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[SYMPOSIUM]

## WHOSE PUBLIC LANDS?

R. BURNELL HELD\*

"People living at great distances from us are increasingly determining just how the resources in our immediate community will be used. Oftentimes these decisions are contrary to what is in the best interest of the people in our community."

The speaker, a westerner, was referring, not to the use which was being made of private property, but to the use of the federal lands in his area. His concern, however, exaggerated as it may be, draws attention to two questions in a basic issue which has yet to be resolved: who is entitled to decide how public land resources are used, and, should any user group be entitled to preferential treatment? It focuses attention on the fact, too, that a new interest in the public lands is coming about, and not so much in the communities that lie at great distances from the public lands, but within these very areas. People in and near places like Denver, Seattle, Salt Lake City, Portland, Phoenix, Albuquerque, not to mention the major cities of California, where more than one out of every ten of the Nation's urban residents live, are close enough to areas of federal land in their own States to be aware of the existence of these lands and to realize that certain changes in the use of these lands could be beneficial to them. They have also begun to make their voices heard on these matters. The economy and the interests of western urban residents are no longer as closely tied to the fortunes of the mining or timber industries or to those of the rancher as once was true. The economic base in these cities is broadening. Industries other than those immediately related to the resources available from the public lands are making their contribution. When the city or suburban resident looks at the land in public ownership, he sees with eyes that are less likely to calculate the thousands of board feet of timber or animal-unit-months of grazing which it may produce. He may not see it in terms of barrels of petroleum or tons of minerals. Nor is he likely to see these lands as does the secretary of the local chamber of commerce in terms of the number of jobs that their resources

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would generate. While he may marvel at the huge logs he sees on the lumber trucks he meets on the highways in Douglas fir country, he may also resent the scars on the landscape he observes where clear cutting is in progress. And if he visits for the first time an area recently cut, he is probably shocked when he sees the shambles that has been created. Like it or not, he sees things this way.

He sees something else: the opportunities these lands offer for hunting, fishing, the enjoyment of a wilderness experience, boating, and similar activities.

Accommodation of some type is generally possible among various uses of the resources on the federal lands but competition is nevertheless present. If the production of big-game animals is to be encouraged, ranchers may find they are losing summer range land in the high country. The power company seeking a license to construct a dam on a stream may find that it has aroused the ire of fishermen. The state highway commission may be forced to reconsider a projected route for a highway that offends the aesthetic sensibilities of a group of the public. Wilderness proponents reject the plans of the land-managing agency to harvest the timber on the land. A rancher accustomed to using a tract of public domain land for grazing as though it were his in fee simple ownership may be jolted to discover that there are those who feel he has no right to fence the land as though it were private property or to prevent entrance onto the land.

A major difference exists between those who have been making the greatest use of the public land resources in the past and those who now desire increased consideration for their wants. The former group is largely production oriented. Their activities are largely extractive. They seek a raw material which they regard as not particularly useful to anyone until it has been transformed. The other class of users are primarily consumers rather than producers. If they harvest game, it is not for a market but for their own enjoyment. If they resist the cutting of timber or the intrusion of a highway or a power line in an otherwise scenic area, it is not that they fail to appreciate the value of wood products, the necessity of transportation facilities for vehicles or electric power, for they, too, are consumers of these things. They are simply asserting that these actions they seek to prevent are destructive of values which also should be acknowledged.

In short, conditions are changing on the public lands. A once small and relatively ineffective public has discovered new strength in

numbers. With major changes in legislative redistricting, it has also discovered that the political advantage has shifted in its direction. It is not surprising that land-managing agencies are increasingly responsive to this group of users and that changes are taking place in the manner in which the resources of the public lands are being used.

The complaint of some of those who see this change taking place disregards a simple question presumably because they do not see it as an issue. Can and should public lands be administered as though they were the private property of a corporate owner? To phrase the question a bit differently, is the public estate in which all Americans share, by token of their citizenship, something which should be used to promote the well-being of the people in whose area it is located if this comes at the expense of other considerations? Or again, who is the rightful beneficiary of the resources of the public lands? Related to this question are other questions as to how the value of alternative uses in which these resources might be employed are to be measured and what benefits and costs are legitimate for accounting purposes in reaching a decision as to the use of the resources, particularly when conflicts arise.

These questions are by no means new. They can be traced all the way back to after the Revolutionary War when the public domain came into being. Seven of the thirteen new states claimed lands lying beyond the areas which they were actually governing. These lands were ceded to the newly created Government of the United States, not in a spontaneous gesture of generosity, good will, or patriotic fervor, but for two particularly practical reasons. First, the land-owning states recognized that there would be considerable difficulty in resolving the conflicts that would arise because of the overlap of many of these claims. The second reason was an equally persuasive one. The six states which made no claim to western lands were concerned lest their political power in the Union be greatly diluted by the expansion and increase in power of the other states whose western areas would eventually be settled. Maryland even went so far as to refuse to sign the Articles of the Confederation until all seven states had promised to relinquish their claim to those lands.<sup>1</sup>

Cession of the western lands probably did more to build a solid base of unity for the Nation than was realized at the time. The significance of this action was not so much the material gain to the Nation of the real estate itself, but the intangible contribution it

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1. Hibbard, *A History of the Public Land Policies* 8-9 (1965).

made by giving the Nation something which was now held in common and could be used for the common good. A property right had been created in an entity which was more than a single state.

The estimated 222 million acres which were involved in this transaction was small in comparison with what would later become part of the public domain. At one time or another, the federal government has held title to 1.8 billion acres of land, or nearly ninety-five per cent of the acreage of the Nation exclusive of Alaska and Hawaii. Today, the federal government holds title to nearly 21.8 per cent of the land in the oldest forty-eight States and to about 99.7 per cent of the land in Alaska.<sup>2</sup>

It is in a sense both a willing and an unwilling landowner: willing, because it has not only deliberately reserved lands when it was in the public interest to do so, but because it has gone a step beyond this to acquire other lands for special purposes which had already passed into private ownership; unwilling because it has been left holding a significant acreage of land not sufficiently attractive to have been taken by some private owner under one or another of the particularly generous land laws in effect before 1935. The Taylor Grazing Act of 1934 placed all the remaining and previously available lands in a reserved status pending their classification.<sup>3</sup> The Bureau of Land Management, which has responsibility for the management of these lands, has not found a great deal of interest on the part of prospective purchasers for these lands.

The alienation of the major part of the federal estate was a necessary activity. There was never any doubt on the part of the new government that this had to be done. The question was what procedure should be used and what objective should be sought. Hamilton, a financier and a practical person, recognized the potential revenues which the sale of these lands could generate. Revenues were sorely needed by the new government. It was ineffective as a taxing body under the Articles of the Confederation and burdened with debt. The Hamilton proposal, therefore, was for land sales. Jefferson, who attached the greatest importance to measures which would strengthen the newly created government and would build democratic institutions, was eager to create a society in which economic power would be broadly distributed. This could be achieved, he felt, by distributing land to small owners on terms they could easily meet and, if need be, at no cost to them. Land policies

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2. Bureau of Land Management, U.S. Dep't of the Interior, *Public Land Statistics*, 1965, at tables 1 & 10 (1966).

3. 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1964).

which would make the terms of acquisition favorable to bona fide settlers would, in the long run, be beneficial to the Nation.

Hamilton's policy prevailed, in theory at least, and even received Jefferson's support. The unpopularity of the policy and difficulties in its administration led to a series of changes in price, terms of sale, credit provisions and the like. Jefferson's objective may be said to have been achieved at last with the passage of the Homestead Act.<sup>4</sup> The laws and the disposal of land during the years in between had produced conditions which made it difficult for the Homestead Act to accomplish what had been hoped for it. Eventually, the law brought disaster to the settlers it was designed to help when its use was carried into the Great Plains.

In appraising the land policies of the past, it is important to distinguish between situations in which public and private benefits were intimately interrelated and those in which private benefits were paramount and public benefits were negligible. It was often argued during the eighteenth and nineteenth centuries that land on the extreme fringes of settlement was of no value and that it was the efforts of the settler that gave it value. This was undoubtedly true in large measure for land which was being made into farms. Incentives in the form of free land to such persons could be justified in terms of the values created. Speculators or those who were seeking to acquire more than their just share of land and making fraudulent use of the land laws to secure benefits to themselves, were not likely to create public benefits.

Attitudes and patterns of behavior, once established in a society, are difficult to change. They may persist for long periods after the conditions which brought them about have changed. Some are relatively fixed in laws that are outmoded, but remain in effect. Some of the laws and policies which govern the federal lands have changed to meet present conditions. Others remain on the books. Substantial remnants of older attitudes toward these lands also exist because those attitudes have been passed down from former generations who used these lands under conditions which were considerably different from those of today. Years of neglect during the nineteenth century by both the legislative and the executive branches of the Government, permitting abuse of the larger public interest in these lands, could do little more than lead to contempt or disregard for the legitimacy of the Government's role as a custodian of the property rights in these lands in the interest of the public. Reaction to such

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4. Rev. Stat. § 2289 (1875), as amended, 43 U.S.C. § 161 (1964).

conditions led to the emergence of the conservation movement. Although it accomplished a great deal, loose ends remain which make the question still pertinent today—whose lands are the public lands?

Private property, as any student of law and government will quickly point out, is an institution which recognizes the existence of certain rights or privileges in the property object—rights or privileges which are subject, however, to certain social controls which are exercised or administered by units of government. Interestingly, federal property which has been reserved from the public domain is also less than an absolute right. The mining laws, for instance, permit the location of claims on national forest land. Claims of up to twenty acres can be staked out on any area not closed to mining by law or administrative action. As long as the claimant makes a diligent search for minerals, he may remain on the claim and a finding of minerals permits him to hold the claim indefinitely if he spends the equivalent of one hundred dollars a year on the claim.<sup>5</sup>

To patent the claim requires only a moderate additional investment, a survey, and compliance with other legal provisions. Once those requirements are satisfied, full title to the land passes to the applicant at a price of five dollars per acre, if it is a lode claim.<sup>6</sup> The surface resources also pass to him in the transaction and there are instances where claims have been established on national forest lands where standing timber has been worth several hundred dollars per acre.

The justification given for such provisions in the mining laws is that the incentives are necessary to induce a prospector to take the risks necessary to locate ore bodies. In turn, the public benefits from the discovery of these minerals. Again, there may be justification for such rewards where a truly bona fide effort is involved and a commercially profitable mine is brought into production. The law as it stands today, however, with the qualifying improvement and development costs unchanged from those established in 1872 and title to the claim sold for a price which has no relation to the value of the ores involved, invites people to take advantage of the public with little or no value in return for the public. No prudent private landowner would tolerate such a situation. There is little reason for the public to tolerate it either on its land.

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5. Rev. Stat. § 2324 (1875), as amended, 30 U.S.C. § 28 (1964). This provision was intended to be used to settle disputes between miners over unpatented claims rather than to protect any general public interest in the claim.

6. Rev. Stat. § 2325 (1875), as amended, 30 U.S.C. § 29 (1964).

Private ownership of the land is not a prerequisite for the use of the resources found upon it. Particular situations may even make it advantageous *not* to own the land just as under other circumstances, the advantage may lie in ownership. Certainly, federal ownership has not prevented the development and use of timber, minerals, forage, water, and the various recreation resources on public lands. Churches, youth groups, and other organizations as well as individuals lease land for summer camps or summer cottages. Concessionaires operate hotels, restaurants, stores, and other service enterprises in most national parks and on some other federal lands.

Because the resources are available for use, and in certain situations, under terms that are particularly attractive to the user, there would be no desire on the part of the user to acquire the land, even if it were available.

Certain present users enjoy distinct advantages over other potential users. Problems of access to the public property, the necessity of combining the land in question or its resources with other resources in order to have a profitable enterprise, or the lack of a property right in water are factors which could make the property unattractive to persons other than the present user.

It has been argued, too, in the case of federal grazing lands which complement the private lands and determine the carrying capacity of the ranch, that the value of the grazing right on the federal lands has often been capitalized in the value of the private property. In effect, the property owner has sold a franchise to the purchaser of a ranch property for the right to use the grazing land which remains in public ownership and is theoretically available for other uses or users.

A rancher with a "captive" piece of federal grazing land is not without his problems, however. Under some arrangements, he may have the decision as to what the carrying capacity of the public land will be; in other instances, this is the decision of the land-managing agency. Should the range land also be carrying big-game animals which are competing with the domestic livestock for some of the forage, someone must determine the most valuable use of this forage.

To the rancher using the grazing land for his livestock, the answer is obviously the same whether the land is public or private. But the production of game animals, property of the state rather than of the rancher or the federal government, represents something of value, albeit a value somewhat difficult to assess and a value

not accruing to either the rancher, unless he is also a hunter, or the federal government. The public land manager has a decision to make relative to the public interest, but what public does he serve?

A tract of timber in public ownership would produce a considerable volume of lumber if harvested. The harvesting operation, moreover, would provide new employment opportunities in the local community, and the sale of the timber would produce revenues for the federal treasury. If the trees were harvested, however, the character of the landscape would be altered and the aesthetic values, which some persons value highly, would be destroyed. Which values should the public land manager favor?

Another tract of federal property, presently a roadless area with difficult terrain, is a promising source of domestic water supply for a municipality hard pressed for water. If roads were built, it would also provide recreation opportunities for thousands of visitors but that would destroy a wilderness environment now valued by a much smaller number of visitors who prefer to have it remain as a primitive area. Opening the area to greater use might bring about some deterioration in the quality of the water that would require the municipality to install a water treatment plant. In what type of use does the greatest public interest lie?

With a substantial investment of federal funds, a dam can be constructed and a reservoir created on land in public ownership. The project will provide electric power, the sale of which will cover all costs of the project and subsidize the sale of water. The economy of the local region will be stimulated. At the same time, however, the increased farm output resulting from the subsidization of irrigation is responsible for displacing the agricultural output in another region of the Nation.

The economic development of the Nation was at one time closely related to the settlement of the unpopulated areas of the Nation and to the development of the natural resources in those areas. The policies and procedures which contributed to this development were often in the best interest of the Nation as a whole. The situation today is much different. The era of settlement and the large-scale development of natural resources is past. Our resource problems now require a hard look at the possibility that an unbalanced population-resource relationship in some areas can be best dealt with by encouraging migration out of the area. Further, if the well-being of the Nation can be increased in some areas by diverting marginal quantities of resources on federal lands from transformation into

physical goods in order to have increased opportunities for direct enjoyment of these resources in their natural setting, and if this is done, there will be more questions raised concerning who the rightful beneficiaries of these lands are. Justice and equity call for careful analysis of such situations and for provisions to offset local losses. If such losses can be compensated and the net benefit to society is greater than before the shift in the use of resources, the larger public should insist on the recognition of its fundamental interest in these resources, for the federal lands do belong to the public.