THE FEDERAL PROPRIETARY FUNCTIONS--
A NEGLECTED ASPECT OF FEDERAL ADMINISTRATIVE LAW

Twenty years have passed since the Administrative Procedure Act became law, and probably a majority of those actively practicing in the field of administrative law today have known no other body of law governing the procedural aspects of Federal administrative agencies. Our memories are dim about the long period of gestation that preceded its birth, the debates about its need, the compromises required to secure its enactment.

The basic features of the Act have stood the test of time. But the growing complexity of society and therefore of government is causing new stirrings: the Freedom of Information Act, and the Senate's approval of S. 1336.

The Administrative Procedure Act was a remarkable job of translating the already developed administrative law of the courts into an admirably concise code of statutory rules. It demonstrated the truth of Justice Holmes' basic premise on the Common Law -- that the lesson of the law is not logic but experience.

With one of my able associates in the Department, Karl Landstrom, I recorded views on one aspect of the subject of our discussion today in the Arizona Law Review's symposium on public land law -- rulemaking as a part of the administrative process in public land management, emphasizing the need for greater use of formal rules as a method of interpreting the statutes and of applying Secretarial discretion to classes of actions in advance of individual public land adjudications. Another facet of the same general subject -- one that I feel has been neglected -- is the decision-making or adjudicative process involved in matching the actual fact situations of real cases against established statutory and regulatory standards. A reformed set of public land laws would perhaps make the discussion unnecessary. In part our problem is as stated by Nevada Federal District Judge Bruce Thompson: "The inertia of Congress in modernizing the public land laws has been a disservice not only
to the public but also to the officials of the Bureau of Land Management who have been faced with the problem of applying archaic laws to present-day problems of public land disposition." 5/

But the existence of archaic laws ought not excuse archaic thinking about their administration.

In dealing with the resources of the public lands, federal officials are executing the proprietary role of the sovereign, which is different from the function of regulator of private activities or of arbitrating conflicting interests between private citizens as individuals, or between private interests and the public health, safety or welfare. As we pointed out in the Arizona Law Review article, the compulsory rulemaking procedures of the Administrative Procedures Act, under a construction of the "public property" exemption of the A.P.A., are not deemed applicable to such functions. 6/ The Department follows the rulemaking procedures of the Act in these functions when it does on a voluntary basis. 7/

The adjudication requirements of the A.P.A. are similarly circumscribed or limited, but by a wholly different kind of exemption. The Act's procedures are required, "// every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing" with certain exceptions. 8/ The proprietary functions of government are not among the enumerated exceptions to this section, and the fact is that Congress has rarely required that public resource matters be determined on the record after opportunity for hearing. On the contrary, many of the public land laws must be read in conjunction with the Taylor Grazing Act, 9/ the net effect being that in the great majority of public land adjudications, the Secretary of the Interior has unlimited discretion, in that he may choose or choose not to classify the land and its resources as available for disposition. 10/ Thus, on the surface at least the mandatory A.P.A. formalities and criteria for notice, hearings procedures, conduct of officers, etc., would appear inapplicable.

For a decade after enactment of A.P.A., the Department made no provision for observing the Act's adjudicative formalities as to independence of hearing officers and other requirements even where private rights had vested conditionally in public lands, such as where grazing permits had been issued or public land entries had been made.

The beginning of the courts' different view deserves, perhaps, to be pinpointed as an historical aside. The express language which limits the adjudication provisions to cases "required by statute to be determined on the record" after hearing was broadened by the Supreme Court in 1950 in Wong Yang Sung v. McGrath 11/ to bring into the Act's procedural umbrella a whole category of cases where no statutory hearing requirement existed.

To arrive at this result, the Court reached back into the pre-A.P.A. body of administrative law, recalling that whenever a "right" of person or property was threatened by administrative action, procedural due process of law
demanded that a hearing be granted 12/. Then, through Justice Jackson, one of the early architects of administrative procedure legislation, the Court held: 13/

"... We do not think the limiting words 'required by statute, etc.' render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency."

This reasoning process suffers from too close scrutiny of the legislative history of Section 5. Although Justice Jackson in the Wong Yang Sung case described that history as "more conflicting than the text is ambiguous" 14/ the fact of the matter is that in 1941 the then acting Attorney General, within a few days of Mr. Jackson's departure from that office, presented to the Congress an extensive analysis and critique of the then pending version of the A.P.A. in which he urged that the hearings section be amended so that it would cover hearings "required by statute or the Constitution." 15/ Congress didn't accept the suggestion at least until the Attorney General-become-Justice succeeded in reading it into the statute by judicial interpretation.

The applicability of this interpretation to resource adjudications before the Department of the Interior was faced in the departmental decision of U. S. v. O'Leary in 1956 where the then Secretary concluded: 16/

"inasmuch as a mining claim is a property claim which may not be invalidated without due process of law, hearings on the validity of such claims seem clearly to be within the scope of the court decisions ... holding that administrative proceedings in which a hearing is necessary in order to satisfy the requirements of due process must comply with the Administrative Procedure Act, even though there is no statute requiring that the matter be determined on the record after opportunity for an agency hearing."

The Department conformed its adjudicative machinery to the requirements of the A.P.A. for some but by no means all of its functions. Thus a hearing with all of the attributes created by Section 5 and related provisions of the A.P.A. is available to any party threatened with loss of any presumably vested interest, such as a mining claim or unexpired agricultural entry. 17/ But such procedures are not generally available to those who hold no present interests in public resources where decision in the matter is committed by statute to Secretarial discretion. 18/

The most usual practical problem is that the applicant is not sure under the present confusing body of laws which of these categories applies to his case.
Even in centers of public land administrative areas like Boise, Salt Lake, Denver, and Albuquerque, we find a basic ignorance of the fact that the agricultural land laws including the Indian allotment laws since 1934 have had to be read in conjunction with the classification discretion committed to the Secretary of the Interior by the Taylor Grazing Act. 19/ This one source of confusion, exploited at times by so-called "public land agents," has added tens of thousands of cases to the adjudication load in the past ten years with generally negative results.

To illustrate further the distinction, BLM hearings examiners heard government contests challenging the validity of mining claims in only 211 proceedings last year, and only 50 grazing decisions, totalling 261 A.P.A proceedings. This was 90 percent of the examiners' case load but only a fraction of one percent of the total number of adjudications, which was 108,431. 20/

Even with respect to this small fraction of the cases, however, we have not proceeded further in principle in the past two decades than the courts had already advanced us prior to the A.P.A. That is, as to these hearings-type cases, the right to a hearing before a hearing examiner is not dependent upon statutory mandate, but upon a previously established constitutional principle of procedural due process. Justice Jackson's legerdemain in Wong Yang Sung was therefore novel only to the extent that he adopted the standards of the A.P.A. as a shorthand way of defining what would meet the constitutional standard.

While not directly relevant to the Department's internal administrative processes, it might be well to round off the general subject of the A.P.A. and its impact on public land and resource questions. Most people speak of the Act's dichotomy but it has always seemed to me that the Act resembled a three-legged stool: rulemaking, adjudication, and judicial review. We have spoken of the first two. The third is pertinent here because of recent cases which reveal developing judicial attitudes toward the Department's administrative policies.

The Act extends the right of judicial review of administrative action to any person who raises any of the particular issues provided in the Act, with two exceptions: (1) where statutes specifically preclude review, and (2) where agency action is by statute committed to agency discretion. 21/ The previously noted breadth of discretionary power is in its essence a delegated legislative discretion. 22/ So long as its exercise stays within the Congressional standards, courts have been loath to interfere. 23/ Another basis often cited is the courts' recognition of the Department's expertise, applied to both its statutory interpretations and its factual determinations on the public land matters. In this respect the Secretary's authority has been judicially described as "plenary." 24/

In the face of such precedents, it would seem that one adversely affected by an administrative decision would be required to demonstrate clear error of
fact or law, arbitrary or capricious action, or some other element bringing his case within the due-process-of-law category. But there have been more and more attempts to get cases reviewed as an A.P.A. specified statutory right, contested generally on grounds either that the "agency discretion" exception applies or that the Department's determination of questions of fact and law is conclusive in the absence of some clear showing.

The Ninth Circuit (in whose territorial jurisdiction about 75 percent of the public lands are located) resolved the latter of these two contentions on the side of A.P.A. coverage. Rejecting the government's contention that decisions of the Department of the Interior hold a more favored position than those of other executive agencies under the judicial review provisions of the Act, that Court, in Coleman v. United States, 25/ held that those provisions apply in their full force to decisions of the Department which would strike down private rights presumed to have been legally established in the public lands.

Through the processes I have described, therefore, two of the three basic requirements of the A.P.A. are now mandatory in certain limited classes of public land and resource questions, despite the original assumption that the Act would not at all affect the Department's proprietary operations, based on specific language of exception that seemed clearly applicable.

My own view of this reversal in direction is that the courts have sensed that some of the administrative interpretations of statutes governing valuable property rights were leading to distortion of Congressional intent and purpose. Therefore, seeing an evil crying for correction, the courts themselves have taken some liberties with the A.P.A. to construct a jurisdiction to review what historically had been an independent executive function.

But because of the express exception to judicial review, these judicial strictures affect only those transactions not committed by statute to agency discretion. This leaves possibly 65 percent of the current mix of public resource management cases where under the present A.P.A. the Department apparently may exclusively establish its own standards of fair play. But there is no assurance that the courts will not step even into the discretionary area so generally and generously bounded by the Taylor Grazing Act.

The very endlessness of the list of reasons which may develop to exercise discretion negatively, such as unsatisfactory soils, climate, topography, or access, conflicting present uses, potential for a higher and better use, or inadequate water supply, may lead toward a judicial inclination at least to question the right of the Secretary to use a reason not urged when the applicant had the chance to meet it.

The mineral leasing statutes (as contrasted with the mineral entry laws) are permissive in form. Oil and gas, coal, sodium, potash and the other leasable minerals may be leased in the Secretary's discretion, a legislative power delegated by Congress. 26/ Whether the wisdom of his decision not to lease a particular area or his rejection of a particular lease offer will be accepted
as clearly within the express exception to the A.P.A. adjudicative requirements also may depend on whether that discretion is exercised in a manner which does not offend the sense of justice of the courts.

Whether administrative decisions are to be exercised in a manner consistent with our concepts of law and fair dealing, depends upon a self-imposed system of administrative discipline. Due process is an ideal to be pursued whether or not it can be enforced by judicial sanction. The welfare of individuals and the economy of many American communities can be deeply affected by the manner in which the statutes are interpreted, the facts are established, and the delegated discretion is applied. The underlying philosophy of the Administrative Procedure Act gives us the pattern most likely to achieve that result. To the extent that we observe its spirit, we can have assurance that the public is being dealt with fairly and we need have no concern about whether our actions meet judicial standards of propriety.

After more than five years of wrestling with these issues, I am glad to report some progress but I am not satisfied that we have achieved that goal. To cite one example, the time lapse in disposing of most cases, often burdensome in the past, has been substantially reduced. The A.P.A. contains the standard that matters shall be disposed of with "reasonable dispatch." There has been a definite improvement in this regard over the past three or four years, but some cases still pending were started five years ago; a few even longer. When we took drastic measures in 1961 to rid ourselves of the overwhelming case backlog, we set the stage for a condition under which greater use may be made of hearings to establish the truth of controverted material facts. We are now at a stage where that opportunity can be exploited even though not required under A.P.A. provisions. This I think we should do.

We have extended substantially the content of our public land regulations setting forth Secretarial criteria for the exercise of land classification judgment under the power of Secretarial discretion. New ground was broken in land classification rulemaking completed last year. Many proposals have been made over the past several years for reform of the public land appeals system. Some would go so far as to make adjudication final at the level of first instance with no provision for review at the departmental or intervening levels. Strangely enough, the most vigorous objection to this simplification comes from within the Department, from those who insist upon preserving the Secretary's prerogative to correct errors of his subordinates. Their interest, however, is not principally aimed at fairness to the public, but concern lest public resources be disposed of improperly. The argument holds little merit, of course, because in the ordinary course, if the local land manager decides in favor of the applicant and no other party protests, there is no appeal or request for review and no review occurs.

Another closely related proposal is that initial decisions be reviewed strictly on the issues of record, with no arguments or objections permitted which were
not made a part of the original proceeding. This, too, is found objectionable, especially by the lawyers, who insist that departmental consideration should have wide latitude to raise any defense which will protect the public interest, even to the point of a consideration de novo.

Another idea, which in one form reached the Senate Committee hearings stage, 30/ is to route the appeals to a Board of Public Land Appeals within the Department. Notably, Agriculture Secretary Orville Freeman in May of this year established a new Board of Forest Appeals to hear appeals from Forest Service decisions. 31/

We could go on enumerating elements of the system which seem to fall short of the goal of efficient management in an atmosphere of fair play. But I will mention only one more and here I revert to the theme of the law review article earlier mentioned. This element goes to the very root of substantive content. It relates to the existence of standards derived from public rulemaking, under which the applicable statutes will be interpreted and the delegated discretion will be carried out. To my mind, this is the very essence of substantive due process: that the public should know in advance at least the main substantive rules of the game. Certainty and predictability are the very foundation stones of any advanced legal system whether judicially or administratively applied.

If we match this criterion against the present status of public resource management, the shortcomings are all too apparent. That portion of the Code of Federal Regulations which governs public land and resources is more than 600 pages long. 32/ But careful analysis will reveal that it consists almost entirely of a paraphrase of the statutes being implemented—literally hundreds of them—together with elaborate procedural instructions governing the filing and processing of applications and other documents. Statutory interpretations and substantive criteria or standards, although recently increased, are still relatively scanty. For the most part, these factors are left for individual, ad hoc decisions on a case basis, so far as the public is concerned.

To be sure, the main outline of interpretations and substantive policies are available in the published decisions of the Department. 33/ But as you may surmise, this presents a formidable challenge of library research through the 70-odd volumes of the selected decisions which are published. And deducing from the cases the future applicability of their apparent substantive rules is a matter of considerable hazard.

Stare decisis is a venerable part of our jurisprudence, but in this context high priority is placed on specialization in a very narrow field of Federal administrative practice in which the cases exhibit wide factual variance. The reluctance of some administrative and legal personnel to reduce established precedent to regulatory form is understandable, but it falls painfully short of full public disclosure of the standards being applied to the public business.

The leading Federal case on this point was already pending on appeal when the A.P.A. was enacted. S.E.C. v. Chenery 34/ was therefore decided without reference to the formal publication and rulemaking requirements of that Act. The case holds, as you may recall, that administrative interpretation to fill
in the interstices of statutory policy may be supplied by the ad hoc decisional process, as well as formal rulemaking. Retroactivity in the application of standards, especially to meet new or unforeseen questions, will not, therefore, be interdicted by the courts.

This was clearly sound policy in the context of the particular case then before the Court. But it seems to me that it does not provide a basis for a general course of action and that we must, in the interest of administrative fair play, move ever more closely to the philosophy reflected in the A.P.A. of reducing not only statutory interpretations but also discretionary administrative standards to regulatory language. In that direction lies the certainty and predictability which the public is entitled to have when it undertakes to do business with its government as a resource proprietor. Flexibility is undoubtedly essential to proper protection of the public interest, but complete freedom to revise the substantive rules retroactively invites the caprice that offends due process.

Some of the points I have suggested here demonstrate, I think, that administrative law related to the Federal proprietary functions has been relatively neglected by the profession. I think it offers a fertile field for systematic research and progressive reform.

Analysis of relative professional neglect in this field suggests that it may have been due to the long period of public land inactivity between the two World Wars. It may have been due despite the recent "public land boom" to the fact that the most typical case, say a homestead, small tract or noncompetitive oil and gas leasing application, represented at the time no tangible vested property interest and only a speculative potential. But the situation is rapidly changing. Individual cases such as competitive leases, land exchanges, and group contests against unperfected claims involve high property values in their own right. In the aggregate high market values and highly significant public interest considerations are involved. Not the least of these is the kind of future natural resource environment that will exist in the long-term future in the public land States.

We have witnessed some bright spots in the trend of administrative law developments affecting public lands and resources. One of these was the venue act of a few years ago making it possible for judicial reviews to occur outside the District of Columbia--for courts convenient to the people most concerned to consider the facts and issues with an awareness of regional and local settings and points of view. 35/

To the law schools represented here, especially those in public land States, I would encourage re-examination of the significance of administrative law in this interesting and important field. The timing is opportune in view of the Public Land Law Review Commission's study of the land laws and their administration. This neglected branch of administrative law should also be given a more prominent place in the academic curriculum as a relief from over-
concentration on the independent regulatory agency functions.

Your Section Chairman-elect, Robert McCarty, recently presented a perceptive treatment of the Department's decision-making processes before the Rocky Mountain Mineral Law Institute. More of this is needed. Constructive reform proposals are welcomed. To this Section of the Association, therefore, in its tradition of leadership, I urge alertness to this opportunity to contribute toward improving the administrative law of public resource management.

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Footnotes

6/ Carver and Landstrom, op. cit. supra note 4, at 52.
7/ This practice was described as follows in a letter of July 8, 1965, from the Department to Sen. Eastland, Hearings on S. 1160 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 426 (1965):

It is the policy of this Department to afford the public an opportunity, to the maximum extent feasible, to participate in the rulemaking process before the adoption of rules and regulations which are to be published in the Federal Register, even though such participation may not be required by the act. This is in accord with the Congressional policy stated. This policy, however, recognizes that the executive branch must have some discretion relating to "what, if any, public rulemaking procedures" it will adopt . . .


10/ See, e.g., Ferry v. Udall, 336 F. 2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965) in which it was held that the Secretary's refusal to issue final certificate was not subject to judicial review where the Isolated Tracts Act (§ 14 of the Taylor Grazing Act) commits the decision to sell to the Secretary's discretion and where under regulations the Secretary reserved the right to exercise that discretion at any time before a bid had been accepted by the issuance of the certificate, since § 10 of the A.P.A. prohibits judicial review of agency action that is by law committed to agency discretion.


12/ Id. at 49.

13/ Id. at 50.

14/ Id. at 49.


The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands, withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such application under applicable public-land laws . . .

20/ 1965 PUBLIC LAND STATISTICS 106-109, 122.


22/ The term "delegated legislative discretion" is used here in the sense of delegated power, which the Congress may exercise itself,
to employ discretion in the execution of a statute. See U.S. v.
Grimaud, 220 U.S. 506 (1911); Hampton & Co. v. U.S., 276 U.S. 394

23/ See cases cited at note 22, supra.

24/ Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336
(1963).

25/ Civil No. 20,227, 9th Cir., June 21, 1966.

1938); U.S. ex rel. Jordan v. Ickes, 143 F.2d 152 (D.C. Cir. 1944),
cert. denied, 323 U.S. 759.


28/ An 18-month moratorium was declared by the Secretary of the
Interior in February 1961 temporarily halting the receipt for filing
in the land offices of new applications for most classes of non-
mineral leases, sales and entries to permit large numbers of cases
on file to be acted upon more expeditiously.

29/ Proposed 43 CFR Subparts 1725, 2243, 2410, and 2411, 30
Fed. Reg. 2384-2392 (1965); 43 CFR Subparts 1725, 2243, 2410, and

30/ S. 758, 88th Cong., 1st Sess., "to establish in the Office
of the Secretary of the Department of the Interior a Board of Public
Land Appeals . . . ." Hearings held by the Senate Subcommittee on
Public Lands on May 6, 1963.

32/ Title 43--Public Lands: Interior (1966) at pages 103-732 contains regulations dealing with matters coming under the jurisdiction of the Bureau of Land Management.

