REMARKS OF UNDER SECRETARY OF THE INTERIOR, JOHN A. CARVER, JR., BEFORE THE WESTERN ATTORNEYS GENERAL CONFERENCE, BOISE, IDAHO, AUGUST 19, 1965

Administrative Law and Public Land Management

The Public Land Law Review Commission completed its organization last month and is meeting now in Washington to select the Advisory Council which its authorizing act created. I am glad to present to you today some thoughts related to the Commission's work, knowing that the subject is of more than academic interest to Attorneys General of the public land states of the West.

The Advisory Council will be made up of liaison officers from the Federal departments and twenty-five representatives of major citizen groups. Under another provision of the Act, state governors may designate representatives to work with the Commission and the Advisory Council.

The creation of the Public Land Law Review Commission for some purposes may be thought of as a response to a "crisis in confidence" with respect to the administration of the public lands.

This "crisis in confidence" has resulted from a number of symptoms, many of them seemingly inconsistent and even irreconcilable. The broad support for the idea of the Commission from so many groups whose objectives have always seemed diverse indicates that the dissatisfaction with public land law administration did not follow any particular ideological line.

To name but a few of the points of view, there are those who feel that the Federal government is not getting its money's worth for the resources it sells; those who feel that the mining laws are too strict and those who feel they are too liberal; those who feel that wildlife and recreation are getting too much attention, and those who feel they are getting too little.

Some are concerned with the needs of cities or counties, or for industrial development, while others are concerned with the tenure or other stability which will justify further investments on the lands by permitted users.

One possible contributing factor in the crisis of confidence has had comparatively little attention. It falls within the peculiar domain of the legal profession.
The Public Land Law Review Commission is charged with the duty of reviewing "the policies and practices of the Federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management, and disposition of those lands." Since "policies and practices" may comprise the fabric of "administrative law", as contrasted with the statutory law, the administrative law of public land administration will be examined.

I have called attention to the vital nature of this aspect of the Commission's work on a number of occasions. Most recently, on the fifteenth of last month, I discussed it before the Rocky Mountain Mineral Law Institute at Denver.

Today I would like to amplify on the theme. My Denver presentation emphasized the relative roles of the Congress and the Executive Branch, in the system of land administration, as to which I cannot express one guiding principle more effectively than did the late President John F. Kennedy in correspondence with Congressman Aspinall, Chairman of the House Committee on Interior and Insular Affairs, and now Chairman of the Review Commission. He said:

"I wish to assure you that we are fully mindful of and sincerely respect the constitutional prerogative of the Congress to make rules for the management and disposal of the public lands. At the same time, it is the function of the Executive Branch to administer publicly-owned resources within the framework of standards established by the Congress."

The late President stated that the wise use of the dwindling public land base is becoming increasingly technical and complex, and that at the same time the Congress is faced with major policy decisions in other fields. These factors, he said, "dictate that day-to-day administration be conducted as an executive function subject to the policy guidance provided by the Congress."

I attempted in Denver to state also some basic guidelines against which proposals and representations to the Commission might be measured:

The Commission might state explicitly that it will seek always to draw a clear line between legislative and executive prerogatives by insisting that the legislative standards always be stated as precisely as circumstances permit, and with equivalent concern that the administrative function be left as effectively to the administrators.

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I favor, as the more desirable choice, land management procedures which bring the interested public into the decision-making process. Such participation should be a genuine one, while alternatives are truly available.

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Where a standard which in fact controls the decision-making process is capable of being stated to administrators, it ought to be stated to the affected public.

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The system ought to accommodate in a reasonable way the requests of individual citizens. The governmental function of classifying land should not be misused to insulate the administrator from the legitimate expression of interest by the public, including individual members thereof.

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In my experience, no duty has been more distasteful than that which has occasionally fallen to me to inform citizens that the sovereign does not feel itself bound by the same property rules which apply to other landowners. It is traditional with English speaking peoples that the King is under the law. It shakes confidence for the citizen to find the sovereign disavowing the good faith acts of its agents on the narrow ground of lack of authority, when the lack of authority is based on an admitted change in interpretation of law.

As nearly as may be, therefore, I would opt against reliance on technical defenses except where extraordinary conditions, of stated import, prevail.

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In sum, we are the legatees of a tradition of freedom. The system of land administration must remember this at every moment.

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Some of you may have seen a Wall Street Journal report last week from the American Bar Association Convention in Miami entitled "Crisis in the Courts,"
and subtitled "Decline in Respect for Judicial Process Worries Lawyers." Two things struck me: One is the public's willingness to generalize from reports of specific situations to critical attitudes about the whole court system. How true this is also in the land administration field; one bad case can do more harm than a thousand good cases can correct.

The other was the information that Michigan has instituted the right of appeal to the courts from most of the State administrative decisions. Obviously, some of the loss of confidence applies to administrative tribunals. The public doesn't always distinguish.

The Department of the Interior has all the problems of size and complexity of the administrative task which has played so prominent a role in the loss of confidence in our courts, particularly at the lower levels.

It is charged with administering statutes and applicable rules of common law pertaining to mineral resources on some 830 million acres of Federal and patented lands, and all other resources on some 553 million acres of this total. In the year ended June 30, 1964, the Department's Bureau of Land Management acted on 427,457 mineral and nonmineral cases involving properties in more than 18 states, and receipts totalled nearly $200 million.

The most common kind of administrative actions consist of mineral leasing (especially oil and gas), title transfers (agricultural, sale selection and exchange), nonmineral leasing, mineral contests and patents, and withdrawals of reservations of public lands. Over 1,600 local decisions were formally appealed to the Washington, D.C., headquarters in the year, and formal hearings were held in 279 adversary proceedings.

That may not seem to some of you such a heavy load. But as Western Attorneys General know, these statistics are mostly centralized in just a few states, and where they are centralized, they have a tremendous influence on the local economy, the local attitudes, sometimes the local politics.

There is plenty of reason that the system should be fair, prompt, and be protected by judicial review.

Furthermore, we can assume that human demands and therefore transactions affecting Federal lands will sharply increase. Acquiring, exchanging, granting, selling, conserving, leasing, and developing Federal lands will involve more people in more parts of the country.

Where then, in this setting, do we now stand in the field of administrative law applied to public lands and where should we be headed?

The public land "law" present consists of a voluminous, even forbidding, body of heterogeneous statutes, policies, and procedures under which the land managing agencies operate. Lacking self-coordination and discipline, this
framework has forced great reliance upon administrative construction and supplementation by administrative rules to serve the needs of conservation and management.

I should like to emphasize this point. No matter how heterogeneous and disorderly the Congressional patchwork of public land laws may be, the administrator seeks for his own purposes to make it systematic and orderly. Therefore, he extends, supplements, interprets, and sometimes ignores the statutory language as he seeks to pull the whole into some kind of unified system, usually denominated "good conservation."

I feel strongly that the process of ordering and arranging is necessary. We do have program objectives; we have the opportunity and the responsibility to choose from among alternatives permitted us, to emphasize, to conform to overall budgetary discipline.

But this necessity does not justify losing track of the fundamental fact that we are not authorized to legislate, and certainly not to justify departure from the purposes of the Administrative Procedure Act "to improve the administration of justice by prescribing fair administrative procedures."

That Act prescribed five major kinds of uniform procedures: for rule making, for administrative proceedings, for administrative hearings and decisions for judicial review of legal wrongs, and for a system of semi-independent trial examiners to preside at agency hearings.

And to the extent that the Administrative Procedure Act applies to public lands, the administration of substantive policies may be said to conform to current standards. Thus, the Federal land administering agencies have published their organizational set-ups, their delegations of authority, and the locations of their offices. They publish or make available for public inspection all final case adjudications and all regulations and rules. They make the public records available to persons properly concerned except for information classified on good cause. The Department of the Interior, in virtually all instances, goes beyond the Act, which exempts public property from the rule making requirement, and gives general notice of proposed making of rules, and allows participation by any citizen. And, the provisions of the Act concerning formal administrative hearings in matters affecting private property interests are applied by the Department in matters such as mining claim contests and grazing privilege appeals. As you know, a corps of hearing examiners is maintained in the Bureau of Land Management under the safeguards of the Act.

I had a small role in making it possible for judicial review of Interior decisions to be had in the district where the land is, a reform instituted in 1962. The cases are beginning to come under this new venue statute, and the effect is salutary as land administrators feel or fear the effect of critical land decisions in their own communities.

Yet, we still have administrative law problems of several kinds. One
arises from the use of reports of case-by-case adjudications as the method of
determining or refining policy or as the medium for communicating policy.

Case-by-case adjudication has been standard practice over the years
under the older non-discretionary public land laws.

It was basically through the trial-and-error method of applying the
statute directly to the facts in individual circumstances that the body of
administrative law developed in the public land field.

Such was and still is the pervasive pattern in the mineral land law
area -- at least as to administration of the Mining Law of 1872. That statute,
as you know, is largely self-operating, calling for ministerial rather than
discretionary judgments on the part of the Secretary of the Interior.

But when rank-and-file civil service technicians -- geologists and
mining engineers -- are required to attempt mastery of abstractions, baffling
even to members of the legal profession, the system presents real defects. Or
when the adjudicator is really making new policy without secretarial concurrence,
it is time to look into it.

I have observed, particularly in the area of administration of the
mining laws, that adjudication dominates administration. This criticism may
seem anomalous, since the adjudicative process has always been deemed more
protective of individual rights than the administrative process.

But in its practical application, this trial-and-error method of applying
a statute directly to the facts in individual circumstances, has caused diffi-
culties to both the affected public, and to the administrators -- difficulties
which contribute to the "crisis in confidence," and perhaps also are substanz-
tively questionable.

There is no published set of regulations which spells out the present day
complexity of the Mining Law of 1872. The fabric of this law is, like the
common law, in the reported decisions -- court and departmental.

The prime example -- one that seemingly cannot be omitted in any seminar
of mining law attorneys -- is the matter of interpreting the "valuable mineral"
requirement of the Mining Law of 1872. Suffice it to say that the discovery
rule question is considered open by many people and it is fostering excessive
litigation at the present time.

Another category of difficulty in the field of administrative law comes
from the general tendency to confuse discretionary and non-discretionary acts of
the Secretary and to put them into the same procedural format.

For example, before the rules of practice were changed two years ago,
appeals could be filed from land office "decisions" whether they dealt with minis-
terial or discretionary actions, and this is still the case in the mineral land
A homestead or desert land entry applicant appealed through the same process whether the rejection appealed from was for a defect in his application or for classification of the land as unsuitable. Measuring the sufficiency of an application against the law and regulations is ministerial. Under Section 7 of the Taylor Grazing Act, classification is discretionary.

Time after time a man may have expended time, money, and effort pursuing an appeal involving the correctness of his paper work, only to find, at the end of the line, that an adverse decision rests in the discretionary area.

Furthermore, the "substantial evidence" rule, applicable in appellate judicial procedures as a device to avoid substituting the judgment of an appellate level for the judgment of the lower level, on the same facts, is not applied in administrative practice in the Department of the Interior. So the ground for rejection may shift.

Following the moratorium on receipt of new nonmineral land cases in the Department in 1961 and 1962, a further measure in 1963 separated the discretionary land classification cases and took them out of the appeals channels. Instead, a 60-day period of administrative review is provided, during which the initial decision may be set aside by the Office of the Secretary if good cause is shown. Unless set aside, the initial decision becomes the final decision of the Department, subject to judicial review to the extent permitted under the Administrative Procedure Act. Such judicial review, of course, is narrow, since Section 10 of the APA excepts from judicial review "agency action which is by law committed to agency discretion," but it does cover the right to assert that the agency finding was arbitrary, capricious, an abuse of discretion, or not supported by any evidence.

Failure to distinguish between ministerial actions and those actions which call for discretion has led, I think, in some instances to an abdication of the policy making function, but more often to a looseness of supervision. Without clear guidelines in published and public form, local officials can be arbitrary with impunity. This is not healthy.

When the Congress adopted the Classification and Multiple Use Act last year, it specified with particularity what kind of implementing regulations were to be issued by the Department of the Interior. I, for one, welcome the requirement that there must be regulations containing criteria to be applied before any lands are to be classified for sale under the interim Public Sale Act or for retention for multiple-use management, and its further requirement that no classification or designation of any of the BLM public domain be made except as authorized by statute or in accordance with categories defined in Departmental regulations.

This is as it should be; it is essential for orderly administration and allows citizen participation in developing the criteria, and for public information.
It would be legitimate at this point to inquire why I should be spending so much time with matters of such narrow application. Part of my answer I would find in Anthony Lewis' fine book, Gideon's Trumpet. You will recall that in the Gideon Case, wherein the Supreme Court determined that the right to counsel was an aspect of due process even in State courts and without the existence of special circumstances, your colleague from Florida wrote to each Attorney General in the United States asking him to file or join in an amicus brief. A number of them, including several of you, did file such a brief; but not, as expected, for affirmance of the existing rule, but for overturning it.

What was involved was a principle of justice higher than administrative convenience.

The burden of my presentation to you is that the liberties of our citizens are at stake in the growing complexity of our administrative systems. If we do not keep those administrative systems responsive to fundamental principles of fairness, justice, equity and common sense, we are not worthy of the trust which public office gives us.

So I am taking such opportunities as come to me, to interest the legal profession, the law schools, public law officers, and through them the public itself, in this vital subject, and trying to say that this is important. It is worthy of study, analysis, surveillance.

There are many aspects of the problem which I haven't discussed, some of which I will take up as I get later opportunities to take a public platform. For example, right now I am wrestling with problems related to reliance on administrative practice of executive departments. To what extent can the departments disavow prior administrative practice as erroneous? Or, what retroactive rule-making by decision, the current determination that a prior legal ruling was wrong? Does the concept of agency and actual authority apply to former incumbents of Cabinet or other high office, so that it can be said now that as a matter of law they had no authority to come to wrong conclusions of what the law was then the question came before them?

These are not Interior Department questions, but important public questions. They are questions of interest to the profession, and to the public. They deserve public airing.

I appreciate your giving me the opportunity to expound on a theme which I hope may lead to a lot of thinking on the "rule of law" in the Executive Branch of the Government.