REMARKS OF COMMISSIONER JOHN A. CARVER, JR., FEDERAL POWER
COMMISSION, BEFORE THE PUBLIC LAND LAW REVIEW COMMISSION
CONFERENCE, AMES, IOWA, DECEMBER 11, 1970

To put the work of the PLLRC in perspective, I think it essential that there be a full appreciation of the constitutional and public affairs context of its creation and operation. The real life of politics and government administration, if you will. Regardless of the substantive merit of its policy recommendations and their eventual fate in the legislative or administrative processes, I view the whole history of this Commission as a classic study in legislative-executive relations at the Federal level.

In the historical perspective which I perceive, this effort at modernization of our public land laws had its inception in a particularly articulate and revealing exchange of correspondence between the Chairman of the House Interior Committee and the President of the United States in 1962 and 1963.

Congressman Wayne Aspinall, then as now Chairman of the House Committee on Interior and Insular Affairs, took a characteristically direct approach in raising with the Chief Executive some very central issues of Executive-Legislative responsibility. In late 1962, he invited and urged his friend and one-time House Office Building next-door neighbor, President John F. Kennedy, to submit his views "as to legislation which would permit the Congress to fulfill its constitutional responsibility to make rules governing the use and disposition of Federal property and at the same time not hamper the effective administration of that property in accordance with the time honored conservation principle of effecting the maximum good for the maximum number."

President Kennedy responded to this invitation personally. He projected the discussion beyond the issues reflected in pending legislative proposals. Noting the increasing complexity of public land management and the limited amount of time that Congress could devote to the detail of that subject matter, he observed that "the public land laws constitute a voluminous, even forbidding, body of policy determinations within which the land management agencies must operate"; he described the uncoordinated and
disjointed, conflicting and inconsistent state of the statutory framework; and he concluded by saying that the system warranted comprehensive revision. He interpreted Chairman Aspinall's invitation as "evidence of substantial agreement that the standards of the past are not adequate to the challenge of the present or future."

This exchange of views occurred as the 88th Congress was preparing to take up its duties. Before that Congress adjourned, three major pieces of public land legislation had been enacted, thus hurdling an impasse that had existed for several sessions. Two of these laws were interim in form, but the Classification and Multiple Use Act and the Public Sale Act nevertheless stated broad policies of continuing validity. Both of these were approved the same date as the statute creating the Public Land Law Review Commission.

Viewed in retrospect, the observations of President Kennedy and Chairman Aspinall in the early 1960's were prophetic of what that decade was to bring. They communicated in the classical terminology of conservation and resource use. "Environment" and "ecology" were then still locked in the lexicon of scientific specialization. But it is clear that the terms of reference of the Aspinall-Kennedy letters comprehended the very issues that have brought us to the brink of national crisis. The "decade of the environment" did not spring suddenly over the horizon in 1970 except in the fertile imagination of public relations.

This review of some events of the last decade may seem overly simple when we contemplate the sheer volume of the results of the long and earnest labors of the Public Land Law Review Commission. We have had in the past six years the most searching assessment, the most fundamental public exposure and discussion ever concentrated on a broad natural resource issue. Much of the best talent of the country has been marshalled to make its contribution in study reports and consultative effort.

Through this process, the issues in public land policy have been identified, defined, clarified, and inventoried
in comprehensive terms. The surrounding facts and conditioning circumstances have been enumerated, described and analyzed. Reasonable alternatives for the resolution of every policy issue have been formulated and weighed pro and con. One might say, even, that even if the ultimate report of the Commission were to be disregarded, the basic analytical background structure exists for a de novo judgment on the merits by the public and the Congress.

When Congressman Aspinall wrote to President Kennedy, he crammed many ideas into one sentence. He invited President Kennedy to submit his views "as to legislation." It would have been possible (other administrations had taken the position consistently) for a White House reply to tell the Chairman that, in due course, any legislation deemed necessary would be transmitted, and in the meantime we are managing nicely, thank you. Instead, the reply was Presidential and responsive, and there followed a remarkable and unprecedented pattern of executive-legislative cooperation in devising the plan to create the Commission.

By no means did President Kennedy yield any executive prerogative for the future, nor apologize for what some might have characterized as encroachment upon legislative prerogatives in the past. Two strong and patriotic statements were the foundation for the Commission's creation.

I think it important that we remember the same lessons as we begin the next phase. Competition as fundamental as that between President and Congress can lead to sterile impasses, or to prodigies of accomplishment. Mutual respect is the starting point if impasse is to be avoided.

A second lesson is that complexity need not overwhelm us. Mr. Aspinall and President Kennedy could master and articulate the fundamentals. In a real sense, the Commission's final report document illustrates the same point. The Commission refused to be frightened by the awesome bulk of the data before it.

When I was in the Interior Department, I had occasion sometimes to delve into how past administrations, as long
as a hundred years ago sometimes, had handled particular problems, and I was struck far more with the similarities than with the differences which time had brought, so far as land administration questions were concerned. However, whether or not the formal report is to be implemented per se, in whole or in part, the task of dealing with its subject matter must proceed promptly. It is unlikely that we shall have another opportunity for constructive action on such an informed basis in this generation or ever. The promise of systematic legal and policy reform will be forfeited if action does not proceed promptly.

If the PLLRC concept hadn't been foreseen in 1964, it would have to be undertaken now. At a time when wide segments of the public are beginning to comprehend some of the resource and environmental problems facing our society, we have a vital head start. The unanswered question is whether the necessary conviction to act is present.

At least as far as I have been able to sample and assess it, public reaction to the Commission's report has been a disappointment. In the first place, and despite the broad interest being displayed in resource and environmental issues, only narrow segments of the public have given evidence of exposure to the Commission's work. And those who have reacted have done so pretty much in line with predictable bias, and in obvious contradiction.

On the one hand, the so-called preservationists see the report as having one central point of emphasis: commercial exploitation of public land values. As exemplified by a New York Times editorial which appeared within hours after the report was released, the miners, grazers, and timber harvesters were provided with a roadmap to the undeveloped resources on a third of the nation's acres. According to that reading of the report, public land values are to be determined by the standards of the market place rather than the environmental requirements of the future.

While lacking the nationwide audience of the New York Times, the opposite end of the spectrum has also been
heard. The Commission's recommendations are criticized as anti-West, anti-progress, destructive of community development--another step toward the lock-up of a national resource base.

Quite obviously, both of these reactions can't be right. A balanced study of the entire report will show that neither of them is. The Commission has acted responsibly, reflecting a maturity that is badly needed in this decade of screaming absolutes. Whether you call it compromise or pragmatism, the overall effect is a realistic diagram for intelligent use of resources under protective conditions that will avert ecological calamity. In the context of my training and experience at least, this is the function of government, indeed of all institutional processes in a democracy.

Perhaps most disturbing of all, however, is that great middle ground of non-involved reaction which adds up to complacent boredom, if not cynicism. Much of the general press, and even the trade and resource journal commentary, has treated the report in purely volumetric or statistical terms. It is summarized as a $7 million contribution to the archives, a compendium of 137 detailed recommendations plus numerous expressions of proposed policy and subsidiary comment. At an even less charitable level, this evaluation looks upon the result as another aspect of the something for everyone syndrome, with the implication that such an approach can gain us nothing.

It is the tendency of shallow criticism that causes particular concern, for it reflects a lack of appreciation for some of the very fundamental policy recommendations contained in the report. Just a random sampling of a few key points is enough to demonstrate this:

1. Foremost in this respect is the clear break with the historic policy of disposal as the guiding principle of public land management. A proposal to adopt retention as the basic practice with selective disposal to be governed by public interest criteria represents a major policy decision that demands more than a ho-hum reaction.

2. The emphasis throughout the report on reassertion of Congress' constitutional responsibilities and the need
for more explicit policy guidelines means that public land decisions will return to center stage in national affairs.

3. Recommended repeal of such long-standing pre-emption statutes as The Homestead and Desert Land Acts portends a greater emphasis on public control and positive management of a national resource.

I would be less than candid if I did not confess that I, too, have been a little negative and cynical. In the discipline of preparing these remarks, I have analyzed my own reactions, and concluded that it is not the report, but the follow-up of the report, which elicits my negativism. Perhaps I am overly-nostalgic about the level of executive-legislative cooperation achieved during my tenure in Interior, when this great work began. It seems to me, through my rosy "retrospectacles," that at both ends of Pennsylvania Avenue the policy officials--Congressmen and Senators, and Presidential appointees--there was application, respect for facts, willingness to make hard choices, and a sense of responsibility for public land stewardship of a very high order. In a way not experienced since, we have infused the idea that users, too, could be conservationists.

Remarkably, the Commission's "official family" generally retained that spirit throughout its life. But outside this island of calm and reason, the natural resource management world was polarizing. My cynicism is a product of my disappointment that the final report of the Commission cannot be taken up by a Congress and executive branch as highly motivated as in 1963 and 1964, when the Commission was created.

The public impact of the Commission's contribution is yet to be felt, really. Reaction outside a fairly circumscribed audience of public land law students, practitioners and user interests has tended to be superficial and unappreciative of the full reach of the proposals advanced. Perhaps this means that those who gather in conferences like this make up a smaller fraternity than we had thought. Perhaps also public interest will sharpen as individual Commission recommendations are translated into specific legislative proposals.
This can be as much a danger as a virtue. Polarization and confrontation avail us little in the formulation of public policy decisions if sides are chosen on the basis of slogans and cliches, rather than informed judgment. And it is clear that much of the discussion to date has been less than well informed. This demonstrates the wisdom of the Commission in committing the waning days of its statutory life to a program of discussion and education. This process must reach out. It is appropriate that it is launched under Commission auspices.

Yet I cannot resist a little discussion that bears on the content of the report. I will turn first to one matter that concerns me seriously, not because of what the report says but because of its silence.

The Commission has focused its entire attention on the policy issues in public land management. No one can argue with this direction in emphasis and its statutory mandate clearly intended that such should be the case. The public would be critical, indeed, of an effort of this scope that magnified form over substance or looked only at the operation of existing law.

At the same time, however, and as the report observes at several points, one of the major deficiencies of current public land law is the almost complete absence of organization, cohesiveness and rationality. Related or dependent provisions are spread through several titles of the U. S. Code. The main vehicle in this regard, Title 43, has not been codified and reenacted as positive law. Consequently, it constitutes a melange of the miscellaneous and the milestone markers going back to the earliest days of the republic. Duplication and contradiction have not been reconciled. The obsolete and the most recent statutes convey the same emphasis.

This condition has long been recognized, and I was hopeful and fully anticipated that codification would be one of the initial by-products of the review process.

This question is not merely a matter of editorial nicety or organizational form. As the history of statutory codification has demonstrated over the past several years,
it offers a systematic methodology for the discovery of the obsolete and the conflicting and for identifying gaps in the scheme of statutory policy. It provides an orderly framework for the articulation of legislative intent, with minimal opportunity for ambiguity or misinterpretation.

It is not too late to fill this gap in the structure of the Commission's report. Even as the Congress and the Executive Branch turn to and ponder the policy recommendations of the Commission, I would urge most strongly that the most knowledgeable technicians of public land law be put to work on the rationalization of existing law into a consistent format. This will not only aid in the process of developing new substantive policy, but will provide a streamlined, comprehensive and consistent vehicle for the expression of that policy.

A related criticism arises from the Commission's commendable spirit of comity and restraint by deferring to the National Water Commission and the Water Resources Council on water resource issues. That need not and should not be the case as to a large area of concern to Federal land managers. Land use for power structures and impoundment reservoirs must be judged in the context of other competing uses in an era of a shrinking land base. As such it is a public land issue to be resolved in the context of the study with which we are now concerned.

My final comments relate to an area which interests me as much as the Report's substantive policy discussions--its treatment of administrative procedures and adjudicative practices.

Not that substantive issues are not involved. In truth, it might be said that the most serious misreading of the Report is the failure to see the full significance of the opening of the decision-making and adjudicative procedures to the full participation by all elements of the public, environmentalist as well as user, local as well as national interest.
Those who worked with him have told me that Chief Justice Warren frequently had a question for lawyers arguing before him about the workings of rules, regulations, and procedures—"Is it fair?"

Perhaps I hope for too much when I looked for a reflection of the spirit of that question in the Report and did not find it. The Commission adopted faithfully the outline and analysis presented by the background contract study on the subject. Conducted under the direction of Professor Carl McFarland, undoubtedly dean of the administrative law specialty and principal architect of the Administrative Procedure Act of 1946, that study dwelt in careful detail on the usual questions of interest to academic researchers: rulemaking, notice and hearing, separation of functions, appellate procedures and judicial review.

The resulting chapter in the final report is equally proper in its advocacy of due process and equitable consideration, avoidance of delay, increased use of rulemaking and clear standards for judicial review of departmental decisions. It is difficult to explain precisely why these laudable objectives miss the mark in getting at the heart of this question. To indulge in oversimplification, I think that neither the Commission nor its contract researcher ever really fully appreciated or got thoroughly immersed in the spirit or atmosphere that surrounds the decision-making process at the administrative level. And I suspect that only one who has labored in that vineyard can fully comprehend what disturbs me on the point. It is something that is felt, rather than articulated; it is visceral, rather than intellectual.

What I am driving at is the failure to comprehend and deal with the absence of confidence, as I have observed it, on the part of the ordinary citizen that he can count on fair treatment when dealing with his government on public land matters. I do not mean that land administrators deliberately delude those on the other side of the counter or consciously indulge in the practice of bad faith. The phenomenon is much more subtle. It derives from the fact that government in this field of activity does not hold itself to the same standards of conduct that would bind private parties under similar circumstances. It resorts
to a variety of defenses and other devices to defeat the legitimate efforts of private citizens to secure benefits authorized by statute.

It isn't necessary to describe these defensive mechanisms in detail; you will recognize them by summary reference. Mere pendency of a claim, no matter how diligently perfected, creates no vested right. Extra-statutory tests of discovery have been engrafted on the mineral laws. Unyielding delineation between privileges and rights in licensed occupancy may defeat a tenancy without recompense. Sovereign immunity provides an all-inclusive shield against legal remedies, particularly when coupled with strict and unrealistic doctrines about the authority of agents to bind the government when acting in the apparent scope of authority.

Proper protection of the public interest undoubtedly requires that many of the historic attributes of sovereignty remain available to the government. But their indiscriminate use places the citizen claimant in constant jeopardy; he concludes that a trap may be sprung at any stage of his transaction--and this is not good government. There must be a firmer foundation of confidence and certainty in the adjudicative process.

To return to the note on which I started, President Kennedy adverted to the source of this phenomenon in his letter to Chairman Aspinall. In referring to the complex and often vague pattern of the public land laws, he conceded that administrators had tended to make decisions in the public interest as they saw it, even when this meant the development of standards or decisional rules which "may have seemed to outdistance express statutory policy." In short, an inadequate or obsolete body of statutory policy, standards and criteria leaves the ultimate direction of public land management to those who must apply the law. They have been resourceful in constructing a body of regulation and case law which offers maximum protection for the public interest as the administrators see that interest.

In the early 1960's, when public land questions were authorized to be brought in the federal court where the land was situated, rather than in the District of Columbia where the Secretary of the Interior officially resided, I detected an improvement in the quality of land administration, by reason of a subtle restoration of public confidence.
Perhaps what is needed is not a further or different study of administrative procedures, but a study of how the different publics react to that administration. When I was engaged in land administration, I suffered with having to issue decisions which though "legal", weren't "fair"—particularly when I could see that the absence of fairness would lead to future detriment in land administration outweighing by far the advantage the sovereign gained in the particular case.

Once when I was pursuing what seemed to be a justified citizen gripe when I was Assistant Secretary of the Interior, I demanded to know from the particular official why he hadn't "used his head." His response was that the regulations made no provision for that approach.

Somehow that philosophy of using your head and dealing with the using public in an even-handed manner must be incorporated into the body of public land law and its administration. In the vernacular of the day, we must discover "soul" in the monumental effort that Congress set for itself by creating the Commission. Without it, the product will prove sterile indeed.