THE PUBLIC LAND LAW REVIEW COMMISSION'S IMPACT ON THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

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The Public Land Law Review Commission [PLLRC or Commission] was created by Congress in 1964 to conduct a "comprehensive review of . . . [the public land laws of the United States] and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary."[1] Congress declared such a review necessary because the public land laws had

> developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of the public lands and the laws relating thereto have been divided among several agencies of the Federal Government.[2]

The PLLRC study was the brainchild of Rep. Wayne Aspinall, the chairman of the House Interior and Insular Affairs Committee. Rep. Aspinall had served on the Outdoor Recreation Resources Review Commission [ORRRC], which was created by Congress in 1958 to do a comprehensive study of outdoor recreation policy issues, and modeled the PLLRC after it. The basic concept behind having the nineteen-member Commission dominated by the members from the Senate and House of Representatives[3] was that those members could be expected

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1. Act of September 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (43 U.S.C.A. § 1392 (West Supp. 1979)).

2. *Id.* at § 2.

3. The Act provided for a Commission comprised of nineteen members: three majority and three minority members from the Committee on Interior and Insular Affairs in both the House

to initiate and/or support legislation implementing the Commission's recommendations. It was recognized that a report by a traditional, blue-ribbon presidential commission would probably languish on the shelves and largely be ignored since Congress historically has shown benign disdain toward reports by commissions comprised of public figures who do not have to face the political heat of trying to implement often controversial recommendations.

The Commission's methodology for carrying out its charge has been detailed elsewhere.[4] Here it will suffice to summarize that effort by indicating that its comprehensive $7.5 million study program included thirty-three study reports on the whole spectrum of public land problems, testimony and exhibits from over 900 witnesses at sixteen public meetings held throughout the nation, and the extensive advice provided by the representatives appointed by each of the governors of the fifty states and a thirty-four member advisory council. The Commission relied on all of these sources to produce its report, *One Third of the Nation's Land*, which was submitted to the President and Congress in June 1970.

As the Commission's report was being put in final form, a number of the public members of the Commission suggested that it would be useful if the Commission staff could draft some model legislative proposals that could be used as a starting point by Congress for implementing the Commission's recommendations. The legislative members balked at this suggestion, however, expressing the view that it would be preferable for them to be able to maintain flexibility to deal with the recommendations in the traditional give and take of the political process. Most legislative members felt more comfortable supporting only the general principles of the report and were reluctant to be circumscribed by specific legislative proposals, even in draft form.

One of the difficulties in implementing the Commission's recommendations was that there was no ready-made constituency ready and eager to support the Commission's report. The earlier report of the Outdoor Recreation Resources Review Commission—a report based on a narrow charter—was able to muster immediate support from numerous outdoor recreation and environmental groups, a constituency that was galvanized by the creation of the Citizens Committee for the ORRRC Report. The PLLRC report, on the other hand, covered the

and the Senate (the Senate Committee is now the Energy and Natural Resources Committee), six presidential appointees, plus a chairman elected by the other eighteen members. Rep. Aspinall was elected chairman, thus resulting in thirteen legislative members and six public members.

4. See Muys, *The Public Land Law Review Commission Study—Issues and Interests*, 3 NAT. RESOURCES L. 315 (1970).

full range of uses of the public lands, as the titles of the report's chapters make clear:

Planning Future Public Land Use
Public Land Policy and the Environment
Timber Resources
Range Resources
Mineral Resources
Water Resources
Fish and Wildlife Resources
Intensive Agriculture
The Outer Continental Shelf
Outdoor Recreation
Occupancy Uses
Tax Immunity
Land Grants to States
Administrative Procedures
Trespass and Disputed Title
Disposals, Acquisitions, and Exchanges
Federal Legislative Jurisdiction
Organization, Administration, and Budgeting Policy

Consequently, no single interest group, including the affected federal land management agencies, would be completely pleased with the report. For example, although the report places great emphasis on environmental considerations,[5] the national environmental organizations and their media spokesmen were highly critical of the report because the Commission failed to recommend that the Mining Law of 1872 be replaced by a leasing system and because of its unfortunately characterized "dominant use" recommendation.[6] In short, too many oxen were gored to be able to muster something like a Citizens Committee for the PLLRC Report. This made the implementation task particularly difficult, since the legislative process is cumbersome and fraught with uncertainties at best. Indeed, after the Commission's report was submitted, Chairman Aspinall estimated that it would be ten years until most of its recommendations requiring legislation would be enacted.

Nevertheless, Rep. Aspinall mapped out a legislative strategy for taking up the Commission's recommendations in the House Interior Committee in the 92nd Congress. His concept was to start with umbrella legislation that would state the basic elements of a new congressional public lands policy and establish some general land use planning guidelines for the federal lands. That foundation legislation would be

5. See Muys, *The Environmental Recommendations of the Public Land Law Review Commission and Their Implementation*, 5 NAT. RESOURCES L. 274-79 (1972).

6. See Hagenstein, *One Third of the Nation's Land—Evolution of a Policy Recommendation*, 12 NAT. RESOURCES J. 56 (1972).

followed with revisions of the laws dealing with the various resources and uses of the public lands, much along the line of the format of the Commission's report. This approach would enable him to use his leverage as committee chairman to stimulate a consensus among the contending interest groups on each subject. Such had been his practice with most controversial legislation that came before the Interior Committee and was undoubtedly why he never lost a bill on the floor of the House.

Rep. Aspinall launched his program in the 92nd Congress by introducing H.R. 7211, embodying the public land policy goals recommended by the Commission, its proposed public land planning system (including a review of executive withdrawals), provision for fair and expeditious administrative procedures, and provision for judicial review of many public land decisions. The bill generated no significant support, perhaps because the new planning system carried forward the Commission's recommendation that the existing "multiple use" planning and management systems being employed by the Bureau of Land Management [BLM] and the Forest Service recognize that certain lands had a clearly ascertainable "highest and best" use which ought to be paramount to other possible uses in cases of unreconcilable conflicts—the controversial "dominant use" principle. However, it was also apparent that the opposition from most of the national environmental organizations was simply a continuation of their broadside attack on the Commission's report and their vendetta with their old nemesis, Rep. Aspinall.[7] It was clear that the environmentalists were determined not to support any legislation that had Rep. Aspinall's imprimatur on it, regardless of its merits.[8] Indeed most of those environmental groups were mounting a national campaign to defeat him in the Democratic primary in his recently-realigned district in Colorado. They were successful in that effort, and Wayne Aspinall was not returned to Con-

7. This hostility stemmed principally from earlier confrontations over wilderness and water resource development legislation.

8. The author wishes to note that the principal spokesman for one of the leading national environmental organizations later told him confidentially that, although there was much in the report that was environmentally sound, his organization could never endorse a report from a commission chaired by Rep. Aspinall. Moreover, he said that it was essential to emphasize what he viewed as the shortcomings of the report in order to maintain the momentum of the national environmental movement at that time. Similarly, another prominent environmental writer called the author shortly after the report was released and asked if it was not a fact that Chairman Aspinall had dominated the Commission members and staff and had dictated the basic tone of the report. I advised him that nothing could be further from the truth, that the staff designed the contract studies, chose the contractors, and evaluated their reports without interference from the chairman, and that the chairman (consistent with his practice on the House Interior Committee) only voted on Commission recommendations when there was a tie vote. To punctuate the last point, I noted that one of the few votes the chairman cast was to break a tie and carry the day for a proposal to require locators to pay a royalty for the minerals obtained under the revised location and patent system recommended by the Commission to replace the Mining Law of 1872.

gress. That unfortunate development left no moving force in the House to push the Aspinall strategy for implementation of the PLLRC recommendations. The new chairman of the committee, Rep. James Haley (D., Fla.) had little interest in the subject, and the several other committee members who had served on the Commission did not press for implementation either.[9] Moreover, the congressional reform movement of that period greatly weakened the power of the committee chairman and dispersed it among an increased number of subcommittee chairmen with their own interests to pursue. Committee discipline as it existed for years on the House Interior Committee became a thing of the past.

On the Senate side, Chairman Henry Jackson (D. Wash.) and the other five members of the Senate Interior Committee who had served on the Commission[10] had devised no overall strategy for implementing the Commission's recommendations.

Fortunately, however, the Secretary of the Interior had made some special assignments in 1970 within the Department looking toward preparation of legislative proposals to implement those recommendations of the Commission which affected Interior and with which it was in agreement. The principal product of that effort was a draft bill (generally referred to as the BLM Organic Act) which would have implemented the Commission's recommendations: (1) to give the BLM new, streamlined management authority, (2) arm it with modern disposal and management authority, and (3) repeal the scores of old settlement laws which the Commission had recommended be abolished. All of these proposals had been urged by the Department since the early 1960's.

The Department's bill was sent to Congress in 1971 and introduced by a number of representatives, as well as Senator Jackson, who also introduced his own more limited version of the BLM Organic Act. Both bills built on a basic approach that would have made permanent the temporary sales and management authority of the Public Sales Act[11] and the Classification and Multiple Use Act of 1964.[12] The bills were companion legislation to the Public Land Law Review Commis-

9. Rep. John Saylor (R., Pa.), who was the ranking Republican member of the committee, and Rep. Walter Baring (D., Nev.) had died. Rep. John Kyl (R., Iowa) and Rep. Laurence Burton (R., Utah) had been defeated in the 1970 general election. Only Rep. Morris Udall (D., Ariz.) and Rep. Roy Taylor (D., N. C.) remained on the committee, and neither evidenced much interest in trying to mount a legislative program to implement the PLLRC recommendations.

10. Senators Clinton Anderson (D., N.M.), Alan Bible (D., Nev.), Gordon Albott (R., Colo.), Paul Fannin (R., Ariz.), and Len Jordan (R., Idaho).

11. Act of September 19, 1964, Pub. L. No. 88-608, 78 Stat. 988 (codified at 43 U.S.C. §§ 1421-1427 (1976)).

12. Act of September 19, 1964, 78 Stat. 986, Pub. L. No. 88-607 (43 U.S.C.A. §§ 1411-1418 (West Supp. 1979)).

sion Act and were designed to give the Secretary of the Interior interim sale and management authority pending completion of the Commission's study and action on its recommendations. When the Federal Land Policy and Management Act [FLPMA][13] was enacted five years later, it was a curious hybrid of the Aspinall bill, the Interior Department bill, the Jackson bill, and some Christmas-tree additions tacked on along the way in Congress' inimitable fashion. The legislative history that produced that result is beyond the scope of this paper, but fortunately the bills, committee reports, and debates have been assembled by the Senate Energy and Natural Resources Committee as a committee print,[14] and the behind-the-scenes legislative history has been detailed by one of the principal committee staff consultants.[15] Considering how the involved legislators and staff personnel changed during that period, it is fortunate that even more extraneous provisions were not tacked on to the bill to woo various interests. In any event, FLPMA became law in the waning hours of the 94th Congress. The final version of the bill agreed upon by the conference committee could have benefited substantially from further consideration of the House version. Certainly the intent behind the language in the House bill providing for a review of BLM lands for possible wilderness designation, which was enacted as section 603, could have been clarified to avoid the present controversy over the BLM's proposed management guidelines governing wilderness study areas. However, it appears that the conferees were eager to enact a bill of some kind and were content to remedy any problems in a later Congress.

Professor John Carver of Denver University Law School has already done a careful comparison of FLPMA to the recommendations of the PLLRC[16] and I will not repeat that effort here. In general, I believe the Act closely tracks the spirit, if not the letter, of the recommendations, although it conferred far greater discretionary authority on the Secretary than the Commission recommended. Another vice is

13. Pub. L. No. 94-579, 90 Stat. 2744 (codified in scattered sections of 7, 16, 30, 40, 43, U.S.C. (1976)).

14. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 95th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, 95-99 (1978).

15. See Senzel, *Genesis of a Law* (pts. 1-2), AM. FORESTS, January 1978, at 30, February 1978, at 43. Three former PLLRC staff members were active participants in helping to shape the bill during this period. D. Michael Harvey, currently Chief Counsel to the Senate Energy and Natural Resources Committee, was on the Senate Interior Committee staff as special counsel and was heavily involved with the legislation, having helped put together the initial Departmental bill while he was still with the BLM. On the House side, Charles R. Conklin was Committee Staff Director, and Thomas Cavanaugh was staff counsel to the Public Lands Subcommittee.

16. Carver, *Federal Land Policy and Management Act of 1976: Fruition or Frustration*, 54 DENVER L.J. 387, 397-408 (1977). This was one in a compendium of articles produced for a reunion of the PLLRC official family to review the status of efforts to implement the PLLRC recommendations.

that it departed from the Aspinall strategy and wound up including bits and pieces of new public land policies (*e.g.*, grazing management, mining claim recordation, rights-of-way policy, and California Desert management). Also, the Act's planning directives are not as detailed as the PLLRC had recommended with respect to spelling out factors which the BLM must consider in its planning process. Similarly, the planning directives are applicable only to the BLM, whereas they should have been made applicable to the Forest Service as well, as H.R. 7211 provided. Finally, FLPMA did not adopt the PLLRC's "dominant use" principle for multiple use planning.

At the same time FLPMA was in gestation, other bills implementing many other Commission recommendations were wending their way through Congress. The clear-cutting controversy on the National Forest System was brought to a head by the *Monongahela* decision in 1974[17] and the Forest Service's push for remedial legislation evolved into a significant revision of public land timber policy on the national forests with the enactment of the National Forest Management Act[18] contemporaneously with FLPMA. The Arab oil embargo of 1973 spurred efforts to streamline the laws governing the development of federal coal and offshore oil and gas, resulting in the Federal Coal Leasing Amendments Act of 1975[19] and the Outer Continental Shelf Lands Act Amendments.[20] The increasing fiscal pressures faced by western state and local governments led to enactment of the Act of October 20, 1976,[21] implementing in principle the PLLRC's recommendations for the establishment of a comprehensive payments in lieu of taxes system applicable to most federal lands. Finally, the Public Rangelands Improvement Act of 1978[22] implemented a number of the PLLRC's grazing recommendations, including a statutory grazing fee formula, although there is some dispute whether the formula reflects fair market value for grazing privileges.

Several points are clear as a result of the legislative effort in the nine years since the Commission's report was released:

1) Congress and the executive branch agencies have implemented the vast bulk of the Commission's recommendations. The only major

17. West Va. Div. of Izaak Walton League of Am., Inc. v. Butz, 522 F.2d 945 (4th Cir. 1975).
18. Act of October 22, 1976, Pub. L. No. 94-588, 90 Stat. 2949 (codified in scattered sections of 16 U.S.C. (1976)).
19. Act of August 4, 1976, Pub. L. No. 94-377, 90 Stat. 1083 (codified in scattered sections of 30 U.S.C. (1976)).
20. Act of September 18, 1978, Pub. L. No. 95-372, 92 Stat. 629 (codified in scattered sections of 16, 30, 43 U.S.C.A. (West Supp. 1978)).
21. Act of October 20, 1976, Pub. L. No. 94-565, 90 Stat. 2662 (codified at 31 U.S.C. §§ 1602-1607 (1976)).
22. 43 U.S.C.A. §§ 1901-1908 (West Supp. 1979).

exception is Congress' apparent inability to come to grips with revision of the Mining Law of 1872;

2) Hundreds of outmoded agricultural settlement, disposal, right-of-way, and other laws have been repealed or amended, thus taking an important first step to clean up the complex and confused patchwork of archaic laws that led to the creation of the PLLRC;

3) The public land policy goals enacted in FLPMA should be a useful and meritorious frame of reference for Congress and administrators; and

4) The many values of the public lands and their importance to the Nation have received much needed attention.

Much remains to be done, however. Revision of the Mining Law of 1872 is long overdue. A sensible solution to the Alaskan lands controversy must be found. Some relatively minor revisions of the Mineral Leasing Act of 1920 are needed to perfect a coherent leasing system for the minerals subject to disposition under that legislation. Revenue sharing with regard to public land resource development should be fully supplanted by the 1976 payments in lieu of taxes system and a rational impact aid program for energy development on federal lands established. Those scattered, outmoded, and archaic public land laws and policies which have not been dealt with in the legislation recently enacted need to be addressed. Legislative guidelines for the quantification of federal and Indian reserved water rights should be enacted to guide the current effort underway pursuant to the President's national water policy.

Perhaps a more serious cause for concern is that the spate of legislation in the seventies, which has implemented most of the Commission's recommendations, may simply have replaced one series of Acts of Congress which are not fully correlated with each other with a modern assemblage suffering from the same vice. What is needed is for the Senate Energy and Natural Resources Committee or the House Interior and Insular Affairs Committee to conduct a comprehensive oversight review of the federal lands legislation of the 1970's. It should start with a request to the Library of Congress to prepare an analysis of the extent to which the recommendations of the PLLRC have been implemented either by legislation or administrative action. This suggestion does not presuppose that all of the Commission's recommendations offered the only or best solution to the problems they dealt with. Rather its objective is to identify where Congress may have legislated contrary to, or ignored, Commission recommendations, with the further aim of ascertaining whether such action was intentional or inadvertent. If, on review, it becomes clear that Congress may have erred on particular

issues, now is the time to amend the law, before it becomes too established.

The second aspect of the Library of Congress study should be to ascertain the extent to which the recent public land laws are consistent among themselves and with the policy goals detailed in FLPMA. This is more than an exercise motivated by undue concern for statutory symmetry. It goes to the heart of attempting to establish a rational, consistent public land policy. It does not mean that Congress must be a slave to unthinking consistency, inasmuch as compelling circumstances may sometimes dictate inconsistent policies. The objective, however, is to ascertain whether those deviations were consciously legislated and justified in the public interest, or whether they may have been the result of error, inadvertence, or perhaps political trades that were not carefully considered. In any event, such an oversight effort would have the virtue of affording Congress an opportunity to perfect its legislative handiwork before it has become set in concrete.

The long-overdue creation of a Department of Natural Resources, as recently proposed by President Carter, would provide a further reason for Congress to take a careful look at the array of public land laws any new Department may be administering and to make any necessary mid-course corrections. Otherwise, if the past truly is a prologue, the legislative accomplishments in federal lands policy of the 1970's may simply become the subject matter of yet another review commission several decades hence.