Land & Water Law Review

Volume 6
Issue 1 *Symposium: An Analysis of the Public Land Law Review Commission Report*

Article 24

1970

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LAND AND WATER
LAW REVIEW

VOLUME VI 1970 NUMBER 1

ADMINISTRATIVE PROCEDURE ASPECTS OF THE PLLRC REPORT

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I DON'T have the background to see the overall problems in administrative law that Mr. Bloomenthal does. He obviously has worked a great deal in this field, and I'm sure you will be impressed by his paper when you see the very great amount of work and the good work he has done. I agree that the failure in the administrative law area in administration of public lands is to a major extent the fault of Congress. I say this, because the fabric of what is our present resource law was woven one hundred years ago when our national goals were different from what they are now. We had a frontier—we wanted to get the frontier settled. We wanted to develop and subdue, and to accomplish those goals we made our public lands available to those willing to use them. The laws were intended to accomplish production. The United States Supreme Court saw a natural justice in awarding federally owned resources to the individual who first identified with the resource by expending his time and money in its development.[1] Authors like *Lindley on Mines* talked about our natural resource law being the result of the economic forces which created it.[2] Our national

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1. Atkinson v. Peterson, 87 U.S. (Wall.) 507, 512 (1874)
> The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor.

2. 1 LINDLEY ON MINES 57 (3d. Ed. 1914).

goals are changing, but Congress hasn't looked at some of our resource law for a long time. In the absence of congressional action, administrative agencies are reacting to the pressures for change. The agencies don't appear to agree that the law should give relatively free access nor title to the public lands for mining and other purposes, nor that the law should favor full and unrestricted economic use. If such was the intent of Congress when it passed the many public land laws approximately 100 years ago, it is being frustrated by the administrative agencies today.

Since it does appear that our national goals are changing, Congress should re-examine our goals, and adopt public land laws which will accomplish them. Then administrative procedures should be set up which will implement and accomplish the goals set by Congress.

My own experience with administrative agencies, both as a member of one for four years, and as a practicing attorney before many, has convinced me that Mr. Bloomenthal is correct in his observation that we should not try to develop every principle and make every decision by pre-determined rules. In some areas I think we can have clear-cut rules, but in others the law has to be developed step by step as each new fact situation arises.

The problem requires that we recognize that there are different types of administrative procedures. We first have to recognize that as to the public lands, two different interests or powers are involved. One involves the powers of the federal government as a sovereign government, and the other the powers of federal government as the proprietary owner of the federal land.[3]

3. In Alabama v. Texas, 347 U.S. 272 (1954) the court said:

> [In] United States v. Gratiot, 14 Pet. 526, 537: The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." United States v. Midwest Oil Company, 236 U.S. 459, 474: "For it must be borne in mind that Congress not only has legislative power over the public domain, but it also exercise the powers of the proprietor therein. Congress 'may deal with such lands precisely as private individual may deal with his farming property. It may sell or withhold them from sale.' Camfield v. United States 167 U.S. 524; Light v. United States, 220 U.S. 536." United States v. San Francisco, 310 U.S. 16, 29-30: . . . The power over the public land thus entrusted to Con-

Where the government is merely exercising its powers as a proprietary owner to elect to retain and manage or to elect to dispose of its property, its powers, when exercised by Congress, are probably very broad, and almost unrestricted.

This morning Public Land Law Commission Recommendation No. 23 was noted. This is a recommendation that Congress should authorize and require public land agencies to condition the granting of rights or privileges to the public lands on compliance with applicable environmental control measures. This is a power Congress could exercise solely because it is the proprietary owner. When I was a member of the State Land Board of the State of Utah, we endeavored to get many controls of this type in the document granting rights to use state land. The federal government, in its position as the landlord, is inserting clauses in its mineral leases when they are renewed.

In the decision of the Secretary of the Interior in the *Montana Power Company* case,[4] decided on December 3, 1965, this was extended to a situation where the federal government owned the mineral rights, but did not own the surface. The surface rights were held by Northern Pacific Railway Company, which was the assignor of the coal lease. According to the appellants, Northern Pacific had waived restoration of the surface. Nevertheless, the Bureau of Land Management required restoration, and this was one of the main grounds for the appeal. In upholding the insertion of the restoration clause, the decision states:

> The appellant stresses that the Northern Pacific Railway has no interest in the restoration of the surface. It contends that the restoration provision should be limited to acreage, the surface of which is owned by the United States. Although it is true that the United States has a greater interest in its own lands, it also has a substantial concern with the lands of others in which it has reserved the minerals, together with the right to prospect for, mine and remove the minerals. Furthermore, by the end of the twenty-

gress is without limitations. 'And it is not for the courts to say how that trust shall be administered.'

4. 73 INTERIOR DEC. 518 (1965).

> year lease terms, the ownership of the surface of the land may well have changed, and the new owners may have a different attitude from the railroad's.

Thus, where the state or the federal government still owns and controls the minerals or the right to renegotiate leases, they can require restoration of the surface and preservation of aesthetic values a sa contract provision of the lease. Here then we are not concerned with the question of power but with policy.

It might be interesting to note one additional example of the control which the federal government is exercising. The Bureau of Reclamation is constructing a water project in Utah known as th Central Utah Project. There is a contract between the United States and a water conservancy district, under the terms of which the government will finance and build the project, and the District will receive the water and repay various costs. The federal government, which is furnishing the money and will hold title to the project, at least until the money is repaid, has used the fact that it is funding the project to establish contractual controls. The first water contract presented to the district had a clause in it that the government could withhold the water from the district, if the district delivered the water to customers who were violating anti-pollution laws. As attorney for the district, I objected to this, because out of the thousands of customers getting water, we might have only one violator. The government ultimately agreed to change the contract, so that it now can prohibt the district from delivering water to anyone violating the laws. But here is a use, you see, of federal funding to accomplish a federal goal—to protect the environment.

While Congress has by a great variety of statutes provided for the disposal, management and access to the federal lands, nearly all of these statutes involve administrative action. Any discussion of the functions of an administrative agency requires a recognition that there are several kinds of administrative actions. Regulations may be promulgated pursuant to a specific delegation of legislative power, and in prescribing the regulation, the administrative agency, within designated

limits, would actually be making or prescribing what the law will be. The problem here is not one of judicial due process. The legislature itself can adopt statutes without notice or hearing. When Congress delegates such powers to an administrative agency, it normally would do so with adequate guidelines to assure that the congressional intent would be carried into effect. Any regulation or rule adopted by the administrative agency to fill in the details of the law should, of course, operate only in the future.[5] Citizen's advisory boards, public hearings and other traditional methods for investigating the problem and its solutions might be desirable, and Congress might well require them as a condition to the delegation of the legislative power, but constitutional concepts of judicial due process would not be involved.

An administrative order or regulation might be interpretative in nature. In this type of situation Congress has itself prescribed the law. If the Bureau of Land Management were to promulgate rules interpreting the law, it would be nothing more than an administrative guess at a judicial question.[6] If the administrative construction of an act of Congress were erroneous, it should not be given any weight. To do so would in effect permit the administrative agency to amend the statute, and construction should not be substituted for legislation.[7] Thus, an administrative regulation which is contrary to the statutory provision is a nullity,[8] and the rights go back to the antecedent statute, and in this sense are retroactive in point of time to the invalid regulation.

In *Kern River Co. v. United States,*[9] the Secretary of the Interior had granted a permit, pursuant to a federal statute,

5. Arizona Groc. Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1931). The Commission's error arose from a failure to recognize that, when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that, when it was sitting to award reparation, it was sitting, for a purpose judicial in its nature. In the second capacity, while not bound by the rule of res judicata, it was bound to recognize the validity of the rule of conduct prescribed by it, and not to repeal its onw enactment with retroactive effect. It could repeal the order as it affected future actions and substitute a new rule of conduct as often as occasion might require, but this was obviously the limit of its power, as of that of the Legislative itself.

6. *See,* 1 VOMBAUR, FEDERAL ADMINISTRATIVE LAW, § 487, § 490 (1942).

7. United States v. Mo. Pac. R.R., 278 U.S. 269 (1929).

8. Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129 (1936).

for a use of the public domain to transport water. The United States endeavored to cancel the permit on the grounds that there had been a misrepresentation that the primary use of the water would be for irrigation, when in fact the primary use of was for power purposes. The District Court ruled that the federal government had failed to prove fraud. The Supreme Court ruled that fraud had been proved, and went on to say that if the Secretary had approved the easement with full knowledge of the facts, then he exceeded his authority. The U.S. Supreme Court held that the easement should be forfeited, although it had been approved by the Secretary, affirming the Circuit Court's conclusion that if the Secretary issued a permit with full knowledge of the fact that the water was going to be used for power purposes, then he exceeded his statutory authority, and his approval is void.

Another example of this type of problem was presented to the Supreme Court of the State of Utah in *Utah Hotel Co. v. Industrial Commission.*[10] In that case an administrative proceeding had been commenced by the Industrial Commission to require the hotel to pay unemployment taxes on salaries paid to members of an orchestra which performed nightly at the hotel. That administrative proceeding had been compromised bythe hotel and the Industrial Commission. The hotel agreed to pay the taxes on the band which played there regularly, and the Industrial Commission agreed to waive the tax on name bands who performed there from time to time. A subsequent Industrial Commission instituted a new proceeding to force payment of the tax on the members of the "name bands." The new Industrial Commission held that the tax was due, and an action to review that decision was brought in the courts. The hotel relied on the prior administrative proceeding and the settlement and ruling made therein. The Utah Supreme Court held that the Utah statute required payment of the tax for all the orchestra members. It further held that in holding to the contrary the prior Industrial Commission had erroneously interpreted the statute. The court denied the claim of the hotel to the effect that the prior decision was a

9. 257 U.S. 147 (1921).
10. 107 Utah 24, 151 P.2d 467 (1944).

bar to the present action, held that an administrative interpretation of a statute which is contrary to the provisions of the statute cannot be given weight, and that the court's opinion should be given retroactive application.

A regulation may be neither interpretative nor legislative, but only administrative. Examples of this may be the setting of fees to graze the public domain or fees for timber. It might involve the B.L.M. telling livestock operators that because of a late winter they cannot put livestock on the public range on the 1st of May, or that because of dry weather or past overgrazing, the number to be grazed must be reduced. It may involve rules and regulations about how to case an oil well, or to plug an abandoned mining tunnel. I see the approval by a state engineer of a water application as this type of administrative procedure.[11] When an applicant applies for water, he is not seeking adjudication that there is unappropriated water available. He is asking a regulatory agency to determine preliminarily that there is a reasonable possibility that a water right could be perfected. The approval or rejection, even though appealed to the courts. does not settle water rights. The state engineer is not adjudicating rights, but performing an executive function.[12] The applicant should not be required to prove by a preponderance of the evidence that he can do all that his application proposes. When the state engineer approves the application, the decision is administrative, and the appeal to the courts, except for the formalities of the trial, is of the same nature.

> The object of the engineers' office is to maintain order and efficiency in the appropriation, distribution and conservation of water and to allow as much water to be beneficially used as possible. So construed, the law provides a period of experimentation during which ways and means may be sought to make beneficial use of more water under the application before the rights of the parties are finally adjudicated.[13]

11. United States v. District Court, 121 Utah 1, 238 P.2d 1132 (1951); Tracy v. Bullock, 4 Utah 2d 370, 294 P.2d 707 (1956); Anita Ditch Co. v. Turner, 389 P.2d 1018 (Wyo. 1964).
12. Tracy v. Bullock, *supra* note 11.
13. United States v. District Court, *supra* note 11.

In this type of case when an appeal is taken to the court, the appeal is merely an extension or an continuance of the administrative proceedings into the appellate tribunal. This is noted by the Wyoming court in *Anita Ditch Co. v. Turner,*[14] where the court said:

> Decisions rendered by the Board are subject to review by the courts, and the method of appeal from the Board to the District Court is wholly statutory, § 41-193 W.C. 1957. The appeal is merely a continuance of those proceedings [Boards] in an appellate tribunal.

Another example of an executive or regulatory function may be the spacing of wells in an oil field. If the applicant for a particular spacing must prove by a preponderance of the evidence under judicial rules that a particular spacing will assuredly drain the field efficiently and economically, he may fail. In the early stage of field development definitive evidence is not available. However, when the Commission enters its well spacing order it isn't fixing the rights of the parties with the final binding effect of a court decision under principles of res judicata. The Commission might order wide spacing, with full knowledge that as the field is produced, additional evidence will become available, and if its ruling on the initial petition is in error, it can change it to permit the drilling of additional wells. If it approached the problem as a judicial procedure, placing the burdens on the applicant to prove his case by a preponderance of the evidence once and for all, the ability to regulate the production of the field would be impaired. It is thus essential to recognize that the function is regulatory—not judicial—and that the evidence necessary to induce an agency to regulate ought not to be the same as the evidence which might be necessary in a judicial proceeding, where the rights of the parties are to be permanently fixed.

There are some administrative regulations which are essentially judicial in nature. The determination by the administrative agency becomes a final determination of the rights of the parties, with the same binding effect as an ad-

14. 289 P.2d 1018 (Wyo. 1964).

judication in the courts. In non-public land fields, an example might be an application for workmen's compensation because of an injury resulting out of the employment, or an application for unemployment insurance. If the application is granted or denied, and no judicial review is initiated, the rights of the parties become fixed. There are similar situations in the administration of public land law, such as, for example, the denial or granting of an application for patent. In these cases the parties involved should be accorded judicial due process, with adequate notice and opportunity to be heard, the opportunity to subpoena evidence, etc.

One of the advantages of permitting an administrative agency to handle these matters is that the administrative agency often has the expertise and a staff to investigate. If the decision is based upon matters outside the record, then it would appear that due process would require an opportunity on the part of the applicant or respondent to react to such evidence. The Utah Supreme Court has held that an administrative agency ought to be able to examine matters in its own files, and ought to be able to consider information obtained from investigation. The court, however, concludes that the interested persons ought to be given an opportunity to rebut, explore or qualify these materials.[15]

Finally, if there is to be a judicial review of any administrative decision, one has to determine the nature of that review. In some cases a judicial review of an administrative action is to be heard as a trial de novo. Generally this means that the administrative decision is ignored, and the matter heard anew.[16] New Mexico has construed a statute providing for a trial de novo in a water case in a restricted matter. In *Kelly v. Carlsbad Irrigation District,*[17] the court considered an application to change the point of diversion for water. The state engineer denied the application. The District Court, under a statute providing for an appeal "de novo" considered the evidence produced before the state engineer and also heard new

15. Los Angeles & S.L.R.R. v. Pub. Utilities Comm'n, 81 Utah 286, 17 P.2d 287 (1933); Spencer v. Indus. Comm'n, 81 Utah 511, 20 P.2d 618 (1933); Utah Power & Light Co. v. Pub. Serv. Comm'n, 107 Utah 155, 152 P.2d 542 (1944).
16. *See* Eardley v. Terry, 94 Utah 367, 77 P.2d 362 (1938).
17. 71 N. M. 464, 379 P.2d 763 (1963).

evidence. On this basis the District Court reversed the state engineer. On appeal the Supreme Court said the review should have been limited to questions of law, and should have been restricted to a consideration of whether, based on the evidence produced before the state engineer, the officer acted fraudulently, arbitrarily or capriciously. Another rule for review of water applications is that the administrative agency should be sustained if there is any substantial evidence to support it.[18]

In Oregon,[19]the court has held that it should not substitute its judgment for the judgment of the state engineer. The statute provided for a review in the courts to be governed by the practice in equity suits and the court said that its review should be limited to a determination of whether the state engineer's order was outside his authority and arbitrary.

It is thus not enough to say that there should be recourse to the courts. Any statute ought to go further and indicate the nature of the review.

In conclusion then, on legislative type regulations there really is no problem of judicial due process, and there ought to to be no need for court review, except to determine the law question— has the power exercised been legally delegated and properly applied? On interpretative regulations where the statute governs, there should be a right to review the law ruling in the courts, and little or no weight should be given to the initial guess by the administrative agency as to what Congress intended. In administrative or executive type regulations, the procedural requirements should be less stringent. In the judicial type determinations, where rights are finally fixed, procedural due process should be afforded, there should be a right to appeal to the courts, and a review at least of the questions of law and some standard given as to the extent to which the court should review the facts.

18. City of San Antonio v. Texas Water Comm'n, 407 S. W. 752 (Tex. 1966).
19. Broughton's Estate v. Central Oregon Irr. Dist., 160 Ore. 435, 101 P.2d 425 (1940).