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LAND AND WATER LAW REVIEW

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NUMBER 1

DISCUSSION: ADMINISTRATIVE PROCEDURE

Type of review concerning an attack on a self-initiated right.

The question of the standing necessary to participate in the appellate procedure after decisions are made awarding rights in public lands.

The element of the standing of certain environmental groups challenging a certain disposition of the public lands.

MR. BLOOMENTHAL: I would like to comment on one or two things that Mr. Barry has said here. In defense of the appeals procedure he talked about, procedures relating to mining contests, which, as noted in my paper, are covered by the Administrative Procedure Act, there is no question about appropriate due process being available there. We are talking about appeals that are not subject to the Administrative Procedure Act.

In terms of reviewability, I would suggest that we have had some very significant developments in the Supreme Court case of *Association of Data Processing Service Organizations, Inc. v. Camp*, 90 S. Ct. 827 (1970). I think this makes it very clear, absent a very affirmative indication in the statute to the contrary, that administrative decisions of any agency, whether it be the Department of Interior, Controller of Currency, or Department of Agriculture, are going to be subject to judicial review. We are about to enter into a new era on the judicial review level. Incidentally, this is an approach which I would personally applaud.

MR. SHERWOOD: The changes in the Interior Department's administrative procedure for exhaustion of appellate

or administrative remedies, dependent on your point of view, are contained in the Federal Register during the month of July. I have had occasion to look at it in the process of filing some appeals. There are three studies I know of that have examined the matter of appeals in mining contests before the Interior Department. They all show conclusively that the contestees occasionally win before the hearing examiners. The studies also show that while 90 per cent of the actions are decided in favor of the government and against the claimant at the hearing level, all are eventually decided against the contestee on appeals either to the Bureau of Land Management or to the Office of the Secretary. The study that I made along this line produced a result of zero at the secretarial level, four at the directors level, and about 20 at the hearing examiners level over a period of time that extended for more than a year. The individual practitioners in the West insist that it just simply is not possible for the hearing examiners to be wrong, but only if they rule against the government. I do not know whether the new land appeals system will work, but I do suggest that it is not what I read the *Report* to say would be an adequate revision of what has been interpreted rightly or wrongly in the West as an incestuous relationship between judge and prosecutor.

MR. CARVER: I have been working full time in the administrative law area for about four years; and I suppose about 50 per cent of my time in the preceding six years was involved with it. I believe it is fair to say that over that ten year period that a revolution has taken place which the Commission's *Report* dimly recognizes, but does not analyze. However, I feel that this change in the administrative law should be recognized if we are going to get at the core of the problem by preparing legislative changes in the future. That revolution was mentioned by Professor Bloomenthal in his presentation. One aspect of it is, of course, the welfare rights case. Another aspect of it is the scenic Hudson. These cases are indicative of what is happening, and they have a very important implication on this particular subject, which, in my judgment, transcends much of the subject matter of the period that we are talking about here. Let us take two or three particular

examples to illustrate. Last week the Fifth Circuit, which is no wild eyed radical outfit, reversed a district court decision in the state of Florida which said that a permit had to be granted for the Army Corps of Engineers to dredge in a Florida bay because the statute did not comprehend the taking into account of recent environmental values. A New York case which involved the construction of a dike on which a road was to be built was interpreted in much the same way. The construction was stopped because it was shown that the Corps of Engineers did not hold a proper hearing before it granted a permit. You can argue all you want about legislative standards really being behind administrative law. What is behind these decisions is a judicial sensitivity to environment and other values. The court is reaching down and saying that these are the things that have to be taken into account in the process. I only bring that out to say, at least in my judgment, Ed Clyde's discussion and Professor Bloomenthal's paper are really central because they emphasize the need to obtain an understandable and workable process.

The final point I would like to make is that I, too, join in the thought that we cannot design or construct a system of rules to govern every situation. There is a need to adjudicate and build this structure as you go along. The description of what happened in the Securities Exchange Commission is exactly what happens in the Federal Power Commission. We go over fifty items of our agenda, which do not take us more than ten seconds apiece. After a while our work falls into patterns and it becomes routine. Then the routine case suddenly raises the flag that the rate on an oil well may be based on a false premise in terms of our need for gas. I would personally strongly recommend, for whatever it may be worth, what I recommended when this Commission was established. The real key is the procedure by which the United States deals with the people who occupy the land or use the lands, just as much as it concerns any laws or policies as to how the lands are to be used. People will work it out if you have procedures that are fair.

MR. McCLOSKEY: I am glad to hear this line of cases mentioned that has extended the standing of conservation groups and non-commercial interests. I am also stunned by the fact that as I read Recommendation 110 it seems to recommend the curtailing of the standing rights of conservation groups, in that it suggests that judicial review be limited to those who participated in the administrative proceeding. Such a limitation would foreclose the Sierra Club from being a party to many cases in which we have an interest. Presently, we have a case challenging a timber sale in Alaska. We were not a party to that timber sale. According to this recommendation we could not enter that case. In the *Mineral King* case we were not a party to the permit that had been granted to the resort development. As I read the proposal, we could not be a party to that case. Likewise, we could not have participated in the *Hudson River Expressway* case. This recommendation for curtailing involvement is a step away, and really a step backward, from the hopeful line of development that Mr. Carver just spoke about. I would be interested in knowing whether the Commission viewed this in that light.

MR. MUYS: I do not think that it is a step backward. I think the reason that you are in all of these cases is that you were not in on the planning procedures in the initial stages of the decision making. What the Commission has done is to open up the whole planning procedure to involve as many parties as possible in the early stages of the game. This is certainly better than to be in court at the eleventh hour, which is your only recourse now.

MR. McCLOSKEY: How could we be in the administrative procedure of this type of case?

MR. MUYS: Well, you were in the Federal Trade Commission proceeding.

MR. McCLOSKEY: Well, what about, for example, the Forest Service?

MR. MUYS: Well, the Commission is recommending that the whole Forest Service planning procedure be revised, opened up more to public participation.

MR. McCLOSKEY: But we are not a party. There is no situation where we could be a party under the circumstances.

MR. MUYS: This is the way zoning actions are taken now. The planning and the zoning commission provides for public participation, and you cannot go to court unless you participate in some facet of that proceeding, and unless you are a party to that proceeding.

MR. HANSEN: We found in the environmental study on the impact of public land policy some common denominators which we called root causes of the complaints of alleged, or those actually occurring on public land. Some of you might find this list interesting because we are not talking about the type of rule; rather, we are talking about the structure or the daily function of the rule. The motivation of the daily operation of the rule is more psychological than legal. When you look at this list you find the root causes for the Sierra Club's actions, or for the actions of any of us who are representing plaintiffs in an environmental suit. I would just like to take a few minutes and repeat this list of common denominators, or root causes, on the seventeen case studies which we did. They indicate what is wrong with the structure. (1) The lack of resource planning; (2) The lack of adequate research on environmental impacts in consequent decisions; (3) The absence or lack of intergovernmental agency coordination; (4) The absence of public participation, particularly in the informal level (By the time you get to public hearings it is too late anyway); (5) Lack of adequate funding for environmental quality control; (6) Lack of qualified personnel, particularly in the proper disciplines (I pointed out that the United States Geological Survey is not adequate to regulate environmental quality control on mining unless they restructure the agency to bring in other disciplines which they do not now have); and, (7) The basic conflict of the mission of an agency as mandated by Congress. No matter what you call these common denominators we are talking about some very basic structural weakness in the ways the agencies are created, organized, and staffed.

MR. MOCK: Because this discussion is dealing with administrative procedure and appeals, I think it might be helpful to recall the discussion which we had in the Commission. I think it might be helpful to identify the major arguments, which, for the most part, centered on the location system, the non-competitive oil and gas lease, and other types of priority requiring self-initiated acts of individuals. It has basically been identified by Ed Clyde as the difference in the requirements for review of the administrative procedures of the right which is a right, for example, where Congress has said that if you, Mr. Citizen, meet a certain condition to find a piece of land which has minerals, you can do certain things to proceed and ask for a patent. If the governmental agency says no, it becomes a judicial proceeding because there was a right promised dependent upon certain actions of the individual that require a certain type of review.

Now let us come back to the self-initiated right which runs all the way through the discussions which we have had, and which incidentally ran through the five years of discussion that we had in the Commission. The type of attack on self-initiated right is basically changing the type of review that you are entitled to under a law of Congress. If you eliminate the self-initiated right, you have put yourself in the position of extending to the federal government a further discretionary action subject to a different type of review and a different type of procedure than you otherwise would have had. If we recognize in a non-competitive oil and gas lease that discretion has come into play, it is to say that the man who files under the law for non-competitive oil and gas lease in an area that is open for a non-competitive oil and gas lease, and who is the first qualified applicant, shall receive the lease. Within the memory of everyone here these interpretations have been extended to include the discretionary power of the Department of Interior to say: "While you have the priority of right if anyone gets it, we retain the discretionary right to give it to no one; your priority is not denied, but we will simply not give it to you." At that time you have a different type of review than you have when you have a mining location contest. This is the point where these things start to come into focus.

I cannot think of a better place to bring in a statement on our Commission problems. This is an interdependent *Report*. This thing is so inter-tied all the way through that if you take one segment without considering others, you will run into a lot of problems; you will create more problems than we are eliminating. Unfortunately, we are not going to take it in its entirety, we are going to have to take it in segments; but in our discussions here, I think that we can identify that if you eliminate a self-initiated right, for example, under a law, you will have eliminated a type of meaningful review through the administrative procedures. If you extend the discretionary action on certain of these matters to government officials, you have extended the power to change the law which had provided that if certain conditions are met, a person may proceed. I think the problem that we are tackling here, and this is a good place to focus it, is the right of a self-initiated mining claim which is directly under attack. My question would be much more direct. Why shouldn't we give a self-initiated right to the non-commercial users to get an adjudication on the use of the lands under the laws of Congress? This would alleviate the public interest and operate as a check on the discretionary actions of governmental officials which, under present law, establish standards which grant certain preference rights and priorities of uses. A citizen who is fighting for the non-commercial values should be given exactly the same standing as if he were fighting for the commercial uses. My only concern is that in this enthusiasm for the environmental things we do not proceed to destroy these other things that are also an essential part of the things that Congress has laid down.

I think that Ed Clyde did a beautiful job of bringing into focus the very thing that makes an appellant procedure meaningful; namely, the standing of the persons who is participating in that procedure. Instead of restricting it and trying to eliminate it on the self-initiated right of mining claims and others, I think we should be considering the basic problem of whether we should extend it to those other interests that exist on the public lands.

MR. BLOOMENTHAL: The *Report* of the Commission does recommend a very liberal intervention procedure in terms of proceedings before the department, and a better system of giving notice to third party interests. This is the basis for the *Report's* recommendation that standing on review be limited to those who participated in the proceeding. I questioned that recommendation in my paper in those situations where, despite notice of procedures, affected parties cannot realistically be expected to have notice of the proceedings until it is too late to become involved. The decision is made before you become aware of it. The *Barlow* case, which was another recent Supreme Court decision dealing with standing to obtain appellate review, involved obtaining review of a regulation before it has actually gone into effect, and before there has been a proceeding. *Barlow* opens up the door there. If it was required, in order to obtain appellate review, that you must have participated in the proceedings, how could one obtain review if there was no proceeding in which to participate? Similarly, one who has not realistically had an opportunity to participate in the proceedings should not be denied standing if he meets the *Barlow* test of being aggrieved by the administrative action and being within the zone of interests protected by the Act in question.

* *Barlow v. Collins*, 397 U.S. 159, 90 S. Ct. 862 (1970).