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THE PUBLIC GRAZING LANDS

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Mr. Kingery's thesis is that public lands under the regulation of the Taylor Grazing Act are managed and restored more effectively than under prior land laws. He develops this idea by tracing the history of public domain which gave rise to the Taylor Grazing Act. Procedure and the rights granted a grazer under the Act are then analyzed. The author next discusses the enforcement and application of the Act, emphasizing judicial and later legislative approval for the resultant range improvement. He concludes with a discussion of problems confronting the administration of the Act by new use demands for public domain.

I. HISTORY OF THE PUBLIC DOMAIN

"RANGE wars will probably continue as long as open range exists," wrote Circuit Judge Jean Breitenstein in a 1964 opinion involving the federal government's administration of public lands for grazing.[1]

The tradition of the open range — uncontrolled use of the public lands by western livestock men — has meant violence not only between users and would-be users, but violence to the range itself, caused by overgrazing and consequent damaging erosion.[2] By custom, livestock had been permitted to run loose upon the western range. The federal government, constitutionally[3] the only body able to limit use of federal land, tacitly suffered the lands to be so used by failing to grant citizens the right to graze cattle on these lands.[4] The result was open range, described by the Supreme Court as, "[A]n implied license . . . that the public lands . . . shall be free to the people who seek to use them where they are left open and unenclosed. . . ."[5]

After generations of free and unlimited use, Congress first imposed restrictions on the public grazing lands in 1891, by creating the National Forests.[6] Aims of the act creating National Forests and objectives of the Taylor Grazing Act,[7] passed forty-three years later,

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[1] United States v. Morrell, 331 F.2d 498, 500 (10th Cir.), *cert. denied,* Chournos v. United States, 379 U.S. 879 (1964).

[2] United States v. Thompson, 41 F. Supp. 13 (E.D. Wash. 1941); 60 YALE L.J. 455, 462 (1951).

[3] U.S. CONST. art. IV, § 3.

[4] Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918).

[5] Buford v. Houtz, 133 U.S. 320, 326 (1890).

[6] 26 Stat. 1103 (1891), 16 U.S.C. § 471 (1958).

[7] 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1958).

coincided. The Supreme Court described the purpose of the National Forests as preservation of forest land from depredation and destruction.[8] Preservation of the range became a necessary correlative objective, since about a third of the National Forest land was grazing land.

Creation of the forest reserves caused strenuous and violent opposition, both on the range and in the courts.[9] Early in their history, the western states had enacted "fence laws" declaring that livestock which inadvertently wandered onto unfenced land not belonging to their owners could not be regarded as trespassers.[10] When the Forest Service declared that no one could graze his animals on unfenced National Forest land without a permit, many ranchers rebelled. However, the United States Supreme Court in *Light v. United States*[11] rejected the rancher's interpretation of the fence law as a license to let cattle run free, regardless of whose range the animals might stray onto and regardless of where the rancher might intend them to wander. The Court approved issuance of an injunction prohibiting Light from grazing his cattle on federal land.

The western federal judges, while sympathetic to the livestock man, consistently enforced the right of the government to control the use of its land, a right based on the Constitution's language authorizing Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[12] In another case, the Supreme Court held that the government could deal with its land "precisely as a private individual may deal with his farming property."[13]

Nonetheless, the Colorado Supreme Court backed up the rebellious ranchers and specifically rejected *Light*.[14] To do otherwise, said the Colorado court, would nullify the Colorado fence law. The court agreed that the fence statute did not apply if the owner has wilfully

[8] United States v. Grimaud, 220 U.S. 506 (1911). See also *Ex parte* Hyde, 194 Fed. 207, 213 (1904).

[9] For a vivid account of the Routt County, Colorado, ranchers' early reactions to the Forest Service, and of a trumped-up criminal charge against a Forest Ranger, see BURROUGHS, WHERE THE OLD WEST STAYED YOUNG 278 (1962). The case was People v. Ratliff, 14th Judicial Court, Routt County, Colorado, June 11, 1909.

[10] ALASKA REV. STAT. tit. 30, § 03.30.040 (1962); ARIZ. REV. STAT. ANN. §§ 24-341, 24-501 (1956); CAL. AGRI. CODE § 402 (1954); COLO. REV. STAT. § 8-13-2 (1963); IDAHO CODE § 25-2201 (1948); MONT. REV. CODE § 46-1409 (1961); NEV. REV. STAT. § 569.450 (1963); N.M. STAT. ANN. § 47-17-1 (1953); ORE. REV. STAT. § 608.015 (1963); TEX. CIV. STAT. 3947 (Vernon's 1960); REV. CODE WASH. ANN. § 16.60.015 (1962); WYO. STAT. ANN. § 11-532 (1957). *But see* KAN. GEN. STAT. ANN. § 47-101 (1949) (local option); N.D. GEN. CODE ANN. § 36-11-02 (1960) (*contra*); UTAH CODE ANN. §§ 4-12-7 and 4-12-9 (1953) (common law rule, with local option to modify).

[11] 220 U.S. 523 (1911). (This case also arose in Routt County, Colorado.)

[12] U.S. CONST. art. IV, § 3.

[13] Camfield v. United States, 167 U.S. 518, 524 (1897).

[14] Williamson v. Fleming, 65 Colo. 528, 178 Pac. 11 (1918).

or wantonly driven his cattle to trespass,[15] but held that if the owner merely leaves his cattle to drift, although he knows they will trespass onto government lands, the fence law protects him.[16]

New Mexico apparently followed the reasoning of the Colorado court.[17] Although the New Mexico court cited *Light* and even though the fact situation indicates that the owner must have known of a probable or sure trespass, the court found no liability. Other state courts, however, interpreted their fence laws differently and followed the ruling in *Light*.[18]

A related problem which confronted the government on its public lands concerned checkerboard land holdings. Due to these patterns of alternating public and private ownership, a landowner frequently could, by fencing his own lands, prevent access to the public domain. The patterns included juxtaposed public and private lands, alternating holdings of different private owners, and non-adjacent parcels of leased land alternating with either federal land or land of other lessees.[19] The checkerboards, which originated through grants to railroads as incentives for building lines west and grants to states for the benefit of schools, have created a headache for the government. The United States has frequently gone to court to free its lands from these restrictive fences and the federal courts have consistently held that a rancher cannot fence his land so as to enclose the public land.[20]

Although Congress can prescribe rules governing the public lands, the state may prescribe regulations which do not interfere with

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[15] Bell v. Gonzales, 35 Colo. 138, 83 Pac. 639 (1905).

[16] Williamson v. Fleming, 65 Colo. 528, 530, 178 Pac. 11, 12 (1919); Richards v. Sanderson, 39 Colo. 271, 278-79, 89 Pac. 769, 771 (1907).

[17] Hill v. Winkler, 21 N.M. 5, 151 Pac. 1014 (1915) (trespassing defendant cut down fence around a well).

[18] Dorman v. Erie, 63 Mont. 579, 208 Pac. 908 (1922); Chilcott v. Rea, 52 Mont. 134, 155 Pac. 1114 (1916).

[19] For examples of cases involving checkerboard patterns of land holdings, see: Camfield v. United States, 167 U.S. 518 (1897); United States v. Morrell, 331 F.2d 498 (10th Cir.), *cert. denied,* Chournos v. United States, 379 U.S. 879 (1964); Oman v. United States, 195 F.2d 710 (10th Cir. 1952); Chournos v. United States, 193 F.2d 321 (10th Cir.), *cert. denied,* 343 U.S. 977 (1952); Kunzler v. United States, 208 F. Supp. 79 (D. Utah 1961), *appeal dismissed,* 307 F.2d 511 (10th Cir. 1962).

[20] Camfield v. United States, 167 U.S. 518 (1897); Stoddard v. United States, 214 Fed. 566 (8th Cir. 1914); United States v. Bernard, 202 Fed. 728 (9th Cir. 1913); Lillis v. United States, 190 Fed. 530 (9th Cir.), *cert. denied,* 223 U.S. 726 (1911); Hanley v. United States, 186 Fed. 711 (9th Cir. 1911); Simpson v. United States, 184 Fed. 817 (8th Cir. 1911); Bircher v. United States, 169 Fed. 589 (9th Cir. 1909); Carroll v. United States, 154 Fed. 425 (9th Cir. 1907); Krause v. United States, 147 Fed. 442 (8th Cir. 1906); Cardwell v. United States, 136 Fed. 593 (9th Cir. 1905), *cert. denied,* 215 U.S. 599 (1909); Thomas v. United States, 136 Fed. 159 (9th Cir. 1905).

For a report of a recent controversy in Wyoming and in Congress, see: The Rocky Mountain News, Oct. 4, 1965, p. 5, cols. 4-5; *Id.,* Oct. 6, 1965, p. 5, cols. 4-5; *Id.,* Oct. 7, 1965, p. 55, cols. 1-3; *Id.,* Oct. 8, 1965, p. 40, cols. 2-3; *Id.,* Oct. 10, 1965, p. 5, cols. 3-5.

and are not inconsistent with the congressional regulations.[21] The states do not have power to confer the *right* to graze upon the public lands;[22] they can merely *control* grazing.[23] State controls generally were of three forms, each favoring various dominant interests in the states:[24] legislation to prefer local stockmen over stockmen from other states; fence laws protecting stockmen against settlers;[25] and legislation protecting classes of livestock growers[26] — especially cattlemen from sheepmen.[27] State courts declared the statutes of the first type — those preferring local stockmen — unconstitutional[28] but the Supreme Court upheld fence laws[29] and the laws discriminating against sheepmen.[30] These discriminations found their legal basis in the widespread belief that sheep ruin the range for cattle and that exclusion of sheep is necessary in order to preserve the range.[31] Even federal range regulations reflected this preference.[32]

The continuing range wars and continuing range deterioration provided the impetus for enactment of a federal statute to regulate grazing on the public lands. A fifteen-year political battle over closer

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[21] McKelvey v. United States, 260 U.S. 353 (1922); Denee v. Ankeny, 246 U.S. 208 (1918); Omaechevarria v. Idaho, 246 U.S. 343 (1918); Bacon v. Walker, 204 U.S. 311 (1907); Itcaina v. Marble, 56 Nev. 420, 55 P.2d 625 (1936); Big Butte Horse & Cattle Ass'n v. Anderson, 133 Ore. 171, 289 Pac. 503 (1930).

[22] Notes 6, 7, and 21 *supra*. With the establishment of the National Forests and passage of the Taylor Grazing Act, Congress has pre-empted the field. However an Arizona court has held that even though the state cannot issue grazing permits for federal lands [Schell v. White, 80 Ariz. 156, 294 P.2d 385 (1956)], if a Taylor Grazing Act permit expires and the government fails to act on the renewal application, the state law governs until the government acts. In Garcia v. Sumrall, 58 Ariz. 526, 121 P.2d 640 (1942), the court held that the former permit-holder was a month-to-month tenant and could enforce a trespass action against anyone but the United States.

[23] Big Butte Horse & Cattle Ass'n v. Anderson, 133 Ore. 171, 289 Pac. 503 (1930).

[24] Carpenter, *The Public Domain in Colorado,* 13 ROCKY MTN. L. REV. 296 (1941).

[25] The fence laws allowed livestock to graze any place not enclosed by fences; *i.e.,* the farmer had to fence his fields to exclude grazing animals. See discussion in text at note 16 *supra.*

[26] Lamoreaux v. Kinney, 41 F.2d 30 (9th Cir. 1930); State v. Brace, 49 Idaho 580, 290 Pac. 722 (1930).

[27] Omaechevarria v. Idaho, 246 U.S. 343 (1918); Bacon v. Walker, 204 U.S. 311 (1907); Lamoreaux v. Kinney, 41 F.2d 30 (9th Cir. 1930); Big Butte Horse & Cattle Ass'n v. Anderson, 133 Ore. 171, 289 Pac. 503 (1930).

[28] People v. McPherson, 76 Colo. 395, 232 Pac. 675 (1925); State v. Butterfield Live Stock Co., 17 Idaho 441, 106 Pac. 455 (1909); Hostetler v. Harris, 45 Nev. 43, 197 Pac. 697 (1921).

[29] Buford v. Houtz, 133 U.S. 320 (1890); Lazarus v. Phelps, 152 U.S. 81 (1894) (although not always approving their application by the state courts).

[30] Omaechevarria v. Idaho, 246 U.S. 343 (1918) (sheep could not graze range previously grazed by cattle); Bacon v. Walker, 204 U.S. 311 (1907) (no livestock grazing within two miles of any dwelling — a measure directed at the ubiquitous sheep).

[31] Bacon v. Walker, 204 U.S. 311 (1907).

[32] Dastervignes v. United States, 122 Fed. 30, 31 (9th Cir. 1903). A regulation prohibited grazing of sheep and goats except in areas where rainfall would insure "rapid renewal of herbage and undergrowth" and allowing grazing by other livestock as long as "injury is not being done the forest growth and water supply. . . ."

federal management of the public lands[33] culminated in enactment of the Taylor Grazing Act in 1934.[34]

II. TAYLOR GRAZING ACT — ADMINISTRATION

Congress passed the Taylor Grazing Act in order to benefit and stabilize the livestock industry,[35] to protect grazing rights and privileges,[36] and to provide "the most beneficial use of the public range."[37] To carry out these purposes, the administration of the act is vested in the Bureau of Land Management.[38] The Bureau's job is to manage and improve the range by eliminating overgrazing which thereby prevents erosion on public and private lands. As more demands arise for use of the public domain, the Bureau is also faced with the problem of selecting the highest or most beneficial use of the public lands.[39]

The Director of the Bureau oversees agencies for each of the ten major public land states.[40] A District Manager is in charge of each of these agencies, which in turn, supervises several grazing districts.

The Act sets up an Advisory Board for each District.[41] Holders of grazing permits elect the members of the District Boards, with each class of stockmen (cattlemen and sheepmen) represented. The State Director appoints one additional member—a wildlife representative.[42] The District Advisory Boards make recommendations on a variety of matters connected with range management.[43] As the name implies,

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[33] The political machinations leading up to its approval by Congress are discussed in detail by several scholars and government administrators: CALEF & WESLEY, PRIVATE GRAZING AND PUBLIC LANDS (1960); CLAWSON & HELD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 45-47, 81-112 (1957); FOSS, POLITICS AND GRASS (1960); PEFFER, THE CLOSING OF THE PUBLIC DOMAIN, 214-231 (1951); PENNY & CLAWSON, ADMINISTRATION OF GRAZING DISTRICTS IN THE PUBLIC LANDS 461 (1962).

[34] Taylor Grazing Act, note 7 *supra.*

[35] Chournos v. United States, 193 F.2d 321, 323 (10th Cir. 1952); United States v. Achabal, 34 F. Supp. 1, 3 (D. Nev. 1940).

[36] Hatahley v. United States, 351 U.S. 173 (1956); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 314 (D.C. Cir. 1938).

[37] 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1959); Hatahley v. United States, 351 U.S. 173, 177 (1956); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 314 (D.C. Cir. 1938). *Cf.* United States v. Grimaud, 220 U.S. 506 (1911).

[38] The Bureau of Land Management (referred to in this paper as the Bureau or as the BLM) consolidates the functions of the General Land Office and the Grazing Service under the 1946 Reorg. Plan No. 3, sec. 402(2), effective July 16, 1946.

[39] See discussion in text note 159 *infra.*

[40] Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming.

[41] Details of the BLM administrative set-up to adminster the Taylor Grazing Act are contained in 43 C.F.R. §§ 4110-4115.2 (1965), known as the Federal Range Code.

[42] 43 C.F.R. § 4114.1 (1965).

[43] 43 C.F.R. § 4114.1-5 (1965). The framers of the act developed a commendable idea with the provision to manage the range in consultation with the range users. Such an arrangement undoubtedly facilitated a more harmonious implementation of the act. The knowledge and experience which the stockmen brought to the Bureau, interacting with the formal training and practical experience in range management of the Bureau's personnel, led to a better understanding of each point of view by the other.

the function of the Board is strictly advisory; the BLM officials may accept or reject any of the Board's suggestions or recommendations as they see fit.[44]

When a rancher applies for a grazing permit the Advisory Board considers it first[45] and makes a recommendation to the District Manager, explaining the reasons for any unfavorable reports.[46] The District Manager issues a tentative decision.[47] If the applicant wishes, he may "protest" at a hearing before the Advisory Board. After this formal hearing, the Advisory Board reconsiders its advice and again reports to the Manager. The District Manager, still free to reject the Board's advice, issues the final decision.[48] If he still disapproves, the applicant may institute a formal appeal as provided by the Administrative Procedure Act.[49]

The applicant's rights of appeal under the Administrative Procedure Act do not begin until rendition of the final decision by the District Manager. This has led to some confusion among applicants, as it constitutes a hearing *after* the first adjudication, whereas the Administrative Procedure Act contemplates hearings held prior to adjudication.[50] Because of this, the BLM conducts grazing appeals under rules different from those used to hear other appeals. Frequently, to their misfortune, applicants follow the general Bureau Hearing Procedures[51] rather than those for Grazing Proceedings.[52]

To launch the hearing procedure the appellant sends his appeal, stating the grounds on which it is based, to the District Manager who forwards it to the State Director. The State Director, as the adverse party, may file a motion for dismissal which the appellant may answer.[53] The State Director, after collecting the appeal materials, forwards them to a Hearing Examiner who promptly rules on the motion for dismissal, if any, and sets a date for the hearing if he has not dismissed the case.

The Hearing Examiner, an officer of the Department of the Interior, holds hearings on all contests of administrative action involving the BLM-controlled public domain. He must conduct the hearing "in an orderly, impartial, and judicial manner," and has authority to subpoena witnesses, rule upon offers of proof and relevancy of evi-

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[44] 43 C.F.R. § 4115.2a-1; § 4115.2a-4 (1965).
[45] 43 C.F.R. § 4115.2-1(a)(2)(1965).
[46] 43 C.F.R. § 4115.2-1(a)(4)(1965).
[47] *Ibid.*
[48] 43 C.F.R. § 4115.2-1(b)(1965).
[49] 43 C.F.R. § 4115.2-3 (1965).
[50] E. L. Cord, dba El Jiggs Ranch, Int. Graz. Dec. 634 (1957).
[51] 43 C.F.R. § 1850 (1965).
[52] 43 C.F.R. § 1853 (1965).
[53] 43 C.F.R. § 1853.1(d)(1965).

dence, make findings of fact and conclusions of law, and render a decision.[54] Where possible, the parties stipulate all material facts and issues involved.

The evidentiary rules used by the Department at hearings are less stringent than the ones used in the courts and are identical to those generally accepted for federal administrative hearings.[55] Hearsay is admissible, if corroborated by other evidence,[56] and the government uses photographs extensively to demonstrate such things as overgrazed range, excessive numbers of livestock and illegal entry. Witnesses testify under oath and may be cross-examined either by the opposing party or by the Hearing Examiner.

The hearing opens with a brief statement by the government counsel describing the facts leading to the appeal. The appellant, having the burden of proof, then offers his case.[57] The Examiner may, with or without motion by the government, then issue summary dismissal because of insufficiency of the appellant's case. Assuming the hearing continues and there is a proper showing of interest,[58] intervenors — usually permit-holders affected by the protested permit — may present their case. Finally the Director offers his evidence, "if such a presentation appears to the Examiner to be necessary for a proper disposition of the matters in controversy. . . ."[59]

The Examiner makes findings of fact and conclusions of law and writes a decision which he sends to the parties. A verbatim transcript is taken of all BLM hearings; this record and the decision are available for any appeal.[60] Either party may appeal from the Examiner's decision to the Director of the Bureau.[61] Parties file briefs[62] and may request a hearing and oral argument, which the Director may allow at his discretion.[63] Under similar provisions either party may appeal from the Director to the Secretary of the Interior.[64]

A curious provision allowing the Director of the Bureau to require the Examiner to "make only a recommended decision" and sub-

[54] 43 C.F.R. § 1853.3 (1965).

[55] 43 C.F.R. § 1853.5(c) (1965).

[56] E. L. Cord, dba El Jiggs Ranch, Int. Graz. Dec. 634 (1957); Mrs. Myrtle Colvin, Int. Graz. Dec. 245 (1941).

[57] 5 U.S.C. § 1009(a) (1959); E. L. Cord, dba El Jiggs Ranch, Int. Graz. Dec. 634 (1957); William Sellas, Int. Graz. Dec. 526 (1950); Leandro Muniz, Int. Graz. Dec. 302, 304 (1942); R. B. Hackler, Int. Graz. Dec. 274 (1942); King Bros., Int. Graz. Dec. 114, 117 (1938).

[58] 5 U.S.C. § 1009(a) (1959); Bert and Paul Smith, 67 Int. Dec. 300 (1960); Bert and Paul Smith, 66 Int. Dec. 1 (1959); William S. Young, 66 Int. Dec. 113 (1959).

[59] 43 C.F.R. § 1853.5(c) (1965).

[60] 43 C.F.R. § 1853.7(a) (1965).

[61] 43 C.F.R. § 1853.7(b) (1965).

[62] 43 C.F.R. § 1853.7(b) (1965).

[63] 43 C.F.R. § 1843.5 (1965).

[64] 43 C.F.R. § 1844.1 (1965).

mit it to the Director for him to adopt as his decision[65] has its counterpart in the appeal procedure from the Director to the Secretary. If, prior to the Director's "promulgation" of his decision, the Secretary approves it, he may not entertain the appeal, but instead adopts the Director's decision.[66] While these shortcuts sound like an arbitrary deprivation of the right to appeal, the purpose is to simplify the route to the courts, *i.e.,* more appellants can obtain judicial review with fewer departmental appeals and less expense. In grazing cases however, the process has served as a shortcut to nowhere. When used, it not only deprives the applicant of the complete administrative appeal procedure, but, since less than a dozen reported appeals have reached the courts since 1934,[67] it seems not to have attained its purpose.

Statements by courts that an order of the Secretary is not judicially reviewable,[68] which may have discouraged court appeals, contradict both the Administrative Procedure Act[69] and the Federal Range Code.[70] If the BLM has acted arbitrarily or capriciously, the courts can examine its action.[71] "The Court cannot exercise the agency discretion, but it can inquire into whether that discretion has been properly exercised."[72]

Only rarely have the courts reversed the Secretary. Most frequently the decision results in an opinion like that in *Adams v. United States,*[73] in which the court stated: "Since the agency findings are supported by substantial evidence and since the agency decision is not arbitrary, capricious, or otherwise unlawful . . . the trial court properly upheld the agency decision . . . ."[74]

Rights acquired under the Taylor Grazing Act may be protected

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[65] 43 C.F.R. § 1853.6(b) (1965).

[66] 43 C.F.R. § 1844.1 (1965).

[67] See Section IV *infra.*

[68] Sellas v. Kirk, 200 F.2d 217, 220 (9th Cir. 1952); United States v. Wiley's Cove Ranch, 295 F.2d 436, 440 (8th Cir. 1961); Hamel v. Nelson, 226 F. Supp. 96, 98 (N.D. Calif. 1963); *accord,* Cameron v. United States, 252 U.S. 450, 459 (1920) (prior to Administrative Procedure Act); Ross v. Day, 232 U.S. 110 (1914); Whitcomb v. White, 214 U.S. 15 (1909); Quinby v. Conlan, 104 U.S. 420 (1881); Jones v. Ickes, 65 F.2d 197 (D.C. Cir. 1933); City of Los Angeles v. Borax Consolidated Ltd., 5 F. Supp. 281 (S.D. Calif. 1933), *rev'd on other grounds,* 74 F.2d 901 (9th Cir. 1935), *aff'd,* 296 U.S. 10 (1935); Wyoming v. Franke, 58 F. Supp. 890 (D. Wyo. 1945), where the court said it could not interfere with what it considered an abuse of discretion and in which the judge strongly disapproved of the administrative action [establishment of Jackson Hole National Monument when Congress had refused to do so].

[69] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1959).

[70] 43 C.F.R. § 1853.8(b) (1965).

[71] 60 Stat. 243 (1946), 5 U.S.C. § 1009(e). Oman v. United States, 179 F.2d 738 (10th Cir. 1949); See also Oman v. United States, 195 F.2d 710 (10th Cir. 1952).

[72] Bedke v. Quinn, 154 F. Supp. 370, 371 (D. Idaho 1957).

[73] 318 F.2d 861 (9th Cir. 1963) (non-grazing case but illustrative of the judicial treatment of appeals from decisions of the Secretary on Bureau hearings).

[74] *Id.* at 873.

in the courts against unlawful action by the Secretary.[75] Moreover, unlawful or ultra vires acts of the BLM officials may be enjoined, even though the Secretary of the Interior has not been made a party to the action.[76]

III. Nature of the Right Under the Act

Grazing on the public lands had existed traditionally at the sufferance of the federal government;[77] the Taylor Grazing Act replaced that "right by sufferance" with a "right by permission." The courts recognize that the right to graze is a valuable one,[78] as is the right to a grazing permit.[79] Not only by the terms of the Act,[80] but also by administrative and judicial decisions,[81] ranchers who had grazed on public lands prior to the enactment of the law received a preference over those who had not. Such a preference was approved in *McNeil v. Seaton,*[82] in which the court voided application of a Special Rule[83] which, by changing the priority period, deprived the plaintiff of his preference over newcomers to the local ranching business.[84] The court said that McNeil was justified in relying on the preference granted by Congress and in investing his time, effort, and capital to develop his stockraising business.

McNeil upholds "adequately safeguarded" grazing privileges[85] which, as the dissent points out, seem to amount to vested rights in continuation of the permit in derogation of the Supreme Court precedents and the Taylor Grazing Act itself.[86] As long as the stockmen

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[75] Hatahley v. United States, 351 U.S. 173 (1956); McNeil v. Seaton, 281 F.2d 931, 933 (D.C. Cir. 1960); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938). See discussion of these cases in text following, respectively notes 89, 82, and 81 *infra.*

[76] Bedke v. Quinn, 154 F. Supp. 370, 372 (D. Idaho 1957); See also non-grazing cases, *e.g.* Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir. 1960), *cert. denied,* 366 U.S. 936 (1961); Adams v. Witmer, 271 F.2d 29, 35 (9th Cir. 1958). See discussion of a new venue statute in text at note 103 *infra.*

[77] Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918); Light v. United States, 220 U.S. 523, 535 (1911); United States v. Grimaud, 220 U.S. 506 (1911); Buford v. Houtz, 133 U.S. 320, 326 (1890); Lamoreaux v. Kinney, 41 F.2d 30 (9th Cir. 1930).

[78] McNeil v. Seaton, 281 F.2d 931, 934 (D.C. Cir. 1960); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944).

[79] McNeil v. Seaton, 281 F.2d at 934; Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 316 (D.C. Cir. 1938).

[80] 48 Stat. 1270 (1934) (amended by 61 Stat. 790 (1947)), 43 U.S.C. § 315(b) (1959).

[81] Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 314, 316 (D.C. Cir. 1938).

[82] 281 F.2d 931, 936 (D.C. Cir. 1960).

[83] 19 Fed. Reg. 8954 (1954).

[84] 281 F.2d at 937-38. As it turned out in application, McNeil had not lost his rightful preference. His allotment under the special Rule exceeded that under his old priority period. McNeil v. Udall, 340 F.2d 801, 802 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 904 (1965). See discussion in text at note 105 *infra.*

[85] 281 F.2d at 934, quoting from 43 U.S.C.A. § 315(b) (1959).

[86] *Id.* at 938.

are given the "privilege"[87] of using public lands, each should receive this privilege under the same conditions; however, the stockman who has built up his business should have an assurance of continued availability of grazing lands. On the other hand, this right should not build into a "vested right" for permanent grazing since that amount may later damage the range or the government might find a better use for the land.

While the federal courts defined the grazing permit as a preference and a privilege, other courts have considered different aspects. The rights are sufficiently possessory to be taxable within the meaning of a statute imposing a tax on property of the United States held under lease.[88] The rights, derived through the United States, prevail over the aboriginal rights of the Navajos to their traditional grazing grounds since the Navajos have relinquished their rights to the United States by treaty. Nonetheless, the Navajos may enforce their rights against everyone but the United States.[89] The permit holder can recover from the government for damage caused by a forest fire which spread due to the fault of the government.[90] Since the interest is revocable, it cannot be used to force the state to construct cattle passes under a limited access highway.[91]

The holder has an interest of compensable nature by statute, but only in some respects.[92] The courts, in accordance with the Taylor Grazing Act,[93] have stated that a grazing permit creates no vested property rights.[94] While the government need not pay for the value of a permit revoked or lost through eminent domain proceedings, it must pay for the enhanced value to the land caused by an appurtenant permit.[95] Thus, land with a grazing permit attached is worth more

[87] Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 316 (D.C. Cir. 1938). The right granted by the Taylor Act permit is a "privilege [which was] a proper subject of equitable protection against an illegal act."

[88] Sproul v. Gilbert, 225 Ore. 442, 359 P.2d 543 (1961).

[89] Hatahley v. United States, 351 U.S. 173 (1956).

[90] Wilkinson v. United States, 189 F. Supp. 413 (D. Ore. 1960). In this case the permitholder had died, and title to the base land transferred to the plaintiffs. Since the plaintiffs had failed to apply for a permit, they had no rights of recovery for the tort. The court distinguishes Garcia v. Sumrall, 58 Ariz. 526, 121 P.2d 640 (1942), where the action was against a third party, not the United States, and the permit had not terminated.

[91] Fauske v. Dean, 78 S.D. 310, 101 N.W.2d 769 (1960).

[92] 56 Stat. 654 (1942), 43 U.S.C. § 315(q) (1965). This allows for compensation for loss of grazing permits taken for military purposes.

[93] 48 Stat. 1270 (1934) (amended by 61 Stat. 790 (1947), 43 U.S.C. § 315(b) (1959).

[94] United States v. Cox, 190 F.2d 293 (10th Cir.), *cert. denied,* 342 U.S. 867 (1951); Fauske v. Dean, 78 S.D. 310, 101 N.W.2d 769 (1960); Bassett v. Ryan, 72 Ariz. 383, 236 P.2d 458, 460 (1951). *Contra,* Bartlett v. Galleppi Bros., 33 F. Supp. 277 (N.D. Cal. 1940) (dictum).

[95] United States v. Jaramillo, 190 F.2d 300, 302 (10th Cir. 1951). Followed in State Highway Comm'n v. Fortune, 77 S.D. 302, 91 N.W.2d 675 (1958). *Cf.* McDonald v. McDonald, 61 N. M. 458, 302 P.2d 726 (1956), where the government was renting ranchlands with appurtenant permits and the payments were based on, among other factors, cancellation of the Taylor Grazing Act permits.

than the same land would be without such a permit — not only in sales between private parties, but also in forced sales to the government. Companion cases in the Tenth Circuit arrived at conclusions, confusing, but separable on their facts: *United States v. Jaramillo*[96] held the government liable for the permit value where the permits remained in effect; but *United States v. Cox*[97] denied it where the permit was withdrawn as part of the condemnation.

IV. Attacks Against and Operation of the Act

A. *Attacks*

1. Constitutionality-Indispensable Party.

That no full-fledged attacks upon the constitutionality of the act developed is probably attributable to the fact that similar Forest Service grazing controls had been approved several times.[98] In addition, the courts had frequently recognized the unexercised right of the federal government to control the public domain — a right stemming directly from the Constitution.[99] The only attempt thus far to attack the constitutionality of the Taylor Grazing Act failed when several Oregon sheep raisers missed the opportunity to present their constitutional arguments to a federal court because they could not muster the jurisdictional amount.[100]

Only a few court attacks on the *operation* of the act have occurred. Blocking court review were early holdings that the Secretary of the Interior was an indispensable party to grazing appeals since the appeals sought action by him through his subordinates.[101] In order to acquire jurisdiction over him, the applicant had to sue in the District of Columbia.[102] Most stockmen found the expense of maintaining such a suit prohibitive. The 87th Congress rectified this situation by amending the venue statute to allow suit against the Secretary in any jurisdiction where the cause of action arose or where the land in ques-

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[96] 190 F.2d 300 (10th Cir. 1951).

[97] 190 F.2d 293 (10th Cir. 1951).

[98] Light v. United States, 220 U.S. 523 (1911); United States v. Grimaud, 220 U.S. 506 (1911).

[99] U.S. CONST. art. IV, § 3, Omaechevarria v. Idaho, 246 U.S. 343 (1918); Buford v. Houtz, 133 U.S. 320 (1890).

[100] Gavia v. Donaugh, 93 F.2d 173 (9th Cir. 1937). If they then took the case to the state court, it apparently never reached the Oregon Supreme Court.

[101] Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897); Richman v. Beck, 257 F.2d 575 (10th Cir. 1958); Sellas v. Kirk, 200 F.2d 217 (9th Cir. 1952).

[102] McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961); Palmer v. Walsh, 78 F. Supp. 64 (D. Ore. 1948). See, *e.g.*, McNeil v. Seaton, 281 F.2d 931, 933 (D.C. Cir. 1960); LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963); Jones v. Ickes, 65 F.2d 197 (D.C. Cir. 1933).

tion was situated.[103] The rush of appeals Congress expected from the liberalized venue provisions has yet to materialize: the only reported appeal since 1962 went to trial in the District of Columbia.[104]

Only one suit so far has sustained a rancher's claim of arbitrary handling of a permit application — *McNeil v. Seaton*.[105] The Grazing District in which McNeil's lands were located instituted a Special Rule which changed the base period for establishing preferences from 1929-1934 to 1948-1952. The court voided the Special Rule as it applied to McNeil, saying, "We see no basis upon which, by a special rule adopted more than twenty years after appellant had embarked upon his [livestock raising] venture, he may lawfully be deprived of his statutory privilege."[106] A prior case, *Sellas v. Kirk*,[107] had reached a contrary result — concluding that promulgation of a Special Rule was not even judicially reviewable (and that, even if it were, the Secretary was an indispensable party).[108] These cases are distinguishable since McNeil made a showing that the Special Rule discriminated specifically against him whereas the Special Rule in *Sellas* applied

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[103] 28 U.S.C. § 1391(e) (1962). In recommending the legislation, the Senate report, S. Rep. No. 1992, 87th Cong., 2d Sess. (1962), pointed out:

> Frequently these proceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently.

The Tenth Circuit had offered another solution to the indispensable party dilemma in Pan American Petroleum v. Pierson, 284 F.2d 649, 653 (10th Cir. 1960). Here the Secretary was not an indispensable party, where no action was required of him, and a BLM official had exceeded his authority (in this case by canceling an oil and gas lease). Boesche v. Udall, 373 U.S. 472 (1963), affirms a decision the court says is in "seeming conflict" with the *Pan American* case, but the opinion reaches only the power of the *Secretary* to cancel a lease, not that of a regional official of the Bureau.

[104] McNeil v. Udall, 340 F.2d 801 (D.C. Cir. 1964).

[105] 281 F.2d 931 (D.C. Cir. 1960).

[106] *Id.* at 937. His was a hollow victory. On remand the Bureau found that his rights under the 1929-1934 preference period amounted to 143 animals, compared with 232 under the subsequent base period. [McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961)]. This probable determination had been recognized in the dissent in the original case [281 F.2d at 938, n.1] McNeil then attempted to assert greater rights in the Montana District Court, but ran afoul of the indispensable party requirement. [McNeil v. Leonard, 199 F. Supp. 671 (D. Mont. 1961)]. Finally, four years later, the District of Columbia court rendered the *coup d'etet* by supporting the BLM's determinations. [McNeil v. Udall, 340 F.2d 801 (D.C. Cir. 1964)].

[107] 200 F.2d 217 (9th Cir. 1952).

[108] The Special Rule involved the calculation of the "base" [43 U.S.C. § 315(b) (1959)]. For example, grazing areas in the Colorado high mountains are "land base" because since they cannot be used all year, their use is limited by the amount of land the rancher has available elsewhere for winter grazing. On the other hand, in the southwestern deserts where use of the federal range is limited by the amounts of water available to water the animals during the dry season, a "water base" applies. In this Nevada grazing district the Advisory Board, due to special conditions in the district, had recommended a Special Rule combining the two — 2/3 land and 1/3 water. By its application, the Board and District Manager reduced plaintiff's allotment from pre-Taylor Act use of 2500 sheep to 1000 sheep under the Special Rule.

equally to all permittees.[109] Actually this is a distinction without a difference since a Special Rule can discriminate individually whether it changes the base property allowance or the preference period. If any Special Rule discriminatorily vitiates one rancher's rights while benefiting another's, the injured party should be given recourse to the courts.[110]

2. Mining Claims.

The Taylor Act extends to grazing permits on the surface of unpatented mining claims. Despite broad language in the mineral laws[111] and related cases,[112] the Tenth Circuit decided that the exclusive right of possession of the surface is limited to mining purposes; therefore, the government, as title-holder of the land, can control grazing thereon.[113] Congress confirmed case law to this effect by the Multiple Use Act of 1955 which specifically awarded to the government control over uses of the surface of unpatented claims other than mining.[114]

The courts have held that the locator has no tort claim for damages caused by grazing under Bureau auspices on the surface of his mining claim.[115] Moreover, the government cannot recover damages for illegal grazing on an unpatented claim which was later patented.[116] A holder of an unpatented claim was allowed to recover damages,

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[109] Wade McNeil, Int. Graz. Dec. 667, 668 (1957). One fact not mentioned by the court in either case (and very likely pertinent to the decisions) is that McNeil had operated under the Act's regulations since 1936; Sellas never had. In fact, he (Sellas) insisted that the Taylor Act could not curtail the grazing to which he had been accustomed prior to its enactment:

> Mr. Sellas' appeal indicates a fundamental misconception on his part of the effect which the Taylor Grazing Act has had on his right to use the Federal range in his livestock operations. This misconception has apparently remained with Mr. Sellas over the years. . . . [I]t appears to be largely responsible for his continued insistence that his grazing operations on the Federal range must not be changed or curtailed in any manner from what those operations were on the public domain prior to passage of the Taylor Grazing Act. . . . Wm. Sellas, Int. Graz. Dec. 677, 678 (1958).

[110] 200 F.2d at 220.

[111] 17 Stat. 91 (1872), 30 U.S.C. § 26 (1959) (Locators have "exclusive right of possession and enjoyment of all the surface included within the lines of their locations . . . .").

[112] See, *e.g.*, Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 226 (1904); Wilbur v. United States *ex rel.* Krushnic, 280 U.S. 306, 316 (1930).

[113] United States v. Etcheverry, 230 F.2d 193, 196 (10th Cir. 1956) ("[W]e hold that under the statute, general grazing rights of the public domain are not included in the possessory rights of a mining claim."). See also Teller v. United States, 113 Fed. 273 (8th Cir. 1901) (timber); United States v. Rizzinelli, 182 Fed. 675 (D. Idaho 1910) (timber); Ward v. Chevallier Ranch Co., 138 Mont. 144, 354 P.2d 1031, 1033 (1960) (dissent); Coos Bay Timber Co. v. Bigelow, 228 Ore. 469, 365 P.2d 619 (1961) (government can sell timber on claim where no discovery has been made). *But see* United States v. Deasy, 24 F.2d 108 (D. Idaho 1928) (timber) (citing the *Teller* and *Rizzinelli* cases as holding the opposite of their actual decisions, and following the purported holdings).

[114] 69 Stat. 368 (1955), 30 U.S.C. § 612(b) (1959).

[115] Powell v. United States, 233 F.2d 851 (10th Cir. 1956).

[116] United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956).

not against the government, but against the grazer even though the latter was operating under a Forest Service permit.[117] In this case a Montana statute governed the right of recovery for trespassing animals on "agricultural or grazing land or patented mining claims,"[118] but because an unpatented claim was involved, the statute was found inapplicable. However, the court found the grazer liable for trespass because of a jury finding that the boundaries of the land involved were sufficiently well marked to place persons on notice. It is interesting to note that a 1963 amendment to the statute extended its effect to unpatented mining claims.[119]

3. Tort Claims.

A series of cases brought under the Federal Tort Claims Act[120] have established the principle that grazers, in proper circumstances, can recover damages from the government.[121] Moreover, a tort action lies if the Bureau wrongfully aids, allows, abets, or encourages other livestock operators to use the public domain already granted another.[122] The Tort Claims Act does not apply to claims based on the exercise or failure to exercise a discretionary function, "whether or not the discretion involved be abused."[123] Thus, because both the refusal to grant exchange of use permits and the imposition of government carrying capacity standards on a checkerboard landowner[124] are discretionary actions, they probably are not compensable under the Federal Tort Claims Act.[125] Even the granting of a permit to a third party, where the government knows the animals will trespass, does not constitute a tortious act.[126]

B. *Operation*

To solve the problem of checkerboard patterns of private and public land holdings, the Federal Range Code sets up "Exchange of Use" permits[127] where, by negotiation, a holder of alternating parcels agrees to exchange certain parcels which he holds for certain government lands and to give the government control of his land for grazing

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[117] Ward v. Chevallier Ranch Co., 138 Mont. 144, 354 P.2d 1031 (1960).

[118] MONT. REV. CODE § 46-1413 (1947).

[119] MONT. REV. CODE § 46-1413 (Supp. 1963).

[120] Codified in scattered sections of 28 U.S.C. (1965).

[121] Notes 113 and 115 *supra; accord,* the Multiple Use Act of 1964, 78 Stat. 982 (1964), 43 U.S.C. § 1391 (Supp. 1964).

[122] Oman v. United States, 179 F.2d 738, 742 (10th Cir. 1949).

[123] 28 U.S.C. § 2680(a) (1948).

[124] See textual discussion of checkerboard land patterns following note 18 *supra.*

[125] United States v. Morrell, 331 F.2d 498 (10th Cir. 1964).

[126] *Ibid.;* Chournos v. United States, 193 F.2d 321 (10th Cir. 1952); Kunzler v. United States, 208 F. Supp. 79 (D. Utah 1961), *appeal dismissed,* 307 F.2d 511 (10th Cir. 1962).

[127] 43 C.F.R. § 4115.2-1(h) (1965).

purposes. As a result, the government allows him to graze on government land and he allows the government permittees to graze upon his land. The same arrangement is used when the permittee owns non-contiguous segments of base lands which alternate with Taylor Grazing Act land. Exchanges are made to enable the holdings to be contiguous.

Administrative problems in these exchanges arise from the BLM principles of range management. The landowner seeking the exchange must agree to the Bureau-established grazing practices. Concerned with a profitable livestock operation, he frequently calculates a higher grazing capacity than does the Bureau, whose concern centers on restoration and maintenance of good range. If he refuses to agree to the Bureau's levels of grazing, the BLM can refuse to issue exchange permits. His property thereby becomes useless: cattle cannot graze on his unfenced land without trespassing on government land; if they do, the Bureau will prosecute for trespass. Therefore the Bureau has him cornered — he must either graze according to the carrying capacity as determined by the BLM or not graze at all.

Much of the litigation in the past ten years has arisen because the BLM has begun a re-evaluation of its lands. Its appropriations have quadrupled in the past ten years; it no longer needs to farm out the responsibility for administering the permit program to ranchers' cooperatives.[128] During this recent re-evaluation, it has surveyed the range and made significant reductions in grazing on some overstocked lands.[129]

Judging by these actions of the Bureau, criticisms of the Bureau for poor range management are sound.[130] The agency has taken steps to further reduce grazing; the number of animals on the federal range dropped from fourteen million in 1949 to twelve million in 1962. This reduction seems a steady trend and allows the range to recover from years of misuse. The livestock operators are realizing the purpose of government controls over grazing by the improvement in the range.[131] The improved range will eventually increase carrying capacities which must in turn be subject to strict scrutiny to ensure its carrying the maximum number of animals per acre. Even so, demands

[128] See, *e.g.*, Wade McNeil, Int. Graz. Dec. 667, 64 Int. Dec. 423 (1957). The South Phillips Cooperative Grazing District issued grazing permits to take the load from the underfunded and undermanned BLM.

[129] McNeil v. Seaton, 281 F.2d 931 (D.C. Cir. 1960); Wade McNeil, Int. Graz. Dec. 667, 64 Int. Dec. 423 (1957). See text following note 105 *supra.*

[130] CALEF, PUBLIC GRAZING AND PUBLIC LANDS (1960); Note, *Management of Public Land Resources,* 60 YALE L.J. 455 (1951).

[131] See United States v. Thompson, 41 F. Supp. 13, 15 (E.D. Wash. 1941), noting the improvements in range managed by the Forest Service, particularly the 95% increase in carrying capacity. See also Rocky Mountain News, June 9, 1965, p. 5, cols. 1-3, and The Denver Post, June 11, 1965, p. 22, cols. 1-2, to the same effect.

on the BLM for other uses of the public lands may limit the land available for grazing.

V. ATTEMPTS AT ENFORCEMENT BY THE FEDERAL GOVERNMENT

The first extensive litigation under the act occurred when a permittee attempted to enjoin issuance of temporary licenses and collection of fees under the act. After the government failed in its attempt to block the suit,[132] the Nevada Supreme Court declared that a blanket fee for all grazing districts, as temporarily set by the Land Office, was not consistent with the requirement of the act that the fees be reasonable,[133] since range conditions varied from one grazing district to another.[134] The United States Supreme Court disagreed and held that Congress had ratified the temporary blanket fee system by using the money collected therefrom for range improvement.[135] The permanent fee system subsequently adopted, provided a blanket fee for all districts. Disposition of this litigation also reversed a decision by a Nevada federal judge which had voided the fees.[136]

The Bureau has successfully enforced provisions of the act through injunctions,[137] contempt actions,[138] trespass actions,[139] and under the authority of state statutes.[140] However, a dispute involving a group of Navajo Indians on the one hand and the Bureau and its white permittees on the other resulted in a rare setback for the government in its administration of the Taylor Grazing Act.[141] The controversy began when certain grazing land adjacent to the Navajo Indian Reservation in southeastern Utah was incorporated into the Monticello, Utah, Grazing District. The Navajos continued to graze their animals on this land which they claimed as their prehistoric aboriginal home and grazing land. Before the permittes had won

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[132] United States v. Dewar, 18 F. Supp. 981 (D. Nev. 1937); Dewar v. Brooks, 16 F. Supp. 636 (D. Nev. 1936).

[133] 48 Stat. 1270 (1934) (amended by 61 Stat. 790 (1947)), 43 U.S.C. § 315(b) (1959).

[134] Brooks v. Dewar, 60 Nev. 219, 106 P.2d 755 (1940).

[135] Brooks v. Dewar, 313 U.S. 354 (1941). The appropriations coincided with the provisions for disposal of permanent fees under 43 U.S.C. § 315(i) and (j), which the Court cited in approving the temporary fees.

[136] United States v. Achabal, 122 F.2d 791 (9th Cir. 1941), *reversing* 34 F. Supp. 1 (D. Nev. 1940). In Brooks v. Dewar, 60 Nev. 219, 106 P.2d 755 (1940), the Nevada court cited this federal district court decision as influential.

[137] Kenndey v. United States, 119 F.2d 564 (9th Cir. 1941).

[138] United States v. Montgomery, 155 F. Supp. 633 (D. Mont. 1957).

[139] Richman v. Beck, 257 F.2d 575 (10th Cir. 1958); United States v. Hosteen Tse-Kesi, 191 F.2d 518 (10th Cir. 1951); Alton Morrell & Sons, 72 Int. Dec. 100 (1965).

[140] United States v. Hatahley, 220 F.2d 666 (D. Utah 1955), *rev'd*, Hatahley v. United States, 351 U.S. 173 (1956).

[141] The litigation involved the following cases, chronologically: United States v. Hosteen Tse-Kesi, 93 F. Supp. 745 (D. Utah 1950), *rev'd*, 191 F.2d 518 (10th Cir. 1951); Young v. Felornia, 121 Utah 646, 244 P.2d 862 (1952); United States v. Hatahley, 220 F.2d 666 (10th Cir. 1955), *rev'd*, Hatahley v. United States, 351 U.S. 173 (1956).

two court attempts to remove the Indians' stock from BLM land,[142] the Indians had returned to their reservation. Since the Indians continued to graze their animals on this land, the permittees next prevailed upon the Bureau and the San Juan County Commissioners to gather up the Navajo livestock under the authority of the Utah Abandoned Horse statute.[143] The Bureau field men seized animals they claimed were abandoned and shipped them to a Provo packing house. The Navajos then sued under the Federal Tort Claims Act[144] and prevailed in the Utah District Court at a trial described by the Tenth Circuit Court of Appeals as having been conducted "in an atmosphere of maximum emotion and a minimum of judicial impartiality. . . ."[145] The Tenth Circuit reversed the judgment, holding that by proceeding under the Abandoned Horse statute the BLM officials had acted in harmony with the Taylor Grazing Act. Moreover, the court concluded, despite provisions in the act for levying fines on livestock owners who failed or refused to remove their animals from lands under Taylor Act administration, the Utah statute covered an entirely different subject — those animals *abandoned* by their owners.[146]

The Supreme Court reversed.[147] Noting that "[U]nauthorized grazing on the federal range and the removal of trespassing livestock is expressly provided for by section 161.11(b)[148] of this [Federal Range] Code,"[149] the Court declared that "both the written notice and failure to comply are express conditions precedent to the employment of local procedures. The code is, of course, the law of the range, and the activities of federal agents are controlled by its provisions."[150] A conflicting state statute applied discriminately cannot be used by Bureau agents. The Court found liability and reversed because the government agents knew that the horses had not been abandoned; in fact, they knew who the owners were: "[T]he government agents were not exercising due care in their enforcement of the federal law. . . . The agents proceeded with complete disregard for the property rights of petitioners."[151]

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[142] United States v. Hosteen Tse-Kesi, 191 F.2d 518 (10th Cir. 1951); Young v. Felornia, 121 Utah 646, 244 P.2d 862 (1952).

[143] UTAH CODE ANNO. §§ 47-2-1 to -7 (1953).

[144] For other tort claims suits see text at note 120 *supra.*

[145] 220 F.2d 666, 670 (10th Cir. 1945).

[146] *Id.* at 672.

[147] Hatahley v. United States, 351 U.S. 173 (1956).

[148] Now 43 C.F.R. § 4112.3 (1956).

[149] Hatahley v. United States, 351 U.S. 173, 177 (1956).

[150] *Id.* at 178.

[151] *Id.* at 181.

VI. MANAGING THE LANDS IN THE PUBLIC INTEREST

The claims under the Tort Claims Act illustrate the dilemma which confronts the BLM and the courts in grazing cases. On the one hand the Bureau must manage the public domain for the benefit of the public by improving the range and preventing overgrazing and consequent erosion of the public lands. On the other hand, the public lands have been, and will continue to be, a mainstay of the livestock industry of the West. When the ranchers have their permitted grazing reduced, either their expenses go up or their production goes down.

While the rancher and the Bureau parry over grazing permits, other pressures are building up for use of the public land. The West is developing into a more urban community, and demand for use of the public lands now comes not only from the traditional users like the livestock owner, logger, and miner, but also from urban residents such as the hiker, fisherman, hunter, and scientist. The BLM is finding that it must satisfy the needs of more and more people.[152] The grassland in western Colorado, eastern Oregon, or mid-Nevada will not remain remote, unwanted, and unattractive.

The Taylor Grazing Act directs the BLM to manage its lands "in order to promote the highest use of the public lands. . . ."[153] The act authorizes the Secretary to exchange public lands for private lands, within or without the boundaries of the grazing districts, and to issue a patent for the exchanged land if:

1. The land received by the United States is of at least equal value;
2. the land received is within the same state, or else within a distance of not more than 50 miles in the adjacent state nearest the base lands; and
3. the exchange will benefit the public interest.[154]

The first two requirements are mechanical problems which the administrative agencies and the courts are accustomed to handling. The third one is both a judicial and a legislative issue. Does the "public interest" as used in the Taylor Grazing Act mean public interest in grazing or a broad public interest, not restricted to grazing and conservation — the multiple use benefit?

In the 1963 case, *LaRue v. Udall*,[155] the court held that "public

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[152] Hochmuth, *Government Administration and Attitudes in Contest and Patent Proceedings*, 10 ROCKY MOUNTAIN MINERAL LAW INSTITUTE PROCEEDINGS 467 (1965).

[153] 48 Stat. 1269 (1934), 43 U.S.C. § 315 (1959).

[154] 48 Stat. 1269, 1272 (1934), 43 U.S.C. §§ 315, 315g(b) (1959).

[155] 324 F.2d 428 (D.C. Cir. 1963). Since one of the findings of the Secretary was that the public interest in grazing was benefitted by the exchange, the judge objecting to a broad interpretation of "public interest" concurred in the holding.

interest" means the latter. In this case the Secretary had found the public interest under the act was not restricted to grazing and conservation, but rather included reclassification of lands within the grazing district and opening such lands to uses other than grazing if they were more beneficial.[156] Since the act also provides that the granting of a permit does not create any right, title, interest, or estate in the lands, a permit holder in the land to be exchanged could not protest the withdrawal of his privilege.[157]

Subsequent to this case Congress has recognized the changed circumstances by enacting two measures directed at the issues discussed by the court in *LaRue.* A Public Land Law Review Commission has been appointed to review all the laws on public lands[158] and one of its particular targets will be the welter of legislation governing the Bureau of Land Management and especially that dealing with its authority to issue patents and grazing permits. Also, the Public Land Law Review Act[159] and the Multiple Use Act of 1964[160] have extended to the BLM principles which had been previously established for the National Forests by the Multiple Use Act of 1960. Thus, Congress in passing these acts has indicated a desire to encourage land use in harmony with the criteria set up by the Outdoor Recreation Resources Commission and also to manage all the federal land so as to benefit the entire public. Consequently, the recent public debate over whether the public lands should be disposed of as rapidly as possible or retained in the "public interest" has temporarily been settled in favor of the public interest in multiple use.

The Taylor Grazing Act fits into the multiple use framework. Multiple use includes not only consumptive use of land such as mining, timber production and the like, but also non-consumptive uses (uses not compatible with the long-held idea of rapid disposal of the public lands) such as fish and wildlife development, recreational uses, wilderness preservation, watershed protection — and grazing.

The Taylor Grazing Act seems to have little need for revision. The Public Land Law Review Commission should investigate permit evaluation in eminent domain proceedings, reasonable grazing fees,

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[156] *Id.* at 430.

[157] 48 Stat. 1270, 1272 (1934), 43 U.S.C. §§ 315(b), (f) (1959).

[158] 78 Stat. 982 (1964), 43 U.S.C. § 1391 (Supp. 1964).

[159] *Ibid.*

[160] 78 Stat. 986 (1964), 43 U.S.C. § 1411(a) (1965). The Multiple Use Act directs the Bureau to protect its vast holdings for either disposal or retention. The disposal criteria are predicated on county zoning. For retained land, the act lists the following criteria for management: grazing; fish and wildlife development; industrial development related to resource production (although it cannot be developed if the land passes to non-federal ownership); mineral production; occupancy in harmony with protection of resource values; outdoor recreation; timber production; watershed protection; wilderness preservation; or preservation of other public values.

and the need for an impartial Hearing Examiner system. In addition it should affirm the definition of public interest, as contained in the majority opinion in *LaRue*; not only in relation to the Taylor Grazing Act, but also in relation to the total federal public lands program.

The principles approved by Congress in the Multiple Use Act of 1964 recognize the change in the West since the days of the open range in the last half of the nineteenth century. The Public Land Law Review Commission should follow this declaration of policy in examining the mass of legislation surrounding the public lands and in recommending which laws shall govern the public domain in the last half of the twentieth century.