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Whether the American public is aware of it or not, they are increasingly governed directly by appointed agencies, boards and commissions. This is especially true of those who deal in one way or another with the public domain, and consequently with the United States Department of Interior. In this article, the authors examine the methods by which a party adversely affected by an Interior Department ruling might obtain judicial review of that decision.

## JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE MINERAL LEASING ACT OF 1920

*James E. Sperling\**

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### PART I

#### GENERAL BACKGROUND

UNDER the Mineral Leasing Act of 1920 and its amendments,<sup>1</sup> the Secretary of the Interior is charged with the responsibility of administering the leasing for mineral development of lands in the public domain. Since so much of the land area of the Western United States comprises Federal lands, it is not surprising that actions and decisions of the Secretary of the Interior, particularly with reference to the leasing of Federal lands for oil and gas development, should often have a far reaching effect. It is a tribute to the Secre-

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1. Act of Feb. 25, 1920, 41 Stat. 437 (1920), as amended, 30 U.S.C. §§ 181-287 (1964).

tary and to the many dedicated employees of the Department of Interior and the Bureau of Land Management that the administration of the Mineral Leasing Act infrequently results in litigation. However, as the Secretary is often compelled under his statutory grant of authority to render administrative determinations which are adverse to persons holding or expecting to acquire rights in known or prospective mineral deposits, it is not uncommon for the person adversely affected by such a determination to wish to test the correctness of the Secretary's action (or non-action) in court. The purpose of this article is to set forth, in what must necessarily be a broad outline, the various modes of judicial review of the Secretary's decision which are open to such a dissatisfied person. In addition, there will be an attempt at analysis of the situations in which the different modes of review appear to be the most proper. It is hoped that this article will furnish the general practitioner with at least an idea of the problems he faces in seeking review of an adverse decision by the Secretary of the Interior. Although modern rules of pleading and their liberal construction have eliminated many a trap for the unwary litigant, the doctrines of sovereign immunity and indispensable parties and the application of rules of jurisdiction and venue in actions between private individuals and a United States agency or officer thereof raise enough problems to require caution.

Space does not permit an examination of the various actions or decisions adverse to a claimant or lessee which *might* be made by the Secretary of the Interior or his delegate under the Mineral Leasing Act.<sup>2</sup>

The doctrine of exhaustion of administrative remedies, requires that administrative action be completed before courts will undertake to review decisions of the administrator.<sup>3</sup> In general, the action or failure to act which aggrieves the party wishing to appeal will at first involve the manager of the

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2. For a general outline of the scope of the Mineral Leasing Act and procedures thereunder, see Barnhill, *The Mineral Leasing Act; A Guide*, 33 ROCKY MT. L. REV. 267 (1961). For more exhaustive treatments, see HOFFMAN, OIL AND GAS LEASING ON FEDERAL LANDS (1957); ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL AND GAS LEASES (1964).
  3. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). See DAVIS, ADMINISTRATIVE LAW TEXT § 20.01-10 (1959).

local land office of the Bureau of Land Management. In such a case, the first appellate step in the administrative process is an appeal to the Director of the Bureau of Land Management.<sup>4</sup> The rules regulating such appeals are straightforward and are generally furnished to the parties involved along with the decision appealed from, and perhaps the only requirement that need be noted here is that the appeal must be taken by filing a notice of appeal within 30 days in the office of the officer who made the decision appealed from.<sup>5</sup> Assuming an adverse decision from the Director of the Bureau of Land Management, the next step in the administrative process is an appeal to the Secretary of the Interior.<sup>6</sup> Again, the rules regulating appeals from the Director to the Secretary are reasonable and are generally furnished to the adverse party along with the decision of the Director. The 30-day time limit for appeals applies to appeals to the Secretary.<sup>7</sup> One provision of the rules governing appeals at both levels which should not be overlooked is that the appeal will be subject to summary dismissal if a statement of reasons for the appeal is not filed with the notice of appeal or within 30 days thereafter.<sup>8</sup>

Now let us assume that the client has been served with a decision of the Secretary of the Interior, following an appeal to the Secretary from the Director, which upholds the action complained of or refuses to perform the acts sought. The client desires judicial review of the administrative decision. The client's lawyer immediately is faced with the following problems: (1) What is the proper venue? (2) What form should the action take? (3) What statutes govern jurisdiction? (4) Who must be named as parties-defendant? (5) How must service be obtained upon the defendants?

In order to lay the background for a discussion of the proper means of securing judicial review of administrative determinations by the Secretary of the Interior under the Mineral Leasing Act, it is first necessary to review in general

4. For rules governing appeals to the Director, see 43 C.F.R. §§ 1842.2 -5.3 (1965).

5. 43 C.F.R. § 1842.4(a) (1965).

6. For rules governing appeals from the Director to the Secretary of the Interior, see 43 C.F.R. §§ 1844.1 -9 (1965).

7. 43 C.F.R. § 1844.2 (1965).

8. 43 C.F.R. §§ 1840.0-7, 1842.5-1, 1844.3 (1965).

terms the doctrines of sovereign immunity and indispensable parties as they relate to actions against government officials or agencies, and also to trace briefly the historical rules relating to availability of mandamus relief outside the District of Columbia.

### A. Sovereign Immunity

The familiar although shadowy doctrine of sovereign immunity declares that the United States may not be sued without its consent.<sup>9</sup> Where the statutes governing and establishing administrative agencies make no specific provision for judicial review, the action for review should be brought against the officer performing or refusing to perform the action complained of in order to forestall a plea of sovereign immunity. The general theory is that the official who acts outside his statutory authority, misinterprets his authority, or acts pursuant to an invalid statute, is not entitled to rely upon the government's immunity from suit.<sup>10</sup> It is recognized that if the action and the relief sought thereunder is in reality a suit against the government, then the employment of the fiction of naming an individual as defendant should not be resorted to or allowed. Examples of such suits would include those which seek to compel specific performance of contracts entered into by the government,<sup>11</sup> to force the payment of sums of money out of public funds<sup>12</sup> or to secure the possession of government property.<sup>13</sup>

As recently as 1964, it was declared that the doctrine of sovereign immunity arose infrequently in litigation with the Secretary or the Bureau of Land Management.<sup>14</sup> However, an analysis of the holding of the Supreme Court in *Larson v. Domestic & Foreign Commerce Corp.*,<sup>15</sup> the leading case expounding the doctrine of sovereign immunity, demonstrates that the government might be expected to raise the doctrine

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9. See *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846).
  10. *Ex Parte Young*, 209 U.S. 123 (1908). See James, *Indispensability of Government or of Superior Officer in Actions to Review Administrative Determinations*, 10 How. L.J. 22 (1964).
  11. See *Wells v. Roper*, 246 U.S. 335 (1918).
  12. See *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371 (1945).
  13. See *Land v. Dollar*, 330 U.S. 731, 737-38 (1947).
  14. See Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior*, 9 ROCKY MT. MIN. L. INST. 225, 252 (1964).
  15. 337 U.S. 682 (1949).

as a defense in suits brought to review administrative actions of the Secretary of the Interior. In the *Larson* case, the plaintiff had contracted with the War Assets Administration to buy some coal under a contract which the Administration interpreted as requiring a deposit. A letter of credit was offered in place of the deposit, and the War Assets Administration thereupon negotiated for sale of the coal to another. The plaintiff sued for an injunction prohibiting the sale of the coal to another party and a declaratory judgment that he owned the coal and the sale to the second party was invalid. The Supreme Court held that the doctrine of sovereign immunity barred the suit, stating its holding as follows:

We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency.<sup>16</sup>

The doctrine thus enunciated, despite the language of some courts to the contrary,<sup>17</sup> still continues to be very much a part of the Federal law applicable to review of administrative action.<sup>18</sup>

16. *Id.* at 695.

17. In *Smith v. Katzenbach*, 351 F.2d 810 (D.C. Cir. 1965), the court held that the doctrine did not prevent a suit against an official threatening to act unconstitutionally, even though the threatened action is of a type which can only be taken by a federal official. While this ruling may not in fact conflict with the rule laid down in *Larson*, the court in the *Smith* case, in the course of its opinion, stated with reference to the doctrine of sovereign immunity:

There are some gasps of vitality left in this fading doctrine of sovereign immunity—notably in cases involving government property . . . . But it is lifeless when offered as a defense barring examination of a plea that action threatened by an executive official transcends constitutional limitations . . . .

. . . . The doctrine whereby a court denies jurisdiction to entertain a suit upon the basis of a consideration of its merits seems to be an accepted feature of this field of law . . . though one rooted in paradox . . . .

351 F.2d at 813-14.

18. See *Malone v. Bowdoin*, 369 U.S. 643 (1962); *Dugan v. Rank*, 372 U.S. 609 (1963); *Hawaii v. Gordon*, 373 U.S. 57 (1963).

In *Dugan v. Rank*, 372 U.S. 609 (1963), riparian and overlying owners sought to enjoin officials of the Bureau of Reclamation from impounding water at a federal dam on the San Joaquin River, alleging that such impounding contravened the plaintiffs' rights to beneficial use of the waters of the river below the dam. The United States was joined as a party defendant. The Supreme Court held that the government, through its officials, had the statutory power to impound the water and that such seizure was constitutionally permissible. Therefore, even though the action of the officials could be characterized as a "trespass," the injunction would

At least on the surface, it would appear that the doctrine of sovereign immunity thus applied would bar a suit for judicial review of the action of the Secretary of Interior wherein it is alleged merely that the Secretary while acting within his valid statutory authority misconstrued a statute or made an erroneous determination of fact. However, if the Secretary has in fact misconstrued a statute, his action taken pursuant to his erroneous construction of the terms of the authority granted him by the statute *necessarily* exceeds the terms of his statutory authority, for if they did not, his construction of the statute could not be erroneous. By the same token, if his decision is based upon an erroneous determination of fact, or a determination of fact which cannot be supported by substantial evidence, and the existence of that fact is essential to his exercise of authority under the statute, then he has either exceeded or failed to exercise the authority and duties conferred upon him by the statute. Furthermore, the Administrative Procedure Act provides: "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the mean-

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"interfere with the public administration" and would also "expend itself on the public treasury," since the physical solution required the construction, by the government, of ten small dams along the stretch of river involved for the purpose of keeping the water at a level equivalent to the natural flow. Under the doctrine of the *Larson* case, the court held that sovereign immunity barred the suit but that the plaintiffs would be entitled to damages for the interference or taking "in an appropriate proceeding."

In *Malone v. Bowdoin*, 369 U.S. 643 (1962), the plaintiffs filed a common law action of ejectment against a Forest Service officer of the Department of Agriculture, alleging that the defendant occupied certain land which rightfully belonged to the plaintiffs. It was not alleged that the possession was unconstitutional, nor was it alleged that the officer was acting beyond his delegated statutory powers. The plaintiffs' claim was based on the fact that the title of the United States derived from a conveyance in fee by a life tenant and that the plaintiffs were the remaindermen of the life estate. Under the *Larson* doctrine, the Supreme Court held that the suit was rightly dismissed "as an action which in substance and effect was one against the United States without its consent." *Id.* at 648.

See also *Ward v. Humble Oil & Ref. Co.*, 321 F.2d 775 (5th Cir. 1963), in which the plaintiff brought suit to quiet title and to cancel as a cloud upon title an oil and gas lease executed by the Bureau of Land Management. The suit was brought against the Secretary of the Interior and the Director of the Bureau as well as against the lessees. The dispute centered around the question of whether a valid patent had been issued from the United States on the land in question or whether the tract remained public land. The court held that the official defendants had acted within their statutory powers and their actions were not constitutionally void, and that the suit was in reality one against the United States to which it had not consented declaring that the suit was one in essence against a sovereign and could not be "tried behind its back." The court ruled that the complaint should be dismissed as to all parties. See also *Mitchell v. McNamara*, 352 F.2d 700 (D. C. Cir. 1965).

ing of any relevant statute, shall be entitled to judicial review thereof."<sup>19</sup>

Recent decisions have held that this provision of the Administrative Procedure Act constitutes a waiver of the defense of sovereign immunity in actions to which the Act applies.<sup>20</sup> However, even though it is concluded that the Administrative Procedure Act applies and that the particular action is not barred by sovereign immunity, the action should

19. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (a) (1964).

20. In *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958), a local official of the Bureau of Land Management entered an order denying the plaintiff's application for patents to certain mining claims and cancelling his mineral entries thereon. The order was affirmed, following appeals, by both the Director of the Bureau and the Secretary. Suit was brought against the local officers of the Bureau of Land Management to secure review of the order. The district court dismissed the action holding, *inter alia*, that "the action, in effect, is an action against the government of the United States and the government has not consented to be sued." 271 F.2d at 32. In reversing, the Ninth Circuit stated:

We have no difficulty in reaching the conclusion that the Administrative Procedure Act is applicable here both in respect to the agency's procedure and to the right to judicial review . . . .

Furthermore, it seems plain that under § 10 of the Act appellant was entitled to judicial review of the order here involved. That section provides (subject to certain exceptions presently to be noticed by us) that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." The only exceptions are those stated in the first sentence of the section which excepts from this review orders where statutes preclude judicial review, or where "agency action is by law committed to agency discretion." The first exception is not applicable for no statute precludes judicial review here.

Appellees contend that the second section applies,—that in this case the agency action was "by law committed to agency discretion."

Of course the officers of the Bureau of Land Management such as the appellee, Witmer, and those authorized within the Department to review this action, are authorized and required to exercise discretion in passing upon applications for patents to mining claims or upon contests with respect thereto. But this does not preclude judicial review within the meaning of the exception here involved . . . . The exercise of discretion by the agency does not in itself negative the right to judicial review.

*Id.* at 32-33.

In *McEachern v. United States*, 321 F.2d 31 (4th Cir. 1963), the plaintiff was removed from office as a hearing examiner for the Social Security Administration. He thereupon sought review and vacation of the order in the district court, but the suit was dismissed on the ground that the court had no jurisdiction to review the decision of the Civil Service Commission. On appeal, this decision was reversed in part and affirmed in part, the court directing the lower court to allow the plaintiff to amend so as to drop the United States as a party defendant and to implead proper defendants, namely, the members of the Civil Service Commission and Commissioner of Social Security. The court held that the plaintiff had been appointed as a hearing examiner under 5 U.S.C. § 1010 (1964), a part of the Administrative Procedure Act, and that the Act in § 5 [5 U.S.C. § 1004 (1964)], in excepting from review the selection or tenure of an officer or employee of the United States, expressly excepted from the exception "examiners appointed pursuant to Section 1010 of this title." The court held that the selection or tenure of an examiner was therefore reviewable



be brought against the individual officers whose action is sought to be reviewed rather than against the agency or the United States.<sup>21</sup>

under the Act. The court then held that venue of the action could be laid in the District of the plaintiff's residence by virtue of the 1962 Amendment to 28 U.S.C. § 1391(e), and that the same Amendment permitted the officers of the United States or its agency to be sued there.

In *Estrada v. Ahrens*, 296 F.2d 690, 698 (5th Cir. 1961), the court ruled: "The [Administrative Procedure] Act . . . makes a clear waiver of sovereign immunity in actions to which it applies."

These recent decisions recognizing that the Administrative Procedure Act, where applicable, was intended to waive the defense of sovereign immunity, while unquestionably stating what was probably the purpose of the Act, may conflict with certain earlier decisions in which it was held that the Act was not to be construed as an implied waiver of sovereign immunity in all suits against the government. See *Blackmar v. Guerre*, 342 U.S. 512 (1952); *Arizona ex rel. Arizona Bd. of Public Welfare v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954).

21. For an example of the problems which might be raised when a party seeking review of an administrative action simply files suit directly against the United States, see *Chournos v. United States*, 335 F.2d 918 (10th Cir. 1964). The plaintiffs were original locators of placer mining claims. The Department of Interior through administrative proceedings found that there had been no valid discovery of minerals on the claims and declared them to be invalid and of no effect. Without appealing the order within the administrative process (i.e., first to the Director and then to the Secretary), the plaintiffs sued the United States seeking review of the order. The action was promptly dismissed for lack of jurisdiction, and the dismissal was affirmed by the Tenth Circuit. In an opinion which repeated the *Larson* rule of sovereign immunity and at the same time seemed to recognize that sovereign immunity would be no bar to the suit if proper defendants were sued and administrative remedies exhausted, the court said:

The Bureau of Land Management and the United States Department of the Interior are not suable entities, they are administrative agencies of the United States, which has not consented to be sued . . . . There is no allegation or contention that the defendant Nielson acted beyond the scope of his authority. He is a local subordinate of the Secretary of the Interior, and without authority to take any affirmative action which could grant relief to the appellants.

The Administrative Procedure Act, 5 U.S.C., §§ 1001 et seq., does not purport to give consent to suits against the United States. The Act provides that the person suffering legal wrong because of any agency action, or who is adversely affected or aggravated by such action, shall be entitled to judicial review. This review may be obtained only by an appropriate action in "any court of competent jurisdiction." Such an action may not be maintained if the court lacks jurisdiction upon any ground . . . . In *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed.2d 350, the court discussed the nature of the rights of locators to mining claims which had not gone to patent, and stated that controversies over such claims "should be solved by appeal to the land department, and not to the courts." In a footnote (footnote 7, p. 338, 83 S.Ct., p. 383), the court stated that "Claimants today may appeal the Examiner's decision to the Director of the Bureau (43 C.F.R., 1962, Supp., § 221.1), from him to the Secretary (id., § 221.31), and from there to the courts. *Foster v. Seaton* [106 U.S. App. D.C. 253], 271 F.2d 836." Apparently the Supreme Court approves the procedure in *Foster v. Seaton*, supra, which was a suit against the Secretary of the Interior and not the United States. See *McEachern v. United States*, 4 Cir., 321 F.2d 31.

335 F.2d at 918-19.

### B. Indispensability of the Secretary of Interior

In actions for review of an administrative decision under the Mineral Leasing Act brought against a local official in districts outside the District of Columbia, government lawyers have frequently asserted the defense that the Secretary of the Interior is an indispensable party and since the district court lacks jurisdiction over the person of the Secretary, the action is required to be dismissed.<sup>22</sup> The doctrine of the indispensable superior official was stated as follows in the leading case of *Williams v. Fanning*: “[T]he superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.”<sup>23</sup> The doctrine in its application to actions brought against the Secretary of the Interior has led to the conclusion that the Secretary is an indispensable party in actions to compel the issuance of a patent<sup>24</sup> or a lease,<sup>25</sup> but is not an indispensable party where the relief sought is an

22. See, e.g., *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649 (10th Cir. 1960); *Thomas v. Union Pac. R.R.*, 139 F. Supp. 588 (D. Colo. 1956), *aff'd per curiam*, 239 F.2d 641 (10th Cir. 1956).

23. *Williams v. Fanning*, 332 U.S. 490, 493 (1947). The doctrine of *Williams* was apparently relaxed in 1955 in the case of *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), in which the court held that the Commissioner of Immigration and Naturalization was not an indispensable party to a suit brought by an alien to challenge a deportation order since “otherwise in order to try his case an alien might be compelled to go to the District of Columbia to obtain jurisdiction over the Commissioner. To impose this burden on an alien about to be deported would be completely inconsistent with the basic policy of the Administrative Procedure Act to facilitate court review of such administrative action. We know of no necessity for such a harsh rule.” *Id.* at 53. However, in *Ceballos v. Shaughnessy*, 352 U.S. 599 (1957), the issue was whether superior officers must be joined in a suit for declaration that the petitioner was eligible for suspension of deportation and to enjoin the District Director from taking him into custody. The Supreme Court in *Ceballos* repeated the early formal language of the *Williams* test and stated that in *Pedreiro* it had held that the question of indispensability is dependent on the ability and authority of the defendant before the court to effectuate the relief which the alien seeks. The commentators have generally recognized that the *Ceballos* case represents a return to the *Williams* test and an apparent disapproval of the relaxation of that test which had occurred in *Pedreiro*. See DAVIS, *ADMINISTRATIVE LAW TEXT* § 27.08 (1959), wherein Professor Davis, in discussing the effect of the *Ceballos* case on the *Pedreiro* case likened the Supreme Court to “the mother mink who eats her young;” James, *Indispensability of Government or of Superior Officer in Actions to Review Administrative Decisions*, 10 *HOW. L.J.* 22, 29-32 (1964).

24. *Thomas v. Union Pac. R.R.*, 139 F. Supp. 588 (D.Colo. 1956), *aff'd per curiam*, 239 F.2d 641 (10th Cir. 1956).

25. *Warner Valley Stock Co. v. Smith*, 165 U.S. 28 (1897).

injunction restraining the administrative cancellation of a lease.<sup>26</sup>

The problem of deciding whether to sue the Secretary in the District of Columbia, or the district officer in the district of the plaintiff's residence, which previously required the party seeking review to chart a course through the rather confusing decisions defining the doctrine of the indispensable superior officer,<sup>27</sup> have been eliminated by the 1962 amendment to the venue statute which provides as follows:

(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.<sup>28</sup>

There can be little doubt but that the amendment was intended to alleviate the situation faced by the plaintiff who sought review of an action affecting mineral or water rights,<sup>29</sup> and

26. *Pan American Petroleum Corp. v. Pierson*, 284 F.2d 649 (10th Cir. 1960), *cert. denied*, 366 U.S. 936 (1961). See also *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958).

27. See DAVIS, ADMINISTRATIVE LAW TEXT § 27.08 (1959):

A plaintiff who seeks to challenge governmental action taken through a local officer will usually sue the officer in order to escape the doctrine of sovereign immunity. May he sue the local officer, or must he go to the District of Columbia and sue the superior officer? Only slight exaggeration is involved in the statement that nine Supreme Court decisions provide nine solutions.

28. 76 Stat. 744 (1962), 28 U.S.C. § 1391(e) (1964).

29. See S. REP. NO. 1992, 87th Cong., 2d Sess. 3 (1962):

However, disregarding considerations of convenience, broadening of the venue provisions of Title 28 to permit these actions to be brought locally is desirable from the standpoint of efficient judicial administration. 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.

as the Secretary can now be served outside the District of Columbia for the price of a certified letter, the necessity of determining whether the Secretary is in fact an indispensable party has been eliminated.<sup>30</sup>

### C. Unavailability of Mandamus Outside The District of Columbia

In 1813, the United States Supreme Court ruled that the Federal district courts did not have jurisdiction to issue original writs of mandamus.<sup>31</sup> However, in 1838, the Court ruled that the District of Columbia Circuit Court, as the inheritor of the common law jurisdiction of the Maryland courts, had jurisdiction to issue original writs of mandamus.<sup>32</sup> This law remained the same until 1962, and it has been settled law that the district courts outside the District of Columbia could issue writs of mandamus only ancillary to their original jurisdiction and had no jurisdiction to issue original writs of mandamus. The result has been that lower courts have ruled that they are without jurisdiction in cases seeking relief "in the nature of mandamus."<sup>33</sup>

However, in 1962, this rather curious anomaly of the law of Federal jurisdiction was eliminated. In that year, Congress passed Public Law 87-748, which provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."<sup>34</sup> This amendment has greatly simplified the problems faced by a party who seeks to compel an officer to perform a duty owed to him, as it is no longer necessary to travel to the District of Columbia in order to

30. Of course, the amendment to the venue statute does not eliminate the doctrine of the indispensable superior officer. Accordingly, if under the prior law the case is one in which the Secretary would not be an indispensable party, care must be taken to insure that the local official whose action or nonaction is complained of is joined as a party defendant in the proceeding for review. It would seem that in most instances any difficulties could be avoided simply by bringing suit against both the local official whose actions are complained of and against the Secretary.

31. *M'Intire v. Wood*, 11 U.S. (7 Cranch.) 504 (1813). See also *Knapp v. Lake Shore & Mich. So. Ry.*, 197 U.S. 536 (1905).

32. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

33. See, e.g., *Palmer v. Walsh*, 78 F. Supp. 64 (D. Ore. 1948); *Marshall v. Crotty*, 185 F.2d 622 (1st Cir. 1950). See also DAVIS, *ADMINISTRATIVE LAW TEXT* § 23.10 (1959).

34. 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964).

obtain the relief sought. However, the amendment does not solve all the problems surrounding judicial review of administrative decisions under the Mineral Leasing Act. It has been held that the statute does not impliedly waive the sovereign immunity of the United States,<sup>35</sup> and, as will be seen, it has no effect upon the rather limited scope of review available under the mandamus remedy.

## PART II

### THE ACTION FOR REVIEW

Assuming that a party has been aggrieved by a decision of an officer of the Bureau of Land Management under the Mineral Leasing Act, and that the party has appealed that decision to the Director of the Bureau of Land Management and to the Secretary of the Interior only to see the decision affirmed, the case is ripe for the filing of a proceeding in the Federal district court to review the administrative action complained of.

As with any other lawsuit, the first thing to be determined is the time within which the action must be brought. The only applicable statute of limitation states: "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relative to such matter."<sup>36</sup>

The next question the party seeking review must consider is the form in which the action should be brought. The Administrative Procedure Act<sup>37</sup> provides that, in the absence of a special statutory review proceeding, the form of the proceeding for review shall be "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction."<sup>38</sup> It has long been

35. *Smith v. United States*, 224 F. Supp. 402 (D. Wyo. 1963), *aff'd*, 333 F.2d 70 (10th Cir. 1964).

36. 74 Stat. 790 (1960), 30 U.S.C. § 226-2 (1964). See ROCKY MOUNTAIN MINERAL LAW FOUNDATION, FEDERAL OIL AND GAS LEASES § 28.12 n.11-12 (1964), citing *Tallman v. Udall*, 324 F.2d 411 (D.C. Cir. 1963), as holding that a petition for rehearing before the Secretary tolls the 90-day limitation period, which begins to run anew after the petition has been acted upon, provided the petition is considered on its merits.

37. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (b) (1964).

38. *Ibid.*

recognized that the Federal courts are open to actions seeking an injunction or mandamus<sup>39</sup> to correct abuses of administrative action, even in the absence of a specific or general statute authorizing such proceedings.<sup>40</sup> Although a distinction is sometimes drawn between an action for review under section 10 of the Administrative Procedure Act and a "nonstatutory" action seeking review by the historical writs of mandamus and injunction,<sup>41</sup> the only practical distinction for the purposes of reviewing administrative action under the Mineral Leasing Act is between a suit for a writ of mandamus (because of historical limitations on the availability of the writ) and a suit for review under section 10 of the Administrative Procedure Act. Traditionally, the writ of mandamus is not available to control the exercise of discretion,<sup>42</sup> whereas section 10 of the Administrative Procedure Act authorizes review of an action *involving* discretion so long as the action is not *committed* to discretion.<sup>43</sup> Furthermore, since section 10 of the Administrative Procedure Act authorizes suits for "prohibitory or mandatory injunction" and for declaratory judgment, and since the *scope* of review is governed by section 10 in any action to which it applies,<sup>44</sup> it is clear that no practical purpose is served by differentiating between a suit for declaratory judgment or injunction on the one hand and a suit for review under section 10 of the Administrative Procedure Act on the other. Thus, for the purposes of this discussion, it will

39. Note, however, that prior to 1962, an action "in the nature of mandamus" could be brought only in the District of Columbia. See notes 31-33 *supra* and accompanying text.

40. See Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1480-82 (1962).

41. See Byse, *supra* note 40, at 1480 n.3, 1481 n.5; ROCKY MOUNTAIN MINERAL LAW FOUNDATION, FEDERAL OIL AND GAS LEASES § 28.12 at 888 (1964):

Review of Secretarial action . . . [takes] the form . . . of an original action against the Secretary of the Interior in a United States District Court, either in the form of mandamus, injunction, declaratory judgment, or review under section 10 of the APA.

42. See United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903); Seebach v. Cullen, 224 F. Supp. 15 (N.D. Cal. 1963), *aff'd*, 338 F.2d 663 (9th Cir. 1964), *cert. denied*, 380 U.S. 972 (1965).

43. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

44. It is generally recognized that the *scope* of review of administrative action is governed by § 10 of the Administrative Procedure Act unless the case falls within the stated exception precluding review where (1) a statute precludes review or (2) agency action is committed to the agency's or official's discretion. 60 Stat. 243, 5 U.S.C. § 1009 (1964). As pointed out by Professor Davis, review was held precluded in these two situations prior to the enactment of the Administrative Procedure Act, and the Administrative Procedure Act therefore left unchanged the prior law of review-

be assumed that an action for relief will take the form of either (1) an application for an original writ of mandamus, or (2) a suit for review under section 10 of the Administrative Procedure Act.

### A. Mandamus

The writ of mandamus is a proper remedy when the party feeling himself aggrieved by a decision of the Secretary or his delegate under the Mineral Leasing Act seeks only to compel the exercise of some ministerial function. Because of the strict application of the historical rule that the writ is not available to control the exercise of administrative discretion,<sup>45</sup> it will be seen that the mandamus remedy is of limited usefulness in reviewing actions of the Secretary or his delegate under the Mineral Leasing Act.

#### 1. Jurisdiction

By legislation enacted in 1962 and previously discussed,<sup>46</sup> Congress has provided that "the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."<sup>47</sup> It has been held that the statute does not enlarge the scope of available mandamus relief,<sup>48</sup> and creates no new liabilities or causes of actions.<sup>49</sup> The statute does not constitute an im-

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ability. DAVIS, ADMINISTRATIVE LAW TEXT § 28.08 (1959). See also United States *ex rel.* Riverside Oil Co. v. Hitchcock, 190 U.S. 316 (1903). And, the "substantial evidence" test of § 10(e) of the Administrative Procedure Act merely restated that rule as previously developed by the federal courts in reviewing the evidence upon which administrative action was based. See DAVIS, *op. cit. supra* at § 29.01. It appears, then, that except for the special rules applicable to mandamus actions, the reviewability of the agency action and the scope of review will in fact be governed by § 10 of the Administrative Procedure Act, regardless of the form in which the action is brought.

Accordingly, there should be no need for stating that there are four forms of review available: The historical Writ of Mandamus, the historical Writ of Injunction, an action for Declaratory Judgment, and an action for review under Section 10 of the Administrative Procedure Act. See ROCKY MOUNTAIN MINERAL LAW FOUNDATION, FEDERAL OIL AND GAS LEASES § 28.12 at 894 (1964), suggesting these four remedies and advising the parties seeking review to "invoke all applicable methods in his complaint."

45. See note 42 *supra*.

46. See note 34 *supra* and accompanying text.

47. 76 Stat. 744 (1962), 28 U.S.C. § 1361 (1964).

48. Smith v. United States, 333 F.2d 70 (10th Cir. 1964); Application of James, 241 F. Supp. 858 (S.D. N.Y. 1965). See Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. L.J. 19 (1964).

49. White v. Administrator of General Services Administration, 343 F.2d 444 (9th Cir. 1965); Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D. N.H. 1963).

plied waiver of the sovereign immunity of the United States in mandamus actions,<sup>50</sup> and removes no existing statutory bars to such an action other than those of a geographical nature.<sup>51</sup>

### 2. Parties

By definition, mandamus is available only to compel the performance of a ministerial act, and in most situations where the remedy is available the actual performance of the act sought will be done by a local official rather than by the Director of the Bureau of Land Management or the Secretary of the Interior. Thus, in most cases, the local official, whose duty it is to perform the act sought, should probably be joined as a party defendant. However, the doctrine of the indispensable superior officer as laid down in *Williams v. Fanning*,<sup>52</sup> stated that "the superior officer is an indispensable party if the decree granting relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."<sup>53</sup> Since the action taken by the local official is in most instances taken by him as a delegate of the Secretary, who is entrusted under the Mineral Leasing Act with performing the act, the doctrine of the *Williams* case would seem to require that the Secretary be joined in the action seeking mandamus.

### 3. Venue and Service of Process

Since 1962, the problem of deciding whether the Secretary of the Interior is an indispensable party and attempting to discover some means of suing the Secretary for mandamus relief outside the District of Columbia has been eliminated. In fact, insofar as actions for an original writ of mandamus are concerned, prior to 1962 courts outside the District of Columbia were not only improper forums from the standpoint of venue and personal jurisdiction over the Secretary (in that the Secretary could be served only in the District of Columbia), but such courts also lacked jurisdiction to issue original

50. *Smith v. United States*, 224 F. Supp. 402 (D. Wyo. 1963), *aff'd*, 333 F.2d 70 (10th Cir. 1964); *Rose v. McNamara*, 225 F. Supp. 891 (E.D. Pa. 1963).

51. *Sprague Elec. Co. v. Tax Court of United States*, 230 F. Supp. 779 (D. Mass. 1964), *aff'd*, 340 F.2d 947 (1st Cir. 1965).

52. 332 U.S. 490 (1947). See note 23 *supra* and accompanying text.

53. *Id.* at 493.



mandamus relief.<sup>54</sup> As part of the same Act<sup>55</sup> which broadened the jurisdiction of the district courts over actions in the nature of mandamus, Congress also passed the venue statute which has previously been 'discussed'<sup>56</sup> and which provides that the action may be brought in any judicial district in which a defendant in the action resides, the cause of action arose, any real property involved in the action is situated, or the plaintiff resides if no real property is so involved.<sup>57</sup> The summons and complaint are served as in other actions, except that service upon an officer or agency outside the district in which the suit is brought may be made by certified mail.<sup>58</sup>

#### 4. Scope of Relief

As stated above, the scope of relief available in an action for a writ of mandamus under Section 1361 is governed by the prior law.<sup>59</sup> The classic statement of the scope of mandamus relief is found in *Wilbur v. United States ex rel Kadrie*.<sup>60</sup>

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel an action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

. . . . Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.<sup>61</sup>

54. See notes 31-33 *supra* and accompanying text.

55. Act of Oct. 5, 1962, 76 Stat. 744 (1962).

56. See note 28 *supra* and accompanying text.

57. 76 Stat. 744 (1962), 28 U.S.C. § 1391(e) (1964).

58. *Ibid.*

59. See note 48 *supra*.

60. 281 U.S. 206 (1930).

61. *Id.* at 218-19 (Court's footnotes omitted).

Mandamus will lie when the desired action of the officer involves a duty plainly prescribed, but not when the desired actions require acts of examination or consideration.<sup>62</sup> With respect to the interpretation of statutory provisions, mandamus will not lie if the court finds that there is room for 'doubt as to what the statute means.'<sup>63</sup> Mandamus is not proper if there is an adequate remedy at law, including a suit for monetary damages.<sup>64</sup> As in other actions to review administrative decisions, the plaintiff must have exhausted his administrative remedies.<sup>65</sup>

An example of the type of situation arising under the Mineral Leasing Act in which mandamus would appear to be the proper remedy because of the ministerial character of the action involved would be refusal of the Secretary, after having declared certain lands available for leasing, to issue the lease to the highest responsible qualified bidder in the case of competitive bidding<sup>66</sup> or the first qualified person making application to lease lands not within any known geological structure of a producing oil or gas field.<sup>67</sup>

### B. Review Under Section 10 of Administrative Procedure Act

If the action complained of involves the exercise of discretion or the interpretation of a statute the meaning of which is not free from doubt so that mandamus is not available as a remedy, the alternative procedure is a suit for a review of the administrative determination pursuant to section 10 of the Administrative Procedure Act.<sup>68</sup> Under the Administrative Procedure Act, review of administrative determinations is available by means of "any applicable form

62. See *Switzerland Co. v. Udall*, 225 F. Supp. 812 (W.D. N.C. 1964), *aff'd*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

63. *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206 (1930); *Work v. United States ex rel. Dives*, 267 U.S. 175 (1925); *Roberts v. United States*, 176 U.S. 221 (1900); *Switzerland Co. v. Udall*, 225 F. Supp. 812 (W.D. N.C. 1964), *aff'd*, 337 F.2d 56 (4th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

64. *United States ex rel. Girard Co. v. Helvering*, 301 U.S. 540 (1937); *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933).

65. *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535 (1954). See *Jacoby*, *supra* note 48 at 26 n.41, discussing the continued applicability of the doctrine of exhaustion of administrative remedies to suits brought under § 1361.

66. See 74 Stat. 781 (1960), 30 U.S.C. § 226(b) (1964).

67. See 74 Stat. 781 (1960), 30 U.S.C. § 226(c) (1964); *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

68. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction"<sup>69</sup> "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."<sup>70</sup> Just as there is no provision in the Mineral Leasing Act providing for review of administrative actions taken under the Act, there is no provision specifically precluding judicial review. Consequently, the first exception to the actions which are reviewable under the Administrative Procedure Act, namely, that which applies where statutes preclude judicial review, has no application insofar as judicial review of administrative determinations under the Mineral Leasing Act is concerned.<sup>71</sup> The second exception to the reviewability of administrative decisions is that which arises when the agency action is "committed" to agency discretion. Inasmuch as "almost every agency action involves some degree of discretion or judgment," the fact that discretion may be *involved* in the action does not preclude review as long as the action is not *committed* to discretion.<sup>72</sup> In reality, then, there are three levels of administrative discretion which must be considered in seeking review of an administrative determination. The first, where the action involves no judgment or discretion and does not involve the interpretation of an ambiguous statute, presents a situation in which the remedy of mandamus is proper. The second, in which the action involves the exercise of some discretion or the interpretation of a statute the meaning of which is not free from doubt, is subject to review under the provisions of section 10 of the Administrative Procedure Act. In the third situation, in which the action is committed by law to agency discretion, no review is available. On this third level, it has been held that the question of whether oil and gas leases or prospecting permits should be issued with re-

69. 60 Stat. 243 (1946), 5 U.S.C. § 1009(b) (1964).

70. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).

71. In order for review to be precluded by statute within the meaning of § 10 of the Administrative Procedure Act, the statute must expressly preclude review or give "clear and convincing evidence" upon its face of any intention to withhold review and a mere failure to provide for review is not evidence of such intention. See *Legislative History of The Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 275 (1946).

72. *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964); *Homovich v. Chapman*, 191 F.2d 761 (D.C. Cir. 1951).

spect to particular tracts of land is by law committed to the discretion of the Secretary of the Interior and hence is unreviewable by the courts.<sup>73</sup>

An exhaustive review of the types of situations in which it could be said that the agency action (1) involved no discretion or interpretation, (2) involved discretion or interpretation, or (3) was committed to discretion is beyond the scope of this article. In doubtful cases, of course, it is assumed that the positive approach will be taken and that the matter will be presented to the court at least by the plaintiff's counsel as involving no discretion or merely involving, as distinct from being committed to, discretion. For the purposes of this discussion, then, let us assume that it can be determined that the agency action complained of or wrongfully withheld simply involves an exercise of discretion or the interpretation of an ambiguous statute, in which case review is not precluded under the Administrative Procedure Act.

### 1. Jurisdiction

As stated above, the provisions of section 10 of the Administrative Procedure Act which provide that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof,"<sup>74</sup> have been construed by recent decisions as waiving the defense of sovereign immunity and granting jurisdiction to the district courts for a review of administrative decisions.<sup>75</sup> However, the party seeking review would be well advised to plead, as additional bases for Federal jurisdiction, an appropriate section of Title 28, United States Code, in addition to section 10 of the Administrative Procedure Act.<sup>76</sup>

73. See Peck, *Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of Interior*, 9 ROCKY MT. MIN. L. INST. 225, 240 n.51 (1964).

74. 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1964).

75. See note 20 *supra*.

76. Professor Byse, writing in 1962, before the enactment of the new § 1361 granting mandamus jurisdiction to courts outside the District of Columbia, stated the following:

If Section 1361 becomes law, it is likely that careful counsel seeking 'non statutory' judicial review will ground his action on (1) an appropriate jurisdictional section of chapter 85, title 28, *United States Code*, (2) sections 2201 and 2202 of title 28—the Declaratory Judgments Act, (3) section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958), and (4) section 1361. It is likely also that unless government counsel

## 2. Parties

In general, the action for review will seek some specific relief, such as the compelling of agency action which should be taken or the setting aside of some agency action which has been taken. For the most part, the actual performance or nonperformance of the Act in its physical sense will rest with the local land office official. However, the local official in almost all instances is merely acting as a delegate of the Secretary and, under the test in *Williams v. Fanning*,<sup>77</sup> there is a distinct possibility that the Secretary would be held to be an indispensable party. Accordingly, as is the case when relief in the nature of mandamus is sought, the safest way to proceed is to name both the local land office official and the Secretary of the Interior as defendants in the action.

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effectively challenges the applicability of one or more of those provisions, the district court will not draw nice distinctions concerning its scope of review. But if government counsel can show that the court's jurisdiction rests on section 1361, the ministerial-discretionary distinction and other technicalities of mandamus law might become determinative.

Byse, *supra* note 40, at 1517 n.125. The only appropriate sections of Chapter 85, Title 28, *United States Code*, upon which jurisdiction could be grounded in an action to review an administrative decision under the Mineral Leasing Act would be either 28 U.S.C. § 1331 (1964):

[T]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . .

or 28 U.S.C. § 1332 (1964):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

It is doubtful that the majority of cases in which review is sought under the Mineral Leasing Act would involve, for example, an oil and gas lease the value of which exceeded \$10,000. And, while the action for declaratory judgment is certainly a useful vehicle, especially when combined with a prayer for other relief, relief against the Secretary's decision would be a hollow thing indeed if the party seeking review could obtain *only* a declaration of his rights without any possibility of carrying them into effect. Furthermore, the authority of a district court to entertain a suit under the Declaratory Judgment Act is limited by the language of the Act to "a case of actual controversy *within its jurisdiction* . . ." 62 Stat. 964 (1948), 28 U.S.C. § 2201 (1964) (emphasis added). Not surprisingly, it has been held that the Declaratory Judgment Act does not of itself create jurisdiction, but merely adds an additional remedy where the district court already has jurisdiction to entertain a suit. *Wells v. United States*, 280 F.2d 275 (9th Cir. 1960). The conclusion then, is that if it is impossible to allege in good faith that the matter in controversy exceeds the sum of \$10,000, the only jurisdictional bases for a suit for review of an administrative decision under the Mineral Leasing Act are either (1) the Mandamus Statute—28 U.S.C. § 1361; or (2) § 10 of the Administrative Procedure Act.

77. 332 U.S. 490 (1947). See note 23 *supra* and accompanying text.

The venue statute enacted in 1962<sup>78</sup> allows the action for a review under section 10 of the Administrative Procedure Act to be brought in a district in which a defendant in the action resides, the cause of action arose, any real property involved in the action is situated, or the plaintiff resides if no real property is so involved.<sup>79</sup> Service of the summons and complaint outside the district may be made by certified mail.<sup>80</sup>

At this point it might be advisable to insert a word of caution. The venue statute<sup>81</sup> speaks of a civil action in which each defendant "is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, *or an agency of the United States . . .*"<sup>82</sup> This language would seem to contemplate the filing of actions for review against the agency itself, which would mean the filing of an action for review against the Department of the Interior or the Bureau of Land Management. While perhaps no real problem would be presented, and while the authors speak with an abundance of caution, it is recommended that at least until further relaxation of the doctrine of sovereign immunity, the action for review be brought against the individual officials involved rather than against the Department or agency. Even though the law defining the jurisdiction of the court to hear the suit should be the same in either instance, bringing the suit against the Department or the bureau seems simply to invite the government to raise the defense of sovereign immunity.

### 3. *Scope of Review*

Section 10(e) of the Administrative Procedure Act defines the scope of review and the relief which may be granted under the Act as follows:

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

78. 76 Stat. 744 (1962), 28 U.S.C. § 1391(e) (1964). See note 28 *supra* and accompanying text.

79. *Ibid.*

80. *Ibid.*

81. *Ibid.*

82. *Ibid.* (Emphasis added).

applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.<sup>83</sup>

Space does not permit an examination of these rather comprehensive rules of review in their application to specific issues. However, some general statements regarding the scope of review are included herein simply to serve as a broad outline.

*Questions of law.* When the facts upon which the administrative determination was based are not in dispute, and the only question to be decided is the correctness of the Secretary's interpretation of an applicable section of the Mineral Leasing Act itself, the courts will not hesitate to review the Secretary's interpretation to determine if it accords with the language of the statute and the purpose of the statute, gleaned primarily from its legislative history.<sup>84</sup>

83. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).

84. See *Pruitt v. Flemming*, 182 F. Supp. 159 (S.D. W.V. 1960); *Seaton v. Texas Co.*, 256 F.2d 718 (D.C. Cir. 1958); *Land O' Lakes Creameries, Inc. v. Commodity Credit Corp.*, 265 F.2d 163 (8th Cir. 1959); *West v. United States ex rel. Alling*, 30 F.2d 739 (D.C. Cir. 1929); *California Oil Co. v. Udall*, U.S.D.C., Dist. of N.Mex. No. 5729 Civil, Jan. 15, 1965, holding that the Secretary of the Interior could not interpret "actual drilling operations" in 30 U.S.C. § 226-1(d) to mean "drilling must be continued in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geological and other factors normally considered when drilling for oil and gas."

However, since the Secretary is charged with the administration of the statutes, his construction is entitled to great weight and is not normally overturned unless a different construction is plainly required.<sup>85</sup>

With respect to review of an administrative decision involving the interpretation of a regulation enacted pursuant to and not in conflict with valid statutory authority, it is more difficult to overturn the administrative determination. In that situation, the agency's interpretation of its regulation normally governs unless such interpretation is plainly erroneous or inconsistent with the regulation<sup>86</sup> or is so unreasonable or unnatural as to "ensnare and entrap those governed by it."<sup>87</sup> However, the Secretary will not be permitted to make exceptions to his own regulation<sup>88</sup> nor will the courts permit inconsistency in the Secretary's interpretation of a statute or regulation.<sup>89</sup>

*Questions of fact.* Section 10(e) of the Administrative Procedure Act provides in pertinent part:

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court . . . .<sup>90</sup>

Except for the provision in the Mineral Leasing Act providing that the Secretary may himself bring an action

85. See *United States v. Jackson*, 280 U.S. 183 (1930); *Fawcus Machine Co. v. United States*, 282 U.S. 375 (1931); *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956).

86. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

87. *Western Union Tel. Co. v. United States*, 217 F.2d 579, 581 (2d Cir. 1954).

88. See *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

89. See *United States v. Leslie Salt Co.*, 350 U.S. 383 (1956); *Clemons v. United States*, 245 F.2d 298 (6th Cir. 1957); *Atchison, Topeka & Santa Fe Ry. v. United States*, 209 F. Supp. 35 (N.D. Ill. 1962).

90. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).



in the district court to cancel an oil and gas lease,<sup>91</sup> there is no provision in the Mineral Leasing Act providing for a hearing at which evidence can be introduced and witnesses cross-examined prior to the taking of administrative action. Hence, the "substantial evidence" test provided in section 10(e) of the Administrative Procedure Act and the Administrative Procedure Act's requirements with respect to administrative hearings,<sup>92</sup> by their literal terms, are not applicable to hearings under the Mineral Leasing Act nor to actions for a review of determinations based upon factual matters.

However, the Department itself has recognized that the provisions of the Administrative Procedure Act govern hearings on the validity of mining claims, even though no statutory requirement for a hearing existed, for the reason that an unpatented mining claim was a valuable property right protected by the due process clause of the Fifth Amendment.<sup>93</sup> Indeed, it can be argued that the Department should be required to furnish a "trial-type hearing" subject to the requirements of the Administrative Procedure Act in any case where a property right is adjudicated.<sup>94</sup> That question is, however, beyond the scope of this article; and its relevance for our purposes lies only in the fact that, where a hearing subject to the requirements of the Administrative Procedure Act is afforded, or where a discretionary hearing is held before a Field Commissioner,<sup>95</sup> the review of the agency action as pertains to questions of fact will be governed by the substantial evidence and "whole record" test of section 10(e) of the Administrative Procedure Act.

Even where the aggrieved party is afforded no opportunity for a formal hearing, the court in examining the administrative determinations of fact will restrict itself to the administrative record and will not hear the facts de novo.<sup>96</sup>

91. 30 U.S.C. § 188 (1964). See *Boesche v. Udall*, 373 U.S. 472 (1963), holding that the section did not prevent administrative cancellation of an oil and gas lease based on "pre-lease" factors.

92. 60 Stat. 241, 242 (1946), 5 U.S.C. § 1006-07 (1964).

93. *United States v. O'Leary*, 63 Interior Dec. 341 (1956). See also *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958).

94. See *ROCKY MOUNTAIN MINERAL LAW FOUNDATION, FEDERAL OIL AND GAS LEASES* § 28.11 (1964).

95. See 43 C.F.R. §§ 1851.1 -.9 (1965).

96. See *Noren v. Beck*, 199 F. Supp. 708 (S.D. Cal. 1961).

The leading case defining "substantial evidence" as that term is used in the Administrative Procedure Act is *Universal Camera Corp. v. NLRB*. The Court, quoting from *NLRB v. Columbian Enameling & Stamping Co.*,<sup>97</sup> said:

Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."<sup>98</sup>

The "whole record" test means that: "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."<sup>99</sup> Thus, it is seen that the rules governing the scope of review of evidence in an action to review an administrative examination of the Mineral Leasing Act are similar to the familiar rules relating to the substantiality of evidence to support a jury verdict. It goes without saying that the scope of review of the facts, thus defined, is restrictive, and this fact should be taken into account when determining whether an action to review the administrative decision should be brought in the first instance.

*Review of discretion.* As stated above, the Administrative Procedure Act does not prevent the review of agency action which merely involves the exercise of discretion, as long as the action is not "committed" to discretion.<sup>100</sup> Section 10(e) of the Administrative Procedure Act declares that the court shall set aside agency action which is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."<sup>101</sup> Thus, even though the action complained of involves the exercise of discretion, it can be set aside if it is found to be arbitrary or capricious or an abuse of discretion.<sup>102</sup> The decisions allowing review of administrative action involving discretion for the purpose of determining whether the action is arbitrary, capricious, an abuse

97. 306 U.S. 292, 300 (1939).

98. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

99. *Id.* at 488.

100. See note 72 *supra* and accompanying text.

101. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (e) (1964).

102. See *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1958); *Homovich v. Chapman*, 191 F.2d 761 (D.C. Cir. 1951).

of discretion, in excess of statutory authority, or based upon findings of fact not supported by substantial evidence, effectuate the purpose of the Administrative Procedure Act. It is to be hoped that the attitude expressed in early decisions involving the Secretary of the Interior, which held that a determination of fact by the Secretary is conclusive in the absence of fraud or imposition,<sup>103</sup> and that the exercise of his discretion could not be controlled,<sup>104</sup> belongs entirely to the past.

### CONCLUSION

No provision for judicial review is found within the Mineral Leasing Act. Therefore, review of administrative decisions under that Act must be obtained by suit against the Secretary in a federal district court, seeking either mandamus relief if the action sought to be compelled can be classed as "ministerial" or review under section 10 of the Administrative Procedure Act in other cases. Since the determination of what actions are ministerial and what are discretionary is seldom free from doubt, the safest procedure would be to file an action seeking both mandamus relief and relief under section 10 of the Administrative Procedure Act, alleging any other bases of Federal jurisdiction which may be appropriate. Recent amendments to Title 28 of United States Code have greatly expanded the availability of both forms of review, and have removed many bars to judicial review which formerly existed by virtue of the doctrines of the indispensable superior official and unavailability of mandamus relief outside the District of Columbia. The doctrine of sovereign immunity continues to present a problem in judicial review of administrative actions, but careful pleading and attention to the basis upon which review is sought should avoid application of the doctrine.

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103. See *e.g.*, *Cameron v. United States*, 252 U.S. 450 (1920).

104. See *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U.S. 316 (1903).