A month ago, Congress created a Public Land Law Review Commission. Twelve of its nineteen members have been appointed: Senator Anderson of this State, and Senators Jackson, Bible, Kuchel, Allott and Jordan, and Congressmen Aspinall, O'Brien, White, Saylor, Kyl, and Burton. The President will appoint six members, and the eighteen will select the nineteenth to act as their chairman.

In the consideration of H. R. 8070, the bill authored by Mr. Aspinall which was enacted into the law, the administration of the mining laws was a major topic of discussion -- both from the point of view of demonstrating the need for the review, and from the point of view of justifying the inclusion in the bill of the provision for examination into the "policies and practices of the Federal agencies as they relate to the retention, management and disposition of the lands."

For example, on the first point, the House Committee Report states:

"It has been commonplace for years to say that the . . . 'easily found' minerals have been discovered and developed. The inference of these truisms is that the public land laws must be examined to ascertain whether they serve the changed conditions."

And on the second point:

". . . the Secretary of the Interior has withdrawn from the operation of the mining laws millions of acres of public lands without express statutory authority therefor."

"And the requirement of the Taylor Grazing Act that the public lands remain open to location and entry under the mining laws could likewise become meaningless through administrative determinations under the mining laws."

Prior to the passage of the act, I discussed the desirability of inclusion of the provision for examination into policies and practices. At Denver, last April 4, I said:
"I look forward to a close working relationship with the Commission to identify where procedure controls policy, where precedent substitutes for judgment, where administration substitutes for legislation, and to assist the Commission in isolating the policy alternatives looking toward ultimate recommendations to the Congress.

"But I look forward to an inquiry from the Commission into the policies and practices of the federal agencies charged with administrative jurisdiction for a substantive reason--in these policies and practices, as much as in the laws themselves, is found the substance of public lands philosophy. Only a Commission, freed from the institutional bias of such agencies, can get to the real roots."

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"The Public Land Law Review Commission will be able to grapple with the anomaly of mining law administration--that it is both the weapon of the administrator and the refuge of the miner--better than the Congress can directly, and the bureaucracy itself cannot do it at all."

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"With a proper melding of a public and legislative-oriented commission with the resources and talents of the executive branch, cheerfully and patriotically made available to the Commission, and with utilization of the various user groups advisory to the Commission, it will be able to find its way through the maze of public land laws to a recommendation for a rational national policy on public lands, to be legislated by the Congress, and rational and practical standards of administration, to be executed by the Executive Branch.

"Interest groups will be heard, and interests legitimately concerned with the use or benefit of the public lands, both commercial and non-commercial, represented on the Commission's Council, will cover a broad spectrum.

"The highest order of statesmanship is going to be necessary, however, even though the Commission itself, as proposed in H. R. 8070, would have a structure to assure a high quality consideration of the myriad policy issues which will be presented to it."
My thesis today is that if the Public Land Law Review Commission is to be enabled to deliver on the hopes which motivated us all in seeking its enactment, a lot of interests are going to have to exercise a lot of self-restraint over the next four years.

To illustrate, let me start with a discussion of one issue, which has the mining industry exercised, to say the least. It is an issue which will surely be brought to the attention of the Commission at its earliest meetings. How the Commission deals with it will affect the functioning of the Commission on other issues, and overall.

The descriptive word used for the issue, of course, is "marketability". The Public Lands Committee submitted to the American Mining Congress a strongly worded resolution, which was adopted, asking the Department to "return to the policies enunciated by the Congress and to those decisions of the courts which recognize the prudent man test in the determination of the validity of the mining claim."

It wouldn't be useful for me to enter into the discussion of the issue of the application of the concept of marketability from the standpoint of whether it is the law, that is whether the courts will or won't support it.

As an administrator, I described it once as "nonsense", somewhat incautiously, and on numerous occasions I have expressed the thought that as applied in the adjudicative function within the Department it has produced some quite bizarre results.

The attitude of the mineral examiners about it has been interesting. By and large, I suppose, they would feel that if "marketability" is to be the test, their job has been simplified--it becomes an appraisal or economic evaluation process as much as anything else.

But if the concept shifts in the time dimension, as indicated in some of the cases, or if it seems to bear little or no relation to ordinary understanding of what constitutes a valuable mineral, as in some of the other cases, the examiners find that a trend toward a definite standard, which they have favored, has become a trend instead toward confusion.

In any event, the final decision on any mining claim contest has come to be almost universally regarded as a legal rather than an administrative matter, requiring reference to Washington in most cases.

The decisions are not always against locatability and in favor of retention of the lands in public ownership.

Both involve Forest Service contests of mining claims, wherein the Forest Service asserted a program interest in having the lands freed of an incumbrance.

In the Gray case, as originally decided, the marketability test was applied to allow an application for patent of a claim which yielded mineral salts (of an intrinsic value of a few cents a pound) but which when mixed with water yielded a product sold in labelled bottles as "Medicine Rock Mineral Water" at $3.00 each, $28,000 worth. This was vigorously protested, among others by me, as an incorrect application of the language of the statute. I told the Solicitor that it was "my firm view that any mineral to be classified as 'valuable' must possess inherent characteristics which give it intrinsic value in and of itself... Mineral salts having relatively little value cannot be transformed into a marketable product by the mere addition of water".

The Solicitor agreed, eventually, to reconsider, but did not accept my reasoning. Instead, he found that as a matter of law, an applicant could be found to have not acted with prudence, even though the product was marketable and had yielded a profit:

"If there is nothing unique or peculiar in the mixture of these minerals as they occur in the incrustations obtained from claim No. 4, it would appear to me that the claimant would find it much more economical and prudent to obtain pure salts commercially. If this assumption is correct, I would have to conclude that a person of ordinary prudence would not devote his labor and means to this cumbersome and seemingly implausible method of producing a marketable substance."

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"As stated above, if the same product can be produced from pure salts in commercial quantities without the necessity of expensive mining operations, this fact should be taken into consideration in determining whether a person of ordinary prudence would spend labor and means, with the reasonable prospect of developing a profitable mining operation."

Denison interpreted the "intrinsically valuable" concept expressed two years earlier in a September 20, 1962, memorandum to me. I had hoped, in asking the opinion, for the rules to be spelled out, as a guide to the administrators in the field, particularly as to when to apply or not to apply "marketability" tests, and other refinements of the concept of prudent man. I was told that "the marketability rule... is merely one aspect of this /prudent man/ test, and that it didn't apply to intrinsically valuable minerals, adding that "an intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability."
The key word in that sentence apparently was usually, for in Denison, manganese claims, admittedly of a quality which had been patented and mined, were held not to be intrinsically valuable, and the principle was enunciated in the head note language, that:

"Mining claims located for manganese must be declared null and void for lack of a discovery where, although manganese was sold from some of the claims and other claims in the vicinity during World War II and the post-war period when a Government buying program was in existence, the evidence shows that since the end of the buying program in 1959 the price of manganese has dropped 50 percent and sales of domestic manganese have ceased and there is no reasonable prospect of a future market, the need for manganese being supplied by higher grade imported manganese."

An examination of these two cases shows at best that not much is certain in this subject. Denison apparently stands for the proposition that economic considerations will be taken into account as to the locatability of any mineral.

Or is high grade manganese for which there is no market, intrinsically more valuable than low grade manganese for which there is no market?

Coupled with this question is the even more troublesome one of applying this market test retroactively. In theory, supported by another series of cases, the concept of nullity could be applied with all its serious consequences, even though at the time of application for patent all tests of value could be met. The government might seek to recover the value of the ore mined in the subsequent good years, if it should be found that during the lean years a prudent man would have given up.

This concept of nullity arising from the application of the marketability test or any test is most troublesome in the cases where location is sought under the exception in the common varieties provision of P. L. 167, which tried, at least, to assure continued locatability of materials valuable because of 'distinct and special properties'.

A locator in these situations makes application for patent at his peril--if he fails, his entire investment in equipment in place may be jeopardized, not to say the contingent risk of being sued for the value of the materials removed and sold under a good faith assumption that the claim was locatable under the exception of that Act.

As an aside concerning the common varieties exception, I call your attention to the case of U. S. v. Kenneth McClarty, A-29821, August 27, 1964, which has raised its own storm of protest. This opinion denied locatability to a
deposit of commercial quantities of building stone of a particular type, the stone admittedly having "unusual jointing or fracturing". The claimant argued with a good deal of force that his deposit met the test enunciated by one of my predecessors who had also served as Solicitor.

The validity of this claim was attacked in interesting circumstances. It was and is agreed that the building stone on the site was specially desirable for the local building market. The mining locator thought it was subject to location; another business man sought a Forest Service permit to remove the same stone for the same market.

So the contest was really between rival businessmen, not between one businessman and the sovereign. Naturally the Forest Service would rather have the control implicit in a permit, than the servitude of a mining claim or the patenting of the surface in fee. So the deposit was permitted over the top of the claim. One unpleasant word bandied about locally was "topfiling".

A land manager automatically looks to the situation of the land, when a claim is contested. A land manager cannot tolerate the misuse of the mining laws to get control of the surface, and the Congress in the enactment of P. L. 167 has expressed the same view.

In case after case, situation after situation, an examination of all the facts will show that there lurks in the background of contest that other and higher values are involved than recovery of the mineral from the particular deposit.

That was how marketability got its currency—in Layman v. Ellis and other cases to furnish a protection against preemption of surface under guise of mining laws, for sand and gravel values. That is why for so long the concept of marketability was held to apply only to minerals of common occurrence. That is why I've emphasized that many of these cases are Forest Service contests.

It is sometimes forgotten that old Judge Lindley had this in mind, too.

Judge Lindley sought, as land administrators seek, some tests which will tell applicant and administrator alike, what will or won't suffice in showing that a mineral deposit is "valuable" under the Mining Act of 1872. The whole law on this has grown out of his tests. He fathered the prudent man rule, but that rule as he enunciated it also required that it be "demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose."

That test runs through the early cases. It is lately largely ignored, and is not mentioned in Gray.
What concerns me is that the concept of marketability is being applied in situations wherein there is no other competing use for the land. In several cases, the test is applied as an absolute, notwithstanding the fact that the lands involved are inaccessible, non-timbered, not close to significant population centers, and considered to have no significant recreation values. The basic question raised in these cases boils down to a difference of opinion as to whether the expenditure of capital would be considered prudent, given the quality of the mineral and other economic factors apart from the best use of the land.

Whether alternative uses of lands ought to be considered in the administration of the mining laws is a policy question.

From this discussion, it should be readily apparent that all of the controversy which has swirled around such terms as "locatable", "discovery", "prudence", "marketability" and "common variety" stem from the sketchiness of the standard Congress provided in the 1872 law. That standard consists of three operable words—"valuable mineral deposit"—perhaps the most laconic statutory guideline that Congress has ever provided in so important an area for the nation's development.

We are certainly a government of laws and not of men. But men must administer the laws—they must develop comprehensible criteria or tests to give meaning to the words of the law. Thus, "valuable" as used in the statute was first equated to the rationale of a "prudent man" and the "prudent man" was later considered to be motivated by "marketability" of the product.

To expect that a statute enacted in 1872 will be given the same meaning 92 years later is inconsistent with human experience. It was Justice Holmes who said, in the context of the law, that "There is no such thing as plain language. A word is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Laws, including the mining laws, are construed according to man's changing environment. This will always be the case.

There will be a great temptation in presenting views to the Land Law Commission to get side-tracked into debates on the relative merits or evils of the tests that have heretofore been applied. I submit to you that such a course will not well serve the Commission or any industry. What is needed is to tackle the substance of our resource laws—not the semantics which have developed over nearly a century.

I believe I have demonstrated that "marketability" as a test is at best a fragile thing—tending to be flat and single-dimensional in its view of "value". If this be so, the fault is shared, as Chairman Aspinall has said, by both the executive branch and the Congress.
Clearly it is time to stop arguing terminology and turn to the task of contriving an intelligible legislative standard, adequate for the year 1970 and 2000. This standard must accommodate the legitimate needs of the affected groups which use the public lands. The standard must be devised in the context of service to the public and to the progress and prosperity of the nation.

This is a time for soul-searching in many places. The mining industry owes it to the public, the Commission and the Congress—indeed to itself—to define very precisely what it considers to be the proper objectives of the mining laws vis-a-vis the public lands. Emphasis on mineral development and reserves for industry stability is entirely proper. The acquisition of fee title to real estate without rational economic relationship to the total economic structure seems less so. You are mineral resource developers, not real estate operators. There are other and better avenues to the objective of disposal of the public lands per se than the mining laws.

We must all keep in mind that, in large part, restrictive interpretations of laws conferring benefits are usually traceable directly to their abuse—to their distortion for illegitimate ends. The scars of Al Sarena still mark deeply the professional conscience of land law administration. If we would be spared the subconscious aversion to "give-away", we must make the Congressional policy on public mineral resources explicit, certain and understandable.

We can hack our way out of this jungle only with a statutory machete. Extended debate on the secondary aids to construction of old terms will only lead further into the tangled underbrush of confusion.

This is more than an exercise in rhetoric. Basic rethinking of fundamental concepts is necessary. I am persuaded that much of the problem in recent decades revolves around the issue of fee title as an aspect of our mining law philosophy. Is this critical to the right to extract subsurface resources? Would a system of exploration claims followed by a guarantee of tenure for the life of the mineral deposit suffice? I don't know the answer, but it represents an area that the industry should explore as a possible avenue toward coexistence with the long-range social demands that will come with a population of 300 million.

I am suggesting that we should be constructing ultimate objectives, totally divorced from the framework of the past. We shall not have this opportunity again in this generation. It may be too late to expect objectivity and balanced weighing of the equities under the social pressures of another era.