, individual corporations and industries as blocs must press forward with vigorous expansionist and growth policies in order to weather business misfortunes in the most advantageous postures possible and to keep sales ,profit and dividends up. Perhaps a bit simplistically, a team spirit approach seems to pervade. The purpose of having teams and of joining one, from the water boy up to the coaches, is to compete and to win. The terms of competition and success are controlled by rules, insofar as rules are clearly announced, understood, accepted and enforced. There are far too few usable rules controlling the industrial "teams," however. Ticket holding spectators, the purchasers of products, are protected chiefly by products liability rules, which give the narrowly identified spectator redress for only a limited set of grievances. If environmentalists followed this metaphor, they would insist that we are all uneasy, involuntary spectators within the same stadium and that we badly need a new generation of environmental rules to protect the stadium and all its occupants from the activities of the teams. Some such rules have been announced, especially those seeking to curb the more obvious forms of air and water pollution. Environmentalists would assert, however, that the rules have been too often propounded by legislative "referees" who are overly tractable, if not beholden, to the interests of the corporate teams. Environmentalists would further insist that the corporate teams have sought to misconstrue the rules, have

1. Green, *Technology Assessment and the Law: Introduction and Perspective*, 36 GEO. WASH. L. REV. 1033 (1968).

not in fact accepted them since they have appeared antithetical to the nature of the game as played, and that the rules have been enforced by overworked if not inattentive officials who have chosen to negotiate compliance and penalties, often with friends on the teams, and who have blown too few whistles. In addition, environmentalists are actively in quest of a new generation of rules which they may invoke on their own motion in courts, such as expanded concepts of nuisance and waste, creative use of the class action device, and refinement of doctrines such as the weighing of the gravity of harm to the plaintiffs versus the social utility of defendant's conduct in the nuisance area or the "show me a corpse" approach to irreparable injury issues.

At the governmental level, environmentalists see agencies created with ad hoc purposes defined in response to the limited felt needs of times past. Such agencies are too often characterized by tunnel vision towards their programmatic commitments, be they construction or management. The main thrust is frequently towards continuity of programs, stable or increased appropriations, and, possibly, agency self-aggrandizement; and all quite often in service of clearly identifiable, self-interested, and well-organized private sector clientele groups which share a narrow unity of interests with the agency. Decisions too apt to be taken on the basis of the limited range of interests specifically charged to the agency, or historically view by it as within its purview, while broader, amorphous public interests go unheard, unrepresented, and unreflected in the decision making equation. Certainly such broader considerations may render decisions more difficult and ambiguous, require additional inputs of staff and time, and may conceivably militate against programmatic commitments. It may therefore be understandable that agencies have not on their own motion consistently sought full exposition and inclusion of these broader considerations in the decision making process. A great concern of environmentalists, however, is that may agencies are disposed to avoid these broader issues, if possible, and that literally thousands of minor and major decisions are made annually by agencies on a narrow, programmatic basis, and in substantial absence of

environmental considerations. The further fear is that the long run effect of these decisions and the policies they embody will be the misallocation, impoverishment and depletion of resources which may be put to more crucially important uses by future generations than we are presently making of them.

Judicial perception of the reality of some of these notions lies at the heart of the recent series of cases liberalizing standing requirements: In the celebrated case, *Scenic Hudson Preservation Conference v. FPC*,[2] the Court remarks:

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.[3]

Now Chief Justice Burger, writing for the Court in *Office of Communication of United Church of Christ v. FCC*,[4] expressed this perception:

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys generally is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely upon it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.[5]

We might note in passing that despite the high level of environmentalist litigation presently before the courts, the judiciary are not the proper artisans of systematic and detailed environmental policies. The current litigation at best serves to

2. 354 F.2d 608 (2nd Cir. 1965), *Cert. denied*, 384 U.S. 941 (1966).
3. *Id.* at 620.
4. 359 F.2d 994 (D.C. Cir. 1966).
5. *Id.* at 1003, 1004.

curb some individually abusive management decisions and, *perhaps,* to prod the agencies themselves to modify some of their procedures and policies. In the long run, it is widely hoped that this sort of litigation will serve to ventilate agency practices, to highlight the self-dealing and insulated narrowness of many forms of agency decision making, and to point up the pressing need for legislative readjustment of both public and private sector practices and institutional structures.

Finally, as a result of these major perceived trends and numerous subsidiary patterns of production, consumption, managament and policy making, environmentalists harbor grave concerns about the quality and terms of life which will be available to future generations. They perceive alternatives and choices being foreclosed almost willy nilly. They see the emergence of persistent and gravely troublesome consequences of present practices, and regard these as the iceberg-tip harbingers of further drastic consequences which we are in process of creating. They feel many of these consequences will be only slightly modifiable, and some may be irreversible. They essentially regard our patterns of national birthrate, production, consumption, and resource management, as all motor and no brakes. We are both intentionally and inadvertently discounting the future and its necessities on the basis of short run expediency and satisfaction of immediate wants. We are mortgaging the environment. The fear is that the summons in the foreclosure action is already being served for those who care to acknowledge it, that the notice of *lis pendens* will be recorded by way of disaster, and that there will be no equity of redemption. If our reading of the situation is even partially accurate, it would seem we have no choice but to adopt a more conservative approach in our management and use of resources—to hedge our environmental futures, as it were. This new approach will require reversal of dominant attitudes, philosophies, economic patterns and institution arrangements, hopefully without chaotically disrupting them. We must begin at once and hope these is still time to accomplish these adjustments by orderly process. Insofar as our public lands are a major factor in the nation's supply of a wide variety of resources uses, and insofar as the federal

government is in a position to take a dominant and demonstrative leadership role in their management if it chooses to do so, all of the concerns expressed to this point speak to what this nation should be about in the management of the public domain. This is the business at hand.

It is obvious that governmental decisions having impact on the environment, in the dual sense of habitat and sustenance used above, may move up through a progressive sequence of abstractness, from decisions which are quite localized and particularized all the way up through generalized decisions which are actually determinations of national policy. And, of course, any particular localized decision may be simply that, or may be a specific example of the implementation or a regional or national policy. Consider, for instance, an agency decision to harvest a heavy stand of old growth timber from a forest area where timber grows quite slowly due to altitude, rainfall, soil conditions, etc. The decision to harvest is in some senses a decision to "mine" the timber, since the heavy volume to be yielded by the cut may be the result of two or three century's growth and may not naturally be replaced by any comparable regrowth volume for another two centuries. Taken over the perspective of several generations, then, this timber is a non-renewable resource in any realistic sense. Let us examine at various levels the considerations, policies and consequences that may be involved in the decision to harvest this timber.

The decision to cut may be viewed as having significance only within the stand and its immediate vicinity in terms such as species of vegetation which will replace the timber that is cut, quality of wildlife habitat, effects on soil stability and stream sedimentation, and perhaps the availability of the area for pleasant recreational use. At a slightly broader level, the decision to cut may be pressured by demands that the management agency satisfy the raw timber requirements of a local timber operator's unreasonably high mill capacity, *i.e.,* keep his mill supplied for full capacity operation. At a yet broader level, the decision could be in partial implementation of intentional policy in an entire forest to raise the allowable

rate of timber cutting by the manipulation of formulae. The allowable cut rate may be based on a formula whereby there is first computed the volume of timber contained in areas of reasonably rapid timber growth, "commercial timbering areas," we shall call them. Given average growth conditions, the period of years required to grow a tree of harvestable sawlog size, say sixteen inches, can then be computed for these areas. The annual volumetric rate at which timber may be harvested from the "commercial timbering areas" may then be determined, such that the annual timber cut is offset by annual regrowth in reseeded cutover areas and a sustained yield situation is achieved. Some decades hence, when the last of the original growth is harvested, second generation replacement growth will be mature and the annual volume of timber yield may thus continue indefinitely. Now our heavy volume stand of old timber is in an area of slow growth, a "non-commercial timbering area." If this stand is introduced into the sustained yield equation without varying the growth rate factor accordingly, the annual allowable timber cut will be raised *pro tanto* above an amount which can be actually sustained. If many slow growth, previously non-commercial timbering areas are covertly introduced into the sustained yield computation without proper modification of other figures, the apparently objective computation may then be used to justify a yield rate which is anything but sustainable. If in addition the regrowth rate is substantially shortened, as by determining that the regrowth period will be based on the time necessary to grow an eight inch tree for pulpwood rather than a sixteen inch tree for saw timber production, the "sustained yield" rate may be further and drastically increased.

Thus far, under our analysis, the decision to cut our old growth stand has successively had implications within the stand and its environs, been a means of meeting the ad hoc "needs" of a local mill, and been an element in a regional decision to raise the "sustained yield" rate from an entire forest. The latter decision may, of course, blend over into a national policy which may be accompanied by other related motives, policies and consequences. A basic policy looking towards the accelerated short term harvest of many existing

heavy stands of old growth timber may be accompanied by the assumption that the cutover areas can be intensively managed to produce artificially accelerated timber growth rates, thereby sustaining the demand/price patterns created by rapid harvesting of the old growth stands. Perhaps more cynically, additional underlying motivations or policy choices might be that a strong supply-consumption picture will bolster assertions of "needs" both for the timber and for appropriations for intensive timber management programs; will help forestall any push for research into product substitution, alternative constructions techniques involving the use of less timber, and procedures for inducing the recycling of timber; will assure a stable or growing timber industry for at least another two or three decades; and will be useful in the future as a basis for the assertion that yet additional public domain must be opened for harvest to satisfy our timber "requirements." Uncritical adoption of this national policy of accelerated old growth harvesting could clearly subordinate other major national questions such as the effects on watershed yield and quality, fish and wildlife communities, and recreation uses; the effects of widespread, artificial, intensive management techniques on nutrient budgets, pesticide levels, and vegetative bearing capacities over major tracts of land; the long range qualities of force-grown, single variety crops; and the timber supply picture in the future, if present calculations concerning stimulated regrowth potential turn out to contain major flaws.

As the *Report* moves up the ladder of abstraction, or expands in breadth, if you prefer, in dealing with matters of environmental concern, it becomes increasingly less cogent and explicit about the broad policy matters which are legitimately raised by its contents. Stated another way, the degree of articulation of policy choices, of subsidiary areas of inquiry, and of environmental concern expressed in the *Report,* is inversely proportional to the breadth of the issues confronted. In fact, when the *Report* reaches the level of nationwide policies to be followed in the yield of non-renewable and slowly renewable resources from the public domain, alternatives are not considered at all. It may have been too much to expect the Commission to set forth available choices of policy and

philosophy and then to reach a consensus of selection from among them. Statement by the Commission would have required definitive and dispositive resolution, however. It could have served the extremely useful function of clearly highlighting these policy choices and their consequences as vital subjects for the legislative deliberations which will surely now begin. The Commission is to be faulted for letting pass the opportunity, resulting from its years to study, to elucidate and articulate the choices and consequences the nation faces in the long term management and utilization of its public domain resources.

Even more distressing, however, is the fact that despite its failure to articulate choices of national policies and the attendant consequences, the Commission has nonetheless made its own choice of policy, evidently with indifference to consideration of consequences. Much of the substance of the *Report's* recommendations flows from these policy choices. The choices are made, either overtly or covertly, in the commodity chapters of the *Report.* Where stated overtly, they are apt to be stated baldly, are put froth as unexceptionable statements of 1970 America's self-manifest destiny, and are shorn of any analysis, reflection, second thoughts, and even of the obvious lessons of history.

One of the strongest of such commodity chapters is that on mineral resources.[6] In its first page it apparently embraces without criticism the reality, need to continue, and our ability to sustain "[m]any of the factors we take for granted in our standard of living."[7] It then alludes to the dependence of national defense policies on mineral resources without further elaboration or analysis, and on this basis posits "overriding national requimerents" for mineral development..[8] With its analysis of national issues thus complete, the *Report* goes forward to recommend that mineral exploration and development be encouraged as a matter of overriding national policy and as a highly preferred if not top priority use on most of the

6. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 121 (1970). [Hereinafter cited as REPORT].
7. *Id.*
8. *Id.*

federal lands, evidently excepting only national parks, monuments, and other statutorily excluded lands.[9] The *Report* then goes forward to suggest what essentially is a continuation of the Law of 1872 over the footnoted dissent of four Commission members, who characterize this approach as minor surgery, and as an inadequate legal framework for the future.[10] In somewhat similar vein, the timber resources chapter begins by blandly dismissing from consideration the practices which resulted in the shift from the situation in the first half of this century when "private timberlands met the major burden of our wood requirements"[11] to the present situation in which "pressure is now on public lands to supply much of the country's wood needs in the near future."[12] Says the *Report,* regardless of the reasons for this and "the relevancy of these reasons to today's conditions, the facts are:

—Federally owned timber is vital to the wood economy of the country;

—Federally owned timber is vital to the economies of many communities;

—Federal policies with respect to the sale of this timber can result in the life or death of firms that use it;

—The Federal Government's dominance as a supplier of timber will continue in the future."[13]

The *Report* then goes on to recommend that something on the order of one half of the total forest land now in Federal ownership, which would include something less than one-fourth of the total area of the National Forests, be placed in timber production management units under control of a Federal Timber Corporation.[14] These two are among the more strongly commodity-oriented sections of the *Report,* but reflect the basic propensity to state matters of fundamental national policy in conclusory language without any attempt to analyze the asserted necessities or realities justifying the policies

9. *Id.,* 123.
10. *Id.,* 130.
11. *Id.,* 91.
12. *Id.*
13. *Id.*
14. *Id.,* 92-97.

thus selected, or to analyze the consequences of the policies, let alone to articulate alternative policies.

A second major characteristic of the *Report* is its consistent emphasis on intensive use of the public domain founded on lines of analysis that seem either excessivvely short-range or present tense. Concepts such as the trust doctrine, frequently associated with the public domain and connoting broad-scale responsibility into the future, are almost totally absent from the Commission's deliberations as set forth in the *Report*. Early in the Preface to the *Report* the Commission states that in following its mandate to ". . . compile data necessary to understand and determine the various demands on the public lands which now exist and which are likely to exist with the foreseeable future . . ."[15] the Commission's work was ". . . based on a determination that the year *2,000 is the limit of* ITS *"foreseeable future,"* " as to the assimilation of data.[16] This, or a lesser time limit, seems also to have circumscribed the consideration of all trends and future needs.

The statement which seems most illustrative of this attitude is contained in the lead paragraph of the Summary to Chapter Two, To Whom the Public Lands Are Important:[17]

> . . . As national resources, . . . [the public lands] have little value unless their values are made available for the use of our people. either in Federal or non-Federal ownership.[18]

Despite the remark a few paragraphs previous that "all users are concerned that public land policies provide an opportunity for the satisfaction of future requirements as well as present needs . . .",[19] the above statement stressing availability for use occurs in context of discussion of the inteersts held by the various "publics" posited by the Committee as having a stake in the public lands. These are the National Public, the Regional Public, the Federal Government as Sovereign, the Federal Government as Proprietor, State and

15. *Id.* at X, *citing* 43 U.S.C. § 1394(a)(iii) (1964).
16. *Id.* (emphasis added).
17. *Id.*, 38.
18. *Id.*
19. *Id.*, 37.

Local Governments, and the Users of the Public Lands.[20] The National Public might expectably be characterized as having the greatest long term interests, and indeed capability for future production and maintenance of quality environment are discussed,[21] but the first two paragraphs of initial discussion are given to maximizing net revenue production from the public lands, and to the pricing of consumer goods and services derived from the public lands.[22] Discussion of the Federal Government as Sovereign dwells at length on the competitive economic impact of the public lands, and notes that in crisis, the sovereign responsibilities must override other objectives.[23] May the crisis soon be one of depletion and of consumption patterns, perhaps, as well as of national defense? In discussing the Federal Government as Proprietor, strong and almost dominant emphasis is laid on the achievement of net economic gains from public land, on maximization of net economic return, and on cost of administration compared with income received.[24] Finally, here and elsewhere, Users of Public Lands and Resources for consumptive and non-consumptive purposes,for private extractive personal profit and for all forms of recreation, are lumped together under the notion that their interest is a uniform one of equal access and equal treatment in their relations with the Federal Government and each other.[25] If dollar yield and maximization of net economic return is a strong element in the management formula, equality of treatment would seem destined towards more "equal" treatment for commodity interests under present valuation schemes, perhaps at significant discount of future values. The tenor overall through this and similar sections is that of kind thoughts for the environment and the future, but dominance by economic yield in the present tense.

This sensation is reinforced by the statement in Chapter Three, Planning Future Public Land Use:[26]

20. *Id.*, 34, 7.
21. *Id.*, 34, 35.
22. *Id.*, 34.
23. *Id.*, 36, 37
24. *Id.*, 37.
25. *Id.*, 37, 38.
26. *Id.*, 41.

> We believe maximization of net public benefits to be a suitable overall objective for public land management and disposition. It is clear to us that this objective can be served in some cases by retention of public lands and in other cases by disposition of public lands into non-Federal ownership. We also note that the concept of net public benefits implies a comparison of the benefits of a possible course of action with the costs of following this course. 'Public benefits' includes all segments of the public and their interests as defined in Chapter Two. This standard would measure the overall primary and secondary benefits that are generated by a particular mix of uses against the primary and secondary costs . . . We recognize that the terms 'benefits' and 'costs' have a decidedly economic ring, but we do not intend by the use of these terms to place emphasis on economic uses in resource allocation planning to the exclusion of other uses and values. It is essential to give full consideration to non-economic factors in this planning process, and many of our recommendations elsewhere in this report, particulary in connection with environmental quality, fish and wildlife, and some forms of outdoor recreation, are directed to this important end.[27]

The chapter goes on to propose land management on the basis of a zoning concept whereby lands which have an identifiable "highest and best use" at time of classification would be placed into appropriate classifications. The identified "highest and best use" would by classification become the "dominant use" for which the lands would be managed, with secondary uses allowed if consistent with the dominant use. Unclassified lands would remain in multiple use categories until dominant uses became apparent for them.[28]

Seemingly counterpoised against this system of land analysis and management on the basis of dominant use are the planning provisions contained in Chapter Four, Public Land Policy and the Environment.[29] Recommedations in this chapter urge the development of methodology for evaluating

27. *Id.*, 46.
28. *Id.*, 48-52.
29. *Id.*, 67.

the quality of the environment and combining objectively ascertained environmental quality zones and protection for them into the overall scheme of land use planning and management.[30] Additionally, the Chapter contains the following:

> Recommendation 16: Environmental quality should be recognized by law as an important objective of public land management, and public land policy should be designed to enhance and maintain a high quality environment both on and off the public lands.[31]

The various commodity sections are further replete with admonitory statements of good intent about avoiding environmental degradation where "feasible." The thrust of the environmental chapter and of the specific environmental caveats, however, valuable though they are, is limited in scope to the detailed management of planning units of land on a zoning model, or to the ad hoc case by case regulation of specific, individualized user activities which may have adverse environmental impact. The concern, then, is quite particularized. Moreover, the development of usable and accepted methods of determining existing environmental quality and the impact on the environment of other development activities, the insertion of this methodology into the traditional hierarchy of land management analysis, the acceptance of this methodology and its inherent attitudinal changes by the rank and file of agency personnel, the grant of appropriations and staffing up with personnel trained to implement this methodology, the massively time consuming process of data compilation and analysis to reduce this methodology onto maps and into effective operation, will all require time. The culmination of this process lies years in the future. In the interim, given the broad schemes of priorities in the *Report,* the availability of "highest and best use" planning methodology, the *Report's* constant emphasis on maximization of economic return, and the concept of making the resources of the public domain available for present use, it appears likely that dollar-oriented commodity yield will occupy a prevalent position in the man-

30. *Id.*, 73-80.
31. *Id.*, 68-70.

agement of the public domain for some time to come. An exception may be recreation uses, which are clearly defensible on non-economic grounds. Moreover, methodology for evaluating the economic value of recreation use is quite unsatisfactory. Despite this, however, there appears elsewhere in the *Report* a strong thrust towards the charge of uniform recreation user fees,[32] which could conceivably be an opening thrust towards the economic analysis and justification of recreational uses, perhaps in competition with other dollar generating uses and at substantial discount of present and future values.

A further element of the Commission's thinking to note under this head is the persistent hostility towards executive and administrative withdrawals from the public domain.[33] Many of the criticisms raised have merit, but many are quite debatable and strongly biased. In fact, this provokes the first footnoted dissent of the *Report*.[34] Briefly, the historic context and assertable long range benefits of the early, massive Executive withdrawals are virtually ignored.[35] The realities of resource consumption and the foresighted philosophies which provoked these early withdrawals seemingly would have been a useful cautionary reminder in the *Report* and would have provided contrast to some of the *Report's* dominant themes, but are not included. Withdrawals are largely characterized as ill conceived ventures in extra-legal land management, and as usurpations of Congressional authority.[36] The remedy is seen as early review of all withdrawals, assumption of tighter control by Congress over future withdrawals, and an automatic time limit and periodic review of future withdrawals.[37] This may be viewed as a laudable push towards consistency and rationality in withdrawal policies, but gibes equally well with the dominance of short term, intensive use concepts discussed previously.

Somewhat allied to the matters discussed in the previous section is the *Report's* consistent emphasis on management

32. *Id.*, 203-205.
33. *Id.*, 1, 2, 42, 43, 52-57.
34. *Id.*, 2.
35. *Id.*, 28, 42, 43.
36. *Id.*, 2, 52-57.
37. *Id.*

of the Federal lands as an efficient system of proprietary land holdings. Argument against "efficency" *per se* might be fatuous, but much depends on the concepts which underlie the term. Some of the Commission's thinking on disposal policies may be illustrative. Although on the first page of the *Report* the Commission recommends reversal of the historic disposal policies, never formally repealed, it imemdiately rejects the idea that the mere fact of Federal ownership is its own justification for continued ownership.[38] Thereafter, some rather unusual concepts are articulated in various sections of the *Report*. It is asserted that the United States now has the highest living standard on earth in good part because of its policy of making public lands available to those who would develop them.[39] Debatable historic fact is, simply by its statement, sought somehow to be converted into an illuminating guide for future policy. It is further asserted that the remaining unreserved public lands are to a substantial extent held as a coincidence of history, having been acquired through territorial expansion and never having been called upon to fulfill a Federal need nor demanded under various disposal acts.[40] This concept is expressed as part of the analysis in the *Federal Government as Proprietor* section, and is followed almost immediately by statement of the principles of net monetary gain and maximization of net economic return.[41] The recommendation has previously been made in the *Report* that immediate review should be made of all unreserved public lands to determine which should be retained and which would "... best serve the public through private ownership."[42] This concept is later refined somewhat, and disposal at full value is recomemnded as to "... lands required for certin mining activities or where suitable only for dryland farming, grazing of domestic livestock, or residential, commercial, or industrial uses, where such sale is in the public interest and important public values will not thereby be lost."[43] The move seems to be towards tidying up the Federal holdings, perhaps in unstated accord

38. *Id.*, 1.
39. *Id.*, 19.
40. *Id.*, 37.
41. *Id.; see also* the capsule development of comparable concepts, *id.*, 3, 4.
42. *Id.*, 1.
43. *Id.*, 4, 5.

with the concept of maximizing net public benefits noted above. And certainly some of this would be quite justifiable. The overall rationale, as best as can be elaborated, however, seems to be some mixture of the "coincidence of history" theory, plus inquiries into whether it would maximize net public benefits to retain the land, whether any important public values would be lost by disposal, and whether the land would be profitable in private hands.

These criteria, if fairly stated, are largely those of a proprietor, those of a landowner contemplating either sale or retention based on short term economic analysis. Therein lies a basic problem of attitude which emerges throughout the report—the United States is not just a proprietor, just a landowner worried about next year's rent or the next decade's return on capital. It is a trustee of resources, it is a sovereign concerned with the general welfare of its people both now and one and two centuries hence. The functions may be divisible for a structured analysis of issues, but are indivisible in final resolution of issues. Additionally, a sovereign or trustee considering disposal should pursue additional lines of inquiry. Does it appear that potentially significant future values or options may be foreclosed by present disposal? Are disposals consistent with desirable long range policies of resource allocation and consumption? Are there long range public ills or disadvantages which may be created by the disposal, given the possibility of abusive or ill-advised private grantee use? Can this be prevented? What possibility exists of long term speculative private holding of disposals, thereby defeating the private sector productivity motivation of the disposal? Can this be prevented? Some of these questions of prevention are approached in the chapter dealing with disposals, but the suggested curative techniques consist of covenants and reversionary interests which, given limits on detection and enforcemet personnel and the cumbersome nature of the enforcement actions, seem to offer little prospect of widespread potential for realistic control.[44]

44. *Id.*, 265-267; *see* the proposed elimination of present restrictions on corporate acquisitions and total amounts of public domain which may be acquired by individual private entities, *id.*, 265.

One additional major thrust of the *Report* that ties to this discussion section and the preceding one is the emphasis on public land resources as the servant of economic prosperity and growth for dependent local and regional economies in the West.[45] This will doubtless be a major area of tension as the *Report* moves towards legislative fruition. The "dependency" may be terminated in part by the transfer of public assets into private hands. The dependent economies will certainly seek greater prosperity by increased, perhaps privileged, access to public domain resources. In either case there will likely be conflict between the immediate yield of resources in support of local economies and a broader national desire to conserve resources and unspoiled lands into the future.

The potential clearly exists to use the public lands for imaginative regulatory and management programs which would provide leadership and example in strengthening of the states' counterpart programs. This potential has been only partly explored and in at least one are has been specifically rejected by the *Report*.

One area of badly need improvement is approached squarely in Recommendations 13 through 15, contained in the land use planning chapter.[46] Local land use planning, at whatever level, is considerably complicated in the West by the existence of large parcels of public domain with the local planning jurisdictions. Three areas for improvement are given useful exposition in the Recommendations and accompanying text. There needs to be a workable system of selective coordination between federal management plans and local land use planning agencies. As part of this effort, and perhaps as a precondition to such coordination, there needs to be a substantial upgrading of the quality, professional competence, and administration of most local planning efforts. There also needs to be statewide and probably regional planning of certain land use elements and service systems.

All of this casts considerable financial burden on the local and state planning jurisdictions. This burden hits unde-

45. *Id., see e.g.*, 3, 4, 6, 7, 22, 30, 36, 47, 57, 60, 99, 179, 180, 235-242, 265, 266, 270.
46. *Id.*, 61-65.

veloped areas at a time when they may accomplish much by proper police power regulation, but do not have the funds for the creation and administration of such regulations, and, in fact, may be unconvinced of the desirability of such regulations. Recommendation 14 suggests that the Federal Government should provide financial assistance for land use controls in the public land states. This should be done, and should be coupled with certain types of technical assistance and doubtless with additional incentives towards the most advanced sort of land use control planning and administration. The brief sketch of a system for environmental inventory and classification presented at Recomemndations 18 and 19 is an example of precisely the sort of technical assistance which the Federal Government should develop as rapidly as possible, probably through use of private consultants, and then encourage to be used with additional imaginative innovation by states and local units of government.[47] With financial and technical assistance available, compliance with minimal levels of land use control sophistication could be made a pre-condition to local coordination with Federal management planning in the area.

A major disappointment is the abdication of the full potential for Federal leadership in establishing regorous standards for pollution abatement for both private activities on the public domain and for private industry use of public domain

47. *Id.*, 73-80. It bears re-emphasis at this point that there is a serious gap in methodology and skilled personnel in this area. Only a few creative thinkers in the nation are ready at this time to proceed with any techniques that can seriously be called "environmental inventories," and even these systems have substantial limitations. Equally serious is the shortage of personnel with proper training to apply and administer such systems should they become widely used as planning devices. More difficult is the formulation of any really useful response to the mandates of the National Environmental Policy Act of 1969, 83 STAT. 852 (1970) that the environmental impact of major federal actions be considered and mitigated. This moves from inventory of environment to impact projection, with an accompanying increase in degrees of difficulty and sophistication implicit. For these reasons, prompt Congressional attention should be given to the development of methodology and the training of personnel, as is suggested in Recommendation 21, REPORT at 80, 81. It seems a dubious proposition, incidentally, to lodge a creative and innovative research program of this sort within or under the control of a line agency with its own commitments to planning methodology and program, as is suggested by Recommendation 21. Lodging this program in an independent research agency, perhaps an expanded and operational Council on Environmental Quality, would seem a better approach if procedures could be fashioned to encourage the adoption of improved methodology by line agencies. Convincing top line agency administrators of the necessity and benefit of new methods would seem to be a problem in either case, however.

resources off of the public lands. The political and economic pressures against stringent Federal controls are somewhat the same as have hampered state efforts, and the numbers and diligence of detection and enforcement personnel at the Federal level may not automatically be better than at the state level, so perhaps it is unrealistic to expect the Federal government to make major breakthroughs. The potential is there, however, and it was given only a truncated development in the *Report.*

Recommendation 17 suggests:

> Federal standards for environmental quality should be established for public lands to the extent possible, except that, where state standards have been adopted under Federal law, state standards should be utilized.[48]

This is followed by the strikingly imaginative suggestion that use of public domain resources off public lands might be conditioned on the recipient's compliance with ". . . established standards for pollution control or other aspects of environmental quality, both on and off the public lands."[49] These recommendations serve as an opening wedge, albeit quite blunted, for the creation of a truly national system of pollution regulation and environmental protection. State-to-state variation in pollution regulation has been the whipping boy of regional and national industries which, at the same time, have been at least partially responsible for the situation due to their individualized negotiations with each state for moderate standards and enforcement on threat of removing operations from the regulating state to one more hospitable to both their pollutional and economic contributions. In terms at least of persistent pollutants and objectively identified gross environmental affronts, the Federal Government could set uniform and rigorous standards for activities on its lands and for the procesing of its resources off of its lands If an activity is going to foul streams, lakes and oceans for twenty years, air for 100 years, or cause environmental degradation of regional

48. *Id.*, 70-73.
49. *Id.*, 70-72.

or national significance, what diffeernce that it originates in Colorado or Wyoming. A similar approach, with some modifications to allow for carying capacities, might further be adopted for non-conservative pollutants and lesser environmental abuses. Likewise, certainly as to persistent pollutants and gross abuses, at least, why should a nation-wide corporation with it operations in violation of abatement orders in some states pick up a "good citizen" rating as to that portion of its operations which utilize public domain resources and are in compliance with regulations. This appears to be some sort of twentieth century serpentine version of the corporate veil.

If certain types of national regulations were adopted applicable to private operations using the public domain, or its resources, there would perhaps for a while be a dislocation of demand onto private domain resources. This could not last, however, if we really "need" the resources from the public domain. Any differential between state and federal regulation should begin to even out as the states took example from the federal regulation and became more uniform in their regulatory requirements.

The Federal Government should also take a strong lead in strengthening standards for restoration by industries whose operations damage the environment on the public domain, and also as noted above, whose use of public domain resources on private lands causes gross environmental damage. This will require major additions of manpower and enthusiasm. Major problems surround the drafting of workable protective stipulations for leases, determination of compliance with the stipulations, and enforcement of financial sanctions in the event of non-compliance.[50] Workable limits on agency discretion will also be difficult to delineate.

Despite strong and badly needed emphasis on the protection of environmental quality, the *Report* is predominated by a philosophy which largely views the public domain as a national larder to be opened and used immediately in further-

50. Palmer, THE BUREAU OF LAND MANAGEMENT'S ADMINISTRATION OF SURFACE RESTORATION PROVISIONS IN MINERAL LEASES, May 25, 1970 (unpublished paper in University of Colorado Law School Library).

ance of our present patterns of luxuriant consumption. The *Report* accepts these patterns, our national indulgence of ourselves in them, our discount of the future by them, as givens —as unquestionable and, evidently, as sustainable. It posits no alternatives. It therefore offers prospect of use as a manifesto by the commodity interests which it obviously forwards in its various topical chapters. In these respects it is a present tense document which purports to offer leadership in the future. The best hope it offers is that its various environmental recommendations can be made operative in time to offer some control over the methods and perhaps the pace of the intensive production of commodities which it envisages as the manifest destiny of the public domain. What lies at the end of a route of intensive production? Should we in fact take the route at all? How might our public resources be managed to lead us down more liveable alternative routes? These are fundamental questions which should have concerned the Commission and evidently did not.