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[SYMPOSIUM]

THE MINING LAW AND MULTIPLE USE

JERRY A. O'CALLAGHAN*

I

THE NEW ERA OF CONSERVATION

The new emphasis on conservation of our natural heritage and the activity it has engendered, have come to be identified as the Third Conservation Movement. As President Johnson pointed out,¹ the first two phases of national conservation dealt with maintaining large blocks of public land in public ownership, principally in the West, to insure that access to certain resources would be regulated to insure against total depletion. The second phase of the conservation movement was the development of these resources under laws enacted by Congress and regulations published principally by the Secretary of the Interior and the Secretary of Agriculture. These two phases have been highly successful. Multiple use and sustained-yield management of our national forests and public lands have insured a bountiful timber harvest for far into the future. A more important result has been the federal government's demonstration and inspiration to states, local governments, corporations, and individuals to practice conservation on their holdings.

Without, of course, forestalling these developments, President Johnson said in his message on natural beauty:

To deal with these new problems will require a new conservation. We must not only protect the countryside and save it from destruction, we must restore what has been destroyed and salvage the beauty and charm of our cities. Our conservation must be not just the classic conservation of protection and development, but a creative conservation of restoration and innovation. Its concern is not with nature alone but with the total relation between man and the world around him. Its object is not just man's welfare but the dignity of man's spirit.²

This new concept was further amplified in President Johnson's message of February 23, 1966 on environmental pollution: "These

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1. 111 Cong. Rec. 2085 (1965).

2. *Ibid.*

rights assert that no person, or company, or government has a right in this day and age to pollute, to abuse resources, or to waste our common heritage."³

A. The New Concepts of Public Land Management

The new era of conservation avowedly requires new concepts of resource management. Among these will be new concepts for the management of the public lands.

The Public Land Law Review Commission Act⁴ recognizes that our public land laws may be inadequate to meet current and future needs. The Commission, under the chairmanship of Congressman Wayne Aspinall, has been given the responsibility of determining the present and future needs of the American people and making recommendations to implement the congressional policy that "the public lands of the United States shall be (a) retained and managed, or (b) disposed of, all in a manner to provide the maximum benefit for the general public."⁵

In two areas of public land law, Congress realized that there were some matters which could not wait for the Commission. Congress directed the Secretary of the Interior, under the Classification and Multiple Use Act⁶ to conduct a review of public lands to determine which should be retained in public ownership and which should be disposed for community development or other purposes.⁷ Congress also authorized the Secretary to sell, under a new Public Land Sale Act,⁸ lands needed for community growth and development.

B. The Mining Law and the Classification and Multiple Use Act

The Classification and Multiple Use Act is a keystone in the development of new concepts in public land management. First, it provides for classification of the public lands into those which should be disposed of and those which should be retained in Federal ownership.⁹ Second, it recognizes that the lands should be managed for multiple uses. Public lands have been managed in a multiple use context for many years. However, in this act, Congress officially established this as a management principle. Mineral production is specifically named as one of the multiple uses. Further, the law

3. 112 Cong. Rec. 3522 (1966).

4. 78 Stat. 982 (1964), 43 U.S.C. § 1391 (1964).

5. *Ibid.*

6. 78 Stat. 986 (1964), 43 U.S.C. § 1411 (1964).

7. Unless the context indicates otherwise, the term "public lands" means with some exception, the federal lands or interest in lands administered by the Secretary of the Interior through the Bureau of Land Management.

8. 78 Stat. 988 (1964), 43 U.S.C. § 1421 (1964).

9. 78 Stat. 986 (1964), 43 U.S.C. § 1411 (1964).

specifically states that it "shall not be construed as a repeal, in whole or in part, of any existing law, including, but not limited to, the mining and mineral leasing laws."¹⁰

The act provides for public hearings and comments on regulations covering the act.¹¹ Such hearings were held in early 1965, both in Washington and in the West and comments were received from many users of the public land and general public. In addition, there were sixty-five general discussion meetings in the West. The mining industry submitted specific comments and testified at the hearings. The Bureau of Land Management was able to incorporate practically all the significant comments which were received into the final regulations.

In regulations published on October 9, 1965,¹² Secretary Udall outlined, as the act requires, the criteria to be used in determining whether public lands will be retained in public ownership. These regulations are an expression of "the creative federalism" which President Johnson has proclaimed as the hallmark of his administration.

The regulations state that no overall priority is assigned to any specific use. That use or combination of uses will be authorized which will best achieve the objectives of multiple use, taking into consideration all pertinent factors, including, but not limited to, ecology, existing uses, and the relative values of the various resources in particular areas.¹³ The lands will be managed for optimum production of the various products and for those uses for which they are physically and economically suited. The following matters will be considered: (1) existing or future demand for the resource use, value, or commodity; (2) coordination and cooperation with the resource use and management programs of States, local governments, public organizations, and private landowners; (3) consistency with national programs; (4) compatibility of the possible uses.

Among the ten objectives or uses listed in the regulations is "* * * (d) Mineral Production. Management of public lands for mineral production involves the protection, regulated use, and development of public lands in a manner to facilitate the extraction and processing of minerals, whether off-site or on-site, long term or short term."¹⁴

10. 78 Stat. 988 (1964), 43 U.S.C. § 1416 (1964).

11. 78 Stat. 986 (1964), 43 U.S.C. § 1411 (1964).

12. 30 Fed. Reg. 12916, 12918 (1965).

13. 30 Fed. Reg. 12914 (1965).

14. 30 Fed. Reg. 12914 (1965).

The then Director, Charles H. Stoddard, issued further guidelines to Bureau of Land Management (BLM) personnel, including the following:

Multiple use means utilization of the various resources in the combination that will best meet the present and future needs of the American people. . . . We will consider *both* economic demand and intangible social need, and strive for that use or combination of uses which will provide the maximum net long term benefit to the general public.

In considering economic demand and social need, all viewpoints—national, regional, State, and local—shall be fully considered. We must insure that the public lands do their share toward meeting anticipated future national needs for resource uses and products. Subject to this prior objective, we will then insure that the lands make the maximum possible net contribution to the regional, State and local economics dependent upon them. Specified program objectives will be achieved in the least expensive manner possible.¹⁵

In some cases classification would segregate the lands from mining location. However, the regulations specifically state that “land shall not be closed to mining location unless the nonmineral uses would be inconsistent with and of greater importance to the public interest than continued search for a deposit of valuable minerals.”¹⁶ Where the proposed segregation involves over 2,560 acres, a public hearing will be held if sufficient public interest is indicated and must be held if the land totals 25,000 acres or more.

The Bureau of Land Management has been moving in the direction of better management which will aid all users of the public land including the mining industry. It has reorganized both its Washington and field operations so that planning and operations can be as close to the land involved as possible. It is in the process of identifying areas where management effort will be concentrated. This will result in much better and more intensive management. Many minerals people have been moved to district offices so that, among other things, minerals will receive their proper consideration in management plans. BLM has added economists to its staff and is developing benefit-cost analysis techniques which are integrated into multiple-use planning and programming systems.

Before making those classifications which will mark lands for retention in public ownership, Director Charles H. Stoddard

15. BLM Manual 1603, app. 1, pp. 2-3. (Emphasis in original.)

16. 30 Fed. Reg. 12919 (1965).

insisted not only upon the letter of the new Public Land Sale Act, but also insisted upon its spirit of local cooperation; local and state governments will be vitally involved in these classifications.

The Bureau tested cooperative procedures with local governments by pilot tests involving sixteen counties. If, in this review, public lands are classified for community growth, they will be withdrawn from location under the Mining Act¹⁷ and Mineral Leasing Act.¹⁸ Congress has reserved the minerals in lands to be sold for community growth and development and withdrawn them from the operation of the Mining Act and the Mineral Leasing Act.¹⁹

This has been called the "Tucson formula" because the situation which first aroused congressional action arose in Tucson. An enterprising "operator" staked minings claims on homelots of one of Tucson's suburban developments which were built on land patented under the Stockraising Homestead Act which reserved mineral interests to the Government.²⁰

In its analysis of public land procedures BLM will develop the economic benefits from mineral development and perhaps for the first time, mineral values will be explicitly recognized in the development of its program. Classification for retention in public ownership would usually assure that these areas would remain open for exploration and development and for the operation of the mining law including patenting where appropriate. Other multiple uses could also take place to the extent appropriate.

The classification might, for example, identify public lands containing a saleable mineral, like sand and gravel. Where conditions warrant, such as the requirements for construction materials for future growth of cities and towns, sand and gravel deposits on public lands might be classified for retention for ultimate disposition under the Materials Act.²¹ Incompatible uses or disposal of the land would not be allowed. It may also be possible to use the land for other purposes after the sand and gravel has been depleted. Thus, long-range planning is needed. This planning will aid considerably the industry dependent on such supplies and the community in having readily accessible supplies.

These examples illustrate a desire to cooperate with the minerals

17. 14 Stat. 86 (1866), as amended, 30 U.S.C. § 21 (1964).

18. 41 Stat. 437 (1920), as amended, 30 U.S.C. § 181 (1964).

19. 78 Stat. 988, 989 (1964), 43 U.S.C. §§ 1421, 1424 (1964).

20. 39 Stat. 865 (1916), 43 U.S.C. §§ 291, 301 (1964).

21. 61 Stat. 681 (1947), as amended, 30 U.S.C. § 601 (1964).

industry as well as with other users and the general public in the use of the public lands and resources. Another example is the recognition of mining on state advisory boards and the National Advisory Board Council since December 7, 1961, when the Secretary adopted new regulations²² which changed those advisory groups from single-purpose to multi-purpose.

Two emerging forces have an impact on mineral production. These are natural beauty and healthful environment. President Johnson is committed to natural beauty and healthful environment as the basis of the Third Conservation Movement. There may well be those who object to healthfulness and beauty as objects of public policy. There may be others who are willing to argue that their activities are of such a high priority that health and beauty will have to be sacrificed.

In an era when the range users are regulated,²³ when the oil and gas users are under regulated²⁴ and pay the standard royalty to the Government, when even individual citizens are charged for using the public recreation facilities, as they are under the Land and Water Conservation Act,²⁵ a group that hopes to hold itself outside reasonable public regulations by insisting on outmoded and unneeded privileges is bearing a heavy burden.

II

THE MINING LAW

In 1870 the average population density in the entire United States was 13.4 persons per square mile²⁶ compared to 60 persons per square mile in 1960 (excluding Alaska and Hawaii).²⁷ Of course, most of this population was concentrated in the East and Midwest. The total population was about 40 million with less than 1 million in the West and over one-half of these in California. Of the Western States, only California, Oregon, and Washington had achieved statehood.²⁸ Gross national product was about 7 billion dollars compared to about 700 billion dollars today. Even consider-

22. 43 C.F.R. § 4114 (1960).

23. 41 Stat. 437 (1920), as amended, 30 U.S.C. § 181 (1964).

24. 48 Stat. 1269 (1934), as amended, 43 U.S.C. § 315 (1964).

25. 78 Stat. 897 (1965), 16 U.S.C. § 460 (1964).

26. U.S. Bureau of the Census, Statistical Abstract of the United States 5, table 1 (86th ed. 1965).

27. *Ibid.*

28. U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, at 7-12 (1960).

ing a rise in the price index of about 400 per cent, the growth in the economy has been tremendous.

With these conditions, the mining law was a part of a series of laws designed to explore, develop, and settle the West. There was relatively little competition between various uses for the public lands. There was almost unlimited "room" for the pioneers who came West and there was a real need to conquer the wilderness.

When the prospector was days, if not weeks, removed from the closest land office and most lands were unsurveyed, it was obviously not practical in 1872 to require recordation of location notices in the federal land offices.

In 1872 the prospector often was alone or part of a small group. A prospect or mine might be explored or operated by a few friends. These miners could work only a few claims at the most. They did not locate hundreds or even thousands of claims—usually they located only one or two. Wages were very low compared to today. The average wage in 1890 (the earliest figures available) was twenty cents per hour.²⁹ Average earnings were less than 480 dollars per year.³⁰ So in 1872, the one hundred dollar yearly assessment work amounted to a significant and bona fide contribution—it may have represented almost all of a summer's work.

The prospector was usually interested in a true lode deposit—a vein containing gold, silver, copper, lead, or some similar metal. Or if he was a placer miner, he was interested in true placer deposits—usually gold placers. These miners were not interested in sand and gravel (whether common or uncommon), limestone, uranium, rare earths, or other deposits in which a fast paced technology creates interest.

The Mining Act authorizes the Secretary of the Interior to sell, for two dollars and fifty cents an acre in one situation and five dollars an acre in another situation, public lands upon which a claimant has proved the discovery of a valuable mineral deposit.³¹ This act was extremely well adapted to the conditions of 1872. The miners of California in the absence of any activity by Congress had adapted the colonial mining code of Spain. It might be surmised that they dropped the royalty provision as a payment of tribute to the sovereign, unseemly to citizens of a republic. The mining camp codes were one of the clearest examples of the Anglo-Saxon pen-

29. *Id.* at 91.

30. *Id.* at 92.

31. 17 Stat. 94 (1872), 30 U.S.C. § 37 (1964) (placer); 17 Stat. 92 (1872), 30 U.S.C. § 29 (1964) (lode).

chant for self-government.³² They were designed, however, to regulate the relationships between private parties with little thought to the position of the United States as landlord.

In 1872 the Mining Act conferred no privileges on the miners. They were called upon to pay a sum equivalent to the premium which the Government was getting on its own alternate sections within the railroad land grants. In the other instance, it was paying double that premium. The act has not been changed, but the values have. By a change in conditions, the Mining Act now confers a privilege upon claimants.

For example, in one case near a growing Western city, valid sand and gravel claims which were patented for the statutory two dollars and fifty cents per acre, were shortly thereafter sold for about 2,500 dollars per acre or roughly 1,000 times the original cost. Sand and gravel were removed from the surface of the claims, but only in such a manner as to improve the land for other non-mineral purposes.

Consider the contrast with the present. The Nation has grown in both population and in standards of living and the West is growing fastest of all. Competition of uses of the land is everywhere evident. There is still open space in the West, but the West has been settled; it is no longer a frontier except in a few places. The policy which was needed in 1872 may be largely unnecessary today. For a long time it would seem there has been little need to offer excessive encouragement for unplanned, uncoordinated development. The West will continue its development without that encouragement. There are no advantages and distinct potential disadvantages to sporadic growth. While lack of a requirement to file location notices covering public lands ruffles bureaucratic sensibilities, more importantly it can also delay economic development and otherwise disrupt good land management. One or a few people locate hundreds of paper claims in a few days. One locator has located over 6,500 claims of very doubtful validity in several states in the West in the last few years involving one-half million acres or more. These claims nevertheless must be treated as prima facie valid and constitute a cloud over proper management of these lands and an obstacle to other users including legitimate prospectors and miners.

Discovery work and assessment work is in all too many cases a farce. Discovery work has become a form with very little substance.

32. O'Callaghan, *Historical Pattern of Minerals Exploration in the United States*, Quarterly J. of the Colo. School of Mines, Oct. 1962, pp. 31-42.

Pits or shafts which are dug in alluvium are worse than useless—they impinge on the natural beauty and may contribute to stream pollution—in short, they provide the antithesis of the multiple use management to which the national forests and the public lands are committed by acts of Congress.

A mining claimant, as an optionee, writes his own option without even notifying the optionor (United States). He is not required to file his notice in the Federal Land Office. While it can be said that he buys the option by the amount of development work he does, the change in values since 1872 has changed the relative contribution of this development work to the surface value of the lands so that it is often token at best.

Many will recall that in 1963 the news media focused on the story of alleged salting of samples taken from gold placer claims in the Phoenix area in an effort to establish their validity and thereby obtain the fee title to lands with a high value for nonmineral use. This is an example of the extremes to which men may go in seeking to subvert the mining law.

In Wyoming a man acting as an agent, has located over 100,000 acres for various minerals. This Wyoming staking is in oil shale country. Oil shale has not been available under the Mining Act since 1920. However, if nothing else happens, the United States may someday have to spend thousands of dollars to determine the validity of these claims. And the cruel irony is that a claimant the day after his claim is declared null and void can restake his claim, unless the land is closed to mining by withdrawal. In the meantime, these claims could cause problems for prospectors whose discoveries would meet the test of the mining law.

These examples relate to situations where good faith appeared at its outer limits. Even where good faith abounds, the problems posed by the Mining Act are hardly less soluble. Today, mining deposits exist of a complexity in the mineral world that is matched only by the complexity of the innumerable decisions of the Department of the Interior and the courts.

The difference between the one complexity is that it is natural. The complexity of definition and redefinition results from the minds of men. It is fast approaching a form of counting angels on needles.

In summary, the Mining Act today is very difficult to administer in a context where the public interest and law demand a harmonious combination of uses on public lands.

CONCLUSION

The Public Land Law Review Commission brings a new factor into the consideration of public land policy. Before the Commission was created, the various groups interested in the various resources went before Congress at different times. The miners went in the 1860's; the oil people went in the 1900's and the 1910's; the livestock people went in the 1920's and 1930's. The recreation people, the wilderness people, and the natural beauty people have increasingly been before the Congress. Congress responded at each of these times. With the Public Land Law Review Commission, however, all these people and many others will be coming before the Commission at the same time. The Commission will, therefore, not be considering recommendations on their internal consistency alone. It will also be alert to the interrelationships. In much the same way, the Bureau of Land Management must necessarily consider all the uses at the same time if it is to administer the public lands under multiple use principles as Congress has directed.

No reasonable person can deny what the law asserts. Mining is a multiple use of public lands as provided in the law and regulations. The law and the regulations are carefully tailored so that decisions will be made after local consultation and in some cases public hearings. No interest, including the mining interest, must have its views and information unheeded by administrators.

What is needed in all facets of public land management is new thinking to place before the Public Land Law Review Commission.

Some miners are prudent men by definition. When they mine on patented mining claims, they have, in effect, been publicly certified as prudent men. A prudent man adapts to changes in conditions. These are changing times and prudent men are on their mettle to adapt. The Interior Committees of the Congress, the Public Land Law Review Commission, and the Department of the Interior would much prefer to start discussions on the recommendations of the industry itself.