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ADMINISTRATIVE PROCEDURES

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INTRODUCTION

THE Public Land Law Review Commission's substantive recommendations generally are bold and far reaching placing emphasis on modern planning techniques and environmental controls, but unfortunately the administrative procedures recommendations represent little more than the pouring of old wine into new bottles. The recommendations are based in part on an underlying study[1] which reflects a prodigious effort of scholarship and the sagacious comments of one who has devoted a lifetime to the study of administrative law, but which fails to inquire into how the administrative process really works. This is not to suggest that none of the recommendations have merit, but rather that they fail to explore, as is characteristic of much of current administrative law scholarship, alternative procedures for resolving conflicts, exercising discretion, evolving and implementing policy so desperately needed if the modern land policies otherwise recommended are to be effectuated. The advanced land planning and use recommendations of the *Report,* if implemented, inevitably will place a tremendous strain on administrative procedures and, in the author's judgment, if accompanied by some of the recommendations for antiquated administrative procedures will overwhelm the administrative process.

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1. MCFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS. (PLLRC Study Report, 1969). [Hereinafter cited as ADMINISTRATION PROCEDURES STUDY].

A good deal of the administrative procedure recommendations reflect a longing for a simpler society and a less complex set of problems.[2] The ideal posed is a system under which Congress establishes guidelines and the details are filled in by the public land agencies through rule-making[3] resulting in a high degree of probability in terms of predicting decisions and permitting all concerned without too much legal advice to determine where they stand with respect to public land matters. Under such a system, it is blithely assumed, most of the appeal process will be greatly simplified (and criticism eliminated) as it will be a relatively easy matter for reviewers to reach a correct decision.[4] The *Report* categorically rejects the use of administrative adjudication to develop and evolve policy and law, thus placing the Commission squarely on the side of the late Justice Jackson who in dissent characterized such ad hoc "rule-making" as administrative authoritarianism.[5]

RULE-MAKING

The Commission's *Report* declares: "The lack of specific and meaningful guidelines in most of the public land laws is a significant contributing factor underlying many procedural complaints."[6] This may or may not be; presumably, it is based on the contract Study which takes the public land agencies to task for not utilizing their rule-making powers so as to implement substantive provisions to a greater extent.[7] Insofar

2. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 251 (1970). [Hereinafter cited as REPORT].
3. REPORT, 251.
4. Thus the Commission in rejecting an independent review board concluded that by providing more specific guidelines in "statutes or regulations, which spell out the nature of rights or privileges at issue and the standards under which they can be acquired, terminated or otherwise affected . . . would largely eliminate the need for any independent administrative review board." *Id.*, 254.
5. Securities and Exchange Comm'n v. Chenery, 332 U.S. 194, 216 (1946).
6. REPORT, 251.
7. "[It] is quite apparent that the public land agencies now do not attempt to utilize the rule-making process for the development of policy but only for routine administrative purposes." ADMINISTRATIVE PROCEDURES STUDY 308. The Study is also critical of the failure to utilize "interpretative regulations" of the type routinely employed by Internal Revenue Service. *See id.* at 308-399. The Study in this respect ignores the available (albeit inadequate) procedures within the Department of the Interior for interpretative memoranda; perhaps, because not set forth in the regulations or as an established procedure. In fact, however, the Associate Solicitor for Public Lands renders interpretative opinions (or memoranda) largely in his capacity as

as the Study itself is concerned, one can only say that the assertion is not proven. In fact, the Study contains much evidence of substantive implementation through statutory standards;[8] points out that in many other instances that rule-making largely tracks the statute because the statute is so specific and detailed,[9] and observes that the agency cannot be expected to resolve policy issues through rule-making where the issue is a politically sensitive one and Congress itself vacillates as to what should be an appropriate policy.[10] Further, the study contains no real analysis of the flow of adjudicatory decisions in terms of the extent to which regulations and/or precedent are relied upon as a basis for decision.[11] The Com-

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legal advisor to the Director of the Bureau of Land Management. If the matter is of sufficient importance it is asigned an M number and is published. A large number of such opinions, however, are given without being assigned an M number and these are not generally published, although they are systematically filed by the docket section of the Department. Interview with Thomas Cavanaugh, Associate Solicitor, on August 27, 1965.

8. Regarding oil and gas leasing the Study states: "The regulations substantively implement the statute in important respects" and then lists a number of such regulations. ADMINISTRATIVE PROCEDURES STUDY 59. Further, "the separate regulations respecting other Mineral Leasing Act minerals also substantively implement or interpret the statutes as well as add to the statutory procedures." *Id.* at 59-60. The operating regulations of the U.S.G.S. contain "some of the most significant substantive implementations of the statutes. . . ." *Id.* at 61.

9. Regarding patent application procedures for mining claims: "In the face of statutes thus specific, substantive implementation by regulation is minor in character. . . ." ADMINISTRATIVE PROCEDURES STUDY 54.

10. "[The] agencies should not be criticized for failure to venture the explications of policy on subjects upon which Congress itself is sharply divided. . . ." *Id.*, 307.

11. The author selected at random the first twenty-one matters reported in Gower's Federal Service for Oil and Gas in 1969. Three involved memoranda rather than decisions and were eliminated leaving a total of 18 cases. Three of the cases involved Duncan Miller and the same contention pertaining to bitumen tars that had been rejected in 1966 and on the basis of its prior decision appellant's contentions were denied. *See* note 26, *infra*, and related discussion. Four cases involved accreted lands which are under the jurisdiction of the Department of the Army title of which was being disputed by the State of Louisiana. The Department initially sustained rejection of the offers based upon a 1962 decision; however, upon reconsideration, consideration of the offers based upon a current record was authorized as it appeared that the Department of the Army was now amenable to leasing and it might be in the interest of the United States to raise the title issue through the issuance of oil and gas leases. Three of the cases involved late rental payments and were resolved on the basis of prior decisions and a reasonably clear interpretation of the statute. Two involved party in interest statements and are based on prior decisions. One involved an offer to lease an alleged hiatus and was resolved by applying the well-established principle that monuments on the ground control descriptions. One case involving utilization of the multiple-mineral development statute procedures for clearing title clouds raised by old unpatented mining claims, was suspended pending determination of issues presently being litigated in the courts (*see* note 36, *infra*). In the remaining four cases the BLM was reversed and the Solicitor found for the applicant based upon the Solicitor's interpretation of the relevant regulations.

mission's insistence on rule-making as a preferable, if not exclusive means of developing the law is supported only by *a priori* reasoning and a lay concept of the "rule of law."

The Study's case for the failure of the Department of Interior to utilize its rule-making power is based largely on the failure of the Department to define the "valuable mineral" or "discovery" concept through rule-making.[12] One may question whether the Department has authority in this area beyond the adoption of a so-called interpretive rule rather than legislative rule,[13] but this aside it is clear that the development of this concept through "adjudication" has been an uneven one.[14] However, the failure in this regard (if it may be regarded as such) is not a result of the wrong choice between rule-making and adjudication, but the lack of a national policy with respect to mineral development (of the hard rock type) in the context of public land law and the archaic nature

12. "Specially noticeable is the failure to implement, even despite aid from the courts . . . the statutory term 'valuable' mineral for purposes of valid discovery." ADMINISTRATIVE PROCEDURES STUDY 54. "On the procedural side, again there is notable failure to emphasize the place in the procedures of the requisite discovery of 'valuable' mineral—which would be helpful in warning against making locations in advance of due discovery." *Id.* 308. "In this field [interpretative regulations] an example would be a possible regulation explicating the administrative understanding, requirements, and application of the phrase 'valuable mineral' as used in the Mining Location Law—which would bring the matter out into the open, so to speak, rather than leaving it to be gleaned from departmental decisions." *Id. at* CJR. These comments in terms of the concrete substantive issue involved divorce the text of the mining law from its historical origins and development and from how the law operates in practice. The Courts have developed the valuable mineral concept primarily in a different context—conflicts between two conflicting unpatented claims. The role of the Courts has not been a particularly constructive one. Someone better talk to the mining claimants who are to-day every day of the year locating claims without having made a discovery—the problem in this area is not the need for a "warning" about the discovery requirements. Reliance is being placed upon *pedis possessio* (which is not as the Study states a "non exclusive right" *id.* at 55) and the unwritten law which to a degree functions because all locators are in the same position and, hence, must fear retaliation if they jump someone else's claims. On *pedis possessio see* note 17, *infra.*

13. The Mineral Location Act (17 Stat. 91) contains no delegation of rule-making authority to the Secretary of Interior. According to the Study there are 400 separate statutory sections conferring rule-making powers on public land agencies. ADMINISTRATIVE PROCEDURES STUDY 234. The general rule-making authority, however, referred to by the Study (*id.* fn 17 at 249) refer to mineral leasing and lignites only.

14. The development of the valuable mineral concept has involved an inter-play between judicial decisions and Department of Interior decisions. Judicial decisions have grown out of adverse proceedings ancillary to a patent application, conflicts between rival mining claimants and judicial review of administrative decisions. Administrative decisions have involved contest cases both in connection with applications for mineral patents and unpatented mining claims. An early statement of the prudent man test from Castle v. Womble, 19 L.D. 455 (1894) is "where mineral is found and the evidence shows that a person of ordinary prudence would be justified in the further

of the location system.[15] The Administrative Procedures Study has an Alice in Wonderland air about it in this context in that it assumes that only patented mining claims and the patent procedures for mining claims are relevant; in divorcnig substance from procedure it fails to take into account the havoc unpatented mining claims raise in public land administration and the role the contest procedure plays in this context.[16] One can make a rather good case that the development of the valuable mineral concept through adjudication over a period of years has evolved the best possible policy in the light of the context within which it operates.[17] In a situation in

expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine." A comparable judicial statement of the rule can be found in Chrisman v. Miller, 197 U.S. 313, 322 (1905). An important modern qualification (but in the context of a patent application) is the holding that it is not "enough that the showing might warrant further exploration in hopes of finding a valuable deposit." United States v. Altman, 68 I.D. 235 (1961). An administrative decision also holds that "it is reasonable . . .to apply to a higher standard and more rigid compliance with the requirements of the mining laws where the claim is located within a National Forest." Eleanor A. Gray, GFS Mining SO-1964-25, A-28710 (May 7, 1964). Finally, in *Coleman*, the Supreme Court sustained the denial of a mineral patent because there was no market for the mineral stating, "profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact." United States v. Coleman, 390 U.S. 599, 602 (1968). However, at the same time in cases between conflicting unpatented mining claims extending back to *Chrisman v. Miller, supra*, the "decisions exhibit a marked liberality in sustaining a finding of discovery." Western Standard Uranium Co. v. Thurston, 355 P.2d 377, (Wyo. 1960).

15. Some of these deficiencies are recognized in those portions of the Report dealing with Mineral Resources. *See* REPORT 124-130. For an earlier recognition of these problems *see* C. Martz, *Pick and Shovel Mining Laws in an Atomic Age: A Case for Reform*, 27 ROCKY MTN. L. REV 375 (1955). *See also The Law of Uranium Development—A Symposium*, 9 WYO. L. J. 137 (1955).

16. The unpatented mining claim gave the locator the exclusive right to possession of the surface prior to patent. Prior to August 14, 1954, these rights were such that they precluded the issuance of a subsequent federal oil and gas lease. The Multiple Mineral Development Statute (30 U.S.C.A. § 521) adopted in 1954 modified prospectively the rights of a mineral locator so as to permit leasing for leasing act minerals on located lands and the Surface Resources Act adopted in 1955 (30 U.S.C.A. § 601) restricts surface use by the mining locator and permits to a degree the appropriate federal agency to manage other surface resources. However, mining remains paramount so as to limit the extent to which environmental controls can be imposed and after patent the mining claimant is entitled not only to the minerals but also the surface. The administrative contest procedure in connection with applications for patents has been the means by which the Forest Service and the Department of Interior have attempted to preclude surface resources from passing into private ownership where the mineral claim is based on questionable mineral values and as used in connection with unpatented claims is a device for clearing title to federal lands and preventing the use of the claim for non-mineral purposes.

17. Since very few minerals are discovered on the surface, the mining operator needs reasonably extensive acreage to justify incurring substantial exploration expenditures in the form of exploration drilling and the like. The practice, therefore, is to locate claims before discovery or on the basis of the presence of some but not commercial mineralization. The presence of some mineralization is sufficient to protect the claim against other locators (*See*

which Congress has been unwilling to face up to the consequences for almost a 100 years, it is difficult to fault the Department for belatedly having done so. If it were not for concrete cases requiring specific adjudicative decisions by the Department of Interior the law would be an even greater morass in this area.[18]

This is not to say that Congress in certain areas shouldn't lay down better guidelines or that the public land agencies should not do a better job of implementing policy through rule-making. In areas of broad policy, particularly politically sensitive ones, Congress should make a deliberate choice and spell it out. The general political choices between conservation vs. development with the major subdivisions thereof should be made by Congress. Substandards in an area in which expertise is significant and in areas in which Congress does not have the time or predilection to make an informed choice should be developed by the agency. Rule-making is often, if not generally, the ideal method for developing such standards because it permits wider participation in the decision and generally acts prospectively.[19] However, it is not possible to foresee every variation of a problem and there are some problems that are better handled on the basis of accumulated

note 14, *supra*) and even in the absence of mineralization the locator will be protected against other locators to the extent of his claim if in actual possession and diligently seeking discovery. Adams v. Benedict, 327 P.2d 308 (N. M. 1958). The latter doctrine is generally referred to as *pedis possessio*. As against the federal government even the declaration of a claim as null and void for lack of discovery does not preclude the mining claimant from continuing to explore and rely on the *pedis possessio* doctrine. United States v. Carlile, 67 I.D. 417 (1960). The mining claimant without protection is one who has discovered a deposit which because of its grade and/or the current market price for the mineral cannot operate the deposit at a profit. In addition the mining claimant who cannot obtain a patent because of lack of discovery will not be able to continue to explore if the lands are withdrawn. The system is far from an ideal one, but in view of the competing interests involved it might be difficult to devise a better one without amending the statute which the mining industry has short-sightedly over the years regarded as sacrosanct.

18. In all probability an attempt to "legislate" through rule-making in this context would have reflected the same type of stand-off that has resulted in legislative inaction by Congress. Unlike some other problems (oil-shale development, for example) the most pressing mining law problems could not be deferred indefinitely.

19. ". . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise . . ." Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947). *See also* Davis, Discretionary Justice 55-65 (1969).

case experience. This is, of course, the genius of the "common law" in that it operates in the context of concrete facts based on an actual record rather than hypothetical assumptions concerning the nature of the problems and its perimeters. The area of environmental control, one would think, may be a good example; certainly, we will have better standards after 10 years of actual case experience than we can hope for now. The Commission's *Report* reflects much useful thinking in this area,[20] and undoubtedly somewhat general standards can be adopted now through the rule-making process, but public policy should not be denied the contribution that the flow of decisions can make in refining and evolving those standards.

Nor can one argue with the recommendation with respect to rule-making that "Deliberately instituted and specially staffed organizations are essential. This should be an integral part of policymaking and not be relegated to the clerical or housekeeping level."[21] This recommendation is appropriate for most administrative agencies; the failure to implement it may be the result of inertia and inattention or it may be the failure to provide the staff and funds. Nor can one argue against greater public participation in the rule-making process which as a very minimum should follow APA procedures (which the BLM has been doing) and which should in some instances provide for public hearings.[22] A citizen advisory board to advise the heads of departments with respect to rule-making as recommended[23] may also be appropriate, although one can argue that it is not possible to consult such boards "on contemplated changes in any and all aspects of public land policy." The Public Land Law Review Commission appears to be much impressed with such Boards because of its apparent success in utilizing one; however, one must take into account that the Commission has had but one specific task to accomplish over a four and one-half year period. The heads of agencies must have some discretion as to the degree to which they consult with such an advisory board.

20. REPORT 77-80.
21. REPORT 252. In addition as recommended by the Study, selected portions of the departmental manuals should be promulgated as rules. *See* ADMINISTRATIVE PROCEDURES STUDY 269-270.
22. *Ibid.*
23. *Ibid.*

The really startling recommendation is "that agencies be prohibited from adjudicating any case other than in accord with standards and interpretations contained in published regulations. Where Congress has provided statutory rights, the agencies should be prohibited from denying the right on any grounds not stated in the regulations. . . ."[24] If this means in accord with general standards, it will not change the results of adjudication. In fact, it will encourage the use of general standards in rule-making and make rules less useful than heretofore. It will, in any event, cause decision makers to be less articulate in rationalizing the basis for their decisions. If on the other hand, it means every decision must be based on a specific regulation or interpretation without room for further interpretation, it will result in poor quality decision making and delayed (if not indefinitely postponed) policy formulation. Which result will actually follow, the author would hesitate to predict. But one consequence is quite predictable and that is there will be innumerable arguments between the parties as to whether there is a regulation or prior interpretation covering the case being adjudicated. It is submitted that such arguments will do nothing but obscure the real issues in the case.

Let us take a concrete example. One Duncan Miller[25] applies for and receives an oil and gas lease. He contends that it entitles him to all the "oil" underlying the tract including those found in bitumen tars. In fact, at the time his lease was issued there was no statute, regulation or interpretation that specifically says that he was not so entitled. Based, however, on legislative history, consistent administrative construction, etc., the Department concludes (and probably all oil and gas lawyers would agree) that the federal oil and gas lease does not

24. *Ibid.* It is difficult to understand how this recommendation would be implemented if, as is stated in the Report, adjudication involves "a multitude of unrelated and usually factually distinguishable cases." *Id.* at 252. How will the rule-makers ever catch up with the cases? One paragraph later the Report contradicts itself by asserting (albeit after more prodigious rule-making efforts), that it will only be "unique cases" in which there will not be applicable "published standards." *Ibid.*

25. According to a recent Solicitor's Opinion Duncan Miller has filed over 200 appeals to the Secretary over the past 14 years. The appeals are described as being invariably "discursive, incoherent documents replete with irrelevances," requiring the Department to be "very patient in attempting to extract meaningful arguments from the appeals." Duncan Miller, GFS Oil and Gas SO-1969-6, A-31005, March 4, 1969.

include bitumen tars.[26] Consider the ramifications of the Commission's recommendations when two applicants are competing for a lease to the same tract and one contends that the other for one reason or another is not entitled to a lease advancing in support thereof a reasonable interpretation of the statute of the regulations. The first qualified applicant has a statutory right to the lease, the Courts have said, even though there has been a prior but deficient application.[27] Assuming a deficiency in the first application based upon a reasonable construction of the statute, if such construction is not expressed in the regulations or a prior interpretation, how does the agency adjudicate so as to resolve the issue between the competing applicants?

There is considerable danger in deluding ourselves into thinking that better statutory guidelines and a more effective use of the rule-making power minimizes the problem of discretion. The power of decision makers within the administrative process to make a choice among competing alternatives is inherent and essential both in terms of formulation of evolving standards and in terms of deciding particular cases. It is a dangerous deception because to the extent the public land agencies are absolutely precluded from evolving policy incidental to ad hoc adjudication public lands, or their use, will pass into private hands under circumstances inconsistent with the general public interest. Even more important, to the extent we delude ourselves into thinking that rule-making will always effectively control discretion we fail to explore alternative methods of controlling, limiting and structuring discretion.[28]

In view of the extended role envisioned by the Commission's *Report* for the public land agencies, much of which involves the breaking of new ground, the necessity of interpretation as part of the adjudicative process will increase rather than lessen even if Congress were prepared and capable of adopting guidelines as extensive as those envisioned by the Commission and even though a deliberate effort is made to

26. Duncan Miller, 73 I.D. 211 (1966).
27. *See* Davis, Discretionary Justice—A Preliminary Inquiry, Chs. III through V (1969).
28. McKay v. Wahlemaier, 226 F.2d 35 (D.C. Cir. 1955).

formulate policy through rule-making. Hard-rock minerals in the future would be subject to what is in large part a permit and leasing system which inevitably will breed the type of litigation so prolifigate with respect to oil and gas leasing.[29] There will be dispositions of grazing lands[30] and lands for intensive agriculture[31] in each instance requiring a determination of whether such lands are "known mineral lands" which is to be the key to whether or not minerals are reserved to the government.[32] A glance at a chart of the type of environmental standards that might be established included, but not specifically endorsed at pp. 78-79 of the Commission's Report, makes apparent the innumerable and difficult problems of interpretation that will arise in applying such standards.

29. One need only examine random volumes of Gower's Federal Service for Oil and Gas to realize what a litigation breeder the leasing system is. The description, filing, rental, royalty and work requirements envisioned for the new mining location system (*See* REPORT 121-130) and the resolving of conflicting applications for permits will undoubtedly generate similar administrative litigation. While there is presently a substantial amount of adjudication within the Department involving the mining laws, most of the cases involve either the issue of "discovery" or "common variety" mineral.

30. Although the Report starts out with the declaration on p. 1 that "we urge reversal of the policy that the United States should dispose of the so-called unappropriated public domain lands," it is clear from what is said generally and specific recommendations that fairly large-scale disposals are contemplated. One of the largest disposals would result from the recommendation that out of the 273 million acres now being used for grazing a determination of lands chiefly valuable for domestic livestock be made and (with some qualification) disposed of at market value primarily to grazing permittees. REPORT 115.

31. REPORT 179-180.

32. REPORT 136-137. On the appropriate standard for determining a mineral reservation within three paragraphs three different general standards are employed: (1) "All mineral interests known to be of value should be reserved . . ." *id.* at 136. (2) "Reserving valuable mineral interests . . ." *id.* at 137. (3) "Land is not valuable for minerals . . ." *id.* at 137. The latter standard is used in the context of allowing surface owners to purchase previously deserved mineral interests and, perhaps, is intended to be a different standard. Thus, the Commission fails to face up to the very crucial question of what type of mineral value will determine whether minerals are to be reserved to the United States. If it is to serve its puropted purposes of "providing potential revenues," "permitting consolidation of mineral interests for potential development," and to forestall "possible windfallh to surface owners" (*id.* at 137); presumably, the reservation should be based on prospective rather than established mineral value. If it were otherwise, one could hardly square the other recommendations of the Commission attaching a relatively high priority to mineral development. *Id.* at 121-122. With lands programmed for withdrawal completely from mineral development (*id.* at 123) and mineral development restricted in favor of environmental controls (*id.* 68-70), it would seem to be sheer folly to dispose of potential mineral lands for grazing and agricultural purposes. Compare reservations under the present homestead laws for certain leasing act minerals if the lands are "withdrawn or classified or reported as valuable" for such minerals. 30 U.S.C.A. § 122. *See* Donald S. Tedford, GFS Oil and Gas SO-1964-36, A-29963, March, 24, 1964 and Erma F. Anderson, GFS Oil and Gas SO-1963-64, A-29513, July 5, 1963, holding that the appropriate standard in this context is prospective mineral value.

The "rule of law" does not mean, and has never meant except as an uninformed lay view, that the law must specifically and precisely cover each situation. The "rule of law" means that a reasonable interpretation of the sources of law (which includes statutes, regulations, legislative history, administrative constructions of long standing, the purpose of the statute and all the other aids to statutory construction) has been reached after a consideration of the competing interpretations advanced by adversary parties. We should get on with the task of improving the administrative process rather than imposing impossible, unrealistic and unique burdens on public land administrative procedures.

ADJUDICATION-HEARINGS

The dissatisfaction with the hearing process reflected in testimony given before the Commission is probably attributable in part to the substantive doctrines applied by the Department.[33] It is probably a safe assumption that much of the substantive criticism has been engendered by a few crucial decisions (which have then become precedents) relating to "discovery,"[34] "common variety minerals,"[35] "oil shale claims"[36] and a limited number of facets of oil and gas leasing.[37] The hearing and appeal procedures themselves probably generate much of the dissatisfaction, and, indeed, the procedures are vulnerable to criticism and in some respects are constitutionally questionable.

There is little published information other than the regulations available as to how the adjudicative process actually

33. The author has not had an opportunity to read the transcript and hence this paragraph is based on supposition. Both the Study and the Report make incidental references to the testimony without specifically relying on same as a basis for their recommendations. *See, e.g.*, REPORT 253, 254, 255.

34. *See* note 14, *supra.*

35. *See,* for example, Kelly Shannon, 70 I.D. 136 (1963) involving building stone as a common variety mineral and holding that any building stone used as such is a common variety mineral. *Compare* United States v. Coleman, 399 U.S. 599, 604 (1968) resulting in an unacknowledged revision of the Department's position in United States Minerals Development Corp., 75 I.D. 129 (1968). *See also* McClarty v. Secretary of Interior, 408 F.2d 907 (1969).

36. *See* Union Oil Co. of California, 71 I.D. 169 (1964) reversed in Udall v. Oil Shale Corp., 406 F.2d 759 (10th Cir. 1969) *cert. granted* October 13, 1969 *sub nom* Hickel v. Oil Shale Corp.

37. *See,* for example, Associate Solicitor's Opinion M-36776, GFS Oil and Gas, SO-1969-15.

works within the Department of Interior. One wishes that the Administrative Procedure Study had documented the actual functioning of the appeal process more thoroughly. How are issues framed, what does the record consist of, who is consulted, who participates in the decision, who writes the opinion, etc., etc. are some of the pertinent questions that might have been answered. In fact no clear picture of how the adjudicative process works in practice emerges from the Study. Appraisal is further complicated by the fact that the Department adopted substantial modifications in its appeal procedures almost simultaneously with the publication of the Commission's *Report*.[38]

For descriptive purposes adjudication pertaining to public lands within the Department of the Interior can be divided into two broad classifications—(1) mining and grazing contests which are subject to the provisions of the Administrative Procedure Act[39] and (2) cases arising under the Mineral Leasing Act and other matters pertaining to public land administration which are not subject to the Administrative Procedure Act.[40] A basic difference between the two procedures is the fact that the former involves a hearing as of right before a Hearing Examiner and results in a record as well as reasonably well defined issues. The latter procedure usually involves written submittals with little opportunity to determine issues or to know and meet the opposing contentions of the staff.

The APA type case (mining or grazing) involved a staff determination, hearing before an examiner, examiner's decision, appeal to the Director of the Bureau of Land Management, appeal from the Director to the Secretary (in fact, the

38. 35 F.R. 10010 (June 18, 1970), amending 43 C.F.R. §§ 23.12, Part 1840, Subpart 1842, Subpart 1843, and Part 1850.

39. The division made here is between proceedings within the Administrative Procedure Act and proceedings that do not conform to the Administrative Procedure Act. APA proceedings and non-APA proceedings is the terminology employed. In fact, the regulations refer to private contest proceedings (43 C.F.R. § 1852.1), government contest proceedings involving mining claims (43 C.F.R. § 1852.2) and grazing proceedings (43 C.F.R. § 1853.1) in all of which a procedure conforming with the Administrative Procedure Act is provided for and appeal procedures applicable (43 C.F.R. § 1842.2) to any other case in which a party is adversely affected by a decision of an officer of the Bureau of Land Management which is subject to procedure that does not conform to the Administrative Procedure Act. On mining contest and the APA *see* Keith v. O'Leary, 63 I.D. 341 (1963).

40. *See* Richard K. Todd, 68 I.D. 291 (1961).

Solicitor of the Department[41]). Non-APA cases generally involved staff determination, appeal to the Director of the Bureau of Land Management, appeal from the Director to the Secretary (in fact, the Solicitor of the Department). The recent revisions will not change the basic distinction between APA and non-APA type cases, but the appeal to the Director of the Bureau of Land Management has been eliminated and there is but one appeal to a newly created Board of Land Appeals, the decision of which is final.

Some of the deficiencies of the non-APA proceeding can be illustrated by an adjudicated case: Applicant applies for a phosphate permit which is available (as distinguished from a competitive lease) only if "exploratory work is necessary to determine the existence or workability of phosphate deposits."[42] The area contains known prosphate deposits so the sole issue is their workability. The Manager of the State Land Office denies the application because the U.S.G.S. "reports that its records show the presence of phosphate in sufficient quantity and quality to warrant development under lease. . . ." Appellant is informed that it has "the burden of proving by presenting positive and substantial evidence wherein the decision appealed from is in error." Fortuitously, there are some U.S.G.S. publications available and these are used as the basis for an affidavit submitted by an expert witness as part of appellant's case on appeal. Appellant also submits legal arguments directed to the appropriate standard for determining workability. The decision of the Director of the Bureau of Land Management rejects these arguments and is supported by a so-called supplemental report of the Director, Geological Survey which is in effect a response by the U.S.G.S. to appellant's contentions.[43] On further appeal to the Secretary the Geological Survey presented an additional supplemental report which largely accepts appellant's position.[44]

A happy result from appellant's standpoint, but one which was possible only because the available literature, appellant's

41. 24 F.R. 1348, § 210.2.2A(4)(a) (February 21, 1959).
42. 30 U.S.C.A. § 211(b).
43. Gas Hills Uranium Company, Wyoming 0317674, April 18, 1967.
44. American Nuclear Corporation, A-30808, March 5, 1968.

persistence and reference to a U.S.G.S. Report in the Director's opinion made it possible to bring the issues out into the open. It is submitted that the appeal procedure to meet due process requirements in non-APA cases must afford affected parties a better opportunity of knowing and meeting the case against it. The Department has been relying on the government's plenary control over public lands[45] and the privilege vs. right distinction[46] to jusitfy its patently unfair procedures in non-APA cases. The privilege vs. right distinction is dead in the light of recent Supreme Court decisions in other areas;[47] if a welfare recipient is entitled to know and meet in an appripriate manner the case against him for termination or denial of benefits it is likely that an applicant for authorized uses of public lands has a similar constitutional right.[48] Even informal conference type procedures[49] afford an applicant better protection in terms of meeting the case against him than the present appeal procedures.

The Commission's *Report* without focusing very sharply states broadly that "there is little assurance that due adjudicative process will be afforded most applicants for public land dispositions."[50] The *Report* suggests that an applicant be afforded an opportunity to present his case at least informally at the time applications are considered before such applications are denied.[51] The Study comments on the fact that in so-called appeal cases the government does not present its case[52] and the *Report* recommends "open participation by the Government official rendering the intitial decision below . . ." in

45. Light v. United States, 220 U.S. 523 (1911).

46. Richard K. Todd, 68 I.D. 291 (1961). *But see* Wolf Joint Venture, 75 I.D. 137 (1968).

47. Goldberg v. Kelly, 90 S.Ct. 1011, 397 U.S. 254 (1970). "Such benefits [welfare benefits] are a matter of statutory entitlement for persons qualified to receive them. . . . The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'" *Id.* at 1017.

48. *Ibid.* The key to Goldberg v. Kelly appears to be a procedure appropriate to the situation. In the author's judgment something less than the type of hearing insisted upon in Goldberg v. Kelly would satisfy the due process requirements in most land appeal cases. The Court's protection of the welfare recipient may be based upon such recipient's disadvantaged position and the fact that at issue is usually some aspect of the recipient's personal conduct.

49. *See* discussion at note 80, *infra.*

50. REPORT, 253.

51. ADMINISTTARTIVE PROCEDURES STUDY 165-166; REPORT 253.

52. ADMINISTRATIVE PROCEDURES STUDY 174 and fn170 at 214.

the appellate process so as to help "eliminate complaints about *ex parte* communications."[53] The *Report* also states that "it is clear that in a number of situations reports, comments, etc. are thereafter furnished to the adjudication officer as part of his decisional process . . ."[54]

The Commission has intuitively felt that something was wrong with the adjudicative process, but has directed its attention at the right areas for the wrong reasons or with sound reasons for its criticisms has misconceived the nature of the problem. The processing of the application is not the appropriate time for affording the applicant an opportunity to present his case. The existing appeal procedures provide an adequate and more feasible opportunity to do so from a timing standpoint. The inadequacy in these procedures relates primarily to the failure to afford the applicant an opportunity to know and meet the case against him. This is not solely attributable to the fact that his right to a hearing is only a discretionary one.[55] In many instances there are no disputed facts and a trial-type meeting would be a cumbersome method of framing the issues.[56] The fact, however, that the government never openly presents its case, but presents argument secretly to adjudicators is relevant to the basic procedural defect. The government should present its case not to eliminate complaints about *ex parte* communications but to afford private parties an opportunity to meet the case against them. Further, the person presenting the government's case should not be the "official rendering the initial decision below" but a member of the staff trained to present the government's case on appeal. Nor should adjudicators be denied the opportunity of consulting *ex parte* with staff members who have not participated in the proceedings provided they are consulted for the purpose of evaluating a properly developed record rather than for the purpose of furnishing the very basis for the decision.[57]

53. REPORT 253.
54. *Ibid.*
55. 43 C.F.R. § 1843.6.
56. *See* Robertson v. Udall, 349 F.2d 195 (D.C. Cir. 1965); Richard K. Todd, 68 I.D. 291 (1961). *But compare* Wolf Joint Venture, 75 I.D. 137 (1968).
57. For one view of the appropriate scope of staff consultations and *ex parte* communications *see* Bloomenthal, The Revised Model State Administrative Procedure Act—Reform or Retrogression?, 1963 DUKE L. J. 593, 614-619.

The newly revised procedures of the Department do not rectify the foregoing criticisms. The intermediate appeal is eliminated which seems desirable in view of the fact that for the most part two employee appeal boards (Office of Appeals and Hearings and the Bureau of Land Appeals) never officially styled as such were performing precisely the same functions of adjudicating, deciding and opinion writing. The new Board of Land Appeals will be a part of the Office of Hearings and Appeals, the Director of which has been delegated "all the supervisory authority of the Secretary over hearings and appeals. . . ."[58] Thusly, the decision and opinion writing function has been taken out of the Solicitor's Office. The *Report* had recommended such removal on the grounds that it tended to create the appearance of combining the deciding and prosecuting function.[59] In the author's view the inclusion of this function in the Solicitor's Office is a reflection of the 19th Century view that the decision making function simply involves the application of the law which should be best known to the Solicitor.

The decision of the Department to create a Board of Land Appeals whose decision will be final reflects a similar attitude (that is, mechanical application of well defined rules) toward the role of an administrative adjudicator. It is in fact a departure from the recommendations of the Commission, which would have eliminated two levels of appeal as of a matter of right[60] but which recommended against a Board of Appeals[61] and recommended for a discretionary right of appeal to the Secretary from the initial decision on appeal.[62] The unfortunate aspect of an Appeal Board, particularly one whose decisions are final, is the complete separation of the decision making function from the policy making function. While presumably the Secretary and the Director of the Office of Hearings and Appeals can continue to exercise the supervisory

58. 35 F.R. 12081 (July 28, 1970).
59. REPORT 254-255.
60. *Id.* at 256. The recomemndations in this regard are particularly pertinent to Forest Service procedures which involve five levels of appeals and with respect to which the apropriate procedure depends upon a prior classification as to the type of appeal involved. *See* ADMINISTARTIVE PROCEDURES STUDY 176-178.
61. REPORT 254.
62. *Id.* at 256.

authority of the Secretary in areas of major importance, the new procedures will continue to isolate the Secretary and others within the Department most concerned over policy from any feel for the impact of the flow of decisions on policy.

The Commission rejected the idea of an independent Board because it would "dilute the Secretary's managerial and supervisory authority over public land matters . . ."[63] This seems somewhat inconsistent with the recommendations of the Commission previously discussed which assume that it is possible for the public land agencies by appropriate exercise of rule-making powers to largely eliminate the exercise of discretion from the adjudicative process.[64] In fact, in rejecting the independent board the Commission recognized that it could "only be fully effective if it can operate against some fairly specific guidelines . . . which spell out the nature of rights or privileges at issue . . . ."[65] The Commission in simplistic fashion assumed that its other recommendations would assure such guidelines and eliminate the necessity for an independent administrative review board. While the Board of Land Appeals is not a completely independent Board, the unfortunate result of its creation may very well be the divorcing of policy formulation and responsibility for policy from each other.[66]

The revised regulations also eliminate the obsolete Field Commissioner and provide, in lieu thereof, that the Board of Land Appeals may in its discretion in a non-APA case appoint a trial examiner to hold hearings on relevant, disputed factual

63. *Id.* at 254.

64. *Supra.*

65. REPORT 254.

66. In fact, the general hearing and appeal procedures of the Department of Interior suggest a lack of concern and/or appreciation of the importance of the adjudicative process on the part of the Secretary of the Interior. There are now four separate Boards of Appeals (Contract, Land, Mine Operations and Indian) and provision for creating *ad hoc* Boards from personnel within the Office of Hearings and Appeals for cases not within the jurisdiction of an established Board. The decisions of all the Boards (with the exception of *ad hoc* boards) are final. To the extent any coordination at all among the Boards exists it can arise only as a result from the fact that all of the Boards are a part of the Office of Hearings and Appeals which is under a single Director to whom the Secretary has delegated his supervisory authority over hearings and appeals. Administrative adjudication within the Department of the Interior is now entrusted largely, if not completely, to relatively low level departmental employees.

questions.[67] While not explicitly so providing, the revision of the regulations in this regard may be precursor of a more liberal attitude on the part of the Board of Land Appeals to authorize hearings. The regulations also provide with respect to non-APA cases that oral argument may, within the discretion of the Board of Land Appeals, be allowed in some cases.[68] To the extent that the Board of Land Appeals liberally allows hearings and oral argument, appellants should be in a better position to determine the nature of the staff's case. However, nothing has been done to directly rectify the basic procedural problems referred to above and, in fact, the elimination of the Director's decision on appeal eliminated the one means available for appellants to determine the case against them and to meet such case on appeal. In fact, appellants were successful under the old procedure in reversing the decisions of the Director on appeal to the Secretary in a significant number of cases. Since presumably the personnel in the two former appeals offices are being combined and are now working for a multiple member Board of Land Appeals it will be interesting to observe the quality of the decision making process under the new regime.

The Commission recommended that Secretarial review be "adequately insulated from management officials and legal advisors who have participated in decisions below, except for direct, open presentation of argument. . . ."[69] This type of separation does, of course, exist with respect to APA type proceedings within the Department[70] and to a degree has been voluntarily imposed in non-APA appeal cases.[71] The new regulations pertaining to the Board of Land Appeals provide that no member of the Board who has taken a part in the investigation or prosecution of the case shall not participate in

67. 43 C.F.R. § 1843.5.

68. 43 C.F.R. § 1843.6.

69. REPORT 255.

70. 5 U.S.C.A. § 554(d) among other things, requires (subject to certain exceptions) with respect to every case of adjudication involving a trial-type hearing that personnel who participated in the investigation or presentation of the case be excluded from participation in the decision or agency review of the decision.

71. Interview on August 27, 1965, with Thomas Cavanaugh, then Associate Solicitor, Division of Public Lands, Department of Interior.

the decision of the Board.[72] The unfortunate aspect of this provision is that it is limited to members of the Board; it is difficult to understand why the separation of function provisions of the APA which pertain to others participating in the decision should not be applicable.[73]

INFORMAL ADJUDICATION

The Administrative Law Study pertaining to formal adjudication has a less than substantial empirical basis, and in the less studied areas of informal decision making virtually no empirical basis.[74] Land classification pursuant to individual petition is severely criticized for failure to allow participation by the petitioner and because of the bifurcation of the procedure,[75] but the criticism is based almost entirely on *a priori* reasoning. Yet, it is in those areas of informal decision making that the need will arise for innovation if the new goals set for the public land agencies in the Commission's *Report* are to be realized efficiently and fairly. The traditional conception of rule-making, hearings, and judicial review are simply not adequate to the task. There are within the public land agencies procedures that could have been studied on the operational level from which much could have been learned

72. Part 211, Ch. 13—Office of Hearings and Appeals, Department of Interior Manual, Section 211.138 as same appears in 35 F.R. 12081 (July 28, 1970).

73. *See* note 70 *supra.*

74. One source for the empirical information referred to in the Study is a 1957 Questionnaire prepared by the Department of Interior for the House Committee on Government Operations. ADMINISTRATIVE PROCEDURES STUDY fn. 96 at 258. The contractor states, "It appears that the practices so reported have not changed so far as can now be ascertained." *Ibid.*

75. ADMINISTRATIVE PROCEDURES STUDY 15, 294. The Study does outline in some detail the procedures prescribed by the regulations for classification petitions. *Id.* at 15. They are described as "providing no more than token participation by those immediately interested . . ." *Id.* at 294. The procedures themselves do not appear per se deficient; much might depend upon how they operate in practice. The Study ignores the context in which petitions for classification have taken place in recent years; the fact that only archaic laws are available for land disposition encouraging attempts to use homestead laws for other purposes. The Study also ignores the background that led to taking classification out of the normal adjudication channels; the fact that such proceedings were clogging those channels and many regarded them as more appropriate for administrative determination than legal decisions. Land classification does necessarily involve substantial elements of judgment and discretion; perhaps, such discretion is being exercised arbitrarily or unwisely but, if so, it is not documented by the Study. The Report of the Commission takes no position directly related to such procedures other than noting that the elimination of classificcation cases from normal adjudication procedures has resulted in much speedier action with respect to other phases off the BLM's caseload. REPORT 255.

in this regard. Such procedures include classification pursuant to individual petition, the special use procedures of the Forest Service and the supervisory activities of the U.S.G.S. with respect to leasing act operations. These activities are much more akin to the future role of public land agencies in determining particular uses,[76] negotiating development requirements pertaining to mining, imposing environmetal requirements and the like. In some areas traditional procedures including hearing procedures will remain appropriate (for example, in all probability the cancellation of a mining permit for failure to exercise the equivalent of "due diligence"), but for the most part these decisions will either be made "administratively" or the whole machinery will be clogged with a monumental backlog. Porcedures must be adopted or found which will at the same time protect against arbitrary action and afford affected parties an opportunity to present their position.[77]

The lawyers' assumption that "hearings" are the only means of resolving such issues is not adequate and there is some recognition of this fact in the contractor's Study.[78] There are other methods available for the determination of issues, even those involving disputed facts,[79] that are not necessarily arbitrary or unfair. The Atomic Energy Com-

76. Although the Bureau of Land Management has been classifying lands generally for the past five years pursuant to the Classification and Multiple Use Act of 1964 (43 U.S.C.A. §§ 1411-1418), the Report concludes that "it is apparent that they were made in a hurried manner on the basis of inadequate information." REPORT 53. The Report recommends, in effect, that the job be done over with better guidelines from Congress supplemented by an analytical system to be developed by the agency for implementation of those standards. *Id.* at 45-48. To the extent lands are classified prior to actual use the need for individual determinations will be reduced. However, it is illusory to think such general classification will eliminate entirely the need for determinations as to individual tracts and individual petitions. The planners may determine a particular area suitable for urban development; those with funds available to invest may prefer (and with good reason) another area. Further, irrespective of notice to third party interests, opportunity to be heard etc. in connection with a proposed general classification, there will always be affected parties who for a number of reasons will not be in a position to protest and oppose the particular land use until an actual use of the lands is proposed.

77. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 90 S. Ct. 1011, 1021. However, it is submitted that there are two important qualifications—(1) the decision must "turn" on a question of fact, that is, must be directly and critically involved. (2) The Court is referring to what Professor Davis calls adjudicative facts, that is, those concerning what a party did and with what motive. *See* Davis, Administrative Law Treatise, § 7.02 (1958).

78. ADMINISTRATIVE PROCEDURES STUDY 298-299.

79. *See*, however, note 66 *supra* with respect to critical adjudicative facts.

mission administered its allocation of source materials program involving, among other issues, a determination of individual property reserves without adjudication in the traditional sense.[80] While the procedures employed are open to criticism in some respects[81] and one may even question the fundamental procurement policies effectated, affected parties were afforded an opportunity to make their case. They did so through conferences with staff members responsible for estimating reserves, negotiation with staff members responsible for making the initial decision, and an informal review (when demanded) with higher echelon officials. The Forest Service apparently, in some areas, operates much in the same manner and a close look at how the system operates in practice would have been an unique[82] and an invaluable contribution to the administrative law literature.

The Study is rightly critical of the failure of the public land agencies to publish in a readily available fashion the procedures (formal and informal) available to private parties.[83] The inadequacies in this regard will inevitably be compounded, if as one surmises, informal decision making necessarily plays a larger role in the future of public land administration. If there is one thing clear in this, until recently ignored area,[84] it is that there must be channels available for presenting one's grievances, those channels must be kept open and they must be widely known.

JUDICIAL REVIEW

The doctrine of sovereign immunity which bars private litigants at the gate of judicial review where Congress has failed to provide for judicial review of administrative action

80. *See* Lewis and Rooker, Domestic Uranium Procurement—History and Problems, 1 LAND & WATER L. REV. 449 (1966).

81. In particular the informal procedures were not spelled out specifically in the regulations but rather developed as the result of experience accumulated over a period of time.

82. Professor Davis has undertaken some limited empirical studies reflected in Davis, Discretionary Justice—A Preliminary Inquiry (1969).

83. ADMINISTRATIVE PROCEDURES STUDY 263-265.

84. *See* Davis, Discretionary Justice—A Preliminary Inquiry (1969); Woll, Administrative Law—The Informal Process (1963).

is much under attack.[85] A case involving the Department of Interior[86] which dramatizes the inability of one to contest the government's claim to title is sometimes used to demonstrate the untoward consequences of the doctrine. The Commission's *Report* recommends that sovereign immunity no longer be a bar in a title dispute with the United States.[87] However, it goes further and recommends generally that sovereign immunity not be a bar to judicial review of public land agency decisions.[88] Unfortunately, it would also attempt to control the standing issue by limiting the right to review to those who were actually a party to the administrative proceedings.[89] Since the *Report* recommends liberal third-party intervention[90] and improved methods for giving notice to third-party interest,[91] in theory this should not be a serious limitation. But, in fact, it will not be possible to give the type of notice to third-party interest contemplated by the *Report*. It is inconceivable, for example, to expect some type of public notice to be given before every oil and gas lease, every permit etc. is issued. In those instances in which there is no real opportunity for the third-party to timely present his position before the administrative agency they should not without further ado be denied standing.[92] The real problem with a liberal judicial review concept is that it fails to take into account the type of discretion that should not be subject to judicial review. This involves, among other things, considering the type of issue with respect to which judicial review can make a real contribution. Rather than a *carte blanche* provision for judicial review there is need for either some hard thinking on a statute by statute, procedure by procedure basis as to those areas in which the administrative decision should be final or in the al-

85. *See*, for example, Davis, *Sovereign Immunity Must Go*, 22 ADM. L. REV. 383 (1970). S. 3568 attacking the problem of sovereign immunity generally is now under consideration by Congress.

86. Gardner v. Harris, 391 F.2d 885 (5th Cir. 1968).

87. REPORT 261.

88. REPORT 256-257.

89. *Id.* at 257.

90. *Id.* at 253-254.

91. *Id.* at 254.

92. One wonders why the Commission otherwise concerned about third party interests should regret recent judicial liberalization of the standing issue. REPORT 257. On standing *see* Data Processing Service v. Camp, 397 U.S. 150 (1970); Flast v. Cohen, 392 U.S. 83 (1968).

ternative some general language designed to preserve an area of unreviewable administrative discretion. Since the Commission generally favors spelling out specifically legal rights and obligations,[93] presumably, the Commission would favor such an approach if it had considered the problem. In view of the importance of the questions involved this appears an appropriate area for Congress to make deliberate choices rather than to leave it for judicial determination.

CONCLUSION

The *Report* generally contains a sense of urgency over the need to use our limited public lands wisely and the increasingly important contribution the public lands can make to the general welfare during the concluding decades of the 20th Century. Substantively the *Report* looks to the future, but procedurally it looks to the past. The *Report* generally adopts progressive attitudes on substantive issues, but unforunately relies on administrative procedures hardly adequate for the last half of the 19th Century. There is need for reform of the administrative procedures of the public land agencies; hopefully, if nothing else the *Report* and underlying study will cause the agencies concerned to take a better look at themselves. There is much in the *Report* and the Study which the agencies, if they have the will, can utilize as a point of departure in critically evaluating and improving their own administrative performance.

93. *See* discussion at note 24, *supra*.