SYMPOSIUM:

THE OWNERSHIP, ADMINISTRATION, AND DISPOSAL OF THE PUBLIC LANDS

THE PUBLIC LAND LAW REVIEW COMMISSION: ITS PURPOSE AND OBJECTIVES

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The Constitution of the United States provides that:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States. . . .[1]

Beginning in 1785 with the historic ordinance that set the stage for a bold new land policy yet untested by any nation, the Congress has exercised its constitutional power in thousands of separate actions designed to foster the development and use of our landed heritage in the common good. Determined to avoid the tyrannies and the denial of individual freedoms which attended the absolute control of land by the crown and a privileged few in the old world, the early architects of our public land policy framed a system which had as its cornerstone the major tenets of private land ownership as we know them in the United States today.

The emphasis on private ownership in a free enterprise political economy joined well with the need to settle the land and take physical possession of the vast properties which passed to the central government during the period of territorial accession beginning in 1783 and ending in 1867. The abundance of land and scarcity of hard revenue

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[1] U.S. CONST., art. IV, § 3, cl. 2.

assured perpetuation and expansion of the disposal policies by a government whose leaders were both pressed to raise operating capital and bent on promoting economic development, all under conditions that would engender a free society.

Apart from the Preemption[2] and other laws enacted during the first six decades of the nineteenth century to provide for settlement by individuals, to encourage the construction of railroads, roads, and canals, and to grant lands to States as they were admitted to the Union, the major legislative enactments that molded public land policy and played a key role in shaping national development began with the Homestead Act of 1862,[3] and continued with the mining laws of 1866,[4] 1870,[5] and 1872.[6] Except for the Act of March 1, 1872[7] establishing Yellowstone National Park, the Act of March 3, 1891,[8] which authorized the President to reserve public land as national forests,[9] and for the Historic Sites Act of June 8, 1906,[10] the central thrust of policy reflected in the significant land laws enacted up to the early 1960s was aimed at placing the land and its resources in the hands of the individual citizen, or in any case divesting the Federal title.

Now the geographic frontier is gone. We are an industrial nation of 194 million, settled for the most part, in great urban clusters. Where we were a people of the land, we have become a people of the machine and of steel, concrete, and glass towering above the land. Technology, capital, and organization have given us the capacity to increase the agricultural productivity of our land base far in excess of the needs of our population, and land area alone is not the major factor in agricultural production that it once was.

Now our geographic frontiers are proscribed only by the limitless horizons of space and the universe, and we spend much of our time, money, and efforts striving to solve the problems of the city, of relations with our international neighbors, and in the quest for knowledge and breakthroughs in medicine, science, and technology. We are a different nation and a different people. The era during our economic, social, and political maturation when most of our public land laws were enacted is gone, as are the primary objectives for which they were enacted.

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[2] 2 Stat. 112 (1801); 4 Stat. 420 (1830); 5 Stat. 453 (1841).
[3] 12 Stat. 392 (1862), 43 U.S.C. § 161 (1964).
[4] 14 Stat. 251 (1866), 30 U.S.C. § 21 (1964).
[5] 16 Stat. 217 (1870), 30 U.S.C. § 35 (1964).
[6] 17 Stat. 91 (1872), 30 U.S.C. § 22 (1964).
[7] 17 Stat. 32 (1872), 16 U.S.C. § 21 (1964).
[8] 26 Stat. 1103 (1891), 16 U.S.C. § 471 (1964).
[9] By the Act of June 25, 1910, 36 Stat. 847, as amended 16 U.S.C. 471 (1964), the Congress imposed limits on the powers of the Executive to create or add to national forests in California, Colorado, Idaho, Montana, Oregon, Washington, and Wyoming.
[10] 34 Stat. 225 (1906), 16 U.S.C. § 431 (1964).

But these changes in the characteristics of our national life have brought new and different pressures to bear on the public lands—pressures which didn't exist and weren't foreseen when our principal public land laws were first placed on the statute books. Of the original 1,807,681,920 acres of public domain, approximately 718,115,472 acres are, according to statistics published by the General Services Administration,[11] left in Federal control: 159,988,440 acres of it in the National Forest System; 24,345,950 acres in the National Wildlife Refuge system; 16,781,036 acres in properties withdrawn for military use by the Defense Department; 17,996,114 acres in National Parks and monuments; 7,588,921 acres withdrawn for reclamation purposes; 6,168,108 acres devoted to several other uses (including over 4 million acres for Indian Reservations, which are not within the scope of the Public Land Law Review Commission Study); and 485,246,903 acres administered by the Bureau of Land Management, successor to the General Land Office.

About 165.9 million acres of the BLM lands outside of Alaska[12] are administered under the terms of the Taylor Grazing Act.[13] These lands are susceptible to entry and disposition under most of the public land laws only if they are first classified by the Secretary of the Interior, in his discretion, as being suitable for a specific form of entry or disposition. Approximately 347,141,627 acres of lands in these classes of Federal ownership are located in the eleven western states (excluding Alaska). This is approximately 46% of the total area of those States.

It has been apparent to me for some time that the present body of public land law is inadequate to the needs of today and the foreseeable future. During my sixteen years as a member of the House Interior and Insular Affairs Committee, the last seven of which I have served as its Chairman, my associates and I have struggled to discern those changes in basic policy which need to be enacted into law. While our efforts have not been wholly fruitless, I believe that most of our actions have resulted in accretion to old law and policy to correct inequities and facilitate essential, but piecemeal change, rather than in laying the foundation for concepts and policies required to bring cohesion and direction to the uncoordinated patchwork we inherited.

As I have stated on other occasions, I believe the Congress has abdicated much of its Constitutional authority *and* responsibility to the executive branch of the government in granting broad discretionary authority, especially to the Secretaries of Agriculture and the Interior, to make public land policy administratively. In addition, the Congress

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[11] Reports Division, Central Office, General Services Administration.
[12] *Public Land Statistics*, Bureau of Land Management, U.S.D.I., p. 38 (1964).
[13] 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1964).

has abdicated its basic responsibilities in policy making for the public lands when it was faced with the prospect and need for fundamental change in such policies, and failed to act. The results have been a gradual reversal of the policies of disposition and a juxtaposition of retention philosophy to a position of dominance in operational decision making, and therefore in prevailing policy. In an exchange of correspondence with President Kennedy on this subject in 1962, the President said:

> 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 seemd 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. It has, in your phrase, been 'in accordance with the time-honored conservation principle of effecting the maximum good for the maximum number.' 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. On occasion these choices may have seemed to out-distance express statutory policy, but the policies which have governed the choices have been under constant congressional scrutiny.

The executive branch of government followed the only course open to it in the circumstances. As a single member of the Congress, I cannot judge with finality the correctness of policy decisions taken by departments and agencies of the executive where the law or Congress fails to give explicit guidance. But as a citizen I have a right to expect that the laws are executed with every effort to achieve their intent. When fundamental changes in policy appear necessary, I also expect the legislative and political processes to function as they are intended in reshaping policy through a full measure of common consent and culminating in new or amended law.

We are a nation governed by law. If we are to continue to hold government responsible to the people under this system, the law must reflect the will of the people. When the law does not suit the will of the people, it should be changed. The challenge to lawmakers is to assure stability and orderly transition in our social and economic institutions when new law is in order.

The burden for performance of its Constitutional role in lawmaking for the public lands falls upon the Congress. But, when the Mining

Law, for example, is so administered as to raise fundamental questions as to whether the interpretation reflects the legislative mandate, Congress must step in and inquire into the situation. Certainly there must be adequate provision for assuring the availability of the undiscovered mineral and energy resources which lie in these lands to satisfy the insatiable and growing appetite of our industrialized economy and urbanized society. These resources, including the great energy reserves of oil shale and the extensive coal deposits known to exist on public lands, will make a significant contribution not only to the local and regional economies, but to the future mineral needs of the entire nation. Under what conditions should these resources be used and developed? Should these values be examined without reference to other values? What other resource values and uses will be affected, and how should these considerations bear on the policy for mineral resources development?

The Taylor Grazing Act[14] provided the mechanism and set the policy for stabilizing use by the domestic livestock industry of the public domain which was not appropriated for other purposes. But it was a temporary measure, enacted to meet an emergency. Is that mechanism and its purpose as valid today as it was in the 1930s? Should there be different sets of rules and policies providing for domestic livestock use of public lands in the National Forests, the National Wildlife refuges, those withdrawn for military uses, and those lands outside of grazing districts but to which the Taylor Act is applicable? How should future use of lands now in the grazing districts be determined and managed?

Overwhelming new pressures for use of the public lands by the national public for their outdoor recreation needs raise questions as to the adequacy of long-established law, procedure, and administrative practice affecting timber-harvesting, grazing, mining, water-use and development, and use of the land for intensive agricultural, commercial and industrial activity and residential development. This phenomenal growth of outdoor recreation demand in the United States gives added impetus to the need for examining in its entirety the public land law and policy of the United States.

The rapid physical growth of communities and urban complexes throughout the nation demands a well-designed set of policies for orderly accommodation of such growth in localities where public lands can serve such needs. Systems of revenue-sharing in lieu of taxes, established by a number of public land laws, must be examined in the light of the

[14] *Ibid.*

emerging financial burdens imposed on local government, as well as in consideration of the values and benefits that attend Federal investment and administration of the resources. Most of all, the policy problems and questions I have mentioned, in addition to many more I have not discussed, need to be studied and examined each in relation to the other, and all of them together. One of the major defects in public land law and policy today is directly attributable to the piecemeal character of its evolution.

The task of complete and thorough evaluation is so complex, however, and requires so great an effort, both in staff capacity and in deliberation, that I concluded it would not be possible for the Congress to try to accomplish this work, in the depth and comprehension necessary, in the normal course of its operation. We sought another method. If we were to depart from "normal operations," it became evident that it would be desirable to broaden the participation to include the executive branch and interested groups.

In drafting the legislation which I introduced as H.R. 8070, and which later became Public Law 88-606,[15] we followed the organizational pattern established by Public Law 85-470,[16] which created the Outdoor Recreation Resources Review Commission. I watched that Commission with great interest and admiration, and I believe there is general agreement that the O.R.R.R.C. was eminently successful in its labors — judged by the extent to which its recommendations and proposals have been adopted.

Essentially, the arrangement provided by Public Law 88-606 brings together members of the Congress and persons appointed by the President, working with an Advisory Council comprised of interested and affected citizens and industries and representatives of the Federal agencies most involved. In addition, the Governor of each of the 50 states has a representative to work with the Commission, the Advisory Council, and the staff. A full-time staff of professional persons conducts the fact-finding and the analyses needed by Commission members. The Commission's conclusions and recommendations will be issued in a report submitted to both the President and the Congress.

While there have been three earlier general studies of public land law,[17] none has operated under conditions where both the Congress and persons appointed by the President joined in a common effort to study, delibrate, and decide. I believe this arrangement holds promise for the greatest measure of effectiveness and success in a comprehensive review of public land law and policy.

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[15] 78 Stat. 982 (1964), 43 U.S.C. § 1391 (1964).
[16] 72 Stat. 238 (1958), 16 U.S.C. § 17k (1964).
[17] The Public Lands Commissions of 1879, 1903, and 1931.

By design and function, under the Constitution, friction and conflict between the executive and legislative branches of government in the formulation and execution of public policy is inevitable. In a vigorous society with a healthy political system, I have the greatest faith that this conflict will consistently produce wise government in the common good. I know of no better way to ponder the problems of public land policy in the process of seeking their best solutions than to assemble these qualities at a single conference table. While much of our recent national concern has turned to resolving problems of poverty, urban living, transportation, unemployment, the aged, medicine, education, and international affairs — and this is as it should be — we cannot afford to overlook the finite land and natural resources base upon which we have built a prosperous and mighty nation. We have inherited from great men of vision and courage a wise, workable, natural resources ethic. But we must keep apace of a changing world in applying this doctrine if the earth and its bounty are to continue to serve man's needs, and to serve them well. I submit that our treatment of our natural heritage, and arrangements we make for its allocation and use, pose some of the most profound and complex issues of our time. The course we elect to follow may well determine our ultimate destiny as a nation. I have confidence that the Public Land Law Review Commission will produce a report which will guide us toward the resolution of these issues.