ROLE OF THE
FEDERAL GOVERNMENT
IN LAND MANAGEMENT

INTRODUCTION

The recently completed organization of the Public Land Law Review Commission gives a special timeliness to a preview or overview of the Commission's activities. It is my purpose to detail how I think the Commission may approach the question of the role of the Federal Government in land management.

In the four years I was Assistant Secretary of the Interior for Public Land Management, I participated in no project which gave me a fuller sense of accomplishment than the one which involved me in cooperative activities with Chairman Wayne N. Aspinall of the House Committee on Interior and Insular Affairs in securing the enactment of the bill which authorized the Commission. I feel, therefore, somewhat free to discuss the Commission, and to say what I think will be its priority tasks. Such background should help to make clear my later thoughts about principles the Commission might specify for the long term role of the Federal Government in land management.

LEGISLATIVE DOMINATION OF THE COMMISSION?

The enabling act weighted the Commission's membership in favor of the Congressional members, who number twelve of the authorized total of nineteen. Inferentially at least the Congressional members also control the selection of the Chairman, who is elected by a majority of the eighteen designated members, and is himself the nineteenth member.

This weighting was purposeful. Some say it is a defect. I think it is not.

The final report of the Public Land Law Review Commission, said the framers of the act, is to be made to the President and the Congress. They contemplated that the report should lend to significant legislative action. The report will be legislatively meaningful only as it is persuasive upon the Congress.

The highly specialized subject matter of the Commission's work closely parallels the assigned responsibility of the Committees on Interior and Insular Affairs of
the two Houses of Congress, from whose membership all the Congressional members must be designated.

The majority and minority parties have equal membership.

By reason of these two facts, any Commission recommendations for legislation will have had an advance involvement from key members of the Committees which must consider the recommendations. To a considerable extent, the taint of political partisanship will have been somewhat removed from the recommendations.

So it must be concluded that legislative domination of the Commission at least has practical value, if the objective is getting the laws changed.

The Public Interest

But the fear has been expressed that the recommendations will not be in the "public interest". Or, to put it more accurately, that they may not be as much in the "public interest" as those which might come from a Commission not dominated by Congressional members.

Recommendations as such can't damage the public interest. The public interest is in jeopardy, if it is at all, only if the Congress translates recommendations into bad legislation.

In 1930, a Commission to study the public lands which had no Congressional members recommended that the Congress transfer the public lands to the respective states. Far from being persuasive with the Congress, the Commission's activities probably contributed to the so-called "closing of the public domain" associated with enactment of the Taylor Grazing Act of 1934.

It is inevitable that there will be disagreements with the final recommendations of the Commission, if it gets into some of the problems I will discuss herein.

Each side of each dispute will claim to occupy the high ground of "public interest". I am among those willing to refer to the Congress conflicting claims about where the "public interest" lies in public land and public land resource matters.

My attitude in this is akin to the way I feel about the jury system. Individual current or historic examples of its malfunctioning cannot displace 700 years' experience which tells Anglo-Saxon lawyers that in the system, with all its imperfections, lies our liberty.

Those who express a distrust of the Congress must be reminded, also, that the Executive is not deprived of its Constitutional right of veto in the law-making process. Those who effect a preference for Executive over Legislative action must know that the converse safeguard is much more unwieldy.
Legislative domination of the Commission was purposeful, based upon considerations which are valid. Unless one fundamentally rejects the Congress' Constitutional prerogative to make laws for the public lands, expressed in Art. IV, Sec. 3, Cl. 2, it cannot be argued that the arrangement per se is antithetical to the public interest. The practical objective of getting recommendations capable of being promptly considered by the Congress is affirmatively served.

THE PRELIMINARY WORK

The Commission's charter is deceptively simple: to study existing statutes and regulations, examine present and future demands on the lands, and to recommend changes to provide maximum public benefit.

Concurrent with establishment of the Public Land Law Review Commission, Congress passed two other laws which bear inferentially upon the Commission's work. The Classification and Multiple Use Act indirectly spells out that the Commission must grapple with the concepts of "retention" and "disposition" of public lands in the light of the criteria and procedures devised by the Department of the Interior in a four-year interim period which is subscribed as the duration of the authority and the life of the Commission.

And the Public Land Sale Act evidences a tentative Congressional conclusion that the Commission will desire, as a part of its long-term recommendations, to help strengthen zoning and other planning activities of counties and other non-federal public bodies.

But although such concepts seem clear-cut, and the task simple to state, students and practitioners of the subject should agree that complexity, not simplicity, is the key element.

Scope of Study

In one way or another, the Commission will be considering 750 million acres of federally owned real property and certain other properties not measurable in acres. This is virtually all of it, as only some of that which has been acquired from private owners for various federal programs is excluded from consideration.

The values, present and potential, are very large. Each federal department reports annually an estimate of the value of lands it administers, and the latest estimates (1964) total $94 billion. The oil shale resource in public ownership has been estimated as having a "potential value" equivalent to the national debt.

The raw material for the Commission's work is not the land. The Commission will not recommend land decisions. Its subject matter is the system of land-use decision-making; its raw material is the body of laws, rules, regulations, practices and procedures, which in total comprise the system.
Relationship of Executive to Legislative

The relative roles of the Congress and the Executive Branch will be exposed as the system of land administration is reviewed.

The Commission will find evidence that Congress's jealousy of its Constitutional prerogatives over federal lands perhaps has led to encroachments upon the Executive's implied power to make permanent withdrawals or reservations of public lands for federal uses. In recent years, the withdrawal power has been partially circumscribed. Procedures for reporting certain proposed withdrawals to Congress in advance of making them have been agreed to by executive departments. And legislation is pending to prescribe such advance reporting as a matter of law. But the Commission may also find in this preliminary phase, as I believe, that these tendencies are symptomatic of legislative impatience with imprecise and unclear standards for the decision-making process, and not necessarily of a desire to encroach upon administration functions.

The Commission must start with a clear understanding of these basic principles of administrative law. It must see from the inception that what it must do is recommend standards, which, if the Congress accepts, will leave their administration to the Executive. These standards may be rigid or relaxed, specific or general, lengthy or brief. These are Commission choices.

THE EXISTING SYSTEM

The beginning point for recommending a new system is thorough comprehension of the existing system. Herein lies the great preliminary task of the Commission.

The Commission does not start with a clean slate. Congress has affirmatively indicated that it well understands that the existing system far transcends statutory or even regulatory codification of the past, when it specified that policies and practices and procedures, as well as statutes and regulations would be studied.

By way of illustration, consider mineral lands, and the complexity of the task of determining what the present system is in that one segment of the Commission's work.

The Mineral Public Land Laws

Free and unrestricted mineral entry under the general mining law of 1872, recognizing the "common law of mines," is statutory policy today. There are some recent statutory modifications including Multiple Surface Uses (1954) and extensive indirect eliminations of national parks and areas of wildlife and wilderness value under certain circumstances.
Leasing for oil and gas and certain other mineral exploration and development has been a statutory policy since 1920, with frequent statutory alterations as to details.

These statutory statements do not even scratch the surface. Neither the legal profession nor the industry, and certainly not the Interior Department, has ever stated what the "law" in the mineral area is, in any comprehensive or useful way.

Indeed, as presently administered, the "law" in this subject defies restatement. Within the Department, adjudication dominates administration, and such standards as exist to guide either the applicant or the field administrator are to be found in the published decisions, not in the codified regulations.

Generations of adjudicators have felt no hesitation about venturing further into the shoals of filling out the legislative language in the manner in which the Supreme Court did when it accepted Mr. Lindley's ample paraphrase late in the last century.

For a recent example, I need but mention the concept that a mineral location can be rendered retroactively and irretrievably void upon a finding that between the date of location and the date of application for patent the market for the mineral declined to a point where a prudent man would not then have pursued his claim, notwithstanding the fact that the market later appreciated. This has been seriously stated in published decisions as a presumably logical extension of the "Marketability Test."

Need for Preliminary Analysis

The Commission must analyze this and other equivalent situations wherein statutory or published regulatory standards do not seem to square with observed administrative practices.

These are formidable assignments and will take special talents and vast patience. I do not think the constructive phase of the Commission's work can even be begun until the preliminary work is done and done right.

PERSPECTIVES AND ISSUES

In the process of analyzing and stating the elements of the present system, the Commission will come upon the evidence of old battles, and battles still in progress, each a part of the general guerrilla warfare of land policy issues. Some of the issues are framed as procedural problems, but many of these conceal cleavages of opinion which are broadly governmental, social, or economic.
Historical Perspective

Public land policies of the past were sharply compartmentalized. They lacked harmony with policies dealing with agricultural, mineral, water, and recreational resources. Today, most land managers worry a good deal about the interaction of disparate land policies.

It is a strange reversal of conditions that unoccupied landward regions, thought by the Plymouth settlers to "a hideous and desolate wilderness," are now so crowded as to be desolate for the opposite reason.

There was land enough in America, said Thomas Jefferson in 1801, for descendants "to the thousandth and thousandth generation." Within three generations the Census Bureau announced the disappearance of the frontier.

Resource issues have been political issues since the earliest days of the Republic. The ideological struggle of Jefferson and Hamilton can be found repeated in political discussions today.

With the sizeable exception of Texas, most Trans-Mississippi land was once public domain. Over the years, almost all the public domain in states like Iowa, Nebraska, and Kansas was transferred directly and indirectly to private ownership. Lesser portions were transferred in the arid and mountain states of the west, including California.

The story of how this was done has been recounted many times--the strong points and the weak points, the successes and the failures have been emphasized and re-emphasized. Capsulizing the whole record, one could say it was a noble experiment in land reform--an experiment in which an egalitarian spirit prevailed despite serious anomalies, such as the railroad grants.

Trends in Public Land Policy

A conventional characterization of the major trends in federal land policies divides the long period into four phases: The Revenue Policy, ending with the Homestead Act of 1862; the Settlement Policy, going forward from that date; the Development Policy, beginning with the Railroad grants of 1850; and the Conservation Policy, dating from the establishment of Yellowstone National Park in 1872.

When new states were admitted to the Union, the federal government retained ownership of any public lands not granted to the State.

Some confuse retention of public lands with retention of legislative jurisdiction. The Congress, of course, does not claim general legislative jurisdiction over
federal lands in any State (except where the State legislature has consented) but only such powers as are necessary to carry out federal proprietorship.

By the same token, the States are not subjected to any general barrier in governing the areas embraced by the great majority of federal lands, including such things as the power to levy ad valorem property taxes on private interests in federal real estate.

A general legislative policy of withdrawing and reserving public lands for federal use dates from the 1872 Act reserving Yellowstone National Park and runs through the 1891 Act authorizing forest reservations.

Executive power to effect conservation of land resources was effectively exhibited by the first Roosevelt and his lieutenant, Gifford Pinchot. Forestry, reclamation, and wildlife preserves were set aside under his leadership. The National Park System and the National Wildlife Refuge System exist to a major extent by virtue of reservations of public lands.

The capstone of general public land policy, as it existed until the passage last year of the package bills of which the Commission Act was one, was set in place by joint actions of the Congress and the President, then Franklin D. Roosevelt, when in 1934 a system of withdrawal, classification, and management was extended to the remaining public domain in all States except Alaska under the Taylor Grazing Act and subsequent Executive Order withdrawals.

Policy for Acquired Lands

Acquired lands are distinguished from public domain in that they were acquired for special purposes in individual transactions. Large-scale land purchases to supplement public domain in the national forests began to be debated in the Congress about 1909 and the Weeks Act was adopted in 1911.

The Clarke-McNary Act of 1924 broadened the acquisition authority, and the Forest Service now manages more than 26 million acres of acquired lands.

Acquired lands managed by the Department of the Interior total nearly 12 million acres.

The process of seeking better coordination, and a broadened view of the Congress coming to grips with the needs of our country and the framing of national policy for conservation concepts, takes various forms.

Farm Lands

In recent months, much of this discussion has centered around the relationship of agricultural policies and various land policies, including reclamation.
When the Department of Agriculture was established in 1862 seventy percent of the people of the United States lived in rural areas. Now the condition is exactly reversed, and it is predicted that 80 percent of our people will live in urban areas by 1980.

A place to farm once was the crying need.

Our Department has concluded that from the standpoint of currently bringing about significant farm settlement and development of commercial agriculture, for example, the general homestead laws have been a failure. The researchers felt that untold amounts of individual effort and public funds have been wasted under these laws. Yet the Homestead Policy still exists as a matter of statutory law.

**Range Lands**

Other efforts to achieve coordination have been focused in the so-called vacant public domain under the stewardship of the Department of the Interior.

Until recently the vacant public domain was regarded as having little value. In some of our Western states, the cry has been heard that it was, in fact, a hindrance because it produced no wealth and returned no taxes to the community. It has constituted an irritant in federal-State relations.

But many things have changed since the period of unrestricted exploitation of the vacant public domain.

There is in the country a new respect for this class of land, its soil and its forage cover. Uncle Sam tends now to see his role as a good neighbor and responsible partner with those who rely upon the federal lands. The concept of multiple use is now prescribed by statute.

Whether this means increasingly positive management for lands now committed to specific use patterns is being debated in the process of devising regulations for the implementation of the Classification and Multiple Use Act. Range lands once considered useful only for grazing—and sometimes not very highly prized for that—are now coveted for the support of wildlife, hunting and other forms of outdoor recreation, and many other activities.

**Military Lands**

That the vast federal domain has other uses, too, was evident when military services and defense industries sought and quickly got large space allocations beginning in 1942. Such vital "wasteland" installations as White Sands, Los Alamos, Hanford, and Yucca Flat illustrate this advantage public lands have conferred not only on the country but on the local community.
But military needs change rapidly. Of 22 million acres of land now devoted to military functions, many areas have potential for outdoor recreation, wildlife habitat, and other conservation uses not inconsistent with military requirements. Who should make these determinations?

Of the military lands, 15 million acres are public domain in character for which the Department of the Interior has basic and residual land management responsibility as the lands become excess to military needs. The remaining 7 million acres acquired by purchase and condemnation are under sole jurisdiction of the Department of Defense. Mineral use of the military acquired lands is not now authorized by law except to protect from loss of oil or gas by drainage. How should these obvious management anomalies be reconciled?

Some 80 military installations in 33 states will be closed or reduced under a readjustment program announced by the Secretary of Defense. The future wise use of the lands comprising these installations must be assured, and President Johnson has directed that an inventory be made for this purpose. Under the schedule of events, the excess land will be retained at least until its potential for park and recreational uses can be studied.

Recreational Lands

The Congress in 1958 authorized the Outdoor Recreation Resources Review Commission, and some of the Commission's recommendations are being put into effect. For example, its recommendation that a Bureau of Outdoor Recreation be established in the Department of the Interior has been carried out, and that Bureau attempts to coordinate the outdoor recreation activities of more than 20 federal bureaus and offices which have responsibilities related to outdoor recreation. It is not clear sailing.

A noteworthy development stemming from the Commission's report and the pioneering work of Secretary Udall is the Land and Water Conservation Fund Act.

The idea of further acquisition of lands by the federal government, even for recreation, has its critics. American Forest Products Industries, Inc., for one says: "The rush to remove from tax rolls production forest lands, grasslands, croplands and other areas in the name of an imagined crisis in outdoor recreation cannot be justified by the facts."

Notably, the timber industry, among other commercial users of public lands, is specified for a voice in the Advisory Council of the Commission.

Balanced Federal-State Functions

The relative role of the State and the Federal Government in land management was hotly debated near the beginning of the Union and that situation has continued
more or less right along. It would be unrealistic to think that some strong debates are not in store for the new Commission. Governors are specifically authorized to name representatives to advise the Commission. One State Governor is a member.

The Federal System of government contemplates and expects that each of the several levels of government will play a proper role in meeting the demands of a complex social and technological environment. The obligation of staying close to the people falls alike on each level of the system. Centralized government need not be cold, remote or authoritarian. The Commission will be expected to see that the system it recommends minimizes any tendencies in this direction.

Overlapping Agency Functions

The overlapping of federal agency functions in the land management field leads to the appearance or the fact of inefficiency.

New dimensions in natural resource objectives have re-emphasized long-standing needs for improved coordination of federal management services.

Proper understanding of the various proposals advanced for coordination requires an understanding of the land management roles to be coordinated, and the objectives which are sought.

The Commission, in its later phases, may examine the merits of proposals for a central land data file using automatic data processing methods and other kinds of land common services.

Other Issues

An endless agenda of policy issues can be stated. Here are others in brief:

The economic benefit or burden of federal ownership and federal resource programs; government land acquisition programs; "tenure" and other aspects of economic stability for commercial users; the federal budgeting process for resources; a "Comsat" type corporation for resources such as oil shale; and a federal corporation, like the proposed Suburban Land Corporation which the House Agriculture Committee recently disposed of; and such devices as less-than-fee estates and scenic easements to serve the needs of open space, waterfowl habitat, etc.

POLICY GUIDELINES

It would be foolhardy to attempt predictions of the Commission's own agenda. I have ventured to suggest for them an intensive course of study on the present system, and the historical perspective which brings order from the complexity and profusion of issues.
If such suggestions are useful, they are also general. Now I shall attempt to state a few basic principles and guidelines against which the suggestions and proposals and representations to the Commission might be measured.

The legislatively oriented Commission might decide at the outset to limit itself to making recommendations for legislation. A self-denying policy which would ask of the Executive Branch only that which can be asked in legislation might tend to cut down the length of the agenda, and the number of hours of deliberation.

Similarly, the Commission might state explicitly that it will seek always to draw a clear line between legislative and executive prerogatives by insisting that the legislative standards always be stated as precisely as circumstances permit, and with equivalent concern that the administrative function be left as effectively to the administrators.

Examination of the lessons of the past legislative and executive experience will suggest other possibilities for guideline statements. To state an obvious one negatively, maximum return to the Treasury should not be the criterion of modern land policy.

Policy Choices

The Commission could simplify its work by determining in advance between alternatives where the choice may not be so obvious. These represent philosophy of administration, about which people differ. The choices, if made early, help to assure consistency.

I favor, as the more desirable choice, land management procedures which bring the interested public into the decision-making process. Such participation should be a genuine one, while alternatives are truly available.

Where a standard which in fact controls the decision-making process is capable of being stated to administrators, it ought to be stated to the affected public.

The system ought to accommodate in a reasonable way to requests of individual citizens. The governmental function of classifying land should not be misused to insulate the administrator from the legitimate expression of interest by the public, including individual members thereof.

Conservation programs should not be considered as the exclusive province of government, whether federal, State, or local. No conservation program, however well financed or broadly chartered, can be successful without the cooperation of the public.
Adherence to Principles of Justice

As nearly as may be, federal land management should conform to the general recordation and related real property practices of each State.

In my experience, no duty has been more distasteful than that which has occasionally fallen to me to inform citizens that the sovereign does not feel itself bound by the same property rules which apply to other landowners. It is traditional with English-speaking peoples that the King is under the law. It shakes confidence for the citizen to find the sovereign disavowing the good faith acts of its agents on the narrow ground of lack of authority, when the lack of authority is based on an admitted change in interpretation of law.

As nearly as may be, therefore, I would opt against reliance on technical defenses except where extraordinary conditions, of stated import, prevail.

I would accord equal dignity in the administrative hierarchy to service, record keeping, status reporting and quasi-judicial functions in the land area—the housekeeping and "case" activities. "Cases," the general term for the record of a citizen's struggle with his government over land, may be a nuisance to the administrator by reason of their number and trouble. To the individual citizen, they may be not only of critical economic importance, but also the touchstone by which he measures whether in this modern and complicated world, government can still be fair, straightforward and candid.

In sum, we are the legatees of a tradition of freedom. The system of land administration must remember this at every moment.

The New Conservation

President Johnson has asked for a "new conservation" which would deal with the problems of urbanization and growth which already have deprived too many Americans of the privilege of living in decent surroundings. The challenge he has given is to build a "Great Society," a society of quality.

The thrust of the new conservation is creativity. It assumes a common purpose. It sees opportunities to put the profit motive on the conservation team. It sees the necessity of government regulation, but gives attention also to government sponsored research. It particularly emphasizes the role of industry in research and development work.

Creativity and the highest order of statesmanship are essential, if we are to meet the demands upon our inelastic land and resource base—not just that under the jurisdiction of the Federal Government, but the entire natural resource structure on which our economy and society depend.

The President's articulation of national goals does not rest on simply assuring an adequate supply of food, fiber and fuel; he has added a concern for the quality of our life, and concern for the total environment.
This means that an even wider choice of alternative decisions will be available. For this "creativity" the Commission itself will be a major instrumentality.

"The solution to these problems," he said at Ann Arbor, "does not rest on a massive program in Washington, nor can it rely solely on the strained resource of local authority. They require us to create new concepts of cooperation, a creative federalism, between the national capital and the leaders of local communities."

Routine handling of public land transactions is not good enough to meet such a challenge. Excellence is demanded in every aspect of the public service to conserve resources to serve new needs.

CONCLUSION

The role of the Federal Government is to govern well--to do all that is necessary along with all others, to see to it that our land is used well, that it serves our needs in this new spirit.

Land, like all natural resources, is neither friendly nor unfriendly to laws of man. It obeys the laws of nature. It is man who must shape his laws and customs so as to come to terms with his environment.

The management of land, like any other federal activity, should serve the welfare of all the people. The system for management must conform to our traditions of freedom and liberty. We know we must plan for the long term, for the time when the population is doubled, as it will be in five or six decades, or tripled, as it may be in a century. Just as we must not sacrifice our resources for the needs of the moment, we must also guard the system, so that it is not sacrificed on the altar of false efficiency.

Management is a neutral term. It achieves meaning as we compare it, which we do when we use such adjectives as intensive, prudent, conservative, or minimal. An owner who neglects his land is not a non-manager, he is a bad manager.

Whatever the United States owns, it ought to manage wisely. Disposition and acquisition are aspects of management, just as development or exploitation are management. Repairing damage or erosion is management, which may be good or bad. A very wise man once told me that he would rather not have the government's improvements, if appropriate provision was not made to see that they were thereafter maintained.

As I have said several times, the values for which we manage the public's property are not just commercial or economic; they are social and public, and that encompasses a great variety of alternatives. Choosing from among alternatives requires statements, criteria and standards which are meaningful for the people and the administrators.
Criteria-fixing involves successive refinement of policy or goal, beginning with the Constitutional provisions and the legislation.

I hope I have demonstrated that I think that how we respond to the challenge for land administration reform depends on how well we understand our system of free government.

The Public Land Law Review Commission can, I'm sure, foster mutual trust and confidence between the two branches of government, and between the people and their government.

I believe that it can recommend legislation in a form which, to a major extent, will find the knottiest of land administration problems answering themselves.