ARIZONA'S PUBLIC LANDS— MIXED BLESSING, MIXED BURDEN

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In this symposium issue the Arizona Law Review turns its attention to a subject of profound interest and importance to our State. It is one which has prompted much discussion and considerable misunderstanding through the years. It is a matter which has concerned nearly every public official in Arizona at one time or another. And it is a concern which on innumerable occasions has required the attention of every Member of Congress serving our State. The subject is federal land use.

The time for such a symposium as this is opportune, for, as will be noted later, federal land policy is coming under review, a thorough and comprehensive review, for the very first time. The articles in this issue can serve to stimulate public discussion and awareness of the many points of view which exist about our public lands and the uses to which they should be put.

What is the history of our public domain in this country? How did we acquire it in the first place? The idea apparently was firmly established even before the Revolution, particularly in the minds of colonists living in colonies with a claim to extensive territories.[1] A sense of proprietorship over unoccupied land very promptly extended to the Confederacy, even antedating any tangible claim to the backlands. A resolution of the Congress of the Confederation passed on Octber 10, 1780, provided for the disposal, for the common benefit of the United States, of the territories ceded to the United States; for the formation of States out of these territories; and for the regulation by Congress of the granting and selling of these lands.[2]

The Constitution of the United States, perhaps wisely so, is largely silent with respect to public land policy. It provides in article IV, section 3:

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[1] HIBBARD, A HISTORY OF PUBLIC LAND POLICIES 28 (1924).

[2] SATE, HISTORY OF THE LAND QUESTION IN THE UNITED STATES 77 (IX Johns Hopkins University Studies, fourth series).

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property beloning to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular State.

As a result of fortuitous events (such as the Louisiana Purchase) abundant land of good quality was long a major asset possessed by the United States Government. It was used, some would say lavishly used, to encourage settlement and development of our country. Most of the new States — the so-called public land States — came in for a substantial share in the distribution of grant land both for schools and internal improvements. Large acreages were sold under one law or another; some 287,300,000 acres were granted or sold to homesteaders; grants to veterans as military bounties accounted for 61,000,000 acres; grants to states totaled about 225,000,000 acres; and grants to railroad corporations were about 94,300,000 acres.[3] Though figures are not in complete agreement, it would appear that with the inclusion of Alaska and Hawaii, the public domain acreage still owned by the federal government through June 30, 1963, was 718,115,449 acres, or slightly more than one-third of the total gross area of 2,313,772,160 acres (2,271,343,360 land-acres). A little more than one-half of the public domain still held by the federal government is in Alaska. An additional 51,788,000 acres of lands owned by the federal government in 1963 had been acquired by other methods. Indian reservations for which the federal government acts as trustee are not herein considered as present federal public domain acreage.

Arizona, the sixth largest State (after Alaska, Texas, California, Montana and New Mexico) with a total area of 72,688,000 acres, was fortunate in that land grants to the State in percentage of total area were second only to New Mexico. The grants were very largely under acts in existence at the time of statehood (February 14, 1912). As one of the very late territories to achieve statehood, Arizona was one of the states to receive four sections of common school land per township by the Act of June 20, 1910.[4] Thus common school sections and indemnity lands selected in lieu thereof provided about four-fifths of the total acreage granted to the State for all purposes. Under the terms of the Enabling Act,[5] Congress forbade Arizona from selling any of these properties except by public bid and at not less than appraised value; hence only limited sales have been made by the State Land Department.

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[3] Data are from PUBLIC LAND STATISTICS, 1964, at 3-6 (Bureau of Land Management, U.S. Dept. of the Interior, Washington).
[4] Act of June 20, 1910, ch. 310, 36 Stat. 557, 572.
[5] Act. of June 20, 1910, ch. 310, 36 Stat. 557.

A total of some 9,800,000 acres, or about 14 percent of our total land area, is in State ownership. For the most part, these lands are leased to cattlemen. Education officials are generally opposed to any widespread disposition; but in 1962, the Arizona Legislature, responding to the need for development, petitioned Congress to modify the Enabling Act so that counties, cities, and school districts, could acquire state lands for park, school, and public purposes, either free or at less than appraised value. Under bills which were introduced, (S. 3283; H.R. 11710; and H.R. 11712 of the 87th Con., 2nd Sess.) the legislature would then determine whether and on what terms to make these State lands available to local governments. The Senate did pass S. 3283[6] but the matter was not acted on in the House, even though this writer, one of its sponsors, strongly favored this course.

In addition to the 21,491,000 acres set aside as Reservations for our 15 Indian tribes, for much of which the federal government is trustee, Arizona acreage owned by the federal government includes 32,141,872 acres of public domain and 297,388 acres acquired by other methods. These 32,439,260 acres amount to 44.6 percent of the total area of the State, a figure which is low by comparison with almost all of Alaska; 85.5 percent for Nevada; 66.2 percent for Utah; 63.8 percent for Idaho; 52.1 percent for Oregon; and 48.3 percent for Wyoming.

Of this federal land some 13,100,000 acres, or about 18 percent of the state — consisting largely of grazing lands — are held by the Bureau of Land Management of the Department of the Interior. National forests and wildlife refuges account for another 17 percent, or about 12,900,000 acres. Military reservations such as Luke, Williams, and Davis-Monthan air bases, Ft. Huachuca, Yuma Test Station and the huge bombing and gunnery range between Ajo and Yuma, account for about 5 percent of the total, or 3,600,000 acres. Some 1,400,000 acres, or about 2 percent of Arizona's total, are included in the Grand Canyon, Painted Desert, Chiricahua, Sahuaro, Organ Pipe and other units of the national park system. Federal reclamation, flood control and power projects, such as Lake Mead and Davis Dam, require another 2 percent of the total area.

Thus Arizonans have for many years lived and worked in the midst of public lands. We are acutely aware that both advantages and disadvantages go along with this fact of life in a public land state. Disposal, reservation, conservation and management are very large chapters in the story of our economy and political development.

One of the interesting disposal methods which was long considered but not accepted is cession. Proposals were made to the Congress as

[6] 108 CONG. REC. 22767-68 (1962).

early as 1826[7] to cede all public land to the State in which it lay. Twenty-four bills, proposing federal legislation granting to the states the public lands of the United States situated within their boundaries, were introduced in the Congress in the years from 1872 to 1901.[8] As late as 1935 the sentiment in favor of cession was described as still strong but as having diminished in importance.[9]

Reservation too has deep roots going back, some would say, as far as the Act of March 1, 1817[10] which authoried the Secretary of the Navy, with the approval of the President, to reserve from sale public lands containing live oak and red cedar for "the sole purpose of supplying timber for the Navy of the United States." A more often quoted beginning of reservation is the Act of March 1, 1872[11] which reserved the Yellowstone National Park "as a public park or pleasuring-ground for the benefit and enjoyment of the people." However, much of the reservation of public lands has occurred since 1900; national forests made up the earliest large development in this direction, though national parks, monuments and refuges, etc., have involved major acreages. The Taylor Grazing Act of 1934[12] long has been considered a victory for the reservationists.

The history of conservation, now about a century in the making, has involved, among its multitudinous interests, not only reservation but management of public land resources. The Newlands Act of June 17, 1902[13] created the "reclamation fund" out of receipts from the sale and disposal of public lands in certain states, authorized the Secretary of the Interior to construct irrigation works, to withdraw irrigable lands from entry and to provide for the homesteading and sale of irrigated lands. Congress perhaps climaxed its conservation program for the unreserved public domain lands when, under the Taylor Grazing Act, it authorized classification and management. Wise use has increasingly involved multiple use, including water conservation and outdoor recreation. Mining and hunting uses are permitted except under some types of reservation.

It can be said today that nearly everyone is for "multiple use." Yet some of the thorniest questions arise with respect to management in the public interest. The question of how much users of public lands should pay involves the pricing of goods and services in an economy of

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[7] S. Doc. 99, 19th Cong., 1st Sess. (1826).
[8] S. Doc. 56, 85th Cong., 1st Sess. 41-43 (1957).
[9] CERTAIN ASPECTS OF LAND PROBLEMS AND GOVERNMENT LAND POLICIES, (VII Supplemental Report of the Land Planning Committee to the National Resources Board, Washington at 77 (1935).
[10] Act of March 1, 1817, ch. 22, 3 Stat. 347.
[11] Rev. Stat. § 2474 (1875), 16 U.S.C. § 21 (1960).
[12] 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1964).
[13] 32 Stat. 388 (1902), 43 U.S.C. § 391 (1964).

limited competition. Perhaps equally difficult are the problems associated with investment subsidies required for conservation and development of such areas.

Questions of public land disposal now arise, chiefly, with respect to tracts located in or near major urban and suburban developments. Tracts particularly well suited for summer homes and other recreational development are all too few in this modern era of outdoor living. Flagstaff, Show Low and other communities are surrounded by Forest Service land and need more space for growth, but most Arizonans — and most Americans — undoubtedly would object to any large sale of forest land. The Bureau of Land Management has even larger holdings, but for the most part they are located in remote areas far from Arizona's centers of population, such as Tucson and Phoenix, which together account for about 90 percent of our total population growth.

Even with our rather phenomenonal growth, however, population density in relation to our 8.8 million acres of privately-owned land in Arizona is still only about 120 persons per square mile, whereas Massachusetts has a density of 650 and New Jersey over 800 per square mile. In other words, it would be difficult to argue effectively that we are overpopulated in Arizona today. And the case would be weakened even more if one considered that, leaving out Indian reservations, our population has the use, somewhat restricted though that use may be, of about four acres for each acre it owns and pays taxes on, giving us an overall density of under 15 persons per square mile.[14]

Though homesteading has been very limited since enactment of the Taylor Grazing Act, the Bureau of Land Management has, nevertheless, disposed of thousands of acres and is continuing to do so under several programs. Among them is the Small Tract Act of June 1, 1938,[15] as several times amended, under which sales or leases of up to five acres of certain public lands for residence, recreation, business, or community site purposes, can be arranged. Tracts are sold for fair market value under public bidding. Another is the Mining Claims Occupants Relief Act of October 23, 1962,[16] which permits the residential occupants of mining claim property to apply for the purchase or lease of as much as five acres of such land if the claim had neither been declared null and void nor relinquished, it constituted a principal place of residence as of October 23, 1962, and had so served the qualified applicant and/or his predecessor in interest for not less than seven years prior to that date.

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[14] Data are from ARIZONA STATISTICAL REVIEW, 1965, at 7 (Research Department, Valley National Bank, Phoenix); and STATISTICAL ABSTRACT OF THE UNITED STATES, 1965, at 13 (U.S. Department of Commerce, Washington).

[15] 52 Stat. 609 (1938), 43 U.S.C. § 682(a) (1964).

[16] 76 Stat. 1127 (1962), 30 U.S.C. § 701-09 (Supp. 1965).

Under other laws, up to 1,520 acres in isolated or disconnected tracts may be sold through public bidding; sales to cities or counties are authorized for schools, parks or other public purposes. And Public Law 88-608 of September 19, 1964, authorizes the Secretary of the Interior to sell limited tracts of public land that have been classified for disposal to meet the increasing needs of local governments and private enterprise. Thus we can see that present provisions take care of some of the more pressing requirements for transfer of limited amounts of public land to other uses, incidentally adding some acreage to our tax rolls.

As hard as state and local taxes hit most of us, it nevertheless provides some orientation to remind ourselves that merely adding more land to the tax rolls is not necessarily the answer to our tax problems. The states of New Jersey and Connecticut with a combined area of 12,845 square miles, well under the 13,750 square miles of private land in our state, have nearly 12 times the tax valuation of Arizona. Those same states produce, through the property tax, for the use of state and local governments, nearly nine times the revenue obtained from this same source in Arizona.[17] Thus, when we talk of adding land to the tax rolls, we ought to consider what higher economic uses can be assigned to it. Most federal land in Arizona, though it is not without value, is rough and mountainous, has poor soils, is arid or semiarid, or has some combination of such factors generally unfavorable to private development. In special cases those unfavorable factors may provide the basis for highly desirable development of a public sort, such as the Grand Canyon. But, clearly, it is not the total acreage which counts, but the characteristics of the area and the uses made of it.

In our public lands we see the plowback principle actively at work. Mining, of course, is the leading industry in Arizona. It is worthwhile noting that only 10 percent of the total revenues realized from mineral leasing on public domain lands are returned to the General Fund of the United States Treasury. Of the remaining 90 percent, the Reclamation Fund gets 52½ percent and the states 37½ percent. The federal government also shares its receipts from grazing leases and permits. Percentages of collections, ranging from 12½ percent for grazing districts on public lands to 50 percent on leases for grazing on public domain lands outside grazing districts, are paid to the state for use as the state legislature may prescribe, for the benefit of the county or counties wherein the grazing areas are situated.

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[17] Data are from STATISTICAL ABSTRACT OF THE UNITED STATES, 1965, at 438-39 (U.S. Department of Commerce, Washington).

Eight national forests in Arizona yield an annual crop of about 175,000,000 bd. ft. of timber, substantially more than the approximately 100,000,000 bd. ft. harvested from state and private lands. With minor exceptions, 25 percent of all monies received from each national forest are paid at the end of each fiscal year to the state in which the forest is situated, for expenditure as the legislature may prescribe for the benefit of public schools and roads of the county or counties in which the forest is situated. Matching is not required. In addition to the funds allocated for distribution for county use, the law also provides that 10 percent of the receipts from national forests shall be available for expenditures on forest roads and trails in the states of origin.[18] In the case of Arizona, the Enabling Act also carried provision for a special payment from the gross proceeds from all national forests in the state.[19]

In Arizona, federal expenditures on behalf of the Indian tribes in fiscal 1963, were almost $64 million, a sum equal to approximately 20 percent of the current state budget. There are other direct expenditures which in total provide extensive services utilized by residents of Arizona, by our guests from other states and other countries. Examples are not only special federal forest road financing, but also financing of highways and roads within the national parks and monuments, on Indian reservations, and on other federal lands.

While we often talk of the "burden" of federal lands in our state, we should keep in mind the advantages which also accrue. For example, the area occupied by Indian and public domain lands in relation to the total area of the state is a factor affecting allocation of federal-aid highway funds under the matching concessions provided by law. In contrast to our state "burden," we might reflect on the federal "burden" associated with these public lands. As a Secretary of the Interior, not unfamiliar with our state, has put it:

> In rough terms, and as near as my experts can estimate it, well over half of the total revenues, receipts and royalties from the public lands today are either reinvested directly in the West or are shared with State and local governmental units — notwithstanding the fact that practically all the management costs are borne by the National Government.[20]

In modern society the large decisions in resource development, in the use and management of public lands, have to be made through

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[18] 37 Stat. 843 (1913), 16 U.S.C. § 501 (1960).
[19] Act of June 20, 1910, ch. 310, § 6, 36 Stat. 561.
[20] Udall, *The West and Its Public Lands: Aid or Obstacle to Progress?*, 4 NAT'L. RESOURCES J. 14-15 (1964).

political processes, basically through laws and administrative decisions based thereon. It is hard enough, in any case, to integrate individual, minority, and majority viewpoints; local, state and national interests; multiple and overlapping resource uses; as well as diverse views within the conservation field itself and come up with viable policy. In the public lands field, a problem which would be thorny in any case becomes herculean not only because of its complexity, but because of the confused legal frame of reference which has grown more confounding with the years.

There can be little question that a modern legal structure for the public lands is badly needed. A maze of laws and administrative rulings has taken shape over the past 160 years. Many specific acts, applicable to limited areas or particular situations, and often undesirably detailed, have been passed; few have been repealed. The result is confusion to the would-be land user and to the administrator alike. What is needed is a simpler, more comprehensive and comprehensible, legal structure, one which is codified to facilitate prompt and equitable decisions and provide for more satisfactory and less expensive administration.

With the establishment of the Public Land Review Commission, by the 88th Congress (P.L. 88-606), the many diverse aspects of the public lands and the diverging private and public attitudes towards them again come more nearly into focus. Congress has told the Commission to study the existing statutes and regulations governing the retention, management, and disposition of the public lands; to review the policies and practices of the federal agencies; to compile data to understand and determine the present and future demands likely to be put thereon; and to recommend modifications in existing laws, regulations, policies and practices. All of that constitutes a large order, but the work has begun, and the final report is to be submitted to the President and the Congress not later than December 31, 1968. We can hope that this comprehensive and timely examination of public land policy will help our state, and all the public land states, to chart the future with greater certainty and to develop to the fullest the potential we find within our borders.