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BY CHARLES CONKLIN*

Although John Carver and I began talking about this conference nearly six months ago, only three days ago did I learn that I was to be the "speaker to be announced" for this luncheon. To be candid about it, Professor Carver and I had a conversation about a speaker and it developed that I was not the first choice of either one of us. First we started off on a rather lofty level: We thought it would be appropriate to invite Mo Udall, now Chairman of the House Interior Committee and a former member of the Public Land Law Review Commission; and, after it was learned that Chairman Udall would be unable to attend, Secretary Andrus of the Interior Department was considered. When neither of these prospects materialized, we discussed whether the speaker should be one who could deliver a formal paper or one who merely could entertain you. Although I am honored to be a substitute for the others who were invited, I won't presume to speculate on whether I was selected as an entertainer or as one bearing a more substantive message.

Being a substitute is risky enough. One is reminded of a story about another substitute. Back when Woodrow Wilson was Governor of New Jersey, he was asleep at three o'clock one morning when his telephone rang. Upon answering, the Governor was greeted by his former campaign manager from Hoboken, Manny Baretta. Manny said, "Governor, I called to tell you that Judge Joseph Milano has just died." Governor Wilson, with a substantial trace of irritation, said, "What do you want me to do about it at three o'clock in the morning?" And Manny said, "I just wanted you to know that he died and I would like to take his place." The Governor was quick to respond, "Well, it's all right with me if it's all right with the undertaker."

Other speakers at this conference will provide a review of the reasons leading to the establishment of the Public Land Law Review Commission in 1964. But let me go back a few more years, when the Taylor Grazing Act[1] was about to be implemented, and

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[1] 43 U.S.C. § 315 (1970).

use the words of Ferry Carpenter, the first director of the Grazing Service, as he recalled those early days:

> Well, I feel like the man from Mars. How did I ever get in here? What have I been listening to this morning? What is this problem that brings you here and furls your brow when you think about it? I don't belong here, but 40 years ago to a day, I belonged very much here in Grand Junction because that was the first meeting ever held under the recently passed Taylor Grazing Act to see whether they could put the show on the road or not.
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> I got my appointment on September 7 and on the 12th I was here, with no instructions what to do, and this is what I found: Grand Junction was packed with stockmen. The cattle boys had the LaCourt Hotel and the woolgrowers had the LaHarpe Hotel, and neither would speak to the other.
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> There were so many of them and the next morning when we looked around for a hall, we couldn't begin to get them in any hall. We adjourned and went out on the city park here and took over the exhibition building. The cowboys sat on one side with Frank Delaney and the sheepherders on the other with Dan Hughes and Wilson McCarthy and we got ready for business like a peace talk between two nations that had been fighting—and they had been fighting and I knew they had been fighting. What were they there to talk about? Why did Congress wake up and say they should have to drag grass into the conservation program? They put water in under the Reclamation Act; put trees under the Forest Act; put minerals and oils under the Mineral Reserve Act. But not the grass. Everybody could get the grass if you knew how to get it. All of a sudden they passed the Taylor Grazing Act. The boys out here didn't know the Act existed but they were there to see that they got their share of the grass. There were two factions and they were ready to continue the war they had been having for fifty years to fight over it. That's the woolgrowers and the cowboys.
>
> I didn't get any help from Washington on what to do. There wasn't anybody in the whole Department that knew which end of the cow got up first. I went to the Land Office. I said "You want me to straighten out this land—give me a map of it." "Oh! We haven't got any map. There is filing on it day and night all over 27 local land offices, but we haven't got any map." "Well, how in the hell can I find the land if I haven't got a map!" "That's for you." That was for me. So, when I came here, I said I'm supposed to set up grazing districts. I don't know whether you want them or not and I wouldn't know where they go and Washington doesn't know where they would go and nobody knows where they would go. But you fellows have been fighting over this thing, you know every blessed acre there is and the poorer the acre, the harder you fight for it. I found that out, too. But I had one little piece of advice that I followed—and I am

> going to follow it until the end of my days—and it was a little saying by Justice Cardozo on the Supreme Court. "When the task is to clean house, it is sensible and usual to first consult with the inhabitants." There I was and there were the inhabitants—cowboys ready to jump and sheepherders ready to jump—everybody at each other's throat. But they were the inhabitants.
>
> Well, they read a message from President Roosevelt. He said it was a great day for the West. Read a message from Secretary Ickes; he said he was the Lord's anointed! And now we got down to business and they began asking me questions about the Act, like how near was near. I didn't know how near was near. I didn't know the answer to them but I did know what to do with them. So, I said, all right; you woolgrowers go out there and caucus and pick five men to speak for you. You cowboys do the same.[2]

That was Ferry Carpenter's way of starting in to solve some of the public lands problems that, despite continued efforts at resolution, continue to exist. I don't believe there is a man in the BLM yet who knows where all the public lands are.

Rolling time forward thirty-five years from those early grazing service days will permit a reflection on the PLLRC operation of nearly ten years ago now. Most of you may recall the generalities of the Commission's operations. Only a few of us who are here today, however, were active participants every step of the way. Although, as Chairman Aspinall said in calling this conference to order, the Commission operation generally was an open one, deliberative meetings at which the report evolved, chapter by chapter, were executive sessions. Not only was attendance limited to Commission members and staff, but the Commission also made a decision not to use the services of an official reporter. Consequently, there is no transcript. The staff took notes, and we did have one microphone hooked up to a tape recorder to assist us in interpreting difficult points.

There was humor occasionally at these executive sessions. Mo Udall had a fortuitous way of livening up the meetings when things appeared too grim. And there were some sad episodes, too. My notes indicate the following exchange when the Commission was developing its position with respect to Alaska:

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[2] Remarks of Ferry Carpenter as recorded at a meeting of the National Advisory Board Council of the Bureau of Land Management, Grand Junction, Colorado (Sept. 5, 1974).

Vice-Chairman, Byron Mock: Can a state, particularly Alaska, be trusted with the public interest?

Representative Roy A. Taylor: While Alaska has had to receive more assistance than other states, oil discoveries on state lands will help this problem.

Senator Clinton Anderson: The Federal role will be noticeable and will be continued, but Alaska should not be treated different from other states.

[And then my notes say: "this according to the Chairman; the Senator could not be heard."][3]

Of course, Senator Anderson is now gone, but his mind had remained ever active even though his illness often prevented him from expressing himself clearly. And often we honestly couldn't hear Clinton Anderson; so the Chairman, who sat next to him, had to interpret, as my notes indicate. Two other members of the Commission have died—Representatives Walter Baring and John Saylor. We lost one member of our staff, Joe MacDonald, in a tragic accident about six months before the Commission submitted its report; and, of course, Milton A. Pearl, staff director, died within a few months after the Commission went out of existence.

Other things, however, were in a lighter vein. Let me refer to my notes made the day we discussed multiple use. The Commission found that this term meant "all things to all people." Nowhere was this more evident than when Vice-Chairman Byron Mock opened up the discussion in February, 1970. The Vice-Chairman talked for what seemed over half an hour, but I remember the Chairman, in his usual meticulous way, saying that it was twenty-eight minutes. My secretary did her best to transcribe what could be recorded on tape from the one microphone placed in the middle of a large room. I am not going to relate all twenty-eight minutes of it, but this is the way some of Mr. Mock's thoughts on multiple use came through:

Mr. Mock: Mr. Chairman, in order to get a hold on this problem, I have tried to understand what it's all about, and at this stage I still haven't arrived there.

Representative Morris K. Udall: This is not like you.

Mr. Mock: No, it isn't. I've normally declared otherwise in the

[3] Author's notes on meeting of the Public Land Law Review Commission (PLLRC), Washington, D.C. (May 10, 1969).

same situation. In this particular case, though, I've heard so much of this discussion and debate from all places that I've tried to do a little analysis of my own. I have tried to figure out what the difference is between multiple use and dual use, and I finally came down to the idea that multiple use is where you have more than one use but not necessarily all conceivable uses. And then I got to worrying about how you eliminate which use you exclude, and I think then I began to come a little bit to grips with what the problem is.

And I am going to skip twenty paragraphs. Mr. Mock continues:

[And] now, as for that grazing thing, Mo, I can't help but think that maybe the problem of having cattle out there is probably if they get under foot, rather than anything else, because I don't see anybody objecting to aesthetics and scenery because it's just when you get too close. But the limitation aspect probably becomes the most critical as to whether it is a prohibition of a particular use, and there is where we start to find that the withdrawal on other things would start to come in to limit what the land may be used for, and exclude certain types of development.

So, with that rather extended preface, Mr. Chairman, I think we should proceed now to take these things up rather rapidly on an identification as to what we want to do and make sure that we are doing them. I've read all these papers, and I would suggest that we start directly here, Mr. Chairman, with the first question, and simply ask the staff to state what is involved, and if we need any limitation on it at that stage, then we can discuss it more. I have tried to give this background about my concern, and it is probably shared by many of the others in this discussion.

Chairman Wayne Aspinall: Thank you very much. Perry, you can add anything you wish to what Mr. Mock has said and start right out.

Perry Hagenstein (staff project officer): Thank you, Mr. Chairman. This is a very helpful discussion.[4]

To provide another glimpse of the Commission in executive session, I'll continue with the subject of multiple use. As if it were reflecting its Vice-Chairman's early groping for a meaning, the Commission, in its final report, said:

"Multiple use" is not a precise concept. It is given different meanings by different people, as well as different meanings in different situations. We have listened to statements from diverse interests who all commended the idea of multiple use, but it was apparent

[4] Remarks made in opening the discussion of multiple use at PLLRC meeting, Washington, D.C. (Feb. 21, 1970).

> that they were supporting different basic positions. This confusion permeates public land policy.[5]

To aid it in reaching its conceptual conclusion, the Commission had asked the staff to present various positions for discussion. It was hoped that by detaching the competing interests, our overall principles might be better understood. Here is one of those proposals which was originally posed as a question by the staff: "On national parks and wilderness areas, should preservation of the natural environment be given dominant status over outdoor recreation?"[6]

> Senator Len B. Jordan: What happens where we want to preserve wilderness and yet beetles are infesting the trees located in the wilderness area? Must we let nature take its course?
>
> Chairman Wayne Aspinall: You put your finger on the ultimate question. In certain areas we protect for protection's sake—for example, historical sites. I believe in saving where you preserve, but not in saving where you destroy.
>
> Mr. Hagenstein: I don't think a "yes" answer to this question would conflict with management techniques to preserve a desirable environmental aspect.
>
> Mr. Mock: Should preservation *always* be given dominant status? If this is the question, we should say "no." All we should be8 saying here is that "in proper situations" preservation of natural environment should supersede other utilization.
>
> Professor Emmet Clark: We could strengthen what we said earlier if we say here ". . . in some instances . . . ."

I am going to omit some further remarks so that I may reflect upon the Commission's amendment of this proposition. It was at this time that Byron Mock said:

> Mr. Mock: We should make a flat statement that secondary uses should always be subordinate to the primary purpose for which the lands are acquired or retained.
>
> Mr. Udall: You are merely saying secondary uses should be secondary.
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> Mr. Mock: That is all I am saying.

The Chairman in the end summed it up: "This is what I think we want to state: in national parks and in wilderness areas

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[5] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 45 (1970).

[6] PLLRC staff evaluation paper, "Multiple Use Concepts and Land Use Decisions on the Public Lands" (Feb. 20, 1970).

the values that are present should not be destroyed by an overuse for outdoor recreation purposes. That is all we mean."[7]

Moving ahead, I want to make a few comments as one in the unique position of having participated, not only in the preparation of the Commission report, but also in the congressional effort to translate the Commission recommendations into law.

Although commonly referred to as the "BLM Organic Act," P.L. 94-579, the Federal Land Policy and Management Act,[8] is really more than a BLM organic act and at the same time it is less than an implementation of the PLLRC report. The House Interior Committee's objective was to declare policy for the public lands and thereby implement a portion of the Commission report, not to provide an organic act for the BLM solely.

It was never Chairman Aspinall's intention to implement the Commission report by enactment of one new law, and—contrary to what the Department of the Interior consistently advocated for the day BLM was created in 1946 to late 1976, just before P.L. 94-579 came into being—it was never the Committee's intention to provide nothing more than an organic act.

Functions of the Commission and those of the Congress differ vastly. The Commission completed its task on schedule and within its budget and went out of existence according to law. Among the Commission's blessings were few constraints as to jurisdiction, although the term "public lands" was carefully defined in the law establishing the Commission, and equally precise "treaties" were entered into with respect to such things as studying water problems because of the coexistence of a National Water Commission during much of the life of the PLLRC. Generally, however, the PLLRC could, and did, range far and wide in seeking solutions to the many problems identified for its study.

Congress, on the other hand, is bound by rigid jurisdictional rules as to what committee in each House can consider various matters. It is bound by the vicissitudes of elections and the per-

[7] Author's notes on meeting of the PLLRC, Washington, D.C. (Feb. 21, 1970). The Chairman's summary is reflected in PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 206 (1970): "The values for which national parks and wilderness areas have been set aside should not be destroyed by an overuse for intensive outdoor recreation purposes."

[8] 43 U.S.C.A. § 1701 (West Supp. 1977).

sonalities who gain senior positions in committees. Moreover, even though Congress has little constraint as to either time or money, it is nonetheless restrained greatly by the demands of a busy legislative schedule and the fact that every two years things have to start all over again. In the case of the House Interior Committee, this situation has been exacerbated by a turnover of approximately one-third of the committee's membership every two years.

Today, of the original thirteen Congressional members of the PLLRC, only two remain in the Congress—Senator Jackson and Representative Udall, both strategically placed as chairmen of the committees having public land matters generally under their jurisdiction—Energy and Natural Resources in the Senate and Interior and Insular Affairs in the House.

During the period that the greatest legislative implementation of PLLRC recommendations has taken place—that is, during the past (94th) Congress—the men who formulated the legislation were generally not intimately acquainted with the background of the Commission's decisions.

On the other hand, they had specific problems in mind that they chose to attempt to solve at the same time they proclaimed congressional public land policy—such as revision of the grazing regulations and recognition of the California desert. In these areas the committee strayed from the implementation concept as envisaged by Mr. Aspinall. It is not that he intended to neglect such matters as these, but he did not anticipate dealing with them in the basic policy act; they were to come later, along with other, "second phase" legislation, such as modifying the 1872 Mining Act.[9]

Nonetheless, substantial progress was made in achieving legislative implementation of the Commission recommendations, as was indicated in the activities report of the House Committee on Interior and Insular Affairs, from which I quote:

> When the Public Land Law Review Commission, which had been established by legislation reported out by this committee, submitted its report *One Third of the Nation's Land* to the President and the Congress in 1970, it was said that between 5 and 10 years

[9] 17 Stat. 91, 30 U.S.C. §§ 21-54 (1970).

would be required for the Congress to implement such of the Commission's recommendations as it agreed should be accepted by passage of legislation.

Almost as if that estimate was transformed into a timetable the committee in 1976 reported out, and the Congress and the President approved, the first three significant pieces of legislation growing out of the Commission's report.

The Federal Land Policy and Management Act (Public Law 94-579), often referred to as the "BLM Organic Act," represents a translation into law of many PLLRC recommendations relating to management of the public domain, administered by the Bureau of Land Management of the Department of the Interior, and national forests created out of the public domain, administered by the U.S. Forest Service of the Department of Agriculture. In addition to specific directives contained in sections on land use planning, withdrawals, acquisitions and exchanges, enforcement authority, and repeal of many obsolete public land laws, the act contains Congressional policy pronouncements based upon many of the similar recommendations of the Commission.

Principal among the PLLRC recommendations was the view that: "The policy of large-scale disposal of public lands . . . [should] be revised . . . while retaining in Federal ownership those whose values must be preserved so that they may be used and enjoyed by all Americans."

As a direct corollary of this policy statement, the Commission also recommended that, if the historic policy of disposal of the public lands is to be reversed and those lands are to be retained in Federal ownership,

> it is the obligation of the United States to make certain that the burden of that policy is spread among all the people of the United States and is not borne only by those States and governments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate State and local governments for the tax immunity of Federal lands.

The payments in lieu of taxes measure (Public Law 94-565) would translate the basic principle of this PLLRC recommendation into law. The formula is a relatively simple one which the committee expects can be applied with much less administrative cost than the Commission proposal, which required an appraisement process.

Public Law 94-429, providing for regulation of mining activity within, and to repeal application of mining laws to, areas of the National Park System, also derives from a PLLRC recommendation that Congress continue to exclude some classes of public lands (particularly national parks and monuments) from future mineral development. "We do not favor opening these areas to mineral develop-

> ment," said the Commission; and Congress has now responded by phasing out such operations in the few parks in which they still exist.[10]

As is the case so many times, a constant problem faced in implementing the pronouncements contained in the *One Third of the Nation's Land*[11] is one of communication. The language that the Commission so carefully used is nevertheless capable of different interpretations, depending perhaps most of all on whether the interpreter favors the Commission recommendation or whether he opposes it. Someone fighting a Commission position often seems to speak or understand a language different entirely from that used by the Commission. And when people cannot communicate with a common understanding, it takes longer to attain desirable goals.

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[10] *Legislative and Review Activities of the Committee on Interior and Insular Affairs of the House of Representatives During the 94th Congress*, H.R. REP. No. 1779, 94th Cong., 2d Sess. 4 (1976).

[11] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970).