Mr. Chairman and members of the Committee:

The position of the Department of the Interior with respect to S. 758 is before the Committee in its formal report. It is a matter of deep regret that we find ourselves in opposition to the distinguished array of members who have sponsored the measure, or who have otherwise indicated their support for it.

Notwithstanding our inability to agree on this particular approach to the adjudication of public land issues, I am confident that the members of this Committee appreciate that a broad base of agreement exists among us as to the nature and gravity of the problem it treats. Our dissent relates to method and procedure; we simply feel that solutions are to be found through other and different approaches, most of which are attainable through administrative action. The crux of the matter is that enactment of this bill would tend to thwart or defeat such administrative reforms, rather than aid or supplement them.

In taking this position, it will be understood that we are concerned almost exclusively with procedural and organizational matters. S. 758 is confined to these factors; it does not reach to the substance of the public land laws or establish new criteria or standards for their
application. If such were the hidden intent of S. 758—to change the law through creating a new forum for its interpretation, separate and apart from the cabinet official charged with responsibility to administer the same law—then I fear that our differences would be sharper and deeper.

My position here today is not one of defending the status quo or of assuring the Committee that all’s well in this area of the public business. I would not presume upon your intelligence or test your patience by suggesting that there is no need for drastic reform of the Department’s appellate system. I would not deny that decisions have issued from that system which fail to accord with the elementary concepts of decency and fair dealing expected of the sovereign in a government of laws.

Neither would I attempt to justify the long delays or make excuses for bureaucratic callousness, superficiality or lack of imagination—all of which make occasional appearance in the record on appeal.

I will not intrude upon your time to repeat the content of our formal report. By the same token, I do not propose to engage in minuscule debate with professional administrative lawyers whose pat formulas may have clear merit, but run to procedural nicety rather than the ills of the system. Rather, my comments are addressed to a
few key points which, to my mind, demonstrate that the bill before you deals with symptoms rather than causes, that it will add to delay rather than subtract from it, that it misconceives the nature of the review procedure and some of the actions which come within its purview.

Let me assure you that my coming here today is no mere formality in being responsive to your request for Departmental witnesses. My dissatisfaction with the appellate system is no secret to most of you—and certainly not to the Department. During my confirmation hearing I promised this Committee to do something about it. As I will note later, I have done something about it—in regulatory changes already proposed and in others in process of development. While eschewing argument with lawyers—for today—my experience as a practitioner on the other side of the table in a western state gives me license to do so. It was this experience that prompted me to play my small part in the legislative history of Public Law 87-748, the venue statute initiated in this Committee which opened the doors of the U. S. District Courts in the West to litigants seeking redress from the Department's actions on land matters.

But my focus today must be that of the administrator. My responsibilities involve the exercise of authority delegated by the Secretary of the Interior for review of actions taken at lower levels
in public land matters. My contribution to your consideration of this subject can therefore be most effective if it is addressed to the impact of the appellate system on the management of the public land resource.

Why a Public Land Appeals System?

Looked at from that point of view, why do we have an appeals system? How does it contribute to public land management in accordance with law and with decent and fair administration?

The basic and most obvious reason, of course, is to assure that decisions are right and just—that the law has been applied properly and that public policy has been observed. All governmental actions require human agency, with its known frailty of judgment, capacity, and even honor. So we have auditors to double check some functions—and appeals systems for others. In the public land field, the applicable laws are myriad and complex—the factual situations infinitely varied. Error is inescapable—we can only strive to reduce its incidence.

Some procedure to review actions taken under delegated authority, on the initiative of the aggrieved party, is requisite. Without it, delegation becomes abdication.

A second function served by the appellate process is that of bringing information to the ultimately responsible official. The fact of an appeal will tell the administrator something—if only that the law is being applied in a particular way.
A pattern of appeals on the same point may suggest a defect which should be referred to Congress for correction or clarified by a regulation for uniform application. Whatever the specific result, the system feeds facts to the top--facts adduced impartially by hearing, affidavit, investigation or otherwise. These become a check and balance against what is reported administratively. They tell the administrator whether problems are developing.

Thirdly, the appellate procedure, properly operated, puts meat on the bones of the statutory skeleton. The blank spaces are filled in through regulations which evolve out of the realistic test of application to real situations. Regulations are tested on the anvil of controversy, just as statutes are. The reported decisions of appealed cases become not only grist for the policy formulation mill but, like reported cases of the courts, they are the law until Congress, the courts or some other superior authority dictates otherwise.

**Imperfections of Appellate Procedures**

Again looking at the matter through the administrator's eyes, however good an appellate system may be, it will always prove imperfect and imprecise as a tool for getting things done. It cannot be relied on as a sole device for acceptable supervision.

For one thing it reveals only half of the situation--it corrects mistakes in only one direction. It will release the homestead entry or mineral patent illegally or unjustifiably denied--
but who appeals the give-away transaction approved by a land office agent out of ignorance or corruption? What ignites the procedure for recapture of the improvident or fraudulent grant?

If an appellate system becomes rigid--and there is a natural tendency in that direction--then the timely correction of error may become more difficult than if the appellate system didn't exist. Customarily a case on appeal leaves the jurisdiction of the officer who made the decision appealed from. If he himself discovers he's made a mistake, he may be without power to correct it, however much he would like to.

As for furnishing information to the Secretary, the same imperfections exist. Not all meritorious cases are appealed; meritorious cases have been known to be dismissed on procedural grounds. The toughest kind of letter I have to sign, as an administrator, is the one which dismisses a valid (if unproved) contention on the ground that an appeal was filed too late, with the wrong office, with the wrong filing fee, or something similar.

We've made it cheap to file appeals, and dear to win one. For five dollars, the poorest case gets a second bite at the apple, so meritorious cases vie for attention with hundreds of frivolous ones, and are sometimes lost in the struggle. An appeal is an appeal, and
management must be conscious of the cost of handling an excessive volume of cases on a formal basis. Absent this rigid structure, I suspect there are hundreds of cases where the administrator and the appellant might easily have resolved the points at issue in a matter of minutes of direct communication.

The overriding problem, of course, is delay, delay, delay. Justice delayed is justice denied.

Steps Being Taken.

Most of the imperfections and difficulties outlined above, so far as direct administration of the public land is concerned, involve the review of the appropriateness of the particular exercise of Secretarial discretion—a class of cases which involve the function of classification.

It must always be remembered that the officers below the level of the Secretary, when they classify land under section 7 of the Taylor Act, for example, are exercising a function committed by the Congress to the Secretary. An "appeal" in the juridical sense may properly test the delegation of authority, it may properly test the compliance with the regulations prescribed by the Secretary, and it may properly test inter partes contests and claims of preference. But as to the nub of the action, the discretionary act of opening the land to entry, the word "appeal" has more of its lay connotation.
In effect, the applicant appeals to the Secretary to recall his delegation as to this particular matter, and exercise his discretion in the other direction.

We are sometimes accused of running these appeals through some kind of rubber stamp process which ratifies the original action without any real consideration or cerebration. The record will demonstrate that this might be true in terms of results—the rate of reversal. But this doesn't make it true in fact—and it isn't true.

The fact is that there is rarely anything of record upon which to change the decision. Such appeals put the Secretary in a position of utter futility—he is asked to sit in Washington and reverse the on-site technical judgment of an hydrologist or a soils scientist on the strength of the appellant's unsupported allegation that there is, too, an adequate water source or that the soil base is four feet instead of two inches thick.

Where an appellant is armed with some reasonable evidence of possible technical error, it is wholly appropriate and necessary that we provide some machinery for its reevaluation. But we ought not to misconceive the nature of that process. It isn't really appellate, it's supervisory. It is this supervisory aspect to which I've given intensive attention.
The culmination of this attention was the issuance, a month ago, of a proposed major revision of the regulations affecting the classification of land under the various statutes giving the Secretary such responsibility in his discretion.

We've concurrently taken action to accelerate final determinations. This has been done in various ways, some of which involve the countersignature of opinions prepared in the Bureau of Land Management by the Secretary, either through the Solicitor or the Assistant Secretary.

I would like to emphasize, however, that making a BLM decision final does not mean that it has had less Secretarial review than it would if it had been issued. Not only is the appellant saved a new $5 filing fee, but he escapes the aggravation of having his case go to the foot of the new appeals docket--with all the delay that may entail.

On a more substantive point, moreover, I want to emphasize that honest Secretarial review is performed before countersignature is given. This is performed by a separate staff from that involved in the Bureau action and includes independent checking of contested facts where such is appropriate. It is closely tuned to a review climate not disposed to rule for the government automatically, but rather to assuring that citizens get fair treatment and consideration.
The Petition System.

I sent to each member of this Committee an explanation of the proposed changes in the regulations to get at some of these evils. A copy of the regulations as proposed to be changed, and of my explanation, will be supplied for the record with your consent. I would like to summarize briefly here.

I suppose we are talking about maybe a third of the case load; but I would venture the guess that it would cover more than three-quarters of the cases as to which we get Congressional protests.

We would eliminate one level of appeal.

We seek early administrative finality.

We want a better opportunity for correction in the administrative channels, after informal conference with the parties affected.

We want improved administrative supervision. Above all, we think we will get a higher order of administration, as the responsible officials at the field level know that their mistakes will be subject to judicial scrutiny before Federal judges in the very state, and promptly, not in the remote future.

The Board of Land Appeals.

The pending bill does not go to solve the basic matters outlined above. Where Secretarial discretion is the basic issue, as
it is in almost all classification cases, I think it governmentally inappropriate to put a Board over the Secretary. If the Board is under the Secretary, all you've added is another delay in the process.

It may be that what is really at issue is whether the Congress, or some members, think the Secretary by writing his own regulations and running his own appellate system, is not departing from the standards for the exercise of his discretion which the Congress intended. If this is the case, then the remedy is not S. 758, it is legislative revisitation of the land laws themselves. Congress can write different standards, and ought to before using the oblique method of setting up some kind of court hoping it will do so.

Finally, and here I do trespass a little on the territory of the lawyers, it seems to me that the essence of due process is prompt and efficient access to the courts for review of final administrative actions. Where we extend the administrative process beyond the point where it can produce meaningful results, then I think we do a disservice to the appellant and to our system of law. We propose to close the circuit on the appeals process at the point where further pursuit becomes empty formality. Having thus exhausted the administrative remedy, an aggrieved claimant will be free to test the reasonableness of administrative conduct in timely fashion—not years later after his case is reached on a glutted docket.
Congress took the first step with the venue statute. While we do not consciously seek to promote litigation, the Department does now propose--at least in the discretionary area of petitions for land classification--to make the statute meaningful and available. We will cut the Gordian knot by subjecting administrative judgment to court review promptly and at the field level.