Agricultural Economics Miscellaneous Report No. 22 January 1976

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JOINT AGRICULTURAL ECONOMICS - LAW RESEARCH REPORT

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NATIONAL GRASSLANDS: FARMERS'/RANCHERS' RIGHTS UNDER FEDERAL GOVERNMENT GRAZING PERMITS

by

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WHAT ARE THE GRASSLANDS?

The Forest Service, a part of the United States Department of Agriculture, manages four million acres of land known as the National Grasslands in 11 western states. The National Grasslands are classified as "acquired lands" as compared to the usual classification of federal government owned lands as "lands in the public domain." Acquired lands are pieces of property which were sold to private individuals and then purchased back from them by the federal government as compared to land in the public domain which the federal government has always owned.

The National Grasslands are administered under authority of Title III of the Bankhead Jones Farm Tenant Act of July 23, 1937. The Act was passed as a mechanism to buy back, revitalize, and manage the depleted drought stricken agricultural lands of the West. The Secretary of Agriculture was authorized to:

> **develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestration, preserving natural resources, recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises. 7 U.S.C.A. S1010 (1964).**

The Forest Service has developed programs for land management, conservation, and utilization for the various national grassland reservations.

There are three principal grassland areas in North Dakota: Little Missouri, Sheyenne, and Cedar River. The Little Missouri contains 377,954 acres covering parts of McKenzie, Billings, Slope, and Golden Valley counties in western North Dakota. The Sheyenne contains 71,109 acres in Richland and Ransom counties of southeastern North Dakota. The Cedar River contains 6,645 acres in Sioux and Grant counties on the North and South Dakota border.

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MULTIPLE USE CONCEPT

The Forest Service utilizes the basic concept of "multiple use" in its grasslands' land use programs. "Multiple use" planning is designed not only to promote grassland agriculture, but the sustained yield management of forage, fish and wildlife, timber, water, minerals, and recreation resources as well. Grazing permits are supposed to ensure use of proper conservation procedures in order to preserve grassland production for the future as well as the present. The Little Missouri and Sheyenne Grasslands face pressures from coal development and energy transmission, which must be controlled under the "multiple use" concept.

The issuance of grazing permits to individual ranchers or grazing associations has been one of the most visible aspects of the land management programs. In 1973, 3,168,440 grazing permits were issued nationally by the Forest Service for the lands under the Service's control.

LEGAL RIGHTS OF GRASSLAND PERMITTEES

The development of mineral resources on and near grassland areas raises the question what legal rights farmers and ranchers with grazing permits have in controlling grassland use. Can a farmer or rancher object to the granting of an easement over his grazing area? Can a farmer or rancher prevent the leasing of coal rights to land subject to a grazing agreement? To answer these questions, it is necessary to consider the nature of the rights the federal government has given to the grazing permit holder.

Federal Ownership Supreme

The federal government holds full title (fee simple absolute) to the grasslands. It may grant a lesser possessory interest (e.g., a lease for a term of years); or a lesser nonpossessory interest (e.g., an easement for transmission lines); or it may, if given the statutory authority, sell the land outright passing full title to a private citizen.

Leases and easements may carry grants of substantial interests in the land. If the farmer or

rancher has obtained such a substantial interest, he may seek protection of that interest in a court of law if the government attempts to grant another interest that would damage his own. For example, if a farmer had been granted a five-year surface lease by the government, the government could grant the coal rights to another; but if the granting of those coal rights would interfere with the farmer's surface use during the five-year lease period, the farmer would be entitled to compensation for the damage.

Permits Are Only Licenses

In the above example, the rights of the farmer to recover depend upon having a lease term or easement. However, under the typical grazing agreement used between the Forest Service and the Sheyenne Grazing Association, it does not appear that any such substantial interest has been granted. Instead, the Forest Service has given a "License" or "Permit" to utilize the government owned land. A license is not a grant of a possessory interest, but only permits one to come onto the land in possession of another without being classified as a trespasser. A license can usually be revoked at any time. In contrast, an easement is irrevocable during its term, which can be perpetual.

The U.S. Department of Agriculture has specifically stated in its rules and regulations that:

> **A grazing permit or grazing agreement conveys no right, title, or interest of the United States in any lands or resource use authorized thereunder and is a privilege for the exclusive benefit of the person or organization to whom a permit is issued or with whom a grazing agreement is entered into. 36 C.F.R. S231.3 (b) (1973).**

The grazing agreement between the Forest Service and the Sheyenne Grazing Association provides that the agreement will remain in effect for 10 years. Three other sections of the agreement provide for an earlier termination date:

1. **Either party is allowed to terminate the agreement at any time after giving the other six months' written notice.**

2. **The federal government at any time has the right to withdraw the land from the agreement to accomplish any other purposes outlined in Title III of the Bankhead Jones Farm Tenant Act.**

3. **The agreement might be terminated upon giving 30 days' notice that the land is needed for military, or other higher priority purposes. [The agreement does not spell out what those higher priority purposes might be, but energy demands might be suggested as a current high priority.]**

Given these various means to terminate the agreement, it appears that the grazing permits granted to ranchers and grazing associations are little better than ordinary licenses. The power of the federal government to terminate the agreement at any time appears almost complete. Thus, the amount of protection a farmer or rancher could demand in court would be minimal. The grazing permit does not grant a possessory interest in the land which requires protection, but gives only a license permitting cattle grazing and acquisition of hay. The permit would, however, provide legal protection against any third party that would seek to utilize the land without prior permission from the Forest Service.

The above interpretation has been accepted by the courts in the few instances when a grazing agreement has required judicial interpretation. In Osborne v. United States, 145 F.2d 892, 895-896 (9th Cir. 1944), the court stated:

> **(I)t would seem to follow that a permit or limited right of grazing granted by the service would not act to perfect any property right as against the sovereign . . . It is safe to say that it has always been the intention and policy of the government to regard the use of its public lands for stock grazing, either under the original tacit consent, or, as to national forests under regulation through the permit system, as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation.**

Even if a future court would look upon this agreement as a lease for a term of years rather than a license, it is specifically stated in the permit that the Forest Service shall have "the right to use or permit the use of the lands for uses other than grazing include but not limited to prospecting, mining, recovering coal, oil . . ." This passage would indicate, then, an explicit reservation by the government to retain the power to grant both easements and coal leases to provide for energy development.

MEANS OF PROTECTING PERMITTEES' INTERESTS

Because of the limits of the grazing agreement, the farmer or rancher could not prevent the granting of an easement or coal lease, and probably could not insist that the government consult the grazing permittees beforehand. However, the federal government must operate under the National Environmental Policy Act (NEPA) of 1969. The NEPA requires all federal agencies to use a systematic, interdisciplinary approach in planning and decision making that may have an impact on man's environment. The Forest Service is required to file an

Environmental Impact Statement (EIS) which reflects careful study of any possible environmental effects from a proposed major action. The granting of a transmission line or pipeline easement or coal lease would appear to be major federal action requiring the filing of an EIS. In developing this EIS it is required that comments be solicited from the public and those directly affected. Farmers and ranchers whose grazing agreements would be affected would have a means through which to voice their objections and indicate possible adverse environmental effects.

Currently, Dome Petroleum Limited of Canada wants to construct a 2,000-mile pipeline that would run through the Sheyenne National Grasslands. One EIS has been completed and the Sheyenne Grazing Association has been active in making comments and giving recommendations as to the proposed route.

The Little Missouri River National Grasslands and adjacent federal lands have been the subject of an extensive EIS published in December of 1974. This statement will also be subjected to comment by the general public and grazing permittees in the area.

Farming and ranching interests appear to be further protected by the stated objectives of the Forest Service. In the Forest Service Bulletin, "Framework for the Future," February, 1970, the Forest Service declared that it seeks "to expand opportunities for grazing and other uses of public and private range resources" and any mineral development of the land must provide "adequate protection of surface resources." These administrative objectives of protecting the grasslands for agricultural use are based upon the statutory language of the Bankhead Jones Farm Tenant Act which first authorized acquisition of grassland areas. The act states that the service is "to develop a program of land conservation and land utilization . . . assist in controlling soil erosion, reforestration, preserving natural resources . . . but not to build industrial parks or establish private industrial or commercial enterprises." 7 U.S.C.A. S1010 (1964).

This statutory directive will aid in preserving the use of grassland areas by farming and ranching interests in general, but the extent it protects a specific interest of an individual permittee in a legal dispute would be questionable. The statutory goal of allowing for grassland development and use would be applicable to general plans of grassland utilization in a significant area. For example, the EIS on the Dome pipeline easement would take into consideration the statutory language in determining whether the granting of the easement would have adverse consequences on the goals of the Forest Service in relationship to their administering of the National Grasslands.

In conclusion, grazing permittees have little legal standing under present grazing agreements to prevent the Forest Service from expanding the uses of the National Grasslands. But there are other means through which farmers and ranchers can affect Forest Service decisions as to how the grasslands will be used. These means include the National Environmental Policy Act, the Enabling Act of the Bankhead Jones Act which sets forth the basic guidelines for the administration of the grasslands, and the declared policy of the Forest Service to preserve grassland agriculture.