
Chairman Aspinall's letter asking me to participate in this session generously referred to my "extensive experiences" with this morning's subject, the role of law trained persons in natural resource agencies, and how that role will change in the future.

Perhaps the Chairman had tongue in cheek—he knows that I do indeed have much experience with government lawyers in a natural resource agency. He knows that some of this experience has been on the abrasive side.

I have spoken to bar associations and to professional societies about what the role of both lawyers and other resource professionals was not—mainly not to arrogate to themselves policy dominance in matters committed by law or organizational good sense to an elected Congress, or to administrators properly delegated by officials appointed by an elected President. Obviously I do not mean that lawyers can't or shouldn't occupy administrative roles.

I now serve in a regulatory agency, whose mission is legal in many senses of the term, including both quasi-judicial and quasi-legislative activities. I see some of the same problems which I saw in Interior, but with different dynamics. The size of the agency is a differentiating factor; when engineers, accountants, or (far more seldom) economists in the FPC seem to be "practicing law" they do so in the context of only two basic statutes. This is not so easy when five thousand or so public land laws and countless interpretations and decisions thereunder seem to require the lawyer's professional skill before even the simplest management step can be taken.

Another new experience presented in Commission activity is the "third force" function of staff counsel in contested cases. Lawyers assigned to this function are independent in a real sense, charged to present the "public interest" as they see it.

The instinct of lawyers to practice engineering, and of engineers to practice law, may or may not be demonstrable; I overstate purposely in order to lay the foundation for my first point.

That point is that the resource field on the public side as nearly as may be should be seen whole, and not as
a synthesis of specialties. There was a time, perhaps, when resource compartments were relatively water-tight, when foresters, range experts, land office lawyers, and reclamation engineers could ply their trades with a minimum of interaction. Not so now. On the public side, the poliferation of demands upon publicly owned resources has made the integration of resources management an administrative and policy objective of high importance.

Resource history students are fascinated, I think, with the steps in this integrating process which involved the law profession. One was the separation of lawyers from their program associations. Consciously or not, this had to have been done on the theory that the lawyers in the old relationship constituted a constraint, the removal of which was desirable in the drive to accomplish the integrating goal.

Bureaus of the Department of the Interior which historically were separate sovereignties found, one day, that they had no lawyers—at least no lawyers responsible directly to them.

But taking the lawyers out of the Bureau of Reclamation didn’t take the Bureau of Reclamation out of the lawyers. The desirability of an integrated or unified approach to resource management does not equate with facility in achieving such a goal.

The reorganization, in my opinion, did not serve the desired end, and instead produced two undesirable consequences. One was to erode the power of the program official, not in the direction of a better integrated public program under the command of the cabinet official, but in the direction of a policy irresponsibility. Bureau officials in the new arrangement found more and more of their policy judgments denominated as legal questions, thus not subject to their final control. Far from the intended result of having the bureau power migrate to the cabinet officer, the Secretary of the Interior has found himself, sometimes, caught in the net of this new constraint.

The other consequence was the creation of a corps of lawyers in mufti, some law trained, others not. In the bureaus, lawyers were prevailed upon to stay, and given other titles. They continued to perform a myriad of "legal" duties, either because the duties were not capable of being transferred, or because the centralized law office didn’t want them. But the fiction that the real lawyers were all in the legal department led also to a considerable number of legal functions being assigned to persons without legal training of any kind.

As an example, consider the process of "adjudication"
in the BLM land offices. Without a legal staff in BLM formally to exercise supervision, a process which requires more than any other the techniques and discipline of our profession is almost universally assigned to non-lawyers, and without legal supervision except in the most formalized appellate fashion.

Questions posed to such an official are quite as specialized and complex as those which face the Solicitor of the Department (indeed they are the same ones) or the Federal Power Commission. He must know law and regulations, he must observe the niceties of administrative due process, he must grapple with ex parte communication concepts, with notice, with agency and estoppel, with state water and land law, and with devolution of property—to name but a few.

And the cases are not social-security check size—many involve property rights worth millions of dollars.

Adjudication under these circumstances has to be reduced, in regulation and in practice, to a mechanical technique. Not having the training or inclination to examine "why", or to bring to the process the method of our basic legal institutions as taught in the professional schools, a sort of unreasoning rigidity dominates the process.

The ripples of the deficiencies of this system spread widely. For example, there are those who make it their business to review the papers and records on leasing and other matters, to find the technical defect, to "topfile", and then to set in motion the elaborate processes of contest. Much work is made for lawyers, government and private, but one must ask, at some point, whether we have yet discovered the right way to execute these technical laws.

I've given as my opinion that reorganization is not the answer. Where or how lawyers function in the federal establishment could be adjusted endlessly without getting at the answers we seek about how to preserve the integrity of our system in the face of escalating complexity.

Whether our profession has a major role in this is perhaps best established by pointing out that as a profession we are charged with responsibility for some of the system's failures.

Time magazine last week detailed a horrible example of a citizen losing a quarter-million dollar business as the offshoot of a dispute with Sears Roebuck about a two hundred dollar balance on some home power tools. Time blamed lawyers and the judicial system.

It could be, I think, that the real point is the inability
of major segments of our society, including a part of our profession, to understand what has been called the "paradox of procedures."

It is in procedures, what we call due process, that rights are protected; but it is also in procedure and process that rights are stifled by delay or buried in irrationality. Procedures are both a shield and a sword, and the challenge of our time is to understand this paradox and not to allow procedures to become our master.

It may seem inconsistent, in the context of our topic this morning, to leave the idea that what is needed is a broader view of resource administration, and at the same time to have a better understanding of procedures.

The ideas are consistent. I do not advocate more study of procedures, but a thorough grounding on the subject of procedures, particularly those related to resource administration.

Nowhere is the paradox of procedures more challenging than in the new dimension of administrative law which has been added as courts, regulatory agencies, Congress, and the executive branch have struggled to keep pace with the public's growing awareness of environmental quality.

In Scenic Hudson Preservation Conference v. FPC, the Commission had licensed Consolidated Edison to construct a pumped storage generating project in New York. On appeal from a citizen group concerned with the aesthetic impact of that decision, the Commission was reversed, and ordered to consider certain alternatives posed by the citizen-intervenors. The Court said:

If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete. The petitioners and the public at large have a right to demand this completeness. It is our view, and we find, that the Commission has failed to compile a record which is sufficient to support its decision. The Commission has ignored certain relevant factors and failed to make a thorough study of possible alternatives to the Storm King project. While the courts have no authority to concern themselves with the policies of the Commission, it is their duty to see to it that the Commission's decisions receive that careful consideration which the statute contemplates . . .

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In this case, as in many others, the Commission
has claimed to be the representative of the public interest. This rule does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.

The language of the Court of Appeals was general, and applies to other administrative agencies as well as the FPC. It has been reinforced by Supreme Court language in another electric licensing case, Udall v. FPC (High Mountain Sheep).

Those engaged in the executive, regulatory, or judicial consideration of the problems of our technologically complex era are challenged to develop the "law of the planned society", to use the phrase of Yale Law School Professor Charles A. Reich.

It is my thought that in the public land states, the "normal" incidents of this trend are magnified. I believe the lawyers who practice in these states are insufficiently prepared or grounded in what we might term the "jurisprudence of the public lands".

Specifically, I think it incompletely comprehended that the greatest part of the federal government's resource administration activity rests not upon its status as sovereign, but on its status as proprietor. Particularly in the Western, public land states, this creates tensions of a special kind. When the "public" lands were regarded as belonging to the public in the sense of being nobody's land as well as everybody's land, in other words when the task of the government administrator was the sovereign's task, namely the administration of disposition statutes such as mining law, homestead act, timber and stone acts, and the like, we didn't need to worry about further or better training in forestry, engineering, or recreation. The law's problems were difficult, but straightforward--they weren't intermixed with resource management.

The process of metamorphosis is quite a story, but not to be told here. Suffice it to say that beginning with the withdrawals authorized by the Taylor Grazing Act disposition gave way to management as the dominant interest of administration. The General Land Office became the Bureau of Land Management, for example. Eventually, in comparatively recent years, the process has been to a considerable extent legitimized by legislation—with the passage of the multiple use act for the BLM, for example.
For our purposes today, value judgments on this trend are not relevant. What is to be seen in this is that with the dominance of the attitude of proprietorship, the federal government took to itself a set of privileges and immunities which trace more to the common law and Anglo-Saxon notions of property than to the conceptual limitations on a government of granted powers.

The courts, of course, contributed, and are still contributing to the development of this rationale for federal activity. Once again, ours today is not to judge, but to understand.

In this sense, we find a special significance in the matter of the federal land holdings. Leaving all sovereign functions aside, all questions about immunity of federal instrumentalities or property to state taxation, regulation or control, and just consider what role in the economy or politics of Western Colorado a private owner, any private owner, would have if he owned all the federal land.

What would be his power? What responsibilities would he have?

Would such a proprietor be able to deny even easements of necessity, save on his terms? The Departments of Interior and Agriculture are subject to no control, legislative or otherwise, which inhibits the adoption of regulations and their implementation, to require a public utility who would construct a line across its land to agree to use that line to wheel its competitor's electric power. The wheeling of power of another may be, and often is, sound public policy, but the policy I speak of here is the policy of using the proprietorship of the land to effectuate a policy of governmental nature not sanctioned by the lawmaking power.

So I think the starting point for training a generation of lawyers for the demanding responsibilities of resource administration is a grounding in the legal or conceptual underpinning of resource administration in the public land states. It is a necessary starting point. If I can rely on Chairman Aspinall's vouching for my credentials, I will testify that these relationships are not understood well at any level of government--and a good place to start is in the universities with the upcoming generation.

I do not decry the trends I have been describing, at least not here--what I decry is our inability to articulate these problems so that they can be understood.

This takes us back to the country lawyer in Craig, Colorado, or Cascade, Idaho, who must tell a potential client that redress of his grievance must start with his Congressman.
Ought we to have or do we have a system of resource administration in the public sector so complex that the people affected most by it are deprived of effective legal representation?

We oughtn't and I think we haven't. Government lawyers no less than private lawyers, must be devoted to a system which calls for application of laws in such a way as to conform with the Constitutional requisites of due process and equal protection. But if the government lawyer does not see this as his role, and cannot explain either to himself or to the public, that it is the federal proprietorship, not Congressional policy, which moves him to rely upon technical legal defenses in circumstances even where a private proprietor could not, it is perhaps because he has not been properly trained. Perhaps his law school training did not purport to deal with the special problems of government resource administration where half or two thirds of the whole land area of the state where the resources lie is federal.

Purposely, I've taken us afield from the outline suggested by the agenda. The reason may be clear, but in case it is not, let me treat for a moment some of the topics framed for our seminar discussion, further to illustrate why I have focussed attention on the point of contact between citizen and sovereign, and not on the abstract question of what is legal and what isn't in the arranging of functions and jobs within the federal establishment.

Thus, we could pursue endlessly the question of whether lawyers ought all to report to the Chief Law Officer, or to the program officials, and the ramifications thereof including the creation of quasi-law jobs within the operating agencies. Such a discussion doesn't help much in terms of our topic today, because the issue presented is not legal education, but government administration. There are several schools of thought, no one right answer, and law graduates who seek a career in the federal service who are worried about this question had better give up and try an oil company--he will have to take the situation as he finds it, and that won't be logical or uniform.

Resource lawyers perform all the classic legal tasks. I know of no lawyer worthy of the title who couldn't carry his responsibilities alongside another lawyer who might be also a professional engineer, chemist, or forester. The combination may be important in places like the patent office, but I am not convinced that the answer to any of our problems lies in telling a generation of students that they should get a double degree to work in the Department of Interior or Agriculture.

This is not to say that I think that legal training is ipso facto sufficient for a resource assignment; rather I
think that a really well-trained lawyer must approach service for the government like he would approach service for a client, and that means knowing as much about the client's business or problem as the client does. Lawyers in the Department of the Interior who feel it beneath their dignity to find out what silviculture is, and the day-to-day problems of timber appraisal, road-building, or fish culture, will not be better lawyers by being educated on these things in a professional school. If a lawyer in a resource agency has a mining problem, he has at hand the finest geologists, mining engineers, hydrologists, and what-have-you, right in the Department. If he thinks that the only knowledge on these subjects which he may accept has to be found in the U. S. reports or the land office decisions, he is beyond hope, and further education is not his problem.

Not just in government, but everywhere, the management of our system requires a working familiarity with economics, scientific methods, and the more advanced techniques of the computer age. But this is a need which transcends concern with the lawyers only.

In sum, as I said at the outset, I do not think that planning ought to start with a synthesis of all the legal jobs in the Departments of Interior, Agriculture, the Federal Power Commission, and the like. Rather I think that planning ought to start with some unmet needs of our society in the field of resource administration wherein lawyers or law training can contribute to improvement.

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