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ONE THIRD OF THE NATION'S LAND— EVOLUTION OF A POLICY RECOMMENDATION

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When *One Third of the Nation's Land,* the report of the Public Land Law Review Commission, was presented to the Congress and President in June, 1970, no one familiar with its background believed there would be unanimous support for the recommendations it contained. Even the chairman of the Commission, Congressman Wayne Aspinall of Colorado, in presenting the report to President Nixon, said, "We do not ask unanimity. . . ." The Commission was concerned with problems that had deep roots going back over 100 years in the laws guiding the disposition, use, and management of Federal public lands. The conflicts between groups interested in these lands were too sharp for anyone to expect that a study commission could find solutions that would please everyone.

The Commission, however, did not expect that the uproar following the release of its report would center on a recommendation that stated: "Management of public lands should recognize the highest and best use of particular areas of land as dominant over other authorized uses."[1] This recommendation, supported by several others in the report that express the concept of "dominant use" as applicable to particular uses such as timbering and outdoor recreation, has become the focal point for the ire of conservationists and environmentalists throughout the country. Somewhat surprisingly, the timber, grazing, and other economic interests have also generally been unenthusiastic in their support for the recommendation.

The idea of the dominant use zoning recommendation is that the federal land management agencies would plan use of the public lands by identifying areas, after careful planning, where one use would be given priority over other uses when conflicts among uses arise. It was indicated that only areas having a clearly identifiable highest and best use would be designated for dominant uses. There would be no such designations on a sizable part of the public lands. This approach would be similar to that now followed by the land management agencies except that dominant use zoning would be recognized explicitly by statutory directive and the procedures followed in delineating such zones would be part of a public planning process. The conservationists fear that implementation of the Commission's dominant use concept would restrict their use of public lands over

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1. U.S. Pub. Land L. Rev. Comm'n, One Third of the Nation's Land 48 (1970).

large areas that would be devoted to commercial uses and that there would be little control over the methods employed by commercial users of these areas. The commercial users on their part have realized that they would not have potential access, which they now have, to some areas that would be set aside for such dominant uses as recreation or watershed protection.

It may be that we will never have a thorough public discussion of this controversial recommendation. The outcry over the proposal may lead to its burial without the benefit of "last rites" in Congressional hearings. But one might well raise the question, "How could a broad Commission made up of practical, knowledgeable, and politically sensitive men and women seeking general support for its recommendations come up with a concept that has obtained so little support?" In part, the answer is that the disputes over this recommendation reflect misunderstandings rather than substantive disagreements. But this doesn't explain all of the conflicts, which are also based on substantive disagreements with the "dominant use" recommendation. This was a Commission that viewed itself as pragmatic. It was looking for solutions that would not only improve the present structure of public land laws and policies if implemented, but would also have a good chance of being implemented. That it adopted the dominant use concept was in part a reflection of its view of the chief problems of public land policy, the history of Congressional-Presidential relations on public land matters, and finally, and of considerable importance, the way in which the Commission approached its work.

The dominant use recommendation quoted above appeared as the fourth of 137 numbered recommendations in *One Third of the Nation's Land.* Although it seems to provide a foundation for recommendations that follow it in the report, it was actually derived from the others. In fact, the Commissioners were not asked to vote on this recommendation until one of their very last meetings, at which time it was recognized that rejection of the concept would have meant reconsidering many decisions that were basic to the structure of the entire report. For the sake of coherency, adoption of this recommendation was recognized as necessary. But to understand how this recommendation relates to others in the Commission's report, it would be well to consider how the recommendations on planning land uses developed and how they relate to the problems as seen by the Commission.

IMPORTANCE OF STUDY APPROACH

Commissions have a rather unreal existence. Most have a very

political purpose, being established either to focus attention on, or to take attention away from, an important political problem. One purpose of the Public Land Law Review Commission was to focus public attention on the problems posed by an outdated hodgepodge of laws and policies concerning some 750,000,000 acres of land owned by the federal government. But more important, it was to search for solutions to these problems away from the glare of everyday politics. The nineteen member Commission was heavily weighted with members of Congress. Six Senators, seven Representatives, including the Chairman, and six presidential appointees assured that the ultimate recommendations of the Commission would reflect Congressional concern and emphasize legislative solutions. But to provide the opportunity for consideration of possible solutions that were necessarily complex, interrelated, and politically significant, the Commission's decisions and the writing of its report had to be accomplished in relative obscurity. Removing decisions from the glare of everyday politics and government operations, useful as it may be to permit study commissions to take a broad view, also limits the opportunity to test the reasonableness of these decisions. Study commissions must rely on the experience and knowledge of their members and on a sensible approach if their recommendations are ultimately to meet the test of day-to-day operations. In fact, the approach followed by such a body in developing recommendations is very important, and perhaps as important as the views of its members, in determining just what its recommendations will be when they finally appear.

The Public Land Law Review Commission, after nearly three years of public meetings (where it heard over 900 witnesses), meetings with its Advisory Council and Governors' Representatives, and trips to public land areas to view problems on the ground, began the discussions that led directly to its policy recommendations in November, 1968. It followed this with an average of a day and a half meeting each month until late April of 1970. Throughout this entire period of time, the Commission and its staff, which organized material for each meeting, had to maintain a sense of structure—where had earlier decisions taken the Commission and what might today's decisions imply for future decisions? Once a decision had been made, it could always be changed up to the time the final report went to the printers. A number of changes were made. But as the number of previous decisions grew, the implications of one change for a number of others imparted a degree of rigidity to previous work. But this is jumping ahead of the story of the controversial dominant use recommendation. To understand how the Commission came to this recommendation, one must understand

something of the background of the Commission and explore one of the major problems for which Congress was seeking a solution when it established the Commission.

LAND USE CONFLICTS: A MAJOR PROBLEM

A number of bills to create a commission to review public land laws had been introduced in Congress in the years following 1950. They focused on what to do with the remaining 470,000,000 acres of the original Federal public domain that had not been reserved or withdrawn for particular uses. During the same period of time, a number of bills were introduced to establish a system of wilderness areas, which would, in effect, withdraw or reserve areas for a particular purpose, the preservation of wilderness values. The Senate had held a number of hearings and had passed bills to establish a wilderness system, but further action on the legislation was being held up in the House Interior and Insular Affairs Committee. During this period, partly as a result of the interest in wilderness legislation, there was a growing concern with the country's ability to meet all of its increasing needs for the goods and services obtained from public lands, and with the need for finding a way to balance various land uses. Congressman Wayne Aspinall, Chairman of the House Interior and Insular Affairs Committee, where the wilderness bills were languishing, saw a way of pulling these concerns together. He was perfectly clear and forthright about it, and minced no words, in a letter to President Kennedy in October, 1962. The letter said, "Because of your frequently expressed interest in the extension of conservation measures to our public lands and passage of legislation to provide for the preservation of wilderness areas, it is suggested that your office may be able to facilitate action of these matters during the 88th Congress after it convenes in January, 1963."[2] The price for getting wilderness legislation reported out of the Committee was Presidential support for a general review of public land matters.

Even after receiving President Kennedy's support, Congressman Aspinall was not sure of general support for a review of public land policies. Thus, Aspinall held hearings in the 88th Congress to determine if there was sufficient interest in a review commission to pursue the idea in legislation. His concern was well placed. While many conservation and commercial groups saw the need for some changes in public land policies, they were not anxious for a broad review that might ultimately restrict their particular uses of public lands. They were concerned even then that a study commission would have to

2. U.S. Pub. Land L. Rev. Comm'n, 88th Cong., 2d Sess., Background and Need 132 (Comm'n Print 1964).

direct attention at means for resolving land use conflicts, even if this meant restricting some or all uses of public lands. Nevertheless, an act to create the Public Land Law Review Commission was passed in 1964.

The report of the Outdoor Recreation Resources Review Commission, published in 1962, helped to focus national concern on the conflicts among land uses that are a result of our growing economy and increasing leisure time. The act that created the Public Land Law Review Commission reflected this concern in charging the Commission to "compile data necessary to understand and determine the various demands on the public lands which now exist and which are likely to exist within the foreseeable future."[3] This statement hinted at the possibility of establishing priorities among various uses of the land. This certainly would be one way of resolving conflict among competing uses; uses for which demands were increasing most rapidly could be assigned priority over others. A western Congressman, familiar with state water laws in the West and the priorities they establish among domestic, stock-watering, municipal, irrigation and industrial uses of water, could well be drawn to the conclusion that general priorities established by law might provide a solution for conflicts on the public lands. This requirement of the law creating the Commission helped to focus its attention on providing a means for resolving land use conflicts, although the Commission ultimately rejected the idea of establishing a specific list of generally applicable priorities among uses. But this did not preclude recognizing that priorities among uses might have to be established on individual tracts of land.

WITHDRAWALS BASIC TO PLANNING

Establishing priorities on a case by case basis for individual land areas had always, in fact, been at the heart of resolving conflicts in use of public lands. It was also at the center of the Congressional concern that led to the establishment of the Public Land Law Review Commission. The reservation and withdrawal of public lands, such as the legislative act that established Yellowstone National Park in 1872 and the numerous withdrawals by the President of public lands from disposal or use under various land laws, have been used since the public domain was created. Reservations and withdrawals were used both to assign particular uses to tracts of land and to protect these uses from conflicting ones. But assigning the responsibility for taking such actions has long been a matter of conflict

3. 43 U.S.C. § 1394(a)(iii) (Supp. 1970).

between the Congress and the President. Congress is concerned with its prerogatives and with what it sometimes considers to be a usurpation of its powers by the President. The Constitution gives Congress the authority to make all needful rules and regulations governing the use and disposition of public lands. But the machinery of the Congress grinds exceedingly slowly at times and the President and the executive agencies have found it necessary on many occasions to make decisions on the use of public lands even where the Congress has not provided explicit authority to do so.

Congressman Aspinall's October, 1962, letter to President Kennedy makes clear the nature of this concern: "The core of the controversy surrounding these problems is the degree of responsibility and authority to be exercised by the legislative and executive branches. This had been the main issue in legislation that has been proposed relative to withdrawals, restrictions, and use of public lands as well as in the approach to designating areas to be preserved as wilderness. . . . I think that any student of the public lands situation will recognize that we have reached a point where it is essential to establish clear cut legislative guidelines concerning the management, use, and disposition of our public lands. This has come about because of past inaction of Congress, coupled with the growing scarcity of land in the United States and the parallel need to preserve some of our undisturbed areas in their natural setting."[4] President Kennedy made clear the executive branch view of reserving and withdrawing public lands, which was behind the controversy. He wrote: "My predecessors have been acutely aware of the dilemmas facing the Secretaries of Agriculture and Interior as principal administrators of the original public domain. Whenever they have been faced with a reasonable alternative of continued public ownership and management, or disposition, they have generally elected the former. That course has seemed to them, as to my predecessors and now to me, most consistent with the public interest and the trend of Congressional policy given the expanding pressure of population, the generally rising values and other considerations of similar import. . . . Many of the great issues in public land policy have come about as the result of action by progressive minded Presidents who withdrew land from the effect of the disposition statutes in major segments."[5]

The history of this conflict goes back at least to the beginning of this century. Prior to 1900, both the Congress and the President had taken actions to set lands aside. Until 1891, Congress had not pro-

4. U.S. Pub. Land L. Rev. Comm'n, *supra* note 2.

5. *Id.*

vided explicit authority for Presidential actions, but with a seemingly endless supply of land, this had created little in the way of jurisdictional conflicts. Then, starting with the 1891 act providing for forest reserves, the Congress delegated withdrawal authority for specific purposes in passing the Reclamation Act of 1902, the Antiquities Act of 1906, the Water Hole Act of 1916, and the Federal Power Act of 1920. However, angered by executive withdrawals for national forests by President Theodore Roosevelt, Congress expressly limited further such withdrawals in an appropriation act in 1907. And angered by withdrawals of potential oil and coal lands by President Taft, Congress limited, or thought it limited, executive withdrawals by passage of the Pickett Act of 1910. These Congressional actions did not reflect simply a concern for Constitutional niceties. Rather, western members of the Congress were concerned that these broad actions by the President would permanently withdraw from use the resources believed necessary to support development of the West. This was also the basis for their later and parallel concern with wilderness legislation. The interest in withdrawals also showed the nature of Congressional concern with land use planning.

Planning uses of land generally amounts to assigning specific uses, or placing restriction on uses, of particular areas of land. Regardless of the degree of sophistication of data and models used in evaluating alternative land uses, someone, somewhere, is in the end drawing lines on a map segregating one area from another according to planned uses or nonuses. The actions of Congress in setting aside public lands for national parks, wilderness areas, and military establishments are little different than those of a local board of supervisors in zoning land uses. The Congressional actions are usually larger in terms of land area and usually devote lands to specific uses in addition to restricting uses, the main thrust of most local zoning. In addition, they are relatively inflexible because they can be changed only by another Congressional action. For this latter reason, Congressional action is favored by those wanting protection of land for wilderness or other purposes since it gives them some assurance that changes, the bane of local zoning, will not be readily made. On the other hand, administrative responsibility for land use decisions is favored by those who want flexibility or are opposed to restrictions on their use of public lands. In any case, the act of setting aside public lands is not only fundamental to the process of land use planning, but is a planning action in itself. It is easy to see why Congress is concerned with reservation and withdrawal actions and how this concern is related to land use planning as a process wherein

areas of public lands are dedicated to certain uses and other uses are restricted.

The history of conflict between Congress and the President over executive withdrawals prior to the establishment of the Public Land Law Review Commission had been sharp and, with Congressman Aspinall's letter to President Kennedy stressing this point, resolution of the conflict was clearly one of the major Congressional objectives in establishing this commission. Passage of the Wilderness Act ended, at least for a time, Congressional concern with executive withdrawals for wilderness from the operation of the Mining Law. The Act took this responsibility—in effect, a major land use planning responsibility —from the executive branch and lodged it with the Congress. But it didn't really resolve the matter of the effect of executive withdrawals for other purposes on the operation of the Mining Law or on the availability of timber for commercial production. Nor did it deal with the much more subtle impacts of restrictions on commercial activities, such as timber harvesting, that don't involve the total withdrawal of the land from such uses. While the timber industry was opposed to wilderness withdrawals, of more importance were the limitations on timber harvesting resulting from small, but numerous, decisions to reduce the amount of timber to be sold from various areas requiring some, but not complete protection. These kinds of limitations were not sufficiently great for any one action to be a matter for Congressional action. Yet, if unchecked, they could have a greater impact on the total amount of timber available for harvesting than would the creation of wilderness areas.[6] The relationship between this kind of decision and decisions involving extensive withdrawals was important to the Public Land Law Review Commission in deciding which way it should go in providing guidelines for resolving conflicts in land uses.

INITIAL DECISIONS ON WITHDRAWALS POLICY

When the Commission started in November, 1968, to make decisions that were later incorporated as recommendations in its final report, one of the first of the study areas to be considered was withdrawals and reservations. The Congressional members of the

6. In 1967, there were in primitive or wilderness status about 6 million acres of national forest land that would be considered as commercial if not reserved from timber harvesting by law or administrative directive. At the same time, there were an estimated 2.5 million acres of commercial forest land on national forests under special cutting restrictions. G. Banzhaf and Co., II Study of Public Land Timber Policy, Tables 4.11a and 4.12a (U.S. Dep't of Commerce, Clearinghouse for Fed. Scientific and Technical Information, Oct. 1969).

Commission in particular found this to be a highly charged topic. They had before them a contract study report, which carefully detailed the history of legislative-executive relationships on withdrawals and led the reader to its conclusion that legislative authorities had in fact been usurped by the executive.[7] The Commission reviewed the major events in this history and came to the conclusion that Congress should reassert its prerogatives and in the future make key withdrawal decisions itself.

While reviewing the history of executive withdrawals, the Commission also considered the actions of the Bureau of Land Management since 1964 in implementing the Classification and Multiple Use Act, a companion act to that creating the Public Land Law Review Commission. The history of these actions are of interest here. While deciding to create the Commission, the Congress considered the implications of this action for continuing programs, and decided to provide authority for the disposal of public lands during the life of the Commission. A separate act, the Public Land Sales Act was passed. To assure that those lands that might be disposed of during this period would best meet the test of "maximum benefit to the general public" if they were in non-Federal ownership, the Congress also passed the Classification and Multiple Use Act to give the Bureau of Land Management interim authority to determine by classification whether lands should remain in federal ownership or should be subject to disposition. To assure that the Bureau would not delay its classification actions so as to keep as much land as possible in Federal ownership and under its control, this act directed that classification be done "as soon as possible."[8] It seems clear, at least now, that Congress in including this admonition in the act was thinking of the Bureau's potential response to individual applications for the purchase of federal lands. On the face of it, however, the act required that the Bureau proceed immediately to classify all of the public lands and it did just that, much to the dismay of a number of western Congressmen.

A classification action does much the same thing as a withdrawal action; it limits the applicability of land laws to specified lands. The alacrity with which the Bureau of Land Management went forth to classify the public lands alarmed some of the Congressional members of the Commission and galvanized their distrust of the executive, which was already considerable because of their views concerning the usurpation of authority for withdrawals. The result was two-fold.

7. C. Wheatley, Withdrawals and Reservations of Public Domain Lands (U.S. Dept. of Commerce, Clearinghouse for Fed. Scientific and Technical Information, Sep. 1969, 3 Vols.).

8. 43 U.S.C. § 1411(b) (Supp. 1970).

First, the Commission decided that the Congress should reserve unto itself the authority for making all large and important withdrawals. Second, it decided that Congress should also review all other withdrawals made by the executive, including both the numerous small permanent withdrawals, such as those made to protect Federal buildings or other developments, and the temporary classifications made under the 1964 act.

The Commission decisions at this stage amounted to recommending that Congress accept major responsibilities for planning uses of the public lands. This was consistent with the action Congress took in passing the Wilderness Act, which required Congress to decide on the specific areas to be protected by the Act. It was also consistent both with the historic role of Congress in establishing national parks, and with the Engle Act of 1955, which required Congressional action on any withdrawals of over 5,000 acres for military purposes. However, it would, if effected, require Congress to take action on an almost limitless set of land actions, many of which involve small areas and are for a relatively limited period of time, in contrast to the one-time, large scale actions in establishing national parks. The enormity of the task that was to be assigned to the Congress is evident when one considers the present chaotic state of records on executive withdrawals, which extend over untold millions of acres of public lands, and are a source of great confusion to the land management agencies themselves. This was the first step by the Commission which led to its ultimate recommendations favoring a dominant use zoning concept. Its view of the function of withdrawals was that they were to be used to set aside certain lands for a specific purpose—in effect, for a dominant use.

The next decisions leading to the dominant use zoning recommendation were, in part, the result of the manner in which materials for Commission meetings were organized by the Commission's staff. For each policy area, such as timber or minerals, considered by the Commission, the staff prepared an evaluation paper.[9] Each paper was designed to present the Commission with a series of questions that

9. The official records of the Commission have been filed with the National Archives. The Commission's report and two of its study reports, the *Digest of Public Land Laws* and the *History of Public Land Law Development,* have been published and can be purchased from the Superintendent of Documents, U.S. Government Printing Office. The Commission's other study reports can be purchased from the National Technical Information Service, U.S. Dep't of Commerce. Some of the Commissioners indicated that they intend to turn over their reports and records to university libraries. Whether this has been done and whether the materials include both the study reports and other materials, such as evaluation papers, is not certain. At the time of this writing, copies of the evaluation papers have not been filed with the Commission's official records in the National Archives, although this may yet be done. There were no transcripts of Commission meetings; however, minutes of each meeting were prepared.

could be answered with a "yes" or "no" vote and for which the answers together would define the Commission's recommendations in a policy area. The evaluation papers contained a discussion of the implications of each question, together with supporting data, and served as the basis for Commission questioning of its staff and discussions among Commissioners. These evaluation papers were an important factor in the Commission's deliberations because they established the agenda for each Commission meeting. The information contained in the papers was, of course, also important, especially when it came time to write the Commission's report. But establishing the agenda for Commission meetings was critical to the ultimate recommendations because it established not only the specific questions on which the Commission voted, but also the order in which they were considered.

The manner in which the papers were organized varied somewhat from topic to topic. In most of them, important policy issues were broken down into component parts so that the Commission was able to vote on each part. In most cases, alternatives were offered to the Commission so that it could exercise its choice from a range of possible directions for public land policy. The Commission's decisions on the evaluation paper questions were incorporated in a draft of the Commission's report, where the Commission had an opportunity to review its decisions in the context of all of its decisions. It also was able to review interpolations by the staff where gaps had become evident and had been filled. It was at this stage that the Commission also reviewed the arguments presented to support its recommendations.

The selection of questions to be answered by the Commission was determined by the staff. In a few cases, entire sections of evaluation papers were dropped from consideration by the Commission when it saw the papers; in many cases the questions were reworded by the Commission during its discussions. But by and large, the evaluation papers set the agenda that was followed by the Commission.

DOMINANT USE ZONING DECISIONS

The first of the so-called commodity subjects, such as timber or water, to be considered by the Commission was fish and wildlife. The first question asked in the evaluation paper was "Should the protection of rare and endangered species of wildlife be given priority over all other uses of public lands?" The Commission decided "yes" but in the sense that protection of rare and endangered species not necessarily exclude other uses of the land and that such protection could be disregarded for compelling reasons. What might constitute a

"compelling" reason was not specified. The Commission in adopting the position, however, was reflecting its dislike of absolute directives, which appears in a number of forms throughout its report.

The second question, which the Commission also answered in the affirmative, was, "Should wildlife be given priority over other uses of the public lands in some circumstances?" The emphasis of the Commission in answering this question was on "some circumstances." The evaluation paper contained a discussion of temporary problems of competition between wildlife and domestic livestock, where wildlife might be assigned priority during a severe winter or during drought periods. The Commission's affirmative answer was actually quite limited in application and was based on case by case assignment of priorities. The next question was not of special interest here, but the fourth question before the Commission involved relationships between species of wildlife, and here again the Commission decided that, in some circumstances, priorities should be established on some lands. Taken together, these initial decisions rejected the idea of priorities applicable in all cases by recognizing that even protection of rare and endangered species not be afforded a complete priority over all other uses. It further recognized that one use does not necessarily preclude all others and some form of zoning would be necessary. It was clear from the Commission's discussions that it did not intend that Congress make all of the decisions on each piece of land. The foundation for recommendations for executive action to zone public lands for dominant uses was laid.

The next topic on which the Commission had to consider priorities and dominant use zoning was timber policy. The timber industry had been one of the leaders in fighting passage of the Wilderness Act because establishment of wilderness areas precludes timber harvesting. It also made strong representations to the Commission that the area of federal forest land available for commercial timber harvesting should not be limited further by legislation or executive orders. The problems of overcapacity in the timber industry in the West due to the depletion of private timber holdings were described and relief sought in the form of Federal policies to increase the quantity of timber made available from public lands. Above all, the timber industry sought protection from encroachments from recreation use of the public lands.

The Commission met these concerns head on in the first question posed in the evaluation paper for timber policy: "Should some part of the public forest land be classified for commercial timber production as the dominant use?" This question built on the foundation established by the decisions on fish and wildlife. It seemed so clear at

this point, as a result of the fish and wildlife discussions, that the Commission would be unwilling to assign priority to timber over other uses of the public lands that the matter was not raised explicitly. Thus, when the commission answered "yes" to the question on dominant use for timber on only a part of the lands not reserved for parks or other specific purposes, it also rejected the priorities assigned to timber production and watershed protection on national forests in the 1897 Forest Reserve Act and 1911 Weeks Act.

Zoning a portion of the public forest lands for timber as the dominant use was seen as a means of reaching practical accommodations of competing multiple uses on forest lands, the category of land for which competition is greatest. As one Commissioner said, "Without this, these will be willy-nilly decisions." It was recognized that lands were being committed in a similar fashion for wilderness and recreation purposes and that the public land agencies used informal zoning as a practical means of land use planning. The Commission's decision would increase the degree of formality of present agency planning decisions without greatly changing their substance. It was also clear from the Commission's discussions "that other uses, such as watershed protection and recreation would be allowed" on these areas. However, it was also noted "if we set aside lands for timber production, we have to recognize that it will tend to preclude other uses and that high intensity management will occur on these areas."

The decision on this question necessarily influenced some of the other decisions of the Commission on questions that followed in the evaluation paper. The very next question was: "On forest lands retained in federal ownership, should the federal government generally act differently from a private land owner with respect to timber production?" The question was intended to be limited to matters involving the production of timber for industrial purposes, as contrasted with the management of forest land to meet a variety of objectives, and it reflected a long-standing debate among professional foresters concerning the economically conservative management of timber by the federal agencies. Many had argued that the failure to assess interest charges against the huge direct and indirect federal investment in timber management resulted in unnecessarily conservative practices. They further argued that following the investment practices of a prudent businessman where they would not preclude meeting other objectives of public forest land management would save the taxpayers' money. A Commissioner made this clear by saying, "Those who vote 'no' are doing so in support of consumers, not in support of the industry." The Commission accepted this argument for decisions involving the production of timber as an in-

dustrial raw material, but in view of its previous decision, limited its application to lands to be classified for timber as the dominant use. By so doing, it recognized the important relationship between planning land uses and the expenditure of management funds. But because these two decisions were tied so closely together, the Commission's report was sharply criticized. It was seen as (1) supporting the ideas behind the bill for a National Forest Timber Supply Act, which the House of Representatives had refused to consider in February, 1970, and (2) eliminating conservation measures on public forest lands.

In fact, the Commission saw its decisions as providing the kind of guidelines for expenditures on timber as an industrial material that were lacking in the Timber Supply Act bill and that its other recommendations for environmental zoning and planning would assure that public lands and resources would be protected. It also saw that it was providing a means of assuring that sufficient timber would be forthcoming from public lands to meet the commitments in past public land policies and actions. For instance, the third question in this evaluation paper was: "Should the proportion of timber production potential in federal ownership be reduced through disposal of public lands?" In discussing this question, it was noted that the decision on timber dominant areas had been a sufficient "concession" to the timber industry, and the Commission voted "no." Directing timber management funds to a limited, but highly productive, part of the public forest lands where timber would be the dominant use was seen as the best means of producing timber to meet industrial needs. At the same time, allowing more intensive use of other public forest lands for other purposes was seen as an efficient way of meeting other demands of the public.

A WEAK LINK AND AN EXCEPTION

Following its consideration of timber policy, the Commission next turned to grazing policies on the public lands, a topic at the heart of what to do about the status of the remaining unappropriated and unreserved public domain lands managed by the Bureau of Land Management.

The Taylor Grazing Act of 1934 gave a degree of stability to the management of these lands and gave some control over their disposal to the Department of the Interior. Despite the low quality of much of these lands, it had been recommended by many of those appearing before the Commission that the lands be sold into private ownership, generally to those ranchers who held grazing permits. Grazing is the chief commercial use made of these lands, even though they are

often of low quality for grazing, simply because there is no other practical commercial use of them.

As with timber, the chief conflicts on grazing lands are between grazing and various forms of recreation, especially hunting and the use of off-the-road vehicles. But the concern of the livestock interests was usually expressed in terms of controlling the level of these uses so as not to conflict unduly with livestock grazing, instead of zoning the lands to prohibit certain kinds of uses. Nevertheless, the evaluation paper on forage policies posed a question on zoning some public lands chiefly valuable for forage production for grazing as the dominant use. The question was put in the paper by the staff primarily to achieve consistency with other evaluation papers and was adopted by the Commission largely for the same reason. This decision was also seen as being consistent with an earlier decision on forage policies that some public lands chiefly valuable for grazing should be made available for sale into private ownership.

The Commission recognized that the benefits of adopting this recommendation would not be as great as the expected benefits in the case of zoning forest lands for timber as the dominant use. The arguments in favor of the decision presented in the evaluation paper were weak. At least one of the Commissioners viewed such dominant use zoning for grazing as being less permanent than in the case of timber when he said that he would not view this recommendation as "excluding other uses when they become important." The fact that 24 percent of the public grazing lands require more than 25 acres to support a single cow for one month (one square mile or more is required to support two cows for a year) explains why agriculture or other commercial uses are unlikely to be dominant on these lands. But it also raises the question as to the need for or desirability of zoning such lands as dominant for grazing. In the case of timber, the Commission was using the zoning concept as one means of directing timber management funds toward the lands where they could be used most efficiently. In the case of range management funds, quite the opposite result might be expected.

By the early autumn of 1969, some six months before its report was scheduled to be at the printers, the Commission had come to the point where it had to discuss what everyone realized would involve some of the crucial recommendations of the Commission. The General Mining Law of 1872, which covers the discovery and development of metalliferous minerals on public lands, provides that decisions to enter upon the public lands and search for and develop ore bodies are private decisions made with little or no control by the federal government as landowner. The only means of controlling

mining activities available to the land management agencies is to eliminate them entirely by withdrawal orders. The Commission viewed minerals as a special problem requiring special solutions. Its reasoning was that mineral development takes place on only a very limited area of public lands, and it cannot be determined in advance where minerals will be found. Thus, despite the Commission's general unwillingness to assign priorities among uses, it concluded that "mineral exploration and development should have a preference over some or all other uses on much of our public lands" and that just exactly where this preference shall be effected would be left to the prospector and miner, as under the existing General Mining Law of 1872. This conclusion sharply differed with its earlier decisions not to assign general priorities among uses; the rationale for this break with precedent was the special characteristics of metalliferous minerals.

This decision also broke with the dominant use zoning decision, although it was later argued that the act of locating and developing a mining claim would establish a dominant use zone. The difference, of course, is that previous recommendations for dominant use zoning dealt with the land use planning process, whereby dominant use zones would be established in advance of actual use. The minerals recommendations concerned land uses, which would be permitted to proceed despite planning and dominant use zoning that predated prospecting and mining activities. This was made clear by the Commission's decision that the issuance of prospecting and development permits containing environmental quality requirements would be ministerial rather than discretionary. By specifically rejecting the idea of planning mineral developments in advance, the Commission laid the foundation for inevitable conflicts if the recommended dominant use zoning process were to be adopted.

DOMINANT USE AND MULTIPLE USE

By early 1970, time was growing short. Portions of the Commission's report had been drafted and were being reviewed by the Commission, while a few subjects were still under consideration. One of these topics was multiple use authorities and their relation to land use decisions on the public lands. The multiple use laws for national forest and Bureau of Land Management lands provide the basic statutory authority for planning uses of lands for which there is no statutory dominant use. However, the Commission found multiple use to be a difficult concept when considered as a directive. It accepted the idea of lands being available for a variety of uses, which may or may not exist in conjunction, and the idea that the land

management agency should decide which uses should be permitted and managed on particular areas. Both of these concepts were embodied in the Multiple Use and Sustained Yield Act of 1960, which is applicable to national forest lands, and the temporary Classification and Multiple Use Act of 1964, which is applicable to lands managed by the Bureau of Land Management. But those appearing before the Commission had never been able to explain satisfactorily how multiple use should be interpreted in deciding on uses to be assigned to a particular area.

Throughout its life, the Commission had struggled with the notion of developing criteria, or a specific model such as that used by the water resources agencies, for making land use decisions. In the end, it rejected these as being inappropriate because of the great variety of conditions and demands on public lands. While discussing multiple use guidelines, the Commission made a final attempt to find some more definitive rules than it had previously adopted. It again considered whether general priorities among uses should be adopted and even considered the idea of establishing priorities among categories of criteria, which would assign an environmental quality, economic efficiency, regional growth, or other overriding imperative to public land decisions.

In the end, it recommended that Congress consider the idea of establishing priorities among uses for resolving irreconciliable conflicts and that Congress also consider assigning an environmental quality, economic efficiency, or other imperative to public land decisions. However, it despaired of Congress being able to go far in these directions, as well it might have, considering the likelihood of a busy Congress being able to deal with a problem that baffled this blue-ribbon study Commission. Thus, after considering both the establishment of generally applicable priorities among uses and the establishment of a model for decision making, the Commission decided to rely instead on a land use planning process for resolving conflicts. And this process was the one it had discussed almost from its first meeting, and it included the identification of dominant use zones.

The Commission, at the same time, could find no inconsistencies between existing multiple use authorities and its concept of dominant use zoning. Such zoning would be done by the land management agencies and no use would be afforded priority over other uses until a decision to do so had been made with respect to a particular land area after considering the various production possibilities and the net social benefits of pursuing alternative courses of action. The decision was made to tie the various dominant use deci-

sions together and make them the basis for recommending that the fundamental management authorities of the multiple use acts be continued, but that Congress provide greater legislative guidance to the land management agencies by directing them to zone public lands, where feasible, for dominant use management. In effect, the Commission would take the directives for dominant use zoning contained in the House and Senate Committee reports on the 1960 Multiple Use and Sustained Yield Act and make them a directive in the legislation itself. An identical paragraph appearing in each of these reports stated: "It is recognized that the priority of resource use will vary locality by locality and case by case. In one locality, timber use will dominate; in another locality use of the range by domestic livestock; in another wildlife or outdoor recreation, including wilderness will dominate. Thus, in particular localities, various resource uses will be given priority because of particular circumstances."[10] The Commission's recommendations for changes in multiple use authorities would, if implemented, increase the degree of explicit legislative directives, without greatly changing the substance of these authorities.

REVISING WITHDRAWALS DECISIONS

Between the first and final draft stages of the Commission's report, a major inconsistency in its approach to determining land uses was noted. Its early decisions on withdrawals policy were that Congress should make many of the major land use decisions; its later decisions on dominant use zoning would place most land use decisions in the hands of the land management agencies, but with increased guidance from the Congress. And the Commission's early critical view of the classifications that had been made by the Bureau of Land Management under the Classification and Multiple Use Act of 1964 was not reflected in its generally laudatory view of the Bureau's planning process, also established under the CMUA.

It was decided at this time that withdrawals of major reservations and withdrawals to effect shifts in administration of land from one agency to another should be distinguished from classification actions, which would assign dominant use zones and would identify those lands whose highest and best use would be in non-federal ownership. The final report included the recommendation that action on major withdrawals, both large permanent withdrawals and those that shift responsibilities for public lands among federal agencies, be reserved to the Congress. This was a much narrower recommendation than

10. Sen. Comm. on Agriculture and Forestry, Administration of National Forests for Multiple Use and Sustained Yield, S. Doc. No. 1407, 86th Cong., 2d Sess. 3-4 (1960).

originally conceived by the Commission. In fact, it is not greatly different from current practices, of which the Commission had been so critical. Whatever guidelines might be established to identify what distinguishes a "major" withdrawal from other ones, it seems likely that they would be along the lines of the Engle Act, which establishes 5,000 acres as the maximum that can be withdrawn for military purposes without Congressional action. While there is no similar provision for other kinds of withdrawals now, the executive branch has been limited in recent years in what it can actually do by the interest and intervention of Congress in withdrawal proceedings. For example, several withdrawal orders issued by Secretary Udall just prior to the change of administrations in 1969 were severely curtailed as a result of Congressional intervention.

On the other hand, the Commission's recommendations on classification of public lands would give greater latitude to the executive branch in zoning public lands than it now has, not only by providing for dominant use zoning but also by making the classification action a useful tool in defining specific actions that would be permitted, or prohibited, on public lands. This could be an effective means for implementing environmental controls on public lands that could, for example, distinguish strip mining from underground mining and provide appropriate controls.

CONCLUSION

While not always consistent in its recommendations, the Public Land Law Review Commission had shown a considerable ability to make accommodations with itself as it moved toward its final report and an inclination throughout to moderate its conclusions so as to make them more acceptable. Its controversial recommendation for dominant use zoning may not have emerged had its work been organized differently, although it did consider major alternatives to this approach and found them wanting. The desirability of dominant use zoning as a means of planning uses of public lands has yet to be determined conclusively, but the problems of choice and priorities to which the Public Land Law Review Commission was addressing its recommendations will not go away. Competition among alternative land uses will continue to increase and Congress will continue to view administrative decisions made in the absence of statutory directions as a usurpation of its authority. And with the immense workload it already has, the Congress isn't likely to take on the job of determining uses of the public lands itself. The Public Land Law Review Commission may not have hit on the best of all possible solutions,

and it may not have done what Commissions generally, and this Commission in particular, hope to do—mobilize public support for feasible solutions to important problems. But, it may have done an excellent job of acting as a catalyst to bring about further discussion and resolution of the important matter of deciding just what is to be done with public lands.