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COMMENTS

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Most of the land area of the United States has at some time been in the public domain and thus under the control of the federal government. As territories were acquired by the nation, title to the "vacant" lands passed to the federal government to be managed for future needs or to be disposed of in the course of westward expansion. Today, nearly one third of those lands remain in federal hands. In addition, the federal government has acquired certain lands for specific purposes, such as for national parks and defense installations; and title to some lands previously disposed of by the Government has become "revested." These public lands are concentrated in the western states and in Alaska, and many are extremely valuable for minerals, timber, grazing and recreation.

With the exception of the national forests, which are administered by the Department of Agriculture, most of the lands in the public domain fall under the control of the Department of the Interior, whose Bureau of Land Management (BLM) is responsible for administering nearly sixty per cent of the entire public domain. With that responsibility comes power to affect the utilization of the nation's natural resources and the power over the people whose businesses and manner of living depend upon how the federal government, primarily through the Department of the Interior, exercises its proprietorship. For example, the granting of a mineral lease may provide economic success to the lessee, while the withholding of a grazing permit may cause ruin for a rancher who is dependent upon federal forage lands. The purchase of land for game-management purposes, while pleasing to hunters, may burden a local gov-


2. A significant exception to this process was Texas, which, because it was a sovereign state prior to entering the federal union, retained control of its public lands.

3. Article IV of the United States Constitution empowers Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

4. MAN . . . AN ENDANGERED SPECIES, supra note 1, at 34.


6. MAN . . . AN ENDANGERED SPECIES, supra note 1, at 34.
ernment by removing property from its tax rolls; and the release of federal land to a state may, as in Alaska, mean a revenue windfall in mineral leases. The granting of national park concessions and recreation permits on public lands can provide an economic boost to a local economy, or—like many other actions of the Department of the Interior, primarily those relating to mining rights or watershed utilization—it may enrage conservation groups who fear despoilment of the wilderness.

Because of the far-ranging responsibilities and powers of the Department of the Interior, the manner in which the Department makes its decisions and the procedures by which interested parties may be heard are extremely important. The purposes of this Comment, then, are to examine the general structure and function of the Department of the Interior with respect to the use and disposition of the public lands and to analyze the manner in which persons may attain administrative and judicial review of the agency's actions.

The scope of the Department's functions is vast, and the statutory and regulatory materials dealing with those functions are overwhelming in their complexity and breadth. For that reason, this Comment will not seek to make an exhaustive examination of the agency's functions and procedures; rather, it will attempt to provide a selective illustration of the agency's procedures and functions and to concentrate on adjudicatory and review procedures, including judicial review. Because recent years have seen a marked increase in attention to resources and to conservation issues by persons and groups not otherwise directly concerned with the disposition of public lands, particular attention will be directed toward the availability of a forum for such third parties.

I. THE DEPARTMENT OF THE INTERIOR: FUNCTIONAL ORGANIZATION AND PROCEDURE

A. Functional Organization

The Department is headed by the Secretary of the Interior, whose authority is delegated through a number of units headed by assistant...
secretaries: (1) Administration, (2) Water and Power Development, (3) Mineral Resources, (4) Fish and Wildlife, Parks, and Marine Resources, (5) Public Land Management including the Bureau of Land Management, and, (6) Water Quality and Research. Within these functional divisions, there is frequently a substantial degree of geographical decentralization. For example, the BLM—the division having responsibility for the management of most of the federal public lands—maintains headquarters offices in eleven states and each of these offices, termed "state" or "land" offices, supervises numerous district offices.

In addition to the foregoing administrative separation, there is a further degree of separation of functions within those areas themselves, aimed in part at separating decisions of discretion and policy from those involving administrative adjudication of legal and factual issues. Within the BLM, for instance, there is an Office of Appeals and Hearings, which, in theory at least, remains insulated from administrative adjudication in any given case until that case reaches that office on appeal to the Director of the Bureau.

The Office of the Solicitor is the general legal advisor for the Department of the Interior and is responsible in land matters for the handling of administrative appeals to the Secretary. That office is functionally organized to correspond with the administrative divisions of the Department. The Office of the Deputy Solicitor handles all appeals to the Secretary in land matters, including those relating to mineral leases and to homestead and grazing permits. Within that office is a Branch of Land Appeals in which are decided

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11. The Water and Power Development division includes the Bureau of Reclamation, and the Bonneville, Southeastern, and Southwestern Power Administrations.


13. The Fish and Wildlife, Parks, and Marine Resources divisions include the Office of the Commissioner of the Fish and Wildlife Service, the Bureau of Commercial Fisheries, the Bureau of Sport Fisheries and Wildlife, the National Park Service, and the Office of Marine Resources.

14. The Public Land Management division also includes the Bureau of Indian Affairs, Bureau of Outdoor Recreation, and the Office of Territories.

15. The Water Quality and Research division includes the Federal Water Quality Administration, the Office of Saline Water, and the Office of Water Resources Research.


17. *Id.*

18. That separation of functions is not perfect, and some dissatisfaction with a lack of apparent objectivity is reported. In part, that lack of assurance of objectivity in the resolution of legal issues stems from the discretionary powers of the Secretary, the Solicitor, and the Director of the BLM to enter and decide cases at almost any stage of the decisional process. See McCarty, * supra* note 10, at 172-74.
appeals from the Bureau of Land Management. Like other administrative divisions of the Department, the office of the Solicitor is rather decentralized geographically; there are seven regional offices, each headed by a regional solicitor.

B. Procedures

1. Adjudication

General guidelines applicable to administrative adjudications in many, if not most, federal agencies are set forth in the Administrative Procedure Act (APA). With regard to the Department of the Interior, however, the APA procedures dealing with hearing requirements are required in only a very limited number of cases. Due in part perhaps to the multiplicity of functions of the Department of the Interior, no over-all pattern of adjudication is present within the Department; and each division seems largely to follow its own specialized procedures, particularly with respect to appeals from administrative determinations. Most divisions of the Department appear not to have established any uniform procedures for appeal from the local decision; at least, few such procedures appear in the published regulations. The BLM, however, within whose jurisdiction most of the Department's adjudications occur, has developed a detailed set of regulations. For the most part, the Bureau's adjudications concern applications for grazing permits or recreational-use permits, and for mineral leases and timber sales.

a. Initial determinations. Applications for dispositions of lands and minerals are generally initiated in the appropriate land office of the BLM, except that those relating to grazing or to some smaller

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19. See McCarty, supra note 10, at 152.
23. See generally C. McFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS 154-82 (1969) [hereinafter McFARLAND]; McCarty, supra note 10, at 154. An extreme example is the National Park Service, whose published regulations provide no guidelines at all for appellate action by an aggrieved applicant. Although the Park Service has developed extensive regulations for processing claims, those regulations are published as a manual rather than as regulations. See McFARLAND 118-21. For a discussion of the tendency for procedural regulations to be circulated only within a department, hence causing difficulty for persons who seek to learn what procedures to follow, see McFARLAND 265-71. For a discussion of the problems which that tendency may cause with regard to exhaustion of administrative remedies for judicial review, see text accompanying notes 264-73 infra.
26. For a discussion of special procedures relating to grazing, see McFARLAND 101-03.
timber sales and certain special permits are handled by the district office or other delegated officials. The factual inquiry upon which the initial determination must be based need not, in most cases, be a formal hearing. Formal hearings are mandatory in only a small number of situations such as grazing cases and "contests." In general, there are three methods by which the BLM makes adjudications: mandatory hearings, discretionary hearings, and ex parte determinations. Mandatory hearings are subject to the APA hearing provisions and are held before a trial examiner who meets the requirements of that Act, although in the case of grazing applications, there is a preliminary determination by the district manager, and the actual hearing is held only on "appeal" to the examiner. In nearly all other cases, the initial determination is made by the land office which has jurisdiction for the area. There is provision in the regulations for a discretionary hearing, which may be granted by the Director of the BLM either upon request of an applicant appealing from an initial decision or upon request of an "adverse party." If the request for such a hearing is granted, the case will be heard by an examiner, who, in discretionary hearings, is termed a "field commissioner."

There are significant differences in procedure between the required hearings and the discretionary hearings. In the required hearings, governed by the APA, the hearing examiner has full authority to control the issues for which evidence is to be received. But in the case of a discretionary hearing, the field commissioner lacks that authority; instead, the Director, in ordering the hear-

27. McFARLAND 165 n.103.
30. 43 C.F.R. § 1852.1 (1969). Hearings may also be required in cases involving certain mineral claims [30 U.S.C. §§ 613, 621 (1964)], and in some cases involving statutory preferences for certain "possessory claims" such as the claims of Alaskan natives to nonmineral lands which are under control and actual occupation. 43 C.F.R. § 1855 (1969).
32. The APA requirements relating to hearing examiners are now found in 5 U.S.C. §§ 1305, 3105, 3344, 5362, 7521 (Supp. IV, 1965-1968).
33. The procedures for the preliminary determination are set forth in 43 C.F.R. §§ 4115.2-1(a)-(c) (1969); provisions governing appeal to the examiner and hearings are found in 43 C.F.R. §§ 1823.1-6 (1969).
34. See McCarty, supra note 10, at 157-58.
35. 43 C.F.R. § 1849.5 (1969). "Adverse party" is not defined in this regulation; and it is not clear what is meant by the term, for if the party is sufficiently adverse so as to be involved in a contest with the applicant, there is a right to a hearing. 43 C.F.R. § 1852.1-7(b) (1969).
ing, designates the issues upon which evidence is to be received. In a required hearing, the parties submit to the examiner briefs and proposed findings of fact and law, from which he ordinarily issues an initial decision ruling on those issues. In a discretionary hearing, however, the commissioner does not make the initial decision, but is limited to making proposed findings to be used by the Director. Moreover, in the discretionary hearing, there is no provision for submission of briefs to the commissioners and no opportunity for a party to see the proposed findings before they are sent to the Director.

Whatever shortcomings there may be in the procedures governing discretionary hearings, they are of little note, for the discretionary hearing is seldom used. Due in part, perhaps, to its heavy caseload, the Department has been reluctant to grant a hearing unless it is required to do so. Hence, the determination of applications in the great majority of cases is made ex parte—that is, factual issues are decided under circumstances in which the applicant does not have a right to meet all the evidence adverse to his position. In fact, in most cases, once the applicant has complied with the application details—for which there are generally abundant instructions—and has submitted his application, he has little way...

37. The governing provisions are found in 43 C.F.R. §§ 1822.3-8(b), 1853.5(c), 1853.6(a) (1969). However, in "designated cases"—the meaning of which is unclear—the Director may require that, even in a mandatory hearing, the examiner make only a recommended decision, to be submitted to the Director for further consideration, in the course of which he may make additional findings and conclusions. 43 C.F.R. § 1822.3-8(c) (1969). Such additional findings are apparently limited to issues and evidence brought forth in the hearing—that is, unlike the situation in ex parte determinations (see text following note 40 infra), the Director cannot go outside the record for his supporting material.
38. In sending the record to the Director, the parties are permitted to include whatever briefs or statements they wish; but because of the unavailability of the proposed findings, such briefs may have either little relevance or inadequate responsiveness to the issues considered most important by the Commissioner in his proposed findings. See generally McCarty, supra note 10, at 177-80. The public-information provisions of the APA do not apply to such material. See 5 U.S.C. § 552 (Supp. IV, 1965-1968).
39. See McFarland 168.
40. See McCarty, supra note 10, at 155-57.
41. The term "ex parte" is used here in a broader sense than it is with reference to judicial proceedings. The description is from McCarty, supra note 10, at 175.
42. The specificity and number of instructions relating to applications for patents, leases, permits, or contracts are in marked contrast to the sparsity of published regulations relating to other departmental procedures. There is some exception, however, with respect to BLM appeals procedures; see note 46 infra and accompanying text. See generally McFarland 263-74, for a discussion of problems of public information about the departmental procedures. For an example of the specificity required in applications for even relatively minor dispositions, see instructions for applications under...
of knowing what is happening to his application, and no way of
finding out, unless he knows people in the administrative structure
and is persistent in approaching field officials. There may be in-
formal conferences and questions in the course of evaluating the
application, but there is no established procedure whereby an ap-
plicant can know with certainty what is happening to his application
or what steps should be taken to remedy its defects. In most in-
stances, the application simply disappears into the administrative
machinery; and the applicant does not know what goes into his file,
who sees it, or upon what data the decision is made. Because of
these apparent shortcomings in the initial determination process,
administrative appeal in this area is particularly important for the
applicant. But for the same reason, such appeal is difficult for him
to pursue effectively.

b. Administrative appeals. The BLM, in contrast to most other
agencies within the Department of the Interior, has highly developed
appeals procedures. Any party to the case who is adversely affected
by the initial determination, whether by hearing or ex parte de-
cision, can appeal to the Director simply by filing, within sixty days
of the decision, a notice of appeal in the office within which the
initial decision was made. Receipt of a statement of reasons for
the appeal is a prerequisite to consideration by the office of the
Director. That statement may either be contained in the notice
of appeal or sent directly to the Director within thirty days after
filing notice of appeal. Concurrent with the appeal, the appellant
may request a hearing on factual issues; but, as has been indicated,
the Director is reluctant to grant such hearings. Following an ad-


43. See McFarland 166.
44. There may be procedures established within the Department, but knowledge
of them is seldom available to the applicant. Even if there has been "publication" by
the Department, it may have been lost in obscurity in the Federal Register or pub-
lished in the form of a news release, departmental pamphlet, or other limited publi-
cation, in which case effective notice to the applicant or to his lawyer is problematical
at best. See generally McFarland 265-74.
45. McFarland 265-74; McCarty, supra note 10, at 177.
46. The general appeal provisions of the Bureau of Land Management are con-
tained in 43 C.F.R. §§ 1842-44 (1969). For a discussion of the absence of similar pro-
cedures in other agencies, see McFarland 172.
47. 43 C.F.R. § 1842.4 (1969) (general procedure); 43 C.F.R. § 1855.7 (1969) (graz-
ing); 43 C.F.R. § 1852.3-9 (1969) (contests).
49. 43 C.F.R. § 1842.4(a) (1969).
50. 43 C.F.R. § 1842.5-1 (1969).
52. See text accompanying note 39 supra.
verse decision by the Director, there is usually a right to pursue the appeal to the Secretary. That right may be exercised by filing with the Director notice of appeal to the Secretary; provisions relating to a statement of reasons for appeal are the same as in the case of an appeal to the Director. There is no further administrative appeal after a decision has been rendered by the Secretary, although there may be an opportunity to petition the Secretary for reconsideration.

Although the appeals procedures outlined in the departmental regulations with respect to appeals from BLM determinations are essentially the same for determinations made at hearings and for those made ex parte, the origin of the appeal may, in practice, make a substantial difference in the handling of the case. The crucial difference is that in the case of appeals arising from hearings, whether required or discretionary, appellate consideration is limited to facts and issues contained in the record, whereas in the case of appeals from ex parte determinations no comparable record is available. In the latter, moreover, the actual basis of decision—on appeal, as well as in the initial determination—may depend on factors and data of which the applicant has had no notice or knowledge. Indeed, in some instances, during appeal from ex parte determinations the Bureau may make an additional ex parte investigation, of which the appellant may have no knowledge; and even if he does know of the investigation, he is not able, as a practical matter, even to see the report prior to decision, much less to inquire into the reliability or accuracy of the investigation.

The picture of the Department's application and appeal practices, then, is one of rather loose procedural requirements governing agency action. The Department enjoys a great deal of administrative discretion with respect to its proprietorship over the public lands, and that discretion apparently is thought to carry over to the procedural restrictions which it applies to itself. In contrast, the De-

55. 43 C.F.R. § 1844.3 (1969).
57. See, e.g., B.E. Burnaugh, 67 Interior Dec. 366 (1960); McCarty, supra note 10, at 159.
59. See generally McFarland 171-73; McCarty, supra note 10, at 177-80.
61. McFarland 158. See also, with respect to Departmental discretion, the discussions on classifications, in the text accompanying note 66 infra and on judicial review in the text accompanying notes 277-310 infra.
partment expects persons dealing with the agency to adhere strictly
to procedure. True, the procedures for appeal are not particularly
complex; and the requirements for filing are made clear in the
departmental regulations. But those rules are very strictly con­
strued, and failure to conform with rules concerning the content of
an appeal or with filing deadlines, for example, results in summary
dismissal. Even when summary dismissal under the regulations is
discretionary, the apparent practice of the Department is to dismiss
in all cases, presumably in order to minimize its case load.

2. Classification

a. Nature and purpose. The basic policy question of the gen­
eral use to which public lands should be put is seldom in issue in
adjudications and appeals of the sort outlined above. Instead, such
broader issues are disposed of in advance of any adjudication in­
volving a particular claimant; and the process by which such prior
determination is made is known generally as "classification." Classification is somewhat analogous to zoning, in that it limits the
range of uses to which the public lands may be subject. The
Secretary of the Interior has long held discretionary authority under
the Taylor Grazing Act to classify lands which fall within the scope
of that Act. Today, under the Classification and Multiple Use Act
of 1964, the Secretary has an affirmative duty to classify all public
lands administered exclusively by him through the BLM. Classification under the latter statute is for the purpose of determining first,
which lands should be disposed of by the federal government and
which should be retained and managed, and second, with respect
to those lands which are to be retained, to what use they should be
put.

In view of the strong public interest in the manner in which
public lands are used generally, and the strong private interest which

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63. See McCarty, supra note 10, at 164-68.
64. 43 C.F.R. § 1840.0-7 (1969).
65. BUREAU OF LAND MANAGEMENT MANUAL § 1843.2; McCarty, supra note 10, at 167.
67. Classification seems to be more concerned with general land-use planning than
with the spot disposition of a particular piece of land. Indeed, through disposal of
land to localities, the Department of the Interior appears to be able to exert con­
siderable influence on the manner in which a local government chooses to plan its
land use. 43 U.S.C. § 1422 (1964) prohibits the disposition of public lands under 43
U.S.C. § 1411 (1964) unless the local government has first enacted zoning regulations,
and the regulations of the Department require that such zoning be "adequate." 43
68. 43 U.S.C. §§ 315-15(m), 315(g)-15(n), 315(o)-1 (1964).
often exists in the use of particular public lands, the classification decision assumes substantial importance. To the extent that the Secretary is bound by his promulgated regulations and classifications, a classification may significantly narrow the range of choice on subsequent applications. Thus, for example, if an area of land has been classified for wilderness preservation, an applicant seeking to use the land for mineral production or industrial development may find that his claim had been effectively disposed of well in advance of his application. From another perspective, if a conservation group or local citizen wants to object to an application for timber or mineral rights to land, and if that land has been classified for such development, the objector has little basis upon which to object either in the administrative process or, as will be seen, in the courts.71

Skeletal criteria to guide classification are included in the 1964 statute, but the guideposts seem spaced widely enough to leave considerable room for the exercise of discretion in the promulgation and subsequent application of regulations under the statute.72 The statute requires that all classifications be made in accordance with statute or regulation,73 and the regulations issued under this statute are themselves sufficiently broad that they do not confine the broad administrative discretion conferred by the statute.74

In addition to the 1964 Act which establishes this general classification process, numerous other statutory provisions make classification a prerequisite to the disposal of certain lands.75 In such

71. See text accompanying notes 328-47 infra.

72. The Secretary is to develop and promulgate regulations for the disposal of lands that are either required for the orderly growth and development of a community or chiefly valuable for residential, commercial, agricultural (exclusive of lands chiefly valuable for grazing and raising forage crops), industrial, or public uses or development. Similarly the Secretary is to issue regulations for the retention and federal management of lands for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral production, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from federal ownership. 43 U.S.C. § 1411(a) (1964). The statute also provides that, in making his determination, the Secretary shall “give due consideration to all pertinent factors, including, but not limited to, ecology, priorities of use, and the relative values of the various resources in particular areas.” 43 U.S.C. § 1411(b) (1964).


74. The regulations promulgated by the Secretary under the statute are similarly broad, consisting largely of a verbose repetition of the content of the statute. See 43 C.F.R. §§ 2410.1-1 to .1-3 (1969). See also text accompanying notes 138-40, 333-36 infra.

situations, applications for land often involve a two-step process, in which the applicant must first seek an appropriate classification for the particular tract of land and thereafter pursue his application in the usual manner.\textsuperscript{76} Such classifications by petition differ from the more general classification required by the 1964 Act in that they usually apply only to a small tract, whereas general classifications may apply to a large area. Even though classifications by petition are limited to small tracts, however, their impact may go beyond the immediate parties and lands. Subsequent general classifications and policies will have to take into consideration existing uses—and hence the previous limited classifications.\textsuperscript{77} Moreover, the decision-making process in a classification by petition may include the announcement of policies of more general application.\textsuperscript{78} Thus, the manner by which even small individual classifications are made may be of more general concern, for "[n]ot infrequently, as one strand in this gigantic web is moved, another starts to vibrate."\textsuperscript{79}

b. Procedures for classification. Classification procedures and criteria are set out in broad terms in the 1964 statute\textsuperscript{80} and in somewhat more specific terms in the regulations.\textsuperscript{81} Classification may be triggered by an applicant in a petition-application or, for large-tract classifications, may be initiated by an "authorized officer."\textsuperscript{82} The same basic classification procedures are followed regardless of how the classification was initiated. In the case of classifications for disposal of land,\textsuperscript{83} the state director of the BLM is to serve notice of a

\textsuperscript{76} McFarland 16-17. In many instances, there is a combined procedure, whereby an applicant includes with his application a "petition for classification." See 43 C.F.R. § 2411.1-1 (1969).

\textsuperscript{77} The 1964 legislation requires the Secretary to consider "all pertinent factors" in determining a classification. 43 U.S.C. § 1411(b) (1964). The regulations include as pertinent factors present and potential uses and minimum disturbance of existing users. 43 C.F.R. § 2410.1-1 (1969).

\textsuperscript{78} See, e.g., Hugh S. Ritter, 72 Interior Dec. 111 (1965), a case which involved only forty acres of land and two applicants, but in which the Secretary announced a policy that no California lands irrigable by the Colorado River would be classified for public entry until the water shortage was cured. The decision was of interest to persons in a large area, but was reached in a relatively minor case of which the public affected by the decision had no effective notice.

\textsuperscript{79} McCarty, supra note 10, at 147.

\textsuperscript{80} 43 U.S.C. §§ 1412, 1414 (1964).

\textsuperscript{81} 43 C.F.R. § 2411 (1969).

\textsuperscript{82} Who is an “authorized officer” for purposes of initiating a classification is not entirely clear from the regulations. In the case of classifications by petition, the authorized officer is whoever makes the preliminary determination and forwards the proposed classification to the state director. 43 C.F.R. § 2411.1-1(b) (1969). But in the case of a Department-initiated classification, whether for disposal [43 C.F.R. § 2411.1-2 (1969)] or retention [43 C.F.R. § 2411.2 (1969)], the reference is merely to an "authorized officer."

\textsuperscript{83} The regulations distinguish between a classification for the disposal of land and a classification for the retention of land for federal management under the Sustained Yield and Multiple Yield Act, 43 U.S.C. §§ 1413, 1415 (1964).
proposed classification decision, with supporting reasons, on any petitioner-applicants, on any grazing permittee or lessee on the land, on the District Advisory Board, on any local governing body having zoning jurisdiction over the area, and on "any governmental official . . . from whom the record discloses comments on the classification have been received." For a period of thirty days following service of a proposed disposal classification, any interested party may file a protest with the state director, who then "may" require such statements and testimony, or conduct such further field investigations, as he deems necessary. After having reviewed any protests, the state director issues the initial classification decision, which is then subject to the general supervisory authority of the Secretary for an additional thirty days, during which period the Secretary may alter the classification on motion of a petitioner-applicant, or motion of any protestant, or on his own motion. Upon expiration of that period, the initial classification decision becomes the final order of the Secretary, subject only to his continuing power to vacate or modify it "personally and not through a delegate."

If the disposal classification is to apply to a large tract of land, there must be compliance with certain additional notice and hearing requirements. In such cases, publication of the proposed classification must be made both in the Federal Register and in a newspaper having general circulation in the vicinity of the affected land. Moreover, notice must be sent directly not only to those who must be notified of any small-tract classification decision, but also to certain other governmental officials and to "any other party the authorized officer determines to have an interest in the proper use of the lands." The foregoing procedure must be followed in any

96. See text accompanying notes 84-88 supra.
97. These officials include the head of the local governing body, the state governor, the BLM multiple-use advisory board for the state, and the county land-use planning officer or committee. 43 C.F.R. § 2411.1-2(b) (1969).
disposition classification involving more than 2,560 acres; and if the proposed classification affects more than 25,000 acres, the “authorized officer” is required to hold a “public hearing” as well.\textsuperscript{99} The regulations permit the authorized officer to hold a public hearing for smaller dispositions if “he determines that sufficient public interest exists to warrant the time and expense of a hearing.”\textsuperscript{100} However, in view of the rather negative phrasing of this regulation, and in view of the reluctance of the BLM to hold public hearings in any rule making,\textsuperscript{101} it seems unlikely that authorized officials will avail themselves of that authority with much frequency. Administrative review by the Secretary of large-tract disposition classifications is essentially the same as for small tracts,\textsuperscript{102} except that additional publication in the \textit{Federal Register} is required.\textsuperscript{103}

When a proposed classification favors the retention of public lands in public ownership for purposes of managing those lands for multiple use and sustained yield, the classification procedures are somewhat different. Rather surprisingly, they are more strict for retention than for disposal. Proposed retention classifications must be indicated on a map which is publicly available in the local BLM district office.\textsuperscript{104} Publication in the \textit{Federal Register} and in a local newspaper is required for proposed retention classifications for large tracts\textsuperscript{105} and is permitted for smaller tracts; and notice of any retention classification must be sent not only to the parties who have a right to notice in disposition classifications,\textsuperscript{106} but also to licensees, lessees, and permittees, and to “any other parties indicating interest in such classifications.”\textsuperscript{107} The period for receiving comments on the proposal is, in this situation, at least sixty days,\textsuperscript{108} as opposed to only thirty days in the case of disposal classifications. Following the expiration of that period, the proposed classification becomes the initial classification, which is then subject to administrative review by the Secretary, presumably on the same basis as are other classification decisions.\textsuperscript{109}

\begin{itemize}
\item [99.] 43 C.F.R. § 2411.1-2(b) (1969). Such hearing is not required by the statute; thus, this is one of the few instances in the public-lands area in which departmental regulations narrow somewhat the discretion permitted under the statute.
\item [100.] 43 C.F.R. § 2411.1-2(b)(2) (1969).
\item [102.] See text accompanying note 92 supra.
\item [103.] 43 C.F.R. § 2411.1-2(d) (1969).
\item [104.] 43 C.F.R. § 2411.2(a), (b) (1969).
\item [105.] 43 C.F.R. § 2411.2(a) (1969).
\item [106.] See note 97 supra.
\item [107.] 43 C.F.R. § 2411.2(a) (1969).
\item [108.] 43 C.F.R. § 2411.2(a) (1969).
\item [109.] 43 C.F.R. § 2411.2(c) (1969). Administrative review is limited under 43 C.F.R.
3. Third-Party Interests

a. In adjudications. Because of the public importance of the use of the public lands generally, and because that public interest may extend even to small dispositions, the handling of third-party objections to decisions affecting the public lands assumes substantial importance. As indicated previously, it seems that the administrative procedures—particularly the appellate procedures—relating to public-land uses and dispositions fail to provide fully adequate protection for the applicants themselves. That protection withers away almost entirely when the interests of third parties are in question. Under the APA there is a general right for any interested person to appear before an agency in order to make known his views “so far as the orderly conduct of public business permits.” But the Department of the Interior’s regulations generally fail to emphasize, or even to provide, specific procedures for such appearances. In initial determinations not involving a hearing, an interested party is accorded the status of a “protestant” and has the right to file a protest with the officer who makes the initial decision. In the case of homestead entries, in which the applicant is claiming a statutory right or preference for which he is required to prove his eligibility, a protestant, in addition to merely filing a protest, may appear as a witness before the officer examining the claim. In either case, the action to be taken on a protest appears to lie entirely within the discretion of the officer, who is to take such action “as is deemed appropriate in the circumstances.”

With respect to procedures for administrative appeal, the rights of third parties are even more nebulous. It seems that generally

§ 2411.1-1(c)(2), (4) (1969) to petitioning the Secretary; no other review or appeal by an applicant or protestant is allowed.

110. See note 77 supra and accompanying text.
111. See text accompanying notes 37-45, 58-65 supra.
113. See McFarland 166 n.111.
116. 43 C.F.R. § 1823.1-2 (1969). A hearing-type proceeding is involved in this situation; but it is not the type provided for by the APA. There is no right to confront witnesses; in fact, all testimony is given in private to the examiner alone, 43 C.F.R. § 1823.2-2 (1969), with cross-examination available only to the governmental officer. 43 C.F.R. § 1823.2-1 (1969).
118. In grazing-permit cases, in which a hearing is required by statute, any person who “in the opinion of the district manager may be directly affected by the decision” may be notified and recognized as an intervenor. 43 C.F.R. § 1853.2 (1969).
there is no right of appeal for third parties; the regulations allow appeal to the Director only for “any party to the case who is adversely affected.”\textsuperscript{119} For appeals to the Secretary from the Director’s decision, however, the regulations are somewhat broader, omitting the words “to the case.”\textsuperscript{120} Hence, if “party” were construed broadly to include any person, it might seem that there would be a right to appeal to the Secretary in the unlikely event that it was not necessary first to have pursued an appeal to the Director, for which there would not have been standing under the regulations. Perhaps preliminary appeal to the Director would not be necessary when a lower official’s decision is deemed to be that of the Director. It seems, however, that such vicarious approval usually occurs only after the expiration of a period in which to pursue an appeal to the Director, and the regulations specifically preclude appeal to the Secretary when the party adversely affected has failed to appeal from the initial decision.\textsuperscript{121} Hence, it appears unlikely that in the ordinary case a third party could successfully base standing for appeal on the omission of the words “to the case” in the regulation dealing with appeal to the Secretary; only in the rare instance in which the Director himself had entered a case at the outset might a third-party appeal to the Secretary be predicated on that ground.

The availability of a third-party appeal seems further limited by the posture which the Department has indicated in its case decisions, in which “party” appears to be construed quite strictly.\textsuperscript{122} The Department may permit some distinction, however, according to the degree of the interest possessed by the third party; and a person who has some personal stake in the subject matter, even though his interest is not sufficient to make him a party to the case, has a better chance of being considered an “adversely affected” party than does a “self-appointed guardian of the public interest.”\textsuperscript{123} Moreover, if standing to be a party has been erroneously denied by the Director, the Secretary may permit an appeal even though the appellant is not formally a party to the case.\textsuperscript{124}

b. \textit{In classification}. Because classification decisions are potentially more far-ranging than are most individual adjudications, it might be expected that the classification process would accord greater recognition to third-party interests than is the case with the ad-

\textsuperscript{119} 43 C.F.R. § 1842.2 (1969) (emphasis added).
\textsuperscript{120} 43 C.F.R. § 1844.1 (1969).
\textsuperscript{121} 43 C.F.R. § 1844.1 (1969).
\textsuperscript{123} See McFarland 84 n.132, citing Wight v. Dubois, 21 F. 693 (C.C. Colo. 1884); and Neilson v. Champagne Mining & Milling Co., 119 F. 123 (8th Cir. 1902) (mining lease cases).
judicatory process. Such greater recognition would be particularly appropriate in light of the fact that, because classification proceedings are not adjudicatory in the sense of being adversary, all persons interested in the classification decision are third parties. Indeed, the recognition of third-party interests might extend even to the interests of the "self-appointed guardians of the public interest." Under current departmental regulations, however, treatment of third parties in the classification process is even more dependent upon administrative discretion than it is in the adjudicatory process.

Notice of classification is given to certain specified interested parties, but only in retention classifications can those persons who have previously indicated general interest in classifications be assured of receiving notice of proposed classifications. After notice of a proposed classification has been served on those specified persons, any person—whether or not he is one upon whom notice is required to be served—may file with the state Director a protest regarding that proposed classification. Protests may be filed anytime within thirty days in the case of small-tract disposal classifications, and within sixty days in the case of retention classifications and large-tract disposal classifications. Moreover, for large-tract disposal and retention classifications, the authorized officer may hold a "public hearing." But no specific procedures are set forth to govern such public hearings; apparently these hearings are simply an opportunity for the interested public to be heard, after which the authorized officer is free to make whatever initial classification decision he wishes, so long as he remains within the broad confines of the general classification criteria.

The regulations are extremely vague with respect to procedures for administrative appeal from classification decisions. The only language directly treating appeals in this area is ambiguous as to whether the standard appeal procedures are applicable to classification decisions. If the standard appeal provisions are applicable,

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128. 43 C.F.R. §§ 2411.1-2(c), 2411.2(a) (1969). The regulations do not clearly indicate with whom protests concerning large-tract disposals or retentions should be filed. For small-tract disposals, the protest is filed with the state Director; but for others, the regulations speak only of the "authorized officer."
130. These criteria are set forth in 43 C.F.R. § 2410 (1969) (discussed in text accompanying note 81 supra), and more generally in 43 C.F.R. §§ 1725, 1727 (1969).
131. 43 C.F.R. § 2411.1(e)(4) (1969) provides:
No petitioner-applicant or protestant to a proposed classification decision of a State Director to whom the provisions of this section are applicable shall be
the classification area might possibly be an instance in which an aggrieved third party would have standing to appeal to the Secretary, without first having met the stricter provisions concerning appeal to the Director, since in this situation—at least with regard to small-tract disposal classifications—the initial decision is made by the state Director. On the other hand, the appeal provision, strictly construed, precludes all administrative review except that provided in that section—namely, a right to petition the Secretary to exercise his supervisory authority. A strict reading of the provision might also indicate, however, that the specified appeal procedure applies only to that particular section, which relates solely to those classification decisions involving petition-applications for small-tract disposals. So read, this provision says nothing about appeals from large-tract disposal classifications or from retention classifications.

The regulations which deal specifically with appeals from large-tract disposal or retention classifications are even more unclear with respect to the rights of third parties than is the foregoing provision found in the classification-by-petition section. No specific procedures are provided for review of large-tract disposal and retention classifications, although the large-tract disposal sections seem to anticipate that the Secretary will exercise his supervisory authority after having received motions from interested persons or protestants. In the case of retention classifications, no reference is made to “supervisory authority”; rather, the reference is simply to “administrative review by the Secretary,” and it is not clear how that review is to be triggered. If the review provision found in the classification-by-petition section is read as not applying to other forms of classification, it may be that the standard forms of review—precluded for classifications by petition—do apply to other types of classifications. But even if those standard forms of review do so apply, it is scant comfort to the protestant, for, as has been shown, he is likely to be barred from using the standard appeal provisions. At best, it seems that the most the interested third party can expect by way of appeal from an initial classification decision is merely to petition the Secretary to exercise administrative review or general supervisory authority.

entitled to any administrative review other than that provided by this section or to appeal under provisions of Parts 1840 and 1850 [the general appeal provisions] of this chapter.

132. 43 C.F.R. § 2411.1-1(b)(1), (3) (1969). For a discussion of the difference in standards for appeal between appeal to the Director and appeal to the Secretary, see text accompanying notes 119-21 supra.


135. Those standard review procedures are found in 43 C.F.R. pts. 1840, 1850 (1969), and, because of the provision set forth in note 131 supra, are apparently inapplicable to review of petition-classification decisions.

136. See text accompanying notes 119-24 supra.
Nevertheless, the inability of third parties to utilize standard appeal procedures should not be accorded great importance, for even if there were a right of appeal from a classification decision, such appeal would probably be futile because of what can well be described as a tremendous loophole in the area of administrative control of the classification process. That administrative gap stems from the provision that lands are to be segregated from conflicting uses after a proposed classification has been announced. The purpose of such segregation, as contemplated by the 1964 statute, is eminently reasonable: to prevent harm to public lands during the period between proposal of a classification and its effective date. Thus, after a proposed classification is announced, the land becomes segregated from all uses which would be inconsistent with the proposed classification; and, conversely, the land is open to uses which are consistent with the proposed classification. The potential hiatus in administrative supervision occurs as follows. The segregative effect takes place upon the authorized officer's announcement of the proposed classification; but administrative review, however achieved, does not, and cannot, according to the regulations, take place until the initial decision has been made and notice of it published. During the period between proposal of classification and announcement of an initial classification decision, there is no administrative review under the regulations; yet the segregative effect of the proposal is operative. The duration of that period runs up to two years and can be extended for another two years if the authorized officer gives notice of a proposed continuance.

Thus, insofar as can be determined from the published regulations, it seems that the administrative official who first proposes a classification can significantly narrow the range of alternative classifications. For example, if the authorized officer proposes to classify certain lands for mineral production or other development, the land will remain open to those uses during the period of segregation. By the time that the actual initial classification is made, commencing the running of the period for appeal to the Secretary, the uses initiated during the segregative period may have become so entrenched that even if the Secretary would have been inclined to classify the land for a more restricted use, such as recreation or wilderness, the land may no longer be attractive for that use. Moreover, to the extent that the Secretary is confined by his classification criteria—which include consideration of existing uses—the range

within which he can practically exercise his supervisory authority is narrowed further. Conservationists might be expected to view with distaste the potential abuses inherent in the segregation process. Their rancor may be multiplied when they discover that there is no equivalent discretion when the proposed classification favors a more restricted use of the sort likely to be attractive to the conservationists. At least in the case of large-tract disposals, notice of a proposed classification cannot alter the availability of the lands under applicable laws for leasing, licensing, or permitting, or for disposal of the mineral and vegetable resources of the lands. Conservationists might be expected to view with distaste the potential abuses inherent in the segregation process. Their rancor may be multiplied when they discover that there is no equivalent discretion when the proposed classification favors a more restricted use of the sort likely to be attractive to the conservationists. At least in the case of large-tract disposals, notice of a proposed classification cannot alter the availability of the lands under applicable laws for leasing, licensing, or permitting, or for disposal of the mineral and vegetable resources of the lands. Disposition under the mining laws may be precluded by the proposal; but that restriction provides little comfort to the conservationist for whom a large gravel pit not subject to the restrictions of the mining laws may be fully as unattractive as an iron mine, and for whom there would not be even the redeeming consideration that nationally important mineral resources were being developed. Although those involved in a frenetic quest for an antiestablishment cause may be inclined to view the situation as an exploitationist conspiracy, the more reasonable explanation for the approach of the regulations is that it is a recognition of the fact that use of the public lands is an integral part of many local economies in western states, and that consequently prohibition of traditional rights and uses of the public lands merely upon the proposal of a local officer could be severely disruptive of those economies. The situation does not suggest a search for an enemy, but rather points out the need for better administrative procedures to aid in ensuring that the initial decisions of local officers are in fact subject to executive direction, rather than the reverse, as seems presently to be the case. A further inquiry might reasonably be made into the manner in which the departmental rules and regulations—together with their shortcomings—are adopted. Although a detailed examination of that process is beyond the scope of this Comment, it should be noted that there appears to be substantial dissatisfaction with the failure of public-lands agencies to give adequate consideration to public participation in the rule-making process.  

III. JUDICIAL REVIEW

Because of the problems likely to be encountered by individuals who deal with the public-lands administrators of the Department of

the Interior, it might seem particularly appealing to resort to judicial review of administrative decisions which are considered unsatisfactory. However, the obstacles to judicial review in this area are manifold. An initial problem is that of standing. Since most adjudications of the Department of the Interior concern the granting or withholding of a license, permit, or sale, there may be no individual legal right upon which to predicate a lawsuit, if what is sought is deemed to be a “Government gratuity.” Further difficulties are posed by the bar of sovereign immunity and by the fact that many determinations appealed from are likely to have been committed to agency discretion by statute. Other problems concern jurisdiction for review and the type of proceeding by which judicial review should be sought. In addition, there may be problems relating to the proper parties to the case; thus in a dispute which is essentially between private parties, if the Government must be joined as an indispensable party, sovereign immunity or a quirk in the venue law may vitiate the case. Another problem is how to determine whether administrative remedies have been exhausted; indeed, in light of the frequent obscurity of departmental regulations governing administrative appeals, that determination may be exceedingly difficult. A related question is whether the issue is ripe for review. That problem can be particularly troublesome if appeal is sought from a classification decision, for in that case it must be determined whether classification may be considered a final decision by the agency and whether the injury complained of is proximate enough to warrant judicial intervention. If the foregoing problems do not as a general matter bar judicial review, then there arises the question of the scope of review: may a court depend upon a factual record developed in non-APA administrative proceedings, or must the court hold a proceeding de novo, or is a middle approach, such as remand, available to the court? Questions such as these confront the person who seeks judicial review of decisions of the Department of the Interior.

A. Types of Review

With the exception of tort claims falling under the Federal Tort Claims Act, and monetary claims falling under the Tucker or Court of Claims Acts, the judiciary has considered actions of the Department of the Interior primarily through operation of non-statutory review and, to a much lesser extent, by specific statutory

145. 28 U.S.C. §§ 1346(b), 1402(b), 1504, 2110, 2401-02, 2411-12, 2671-80 (1964).
authorization either for judicial review or for original court proceedings.

Original court proceedings are required for the initial determinations in certain mineral cases, including those involving conflicting claims for possession in applications for a mineral patent, and certain actions for cancellation of oil leases and of pipeline rights of way. In addition, in a few instances there is direct statutory provision for judicial review of administrative determinations. But in all other cases, review, if any, must be nonstatutory—that is, based either upon the general review provisions of the APA, or upon some other general federal statutory provision, such as that governing mandamus. Nearly all actions seeking review of administrative decisions of the Department of the Interior are nonstatutory in nature; accordingly, emphasis will be given here to the procedures and problems involved in that type of review.

B. Nonstatutory Review

1. Basis for Review: Standing and Legal Right

In general, a plaintiff seeking judicial review of agency action must demonstrate that he has suffered harm from the agency's action and that such action has violated a legally protected right. Strictly speaking, the "standing" question is concerned only with whether the plaintiff has suffered harm sufficient to place him in an adversary position with the defendant, and the issue of whether a legally protected right has been invaded goes to the question of reviewability rather than to that of standing. Frequently, however, these
two questions are joined together under the rubric of "standing." Thus it has been stated that standing does not exist "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." In the cases involving regulatory agencies whose activities may impinge upon an individual's property rights or other common-law rights, the existence of a legal right upon which to base a suit may be found outside any statutory grant. However, in the case of decisions by the Department of the Interior concerning the public lands, the existence of a legal right is dependent entirely upon statutory authorization, for the power of Congress over the public domain has been described as "plenary" such that persons have only those rights to public lands as have been granted by Congress. Such rights may be found, for instance, in statutes creating rights to homestead patents or mining patents upon compliance with specified criteria, or may be found in statutes creating preference rights to grazing permits, sales or dispositions following classification. In addition to those legal rights granted by statute, rights may be created by departmental regulations, an example of which is the preference accorded the initial applicant in petition classifications. But it is not necessary for the existence of standing that the right be one the interference with which is legally compensable. For example, although the Taylor Grazing Act creates no "right, title, interest, or estate in or to the lands," and although permits issued under that Act may be withdrawn without compensation, the decision to grant or withdraw must be consistent with statute and regulation; if it is not, the aggrieved party has standing to challenge the administrative action.


169. Acton v. United States, 401 F.2d 896 (9th Cir. 1968).

170. See, e.g., LaRue v. Udall, 324 F.2d 423 (D.C. Cir. 1963), cert. denied, 376 U.S.
Courts are generally quite liberal in construing statutes to find the existence of a legal right sufficient to afford a plaintiff standing and the right to seek review. Thus it is said that there is a judicial tendency to expand the class of aggrieved persons entitled to seek review under the APA171 and that review will not be precluded “unless that purpose is fairly discernible in the statutory scheme.”172

Occasionally the requisite standing and legal right may be inferred from general policy expressions of Congress. For example, congressional statements favoring the consideration of conservation interests in particular federal projects have been held to create enforceable rights on the part of persons purporting to represent such interests; but frequently such findings of standing have been made in the context of statutes containing explicit provisions for judicial review.173 It is another question whether general policy statements may be so used in the context of the public-lands decisions of the Department of the Interior, for there the review sought is non-statutory and the statement of general policy, if any, must be found in some statute other than that which grants judicial review. In the public-lands context, then, courts may still find persuasive the traditional requirement that a plaintiff’s claim must be a personal one in order for him to have standing to challenge the administrative action in a judicial proceeding. Dictum in a recent Supreme Court case indicates that this distinction may not be material,174 but the question must be regarded as, at best, unsettled.

2. Sovereign Immunity

The existence of standing and a legal right does not ensure the availability of judicial review. Another potential obstacle to judicial

907 (1964) (suit by permittee under Taylor Grazing Act entertained, even though statute provides that he acquires “no right, title, interest, or estate in or to the lands”); McNeil v. Seaton, 261 F.2d 931 (D.C. Cir. 1960) (plaintiff permitted to claim preferential right to a permit under Taylor Grazing Act); Oman v. United States, 179 F.2d 738 (10th Cir. 1949) (same); Red Canyon Sheep Co. v. Ickes, 98 F.2d 308 (D.C. Cir. 1938) (suit by an “interim permittee” under the Taylor Grazing Act permitted). See also Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 521 (1950), in which the Supreme Court found “no need” to discuss the question of standing in a suit by a coal-mining lessee to enjoin the Secretary from issuing a similar lease on adjacent property in alleged violation of a regulation.


review of public-land disputes is the doctrine of sovereign immunity, under which one cannot sue the sovereign without its consent. Since in nonstatutory review specific consent is almost by definition lacking, creativity and gamesmanship may be required to avoid the vague contours of that doctrine and to entice the judiciary into considering the merits of a case. Reams of comment critical of the doctrine have been written; but until there is statutory change, the sovereign remains immune. Hence, for the present at least, the game must continue to be played.

An examination of the doctrine must begin with Larson v. Domestic and Foreign Commerce Corporation, the case which provides the "modern keystone of the sovereign immunity doctrine." In that case, plaintiff unsuccessfully sought to enjoin the War Assets Administrator from selling to a third party surplus coal claimed by the plaintiff under a contract. In denying relief on the ground of sovereign immunity, the Supreme Court in a divided opinion held that even though an official's action may have been in error, relief is still barred by sovereign immunity if the act is in the area of the general authority of the official. If it could be said with assurance that Congress, in delegating administrative power, had intended to authorize officials to commit error or wrongful acts so long as those acts are within the general sphere of the official's authority, Larson's holding in this regard would be less troublesome. But presumably Congress does not intend to grant such sweeping delegations except when it expressly commits a broad area of authority to agency discretion. The Larson approach seems to result in a blurring of the distinction between limited delegations of administrative authority and the more general commissions of authority to agency discretion. Thus, under the Larson approach, if a court in its initial perusal of a relevant statute finds an indication that the official's action was within his general authority, the inquiry stops there, and no real attempt is made to ascertain whether the statute was actually intended so to commit the action to agency discretion. The Larson version of sovereign immunity interlocks with an exception to review that is contained in the APA to form a broad front that denies judicial consideration of the merits of controversies. Most nonstatutory review is sought under section 10 of

176. 337 U.S. 682 (1949).
177. Cramton 406.
178. 337 U.S. at 695.
179. Cramton 406-08; Byse 1490-91.
the APA, which specifically precludes review of actions "committed to agency discretion." A finding under that section that a given act is committed to agency discretion would have an effect similar to that of invoking sovereign immunity, for if the official's act is discretionary, it is difficult to show the departure from legal authority that is necessary to avoid sovereign immunity. It might be thought that one reason why Congress excluded discretionary acts from review was a reluctance to disturb the doctrine of sovereign immunity as it existed at the time the APA was enacted. But the subsequent Larson decision fundamentally altered the doctrine of sovereign immunity. That decision has had the effect of permitting courts to bypass the need for any real examination of whether a function is truly committed by statute to agency discretion, with the result that in many instances, the black-letter "presumption of reviewability" may be rendered an empty maxim supplanted by the Larson fiction. Even though courts have sometimes held that the APA itself constitutes a waiver of sovereign immunity in cases to which that Act applies, a general application of the Larson version of sovereign immunity may instead prevent the APA from applying. The circularity is distressing, but is representative of the confusion which surrounds the question of sovereign immunity.

Other aspects of Larson complicate the subject further. Under that decision, the test of whether sovereign immunity is a bar turns on the rubric of whether the suit is "in effect a suit against the sovereign" which would leave the "government . . . stopped in its tracks." But it is a fiction to assert that suits against federal officers are not in effect against the Government, for it is clear that in most cases it is the Government, not its employee, against whom the complaint is directed. That the Government should not be stopped in its tracks is not generally disputed, but cases in this area demonstrate that the rhetoric does not furnish the courts with an adequate guide.

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182. JAFFE 336-53.
184. The Supreme Court has recognized that even prior to Larson the law of sovereign immunity was an area of great confusion. Malone v. Bowdoin, 369 U.S. 643, 646 (1962). It seems doubtful that Larson and later cases have alleviated that confusion. See Cramton 424.
185. 337 U.S. at 687, 704.
186. Cramton 399, 410-11.
187. Despite the admonition, it is clear that many cases do in fact stop the Government in its tracks if the underlying dispute appears important enough to the court. See, e.g., Greene v. McElroy, 360 U.S. 474 (1959) (method of withdrawing security
Sovereign immunity according to Larson erects other barriers to judicial review. If escape from the doctrine is sought in the traditional manner of casting the suit against the officer rather than against the Government, application of immunity may depend upon an examination of the hypothetical question of whether there would be vicarious liability if the officer were a private agent and the Government a private principal. If a private principal would be liable, the suit must fail, for it is then in essence against the sovereign.188 Aside from the dubious relevance of agency law to judicial review of administrative actions,189 this test produces some perplexing questions of application. If a governmental official's vulnerability to suit turns on his "authority," how is that authority to be ascertained? In private agency cases, an agent may acquire authority by oral direction, by the principal's acquiescence, or by mere appearance.190 But the pertinent inquiry in review of administrative action should be whether the act in question was authorized by law. When applied to cases involving public-lands agencies of the Department of the Interior, the problem is further complicated by the question of how to treat the unpublished internal regulations of the agency. If an act is authorized for private agency purposes by such internal direction, presumably the act must then be characterized as one against the sovereign, whether or not the "authorization" was consistent with statute or published regulation. Moreover, if the act complained of falls within the agency's general area of authority, it seems clear from Larson that the suit must fail, and the central question of whether the act was wrongful is not even considered.

Another aspect of sovereign immunity which may pose particular problems for judicial review of actions of public-lands agencies is the Larson court's cryptic footnote indicating that a suit "may" fail if the relief sought would require affirmative action by the sovereign.191 Application of that footnote can mean that even when a governmental official unlawfully seizes a plaintiff's land, the plain­tiff cannot obtain specific relief, but is limited to a damage remedy, notwithstanding traditions of equity respecting the inadequacy of damages in lands cases.192

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189. See generally Cramton 420-23.


191. 337 U.S. at 691 n.11.

Against the backdrop of sovereign immunity there is lent some hope to litigants—and more confusion to everyone—by the long-standing tradition of limited judicial review in public-lands cases.\textsuperscript{193} Prior to \textit{Larson}, sovereign immunity was a bar in only a limited range of lands cases;\textsuperscript{194} and even in the wake of \textit{Larson}, the Supreme Court has not invoked the doctrine in any lands case which involved review of administrative decisions.\textsuperscript{195} Although sovereign immunity has been applied by the Court in cases in which some lands interests of the United States have been involved, notably \textit{Malone v. Bowdoin}\textsuperscript{196} and \textit{Dugan v. Rank},\textsuperscript{197} those cases, it has been suggested, cannot properly be characterized as public-lands cases because they did not arise out of administrative determinations of lands agency officials.\textsuperscript{198} In cases involving review of administrative decisions concerning the public lands, the Court has failed to invoke the doctrine of sovereign immunity, even though the lands interests of the United States may have been directly affected. In \textit{Udall v. Talman},\textsuperscript{199} for example, the plaintiff alleged that the Secretary of the Interior had wrongfully refused to issue to the plaintiff oil and gas leases for certain federal lands; and the Court denied mandamus relief, not on the basis of a thorough interpretation of the applicable statute.

But despite the argument that public-lands cases such as \textit{Talman} comprise an existential category of cases to which the sovereign immunity doctrine does not apply,\textsuperscript{200} that characterization has not been explicitly recognized by the courts. Indeed, since \textit{Larson}, lower courts have applied the sovereign immunity doctrine in public-lands cases, albeit sporadically.\textsuperscript{201} The resulting confusion that sur-

\begin{footnotesize}

\textsuperscript{194} The doctrine was applied in cases in which states sought to invoke the original jurisdiction of the Supreme Court [e.g., \textit{Oregon v. Hitchcock}, 202 U.S. 60 (1906)], and in cases instituted by Indians challenging the administration of tribal lands held in trust by the United States [e.g., \textit{Naganab v. Hitchcock}, 202 U.S. 473 (1906)].

\textsuperscript{195} Apparently \textit{Morrison v. Work}, 205 U.S. 481 (1907), was the last occasion on which the Supreme Court invoked the sovereign immunity doctrine to defeat review of an administrative decision of a land agency. Scalia 908.

\textsuperscript{196} \textit{Malone v. Bowdoin} (1962) (Court held that suit to eject Forest Service officer from plaintiff's land was barred by sovereign immunity).

\textsuperscript{197} \textit{Dugan v. Rank} (1963) (Court held that suit by downstream landowner to enjoin Bureau of Reclamation from impounding water was barred by sovereign immunity).

\textsuperscript{198} Scalia 909-12.

\textsuperscript{199} 380 U.S. 1 (1965).

\textsuperscript{200} Scalia 892-909.

\textsuperscript{201} Compare \textit{Simons v. Vinson}, 394 F.2d 782 (5th Cir.), \textit{cert. denied}, 393 U.S. 968 (1968) (suit to quiet title to accreted land held to be barred), \textit{Ward v. Humble
rounds the entire question of sovereign immunity is such that litigants in this area cannot with certainty rely upon any line of precedent. As a practical matter, whether sovereign immunity will bar relief may depend upon whether the Government includes the doctrine in a shotgun defense, upon the skill of plaintiff's counsel in evading the doctrine, and upon the sophistication of the court.202 In all cases, however, the doctrine remains a potential hazard for litigants, one of a plethora of problems facing those who seek to challenge administrative action.

The time-honored device for evading sovereign immunity is the officer's suit, in which the aggrieved party casts his suit against the administrative officer responsible for the injury or violation, rather than against the Government itself. In the past the necessity of so phrasing the complaint caused many problems when the plaintiff made the error of suing the wrong officer or describing the defendant by his official title rather than by name.203 Further problems arose if the named defendant's term of office expired in the course of the proceedings. In addition, for many years, actions for mandamus or in the nature of mandamus could be brought only in the District of Columbia, whose courts, by virtue of having inherited the equity and common-law powers of the courts of Maryland, possessed powers not held by other federal courts.204 Recent years, however, have seen the elimination of many of these barriers. The Mandamus and Venue Act of 1962205 permits mandamus actions to be brought against federal officers in any federal district court; and the liberal amendment and service-of-process provisions of the Federal Rules of Civil Procedure,206 together with provisions for naming the defendant in his official capacity and for the substitution of suc-

Oil & Ref. Co., 321 F.2d 775 (5th Cir. 1963), and Selkert v. Udall, 280 F. Supp. 443 (D. Mont. 1968), with Zager v. United States, 256 F. Supp. 396 (E.D. Wis. 1966) (title action stemming from resurvey of land ordered by Secretary of the Interior, held to be not barred), and Clackamas County v. McKay, 219 F.2d 479 (D.C. Cir. 1954), vacated as moot, 349 U.S. 909 (1955). See also Brown v. Udall, 325 F.2d 706 (D.C. Cir. 1963) (declaratory judgment holding invalid Secretary's rejection of mineral lease application); Foster v. Udall, 325 F.2d 828 (9th Cir. 1964); Adams v. Whitmer, 271 F.2d 29 (9th Cir. 1959) (enjoined cancellation of grant of mining claim; reversed lower court's holding that sovereign immunity barred relief); McKay v. Whalenmaier, 226 F.2d 35 (D.C. Cir. 1955) (mandamus issued ordering substitution of one oil and gas lease for another).

202. See generally Cramton 420-21.


204. The explanation for this power of the District's courts is that the District was carved from the state of Maryland. See Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).


206. FRN. R. CIV. P. 15.
cessors in office have helped a great deal. Fortunately for litigants in public-lands cases, statutes of limitation have seldom been a problem because when review is nonstatutory, there usually is no applicable statute of limitations; and the only time-bar defense, other than the court's discretionary power to dismiss for delay, is that of equitable laches.

Most cases for nonstatutory review in this area are brought under the APA. In those proceedings, the plaintiff sues the federal officer, claiming that his statutory rights or privileges have been illegally denied by the officer. The relief sought is either an injunction or a declaratory judgment. But since sovereign immunity may prevent the granting of affirmative relief, it may be advisable that plaintiff's prayer for relief be phrased in negative terms. Whether a court will countenance granting affirmative relief in a negative guise is another area of uncertainty upon which the litigant must gamble.

In light of that uncertainty, the plaintiff might prefer to seek affirmative relief by mandamus rather than through an injunction or a declaratory judgment. It appears, however, that the scope of relief available in an action for mandamus is narrower than it is in the other types of actions, since, under traditional formulations, only a "ministerial" act may be compelled, not acts involving some discretion. Moreover, actions in the nature of mandamus may not be available when the federal officer has interfered with the plaintiff's rights, unless it also can be shown that the officer "owed a duty" to the plaintiff. In contrast, injunctive or declaratory relief may be available even if the act sought or complained of involves

207. FED. R. CIV. P. 25(d)(1), (2).
208. Prior to 1966, it was possible that the time delay involved in amending a complaint might operate to defeat an action, but the possibility of such a dismissal has been reduced by the change in 1966 of rule 15(c) of the Federal Rules of Civil Procedure, permitting amendments in pleadings to relate back to the date of the original pleading. The liberal amendment provisions, however, have eliminated only the consequences of suing the wrong officer; they have not entirely done away with the problem of determining which officer to sue.
209. An exception to this generalization is found in the Mineral Leasing Act, 30 U.S.C. § 226-2 (1964), which requires that any action for judicial review must be commenced within ninety days of the final administrative decision.
212. See text accompanying note 191 supra.
213. One important advantage of a mandamus action brought under 28 U.S.C. § 1361 (1964) is that the plaintiff need not demonstrate that the case meets the $10,000 jurisdictional amount of 28 U.S.C. § 1331(a) (1964).
some discretion, for under the APA only those acts committed to agency discretion are unreviewable.\textsuperscript{216} As has been seen, however, that distinction may not get a chance to operate if sovereign immunity is triggered simply on a showing of "general" authority.\textsuperscript{217}

Another way in which a litigant may avoid the bar of sovereign immunity is by persuading the Government to initiate the suit. If the administrative determination is one which requires the claimant to take some action such as surrendering possession, he can simply refuse and wait to defend himself on the merits in a suit initiated by the Government.\textsuperscript{218} That course of action, however, may require expenditures of time and money in maintaining the property—a problem particularly troublesome if the law under which the individual is claiming the land requires development or construction as a condition to the claim. Moreover, a litigant selecting this course of action runs the risk that he may subject himself to civil liabilities if the land has been awarded to another claimant, who initiates suit.\textsuperscript{219}

A third course of action sometimes available to a disappointed claimant is to sue the party to whom the land has been awarded. That practice is employed fairly frequently, and the issues may sometimes be decided in state courts.\textsuperscript{220} However, it seems that a usual prerequisite to such a proceeding is the issuance of a patent by the Government;\textsuperscript{221} and a claimant who waits that long to initiate suit runs the risk that the patentee will defeat the claim by transferring the land to a bona fide purchaser.\textsuperscript{222} Moreover, if the decision upon which the complainant bases his claim does not call for the issuance of a patent, the action will never ripen for this type of review.\textsuperscript{223}


\textsuperscript{217} See text accompanying note 178 supra.

\textsuperscript{218} That right is explicitly recognized in section 10(b) of the APA, 5 U.S.C. § 703 (Supp. IV, 1965-1968): “Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.” But recognition of that right predates the APA. See, e.g., United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 338 (1906).

\textsuperscript{219} See generally McFarland 188.

\textsuperscript{220} See, e.g., Crowder v. Lyle, 225 Cal. App. 2d 439, 37 Cal. Rptr. 343 (1964). But if the action involves a federal officer and seeks specific relief or is based solely on federal law, a state forum probably will not be able to grant relief. See generally Arnold, \textit{The Power of State Courts To Enjoin Federal Officials}, 73 YALE L.J. 1385 (1964).


\textsuperscript{222} See McFarland 186.

\textsuperscript{223} See generally McFarland 188 & n.269.
In those situations in which a claimant seeks to sue the party to whom the land has been awarded, but cannot bring the action in a state court because the patent has not been issued, the claimant may find that relief in the federal courts—at least in the federal district court—is also unavailable. Prior to the passage of the Mandamus and Venue Act in 1962, governmental officers could be sued in the district courts only if they could be reached for service of process. If it was determined that a superior officer was an indispensable party and if a plaintiff could not effect service of process upon that officer, it was necessary for him to bring his suit in the District of Columbia where that superior officer could be served. The Mandamus and Venue Act lessened this problem by providing for nationwide service of process upon the necessary federal officers. But the liberalized service and venue provisions are available only when each defendant is an officer or employee of the United States. Hence, if the nature of a suit is such that it is necessary to join as defendants both federal officers and persons who are not federal officers, a plaintiff probably will be unable to bring his suit in the district court unless all federal officers who are indispensable parties can be served with process without aid of the liberalized provision. A major problem in this connection is to determine who is an indispensable party. The traditional rubric for determining when a superior officer is an indispensable party is whether “the decree granting the relief sought will require [the official] to take action, either by exercising directly a power lodged in him, or by having a subordinate exercise it for him.” In light of the vagaries and obfuscations which are likely to be encountered in an attempt to unravel the lines of authority in the administrative structure of the Department of the Interior, it seems that most plaintiffs faced with the predicament would be best advised simply to forego suit in the district court and seek relief by other means.

224. See notes 220-21 supra.

225. For the traditional test for determining whether a party is indispensable, see text accompanying note 229 infra.


228. See generally McFarland 189, 305; Gramton 463-65.


230. See generally McFarland 285-88; Sperling & Cooney, supra note 216, at 451 nn.24-25. There is some case precedent which can serve as a guide to when the Secretary is an indispensable party. Compare Thomas v. Union P. R.R., 139 F. Supp. 588 (D. Colo.), affd. per curiam, 239 F.2d 641 (10th Cir. 1956) (Secretary indispensable in action to compel issuance of patent), and Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897) (Secretary indispensable in action to compel issuance of lease), with Pan American Petroleum Corp. v. Pierson, 284 F.2d 649 (10th Cir. 1960), cert. denied, 366 U.S. 936 (1961) (Secretary not indispensable in action to enjoin cancellation of lease).
3. Jurisdictional Problems

Another obstacle to the claimant, contestant, or protestant who seeks review of an administrative decision respecting public lands is the requirement that he show that the amount in controversy is sufficient to obtain federal-question jurisdiction under section 1331 (a) of title 28 of the United States Code. In public-lands cases, that amount is determined by reference not to the value of the land itself, but to the value of the plaintiff's interest which is the subject of the controversy. Such value, however, may be difficult to determine in cases involving, for example, the value of a cloud on the title or the value of the enjoyment of recreation or wilderness. Even if a plaintiff is able to determine the value of the interest in controversy, in many public-lands cases that amount is less than the requisite 10,000 dollars, as, for example, in a suit challenging a grant of grazing rights or in a suit challenging an allegedly wrongful enforcement of grazing regulations. A plaintiff may be able to escape the problem simply by asserting that he meets the jurisdictional requirements, but he should not place too much reliance upon the possibility that the court will accept his assertion at face value.

A plaintiff might also evade the jurisdictional-amount requirement by bringing suit in the District of Columbia and thus taking advantage of the inherited equity power of that jurisdiction, which may be exercised without regard to the amount in controversy. But that device has its own built-in cost limitation because if the amount in controversy does not satisfy the requirements for federal-question jurisdiction, it is unlikely to be economically feasible for the plaintiff, who may be a Montanan sheep grazer or an Alaskan homesteader, to bring suit in the District of Columbia.

An alternative method for avoiding jurisdictional-amount prob-

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231. 28 U.S.C. § 1331(a) (1964) provides: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

232. See, e.g., Cameron v. United States, 146 U.S. 533 (1892) (jurisdictional amount must be determined not by value of land itself, but by value of color of title to property).


234. Gavica v. Donaugh, 93 F.2d 173 (9th Cir. 1937) (enforcement of grazing regulations).


lems is for the plaintiff to base jurisdiction on some ground other than federal-question jurisdiction. One possibility is the Declaratory Judgment Act, but the language of that statute does not seem to furnish an independent basis of jurisdiction. An independent basis of jurisdiction is available under the Mandamus and Venue Act, but that basis is effective only if the plaintiff can fit his case within the technicalities and limitations of the mandamus remedy.

A final possibility for evading the jurisdictional-amount limitation is to predicate jurisdiction on section 10 of the APA. Unlike the Declaratory Judgment Act, that statute does not expressly limit itself to situations otherwise within the court's jurisdiction; instead, it makes reference only to "a court of competent jurisdiction," a common bit of statutory boilerplate which seems to beg the question. But although some cases have held that section 10 does provide an independent source of jurisdiction, the weight of authority is to the contrary. Nevertheless, it seems that a narrow construction of section 10 is not consistent with what is arguably the spirit of the APA. That Act aims to expand the availability of review of administrative actions, whereas a narrow construction of section 10 tends to restrict review by permitting it only to the extent that (1) other statutes provide jurisdiction, (2) other statutes do not preclude judicial review, and (3) the agency action is not one committed by law to agency discretion.

238. 28 u.s.c. § 2201 (1964).

239. 28 u.s.c. § 2201 (1964) (emphasis added) provides that "any court of the United States . . . may declare the rights and legal relations of any interested party seeking such declaration" but apparently only "[i]n a case of actual controversy within its jurisdiction." Occasionally, however, courts seem to view the Declaratory Judgment Act as providing an independent source of jurisdiction. See, e.g., Henrikson v. Udall, 229 F. Supp. 510 (N.D. Cal. 1964), aff'd, 350 F.2d 949 (9th Cir. 1965), cert. denied, 384 U.S. 940 (1966) (mining claim); Freeman v. Brown, 342 F.2d 205 (5th Cir. 1965) (tobacco marketing quotas). See generally Bye & Fiocca, supra note 214, at 329.

240. 28 u.s.c. § 1361 (1964).

241. See text accompanying notes 214-17 supra and text accompanying notes 311-14 infra. See also Cramton 443.


4. Ripeness and Exhaustion of Administrative Remedies

Assuming that a person aggrieved by a decision of the Department of the Interior can demonstrate the existence of a legal right upon which to base standing, can avoid sovereign immunity, and can satisfy jurisdictional requirements, judicial review on the merits is still not available unless the controversy is "ripe" for review and the aggrieved person has exhausted his administrative remedies.\(^\text{247}\)

The concept of "ripeness" may include various factors, including whether there is a justiciable controversy, whether there is standing, whether administrative remedies have been exhausted, and whether the injury complained of is imminent enough to warrant judicial intervention.\(^\text{248}\) The concept is vague at best, and its application to public-lands disputes appears uncertain. Most of the cases on the subject seem to turn on the question of whether there is a justiciable case or controversy;\(^\text{249}\) but it has been suggested that those cases, decided in a constitutional context, can be explained by the Supreme Court's reluctance to decide questions of constitutional significance until truly necessary.\(^\text{250}\) So viewed, such cases do not furnish an adequate guide as to when administrative actions not involving constitutional issues should be reviewable.\(^\text{251}\)

It has been further suggested that the judicial insistence that there be a matured controversy between adverse parties may be misplaced when applied in the administrative context. With regard to federal regulatory activities, such judicial reluctance may perpetuate harmful uncertainty among those regulated;\(^\text{252}\) likewise, in the public-lands area, doubt concerning the legal validity of a regulation or a classification may create uncertainty among those who seek to use or develop the land. For example, an arguably invalid classification decision to withdraw lands from availability for mineral development may create uncertainty among potential developers; yet if a strict approach to ripeness is applied, there can be no review of the proposed classification unless and until someone has been willing to go through a tedious, lengthy, perhaps expensive, and probably futile application process\(^\text{253}\) in order to create an issue "ripe" for review. In other areas, "ripeness" has sometimes been found at an early stage in the administrative proceedings, as it has in general

\(^{247}\) See generally JAFFE 424.
\(^{248}\) JAFFE 395-98.
\(^{249}\) JAFFE 395-98.
\(^{251}\) JAFFE 397.
\(^{252}\) Id. There is some suggestion that "justiciability" in the constitutional context is an entirely different term of art from "justiciability" in the context of judicial review. See Association of Data Processing Serv. Organizations, Inc. v. Camp, 38 U.S.L.W. 4198, 4199 n.3 (U.S. March 3, 1970) (dissenting opinion).
\(^{253}\) K. DAVIS, ADMINISTRATIVE LAW § 21.01 (1956) [hereinafter DAVIS].
\(^{254}\) See note 42 supra and accompanying text.
designations of organizations as Communist;\textsuperscript{254} but classifications and adjudications in the public-lands areas seem to lack such immediate impact and appeal to the judiciary. Decisions denying judicial review of public-lands decisions seldom turn upon the ripeness issue, probably because there are so many other bases available on which to refuse review,\textsuperscript{255} and perhaps because if a person is sufficiently aggrieved to hazard an assault on the many barriers to judicial review, the issue at hand is probably very ripe indeed. Moreover, in the few instances in which a decision in this area has turned upon the ripeness issue, reliance on that issue appears to have been misplaced, with the real objection based on sovereign immunity, a lack of standing, or a lack of jurisdiction.\textsuperscript{256}

Clearly there is a place for the ripeness factor in considering whether to grant judicial review of decisions in the public-lands area. But it should be a small niche, with invocation of the doctrine occurring only after a thorough balancing of the considerations involved, including, on the one hand, the hardship which could result from a denial of judicial relief\textsuperscript{257} and the possibility that delay might result in compounding damages,\textsuperscript{258} and, on the other hand, the inappropriateness and difficulty of judicial disposition at an early stage.

Exhaustion of administrative remedies may present a more troublesome problem. Under general notions of administrative law, a prerequisite to judicial review is the exhaustion of administrative remedies.\textsuperscript{259} Some exceptions are made, however, when the challenge is on constitutional grounds\textsuperscript{260} or is one alleging that the entire administrative rule-making apparatus is illegal.\textsuperscript{261} Additional exceptions may be available when it can be shown that further administrative redress would be futile\textsuperscript{262} or that the decision complained of will cause immediate and irreparable injury.\textsuperscript{263}


\textsuperscript{255} Those bases include the lack of a legal right, lack of standing, lack of jurisdiction, sovereign immunity, and failure to exhaust administrative remedies.

\textsuperscript{256} See, e.g., Delaware Valley Conservation Assn. v. Resor, 392 F.2d 331 (3d Cir. 1968) (action to enjoin Army Corps of Engineers' reservoir project dismissed for lack of ripeness) (alternative holding); cf. Arizona v. California, 283 U.S. 423 (1931) (reservoir); Jasper v. Sawyer, 205 F.2d 700 (D.C. Cir. 1953) (airport).

\textsuperscript{257} That flexible approach is favored by Jaffe. See JAFFE 423.

\textsuperscript{258} Thus if ripeness had been the only reason for denying relief in Delaware Conservation Assn. v. Resor, 392 F.2d 331 (3d Cir. 1968), deferring relief until the project was completed could have caused both irreparable harm and the compounding of whatever damages were threatened.

\textsuperscript{259} See generally DAVIS §§ 20.01-10.


\textsuperscript{262} JAFFE 446-49.

\textsuperscript{263} JAFFE 429-32.
Whether all available appeal procedures must have been pursued prior to seeking judicial relief is a matter of some doubt. Apparently, administrative appeal is necessary unless the initial decision is considered final, and "final" decisions seem to be those which are immediately operative. If a party seeks judicial review only to discover that he has failed to exhaust administrative remedies, he may find himself without any forum for review of the offending decision, because administrative appeal may have been foreclosed by the delay which occurred while judicial review was being prematurely sought and because judicial review may be conditioned upon compliance with administrative appeal procedures.

The application of the foregoing general rules to public-lands decisions of the Department of the Interior is only partly clear. At least it is clear that exhaustion of appeal procedures is necessary, since initial orders are generally not effective during appeal. The regulations provide, however, that the officer to whom the appeal is taken may in his discretion provide that a decision, or a part of it, be immediately effective. Whether such orders assume the posture of a final decision for purposes of judicial review is not clear; presumably the answer depends on the effect that the decision will have upon the applicant and on whether the applicant can show that irreparable damage will result from the decision. Because failure to pursue administrative appeals can result in a denial both of judicial relief and of any subsequent administrative recourse, persons dealing with the BLM should adhere closely to the strict provisions and practices concerning the filing deadlines for appeal.

In some instances, however, it is less clear how the exhaustion requirement applies to a decision of the Department of the Interior. Exhaustion of administrative remedies presupposes that the plaintiff has knowledge of how he is to pursue those remedies. But, as has

264. Under the APA, only "final" administrative determinations are subject to judicial review. 5 U.S.C. § 704 (Supp. IV, 1965-1968).
265. See Davis § 20.08.
266. See Jaffe 450.
269. The provisions for summary dismissal are strictly enforced. See text accompanying notes 63-65 supra. Moreover, even if the local official grants an extension for filing, the appellant would be well advised to adhere to the letter of the regulations and not to rely on any such purported extension. The Bureau's internal regulations do not authorize agents to grant extensions of time for appeal, and an appeal in reliance on such an extension may still suffer summary dismissal. See Ollie W. Brooks, 66 Interior Dec. 108 (1959). Occasionally courts express dismay with such cavalier treatment. See, e.g., Tagula v. Gorsuch, 411 F.2d 589 (9th Cir. 1969), in which a departmental official had exercised his power of summary dismissal for failure to file an appeal memorandum within the required thirty days. The court found that summary dismissal was entirely discretionary; but because the appeal had been dismissed outright, the court remanded with instructions that before dismissing, considered discretion must be exercised.
been indicated, there may be some difficulty in determining both the lines of authority within the Department and the means and requirements for prosecuting an administrative appeal.\textsuperscript{270} The problem may become particularly acute if the rights and interests in question are those of a third party. In the first place, it is not clear whether a third party will be allowed to participate in an initial proceeding; if it is a hearing-type proceeding, he may be accorded status as an intervenor; if it is not a hearing proceeding, he may merely get a chance to make his position known to the examining officer. A third party's status in an administrative appeal is even more uncertain: for appeal to the Director, he must be an "aggrieved party to the case" who is "adversely affected";\textsuperscript{271} for appeal to the Secretary, he must be only an "aggrieved party . . . adversely affected."\textsuperscript{272} If the third party is denied standing for administrative appeal, presumably he has exhausted his administrative remedies, thus meeting one requirement for judicial review. Assuming that he can also meet the standing requirement and the other requirements for judicial review, the question that then arises is what the reviewing court should do. Since the scope of review is generally limited to issues and facts raised in administrative proceedings,\textsuperscript{273} the probable decision of the court—if other than dismissal—would be to remand to the agency for further proceedings. Following another administrative appeal, the aggrieved party, if still not satisfied, presumably could again seek judicial review, this time on the merits, at least with respect to those issues raised in the administrative proceedings.

5. Scope of Review

Assuming that a claimant, contestant, or protestant is able to overcome all obstacles and obtain judicial consideration, he must then face the problem of what will be the scope of the review granted. In general, that review is sharply limited with respect to factual determinations and only slightly less so with respect to legal determinations.

a. APA proceedings. The scope of review in APA proceedings is covered generally by section 10(e) of that Act, under which the court is authorized to "compel agency action unlawfully withheld or unreasonably delayed"\textsuperscript{274} and to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, in abuse of discretion, or otherwise not in accordance

\textsuperscript{270} See text accompanying notes 131-35 supra.
\textsuperscript{271} See text accompanying note 119 supra.
\textsuperscript{272} See text accompanying note 120 supra.
\textsuperscript{273} See text accompanying notes 274-314 infra.
\textsuperscript{274} 5 U.S.C. \textsuperscript{\$} 706(1) (Supp. IV, 1965-1968).
with law; (B) contrary to constitutional right . . . ; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory rights; (D) without observance of procedure required by law; (E) unsupported by substantial evidence [if the case is one in which an administrative hearing was required by statute] . . . or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. 275

The foregoing provisions, however, are applicable only to the extent that (1) statutes do not preclude review of the agency action, 276 or (2) the agency action is not one committed by law to agency discretion. 277 Because review of decisions made by the Department of the Interior is almost entirely nonstatutory, there is seldom a special statute precluding review of such decisions. The second exception, however, poses a greater problem; indeed, whether a decision is one committed to agency discretion is frequently the central issue in actions for judicial review. The Department of the Interior has long argued that its determinations are entirely discretionary and that "Congress has delegated to the Secretary the plenary authority to dispose of the public lands as he may direct." 278 Undeniably the discretion delegated to the Secretary of the Interior is immense, 279 and courts have occasionally described his power over the public lands as "plenary." 280 But few courts have been willing to view that power as being so extensive that the Secretary is exempt from APA review; indeed, some courts, particularly in the Ninth and Tenth Circuits, have occasionally sought a liberal application of APA review. 281 But even if the agency action in question is found to have been one which is not entirely committed to agency discretion, with the result that APA review is available, the scope of that review is still limited by judicial deference to agency discretion.

279. A single statute, 43 U.S.C. § 1201 (1964), is cited by the Department as its authority for promulgating a vast number of regulations [see, e.g., 43 C.F.R. pts. 1840, 1850, 2410 (1969)]. That statute authorized the Secretary, or such officer as he may designate, to enforce and carry into execution by appropriate regulations every part of the provisions of title 43 for which there is no other specific provision.
With regard to questions of fact, section 10(e) of the APA permits courts to set aside agency action or findings which are "unsupported by substantial evidence"\(^{282}\) if the agency's action was taken after a hearing which met the formal requirements of sections 7 and 8 of that Act.\(^{283}\) But as has been stated, there are few Department of the Interior adjudications in which such hearings are required.\(^{284}\) In cases not subject to such hearings, it is not entirely clear what constitutes the factual record for the reviewing court, and section 10(e) is silent in that respect.\(^{285}\) The easy answer is simply to hold that if no administrative hearing is required, the agency action is one committed to agency discretion and hence is unreviewable. In practice, that approach may often be what is taken, since cases involving a legal right created by statute are for the most part those for which hearings are provided; and if there is no legal right, there is probably no standing to seek judicial review. Thus cases involving mere refusals to grant applications for sales or permits may be considered discretionary dispensations of a "government gratuity" and therefore unreviewable.\(^{286}\)

If that Draconian approach is rejected, as it often is,\(^{287}\) the court must face the question of what facts it should refer to on review. Section 10(e) seems to anticipate trial de novo,\(^{288}\) but at least with respect to public-lands disputes, that device seems to be unknown.\(^{289}\) Instead, the reviewing courts generally tend to restrict themselves to the administrative record, however that record may have been determined.\(^{290}\) That restriction means that the plaintiff is limited to whatever he has been able to accomplish in the administrative proceedings, in which he may have been at a pronounced disadvantage.

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\(^{284}\) See text accompanying note 29 supra.

\(^{285}\) The "unsupported by substantial evidence" test also applies to a case "otherwise reviewed on the record of an agency hearing provided by statute," 5 U.S.C. § 706(2)(E) (Supp. IV, 1965-1968); but that provision too furnishes little guide, for by and large the Department of the Interior does not have "hearings provided by statute." See text accompanying notes 145-55 supra.

\(^{286}\) See, e.g., Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965) (refusal to sell lands to highest bidder at public auction held to be discretionary; no legal rights created in highest bidder); Hamel v. Nelson, 226 F. Supp. 96 (N.D. Cal. 1963) (rejection of request for patent).

\(^{287}\) See note 170 supra.

\(^{288}\) 5 U.S.C. § 706(2)(F) (Supp. IV, 1965-1968) states that a court may set aside an agency decision found to be "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."


\(^{290}\) See MCAFARLAND 186.
For example, even if a plaintiff had persuaded the officials to grant him a discretionary hearing, he would not have had an opportunity to submit a brief to the field commissioner or to see the commissioner's proposed finding which in all probability proved dispositive of the case.\textsuperscript{291} Worse yet, if the factual determination was made by the more common ex parte method, the applicant would not have had the opportunity to confront, or even to hear testimony by, adverse witnesses,\textsuperscript{292} nor would he have had the chance to know or refute the manner by which factual determinations were made in any investigations pending his departmental appeal.\textsuperscript{293} Yet the fruit of such investigations appears in the departmental file, which must provide the factual record for judicial review. It thus seems that many, if not most, applicants dealing with the Department of the Interior are at a severe disadvantage, with respect to factual issues, throughout both administrative and judicial proceedings. Still, the practice has been approved by at least one reviewing court.\textsuperscript{294}

The "Freedom of Information Act"\textsuperscript{295} may help to alleviate some of these problems; it at least prevents application of previous decisions endorsing such administrative practices. The judicial posture indicated in such decisions, however, exemplifies the deference courts generally show to factual determinations by the Department. In effect, that deference may be equivalent to holding that the action is one committed to agency discretion. The policy of deference is a hoary one, traceable at least to \textit{Cameron v. United States},\textsuperscript{296} in which the Supreme Court held that factual determinations by the Secretary of the Interior were "conclusive in the absence of fraud or imposition."\textsuperscript{297} Although such language may still be troublesome

\textsuperscript{291} McCarty, \textit{supra} note 10, at 176-77. See also text accompanying note 36 \textit{supra}.

\textsuperscript{292} See, e.g., 43 C.F.R. § 1823.2-2 (1969):

[T]he testimony of each witness should be taken separate and apart from, and not within the hearing of, either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state in and as part of the final proof testimony given by them that they have given such testimony without any actual knowledge of any statement made in the testimony of . . . others.

\textsuperscript{293} See \textit{McCarty, supra} note 10, at 178, and the Interior Department decisions cited therein. See also note 36 \textit{supra} and accompanying text.

\textsuperscript{294} Robertson v. Udall, 349 F.2d 195 (D.C. Cir. 1965).

\textsuperscript{295} 5 U.S.C. § 22 (1964), 5 U.S.C. § 552(a)(3) (Supp. IV, 1965-1968) provides that "each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person." The Act grants district courts jurisdiction to enjoin agencies from withholding agency records; and it further provides that such court actions for injunction shall be tried de novo, that the burden is on the agency to sustain its action, and that such actions shall take precedence over other cases on the court's docket.

\textsuperscript{296} 252 U.S. 450 (1920).

\textsuperscript{297} 252 U.S. at 464. See also United States \textit{ex rel. Riverside Oil Co. v. Hitchcock}, 190 U.S. 816 (1903).
precedent, it probably does not adequately reflect the manner in which courts today are likely to view factual determinations of the Department. Apparently some distinction is made by the courts according to the purpose for which the departmental factual determination is made. If the function is essentially adjudicatory, such as when the applicant has a statutory right to a certain disposition upon proof of requisite facts, the findings of the Secretary may be more closely examined by a reviewing court, even if, as under the Mineral Leasing Act, the statutory right is not one for which any statute requires an administrative hearing. However, if the function is not essentially adjudicatory, but rather is one connected with an adjudication of an application seeking an exercise of discretion or policy, the deference accorded to the administrative determination seems to follow the established trail.

It may be stated with little fear of exaggeration that the primary purpose of judicial review of administrative action is to guard against departures by government officials from their legal authority and thus to help ensure that the administration remains within the legal bounds intended by the legislature. That precept is embodied in the judicial-review provisions of the APA and is reflected in the traditional form of review, the officer's suit, in which a departure from law is alleged. Against that background, it may be somewhat surprising to discover that courts accord deference to administrative determinations not only on questions of fact, but, at least in the public-lands area, on questions of law as well.

With respect to matters of statutory interpretation, it is frequently stated that "courts will not hesitate to review the Secretary's interpretation to determine if it accords with the language of the statute and the purpose of the statute, gleaned primarily from its legislative history." But at the same time, it is said that the Secretary's construction is entitled to great weight and is not normally overturned unless a different construction is plainly required.

With respect to statutory interpretation by the Secretary, the latter

299. In some such cases, however—those dealing with the validity of mining claims for example—the Department has ruled that APA-type hearings are to be used, even though not required by statute. See Keith v. O'Leary, 63 Interior Dec. 341 (1956). See also Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959). See generally Sperling & Cooney, supra note 216, at 446.
300. See, e.g., Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968); Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965); Hamel v. Nelson, 226 F. Supp. 96 (N.D. Cal. 1963).
302. Sperling & Cooney, supra note 216, at 444 & n.84, citing, inter alia, Seaton v. Texas Co., 256 F.2d 718 (D.C. Cir. 1958); California Oil Co. v. Udall, Civil No. 5729 (D.N.M., Jan. 15, 1959).
approach is difficult to fault, for it would clearly not be desirable if large segments of public administration were subject to disruption every time a court happened to prefer its own statutory interpretation to that of the Secretary.

It is with respect to interpretation of departmental regulations that one begins to doubt the wisdom of according a broad deference to the Secretary's interpretation. In this area, the Secretary is given more deference than he is even for factual determinations; factual determinations must be based on "substantial evidence," but interpretations of regulations may be upheld if there are "plausible grounds" for the Secretary's interpretation. At first glance, it might seem that interpretation of regulations is the area in which deference is most appropriate—the problems may be complex, and the administrative officers presumably have the familiarity and expertise to deal with those problems. Yet from the standpoint of persons who must deal with the administrators and their interpretations, the picture is less clear. The Secretary is granted broad powers to formulate regulations, and he may be bound by those regulations. Regulations are—or at any rate ought to be—more specific than their authorizing statutes, and hence regulations can provide courts with a convenient gauge from which to determine whether an officer has exceeded his legal bounds. In view of what appears to be the Department's long-standing distaste for judicial review of its actions, it might be expected that in formulating regulations the Department would seek to furnish the courts with as little room for interpretation as possible, at least with respect to matters which border on policy. That indeed seems to be the case. A few hours of wading through the Department's regulations suffice to convince one that much of the regulatory material is prolix paraphrase of the underlying statute. True, in certain highly developed areas, such as grazing, the regulations are quite specific. But in volatile areas which have strong policy implications, such as classification, the regulations carefully go no further than does the statute in restricting official discretion; and with respect to the segregation provisions, they seem even to expand upon the broad discretion conferred by the statute. It is not an adequate answer


305. Cf. Vitarelli v. Seaton, 359 U.S. 535 (1959) (adherence by Secretary to his regulations deprives him of the summary power that he would have had absent the regulations).

306. See text accompanying note 278 supra.


309. See text accompanying note 142 supra.
to say that if discretion is unobjectionable when conferred by statute, it is similarly unobjectionable when found in the regulations. The crucial difference is that the statute confers discretion upon the Secretary, an executive official, whereas the regulations, as a practical matter, confer that discretion upon various lesser administrators. One result of conferring broad discretion upon lesser officials is that opportunities for judicial observation and inquiry into administrative processes are minimal. Persons having an interest in the highly important classification decisions are placed at an additional disadvantage by the failure of the regulations to establish any clear administrative appeal procedures by which interested persons can effectively make known their views to executive officers of the Department.\textsuperscript{310}

b. Mandamus proceedings. The scope of review in mandamus proceedings is much narrower than that in APA proceedings, both as to questions of fact and to questions of law. In general, the plaintiff must show that the defendant officer "owes a duty" to the plaintiff, and the courts may limit themselves to compelling the performance of that duty only when "the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command."\textsuperscript{311} Few statutes are wholly free from doubt; and with respect to the mandamus remedy, courts show "great deference to the interpretation given the statute by the officers or agency charged with its administration."\textsuperscript{312} Thus, even if the officer's function in question is entirely adjudicatory, as it is in determining whether a mining claimant has complied with statutory criteria which create a right to a patent, that officer probably cannot be compelled by mandamus to take certain action, such as to issue the patent, because the officer may be making a statutory interpretation as well as a factual determination. In effect, then, the officer has discretion not only to find the facts, but also to choose the law.\textsuperscript{313}

Conceivably the apparently greater deference accorded administrative interpretations when relief is sought by mandamus rather than by other means could lead to a situation in which the statutory interpretation that is applied in large cases in which the claimant can meet the requirements for federal-question jurisdiction may be a different statutory interpretation from that accorded to claimants whose only practical access to judicial review is by mandamus. Such a result would be anomalous, to say the least; and it is perhaps one factor that has prompted some commentators to call for a less re-

\textsuperscript{310} See text accompanying note 131-35 supra.


\textsuperscript{312} Udall v. Tallman, 380 U.S. 1, 16 (1965).

\textsuperscript{313} JAFFE 183-84.
strictive approach to mandamus relief under the Mandamus and Venue Act.  

III. ANALYSIS AND RECOMMENDATIONS

A. General Considerations

An examination of the administrative procedures governing the public lands and of the administrative and judicial treatment of disputes arising under those procedures suggests the existence of needless complexity and of vast administrative discretion subject to no adequate control by either the courts or the executive. It is suggested that public-lands administration, and certainly those persons who deal with the lands agencies or who otherwise have an interest in the management of public lands, would stand to benefit from an expansion in the availability of judicial review.

Many of the obstacles to judicial review of administrative decisions seem to be irrational, at least in the public-lands context. One example is the minimum amount necessary for federal-question jurisdiction. Of questionable value in any context, it can in the public-lands area serve to inflict unnecessary hardship on would-be litigants who, if they cannot demonstrate that 10,000 dollars is in controversy, must either structure their complaints to meet the technicalities of mandamus jurisdiction or bring their actions in the District of Columbia—often a distant, expensive, and unfamiliar forum. What good purpose is served by that requirement is not clear; what is clear is that the jurisdictional-amount requirement promotes disuniformity of decision, with success often depending upon whether a court accepts at face value a plaintiff’s assertion of jurisdiction or contrives to find jurisdiction under some other statute such as the APA.

A related obstacle to judicial review, and one which is similarly of questionable value, is the necessity for meeting narrow technical requirements in order to gain mandamus jurisdiction in the federal district courts. The inquiries necessitated are whether the defendant “owes a duty” to a plaintiff and whether the act sought is “ministerial” or “discretionary.” Some commentators have suggested that this narrow construction of the requirements for mandamus is not in harmony with a supposed intent of Congress to confer on district courts jurisdiction for land disputes generally. In any

314. See Byse & Fiocca, supra note 214, at 331-36; Parr, supra note 278, at 29-21.
315. See generally Cramton 436-46.
316. See text accompanying notes 231-37 supra.
317. See text accompanying notes 240, 311 supra.
318. See, e.g., Parr, supra note 278, at 21.
event, the operation of that judicial approach is rendered some-
what irrational by the fact that in many cases a plaintiff who is
denied relief in the district court because of failure to meet man-
damus requirements can still obtain relief by means of a change of
forum and a change in pleading.319

Another needless obstacle to judicial review is the possibility
that relief may be denied if the case happens to be one in which it
is necessary to join as defendants both federal officers and persons
who are not federal officers. The restriction of the district court's
venue by the Mandamus and Venue Act320 to situations in which
"each" defendant is a federal official works a needless and irrational
hardship on plaintiffs who, because of that quirk in the statute, may
be obliged to sojourn in the District of Columbia if they want to
obtain judicial review.321

Another obstacle to judicial review is sovereign immunity. That
doctrine, although arguably less irrational in purpose than the fore-
going jurisdictional problems, is at least as effective in diverting
courts' attention from the merits to artificial issues; and the doctrine
is probably even less consistent in application than are the juris-
dictional problems.322 It might be argued that sovereign immunity
is less objectionable when applied to public-lands controversies than
it is when applied to other areas. After all, the sale and granting of
leases and permits on the public lands is an exercise by the Govern-
ment of its proprietorship. Broad discretion, it might be argued, is
peculiarly appropriate when the Government acts as proprietor dis-
pensing gratuities; and if the Larson doctrine results in broadening
that discretion, it is not great cause for concern. That analysis, how-
ever, fails in many respects. It displays as a premise the proposition
that so long as the Government is exercising its proprietorship and
not regulating personal or property rights, the idea that administra-
tive agencies should be subject to judicial control is somehow less
applicable. Whatever merit that proposition may have is diminished
when it is realized that as a practical matter in most public-lands
cases, it is not the "Government" acting, but a lower- or middle-
echelon bureaucrat. That latter observation should prompt at least
some inquiry into the process of administrative decision making in
order to help ensure a proper nexus between the administrative de-
cision and the policy of the executive to whom the discretion has
been delegated. Hence, even when sovereign immunity concerns
only proprietary functions, that doctrine may afford too much shelter.
Moreover, sovereign immunity in public-lands cases is not limited

319. See text accompanying notes 225-28 supra.
321. See text accompanying notes 225-28 supra.
322. See text accompanying notes 193-202 supra.
to strictly proprietary situations; it may also operate in cases involving statutory rights and privileges or even real-property rights. In fact, it seems that the doctrine is less likely to be applied in cases such as *Udall v. Talman,* which involve a clear propriety function, than it is in cases in which "propriorship" is conspicuously absent, such as *Malone v. Bowdoin,* *Simons v. Vinson,* and *Gardner v. Harris.* Whatever virtue sovereign immunity may have with respect to proprietary actions is clearly lacking when its application operates to permit administrative officials to accomplish by their wrongful actions what the Government could not accomplish legally by way of eminent domain. It is to be hoped that the near future will see some statutory alleviation of the hardships permitted by the doctrine as it is now applied.

Another aspect of existing standards for judicial review which may work a substantial hardship on a party aggrieved by an administrative decision concerns the scope of review granted. In general, courts quite rightly review only "questions of law" and not questions of fact. So long as the fact-finding process of the administrative agency conforms to general notions of fundamental fairness, there is no objection to that judicial policy. But with the exception of the few instances in which formal APA-type hearings are available, the fact-finding practices of the lands agencies of the Department of the Interior leave some doubt as to whether considerations of fundamental fairness are really satisfied. When an applicant is denied opportunity to confront, or even to hear the testimony of, adverse witnesses; when he is given no opportunity to see the hearing examiner’s proposed findings, but must on appeal shoot in the dark at what may be important issues; and when the facts which are relied upon for the final administrative decision and which will comprise the factual "record" for judicial review may have been gathered by faceless investigators during the course of an appeal, there is at least some question concerning the fairness or accuracy of the resulting record.

Even the review given to administrative determinations of questions of law may be sharply limited by judicial deference to administrative decisions. Substantial deference is given to secretarial determinations of statutory authority; and in that regard, at least

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325. 394 F.2d 752 (5th Cir.), cert. denied, 393 U.S. 968 (1968).
326. 391 F.2d 885 (5th Cir. 1968).
327. Proposals for statutory reform of the sovereign immunity doctrine have been developed by Professors Byse and Cramton. See Byse 1525; Cramton 428.
329. See text accompanying notes 302-14 supra.
some deference is necessary to ensure smooth administration. But administrative interpretations of regulations may be viewed by the courts with excessive deference, to be upset only if no plausible grounds for the administrative interpretation exist. The result seems to be the encouragement of vague and confusing regulations, of which nearly any interpretation may be deemed "plausible." Such regulations operate to foreclose judicial review and have the effect of shifting the element of discretion away from the executive officers, to whom it was granted by Congress, and toward the lower-level administrators, whose control over fact finding and record making is likely to channel the interpretation and the result in the final administrative—and judicial—decision in any particular case. Moreover, the vague and obfuscatory regulations seemingly encouraged by the deferential policy tend to afford only uncertainty to persons who will deal with the Department. One result can be wasted effort, because the lack of specific rules and regulations may serve to encourage persons to apply for land dispositions which they would not have sought if they had had advance knowledge of the Department's policy. Another apparent result of inadequate regulations is the emphasis given to individual case adjudications, in which there may occur the announcement of policies having far-reaching implications. There is at least a possibility that the decisions reached in such cases are based on rather narrow considerations because third parties who stand to be affected by the general policy lack notice of the pending proceedings and therefore do not have the opportunity to participate in those proceedings; indeed, even if there were notice, those persons are probably not permitted to intervene in such proceedings.330

There seems to be no good reason why courts should continue to accord to administrative findings and actions under secretarial regulations so strong a presumption of validity. No real purpose is served by that presumption; the underlying reason for it is probably the courts' reluctance to enter confusing areas which are thought to be better suited for the technical expertise of administrators than for judicial inquiry. But it might be questioned whether professional expertise is really a valid consideration in many disputes arising in the public-lands area. Perhaps the deference is appropriate in situations such as those long-term development projects which involve highly sophisticated questions of cost-benefit analysis; but such questions would rarely be present in homestead or grazing permit applications, and courts seem reasonably well suited to pass upon the fairness and legality of administrative decisions in such cases. The benefits of judicial review which would accrue in those areas could be gained by discarding the strong presumption of validity currently

330. See text accompanying notes 112-18 supra.
accorded to administrative findings and regulation interpretations. Such a shift need not mean that the courts would have to become involved in the highly technical determinations in which there is good reason for judicial deference. Courts seem generally aware of their limitations, and it is reasonable to assume that there would be few instances in which courts would involve themselves in technical problems that are better left to the experts.

B. Treatment of Third-Party Interests

The public lands have national importance as well as importance for large segments of local communities in the western states. The interests of the public generally in the uses made of the public lands suggest the need for some public voice in determining policies of wide-ranging importance. Moreover, the strong impact which the management of the public lands may have on local communities with respect to both land-use planning and economic well-being suggests the need for some kind of institutionalized consideration of what may loosely be termed third-party interests—that is, the interests of persons not directly concerned in any given controversy.

At present, little recognition is given to those third-party interests either in the administrative process or in the courts. In most administrative determinations, the status accorded to third parties is that of a “protestant.” As such, one has no right to appeal, since that privilege is limited to “aggrieved persons who are parties to the case” and who are “adversely affected.” If a third party’s complaint is related to what he apprehends as being “the public interest,” it might be expected, as a general matter, that such an interest would be more likely to receive fair consideration if it were heard at a level near that of the policy-making executive than it would in the local land office. The possibility of insufficient consideration at the local level seems particularly strong if the dispute concerns a disposition which could benefit a local economy, but which might be objected to by third parties seeking to represent, for example, conservation interests. If indeed there is thought to be a general public interest in such disposition, it is desirable to establish some administrative procedure whereby mere protestants might have an opportunity to be heard on other than the local level. The need to establish some procedure of this type is heightened by the fact that case dispositions have assumed great importance on account of the absence of adequate regulations which might have been promulgated if greater consideration were given to general public interests.

An objection to providing an expanded forum for consideration of third-party views may be found in the statement of the regulations that decisions generally do not become effective until all appeals have been exhausted; clearly it would not be in the interests
of efficient administration to permit a disgruntled "self-appointed guardian of the public interest" to delay a land disposition to which no one immediately concerned has objected. The problem that such a delay could pose is aggravated by the fact that administrative appeal can often be an interminable process, despite the Department's strict enforcement of filing deadlines.

This objection could be alleviated, however, and side benefits realized, if the processing of appeals could be expedited. The stock answer to the problem of administrative delay is to call for an increased staff. But that approach seems unlikely at a time of purported government austerity. Moreover, an increased staff might not provide a satisfactory solution, particularly if bureaucracy really does possess an ability for an infinite expansion of work. A better approach, then, would be to reduce the volume of appeals, and it seems that a significant step could be taken in that direction if there were better departmental dissemination of public information. If better regulatory material were made available—a result that could be encouraged by the courts through a reduced deference to departmental interpretations of vague regulations—presumably fewer futile appeals would be attempted.

Another manner in which objections to permitting third-party appeals might be met is through the Secretary's exercise of his currently available discretionary power to permit initial decisions or portions of them to become immediately effective. One difficulty with that approach, however, is that applicants would still be reluctant to commence operations in reliance upon an initial decision if that decision were subject to appellate alteration. Moreover, third parties might object that the feared harm to the land might be an accomplished fact by the time their appeal could receive appellate consideration. But both difficulties could be minimized if there were provision for according priority treatment to administrative appeals in cases in which the initial decision has been made immediately effective. Coupled with the reduced appellate workload which could result from making better regulatory material available in order to permit parties to gauge more accurately the probable outcome on appeal, a provision for priority appeal could adequately satisfy the objections to permitting third-party appeals.

An area in which there is a severe need for better attention to third-party interests is that of classification. At the present time, classification does not ensure the consideration of, or even notice to, third parties; and the segregation provisions render administrative


332. See text accompanying note 268 supra.
appeal nearly meaningless for everyone concerned. It is at the classification stage that policy determinations affecting broad areas are made, and it is at that stage that consideration of the claims of third parties representing the "public interest" would most appropriately take place. Yet "public hearings" are required only for very large classifications; and the efficacy of such hearings is uncertain, since the regulations provide only that the "authorized officer" consider the issues raised. There is no provision for compiling from those hearings a factual record for review; indeed, it appears that standard administrative review is not permitted and that the only further review allowed is that of "petitioning" the Secretary by some unstated method. It is not clear who may petition; but it is clear that no review at all is possible until the initial classification decision is published, and that such publication may occur as much as four years after segregation and uses consistent with the proposed classification have begun. At the very least, then, there should be explicit provision for administrative review of proposed classifications as well as of the more final "initial classifications." Whatever harm there would be in permitting review of proposed classifications seems minimal in comparison to the present situation in which the "authorized officer" who proposes the classification is able to exercise nearly all the broad discretion which was granted to the Secretary under the 1964 statute.

The same considerations which support increased administrative review of third-party interests also lend support to arguments for judicial review of such interests. If there is a need for greater consideration of the interests of the "public" when decisions having a broad policy impact are made, and if therefore there is a need for administrative review of such decisions, then it seems appropriate to promote fairness and consistency of decision by having judicial review available as well. But judicial review of a proposed classification, for example, might entail a departure from many traditional standards for judicial review. Technically, the proposed classification is not a final decision, and it may not become so until the period for petitioning the Secretary has expired. But since there is no provision preventing an initial classification from being operational before appeal, it could reasonably be argued that the decision is final when the initial classification is published. In addition, it might be argued that in some cases, the decision is final as a practical matter as soon as it is proposed by the authorized officer, for that proposal commences the segregation thereby opening the

333. See text accompanying notes 137-42 supra.
334. See text accompanying note 133 supra.
335. 43 U.S.C. § 1411 (1964). See also text accompanying notes 140-42 supra.
336. See text accompanying notes 252-63 supra.
land for consistent uses. If the harm alleged is that the uses permitted by the proposed classification will make the land unsuitable for the purpose for which it is argued that the land ought to be classified, then it might be possible to fit that argument within the traditional standards for irreparable harm.\(^{337}\)

An additional barrier to judicial review of a proposed classification is the problem of standing.\(^ {338}\) If the person seeking review of the decision is the petitioner whose application initially triggered the classification process, the standing problem is solved relatively easily. But if the party seeking review is, for instance, a conservation group, that requirement is not so easily satisfied. In recent years, however, there has been a substantial relaxation in standing requirements, particularly for public-interest groups and conservation groups. Of particular interest in the latter regard are *Scenic Hudson Preservation Conference v. FPC*,\(^ {339}\) and *Citizens Committee for the Hudson Valley v. Volpe*,\(^ {340}\) both of which permitted standing for conservation groups. But those cases were decided by reference to particular statutes which directed the agencies to give consideration to scenic and conservation interests,\(^ {341}\) whereas in disputes concerning public lands administered by the Department of the Interior, such specific statutes are seldom available. That distinction may have been rendered less important, however, by a recent Supreme Court decision in which *Scenic Hudson* and *United Church of Christ v. FCC*\(^ {342}\) were cited for the proposition that the interest which produced standing may sometimes “reflect ‘aesthetic, conservational, and recreational’ as well as economic values.”\(^ {343}\) Moreover, general statutes dealing with public lands contain references to

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\(^{337}\) An important element in determining whether administrative remedies have been exhausted is whether an adequate administrative remedy is available. JAFFE 426-32. Traditionally, an administrative remedy is inadequate if it does not insure against “irreparable injury” to the aggrieved party. Id. 428-30. See also *Isbrandtsen v. United States*, 211 F.2d 51 (D.C. Cir. 1954).

\(^{338}\) See notes 156-74 supra and accompanying text.


\(^{342}\) 359 F.2d 994 (D.C. Cir. 1966).

wilderness or conservation considerations, and perhaps it would not entail too great a logical jump to go from standing under the Transportation Act or the Federal Power Commission statute to an inference of standing from such statutes as the Multiple Use and Sustained Yield Act under which classification takes place.

Thus, the traditional barriers to review at the classification stage do not appear insuperable for a sympathetic court. The truly difficult issues with respect to judicial review for conservationists or others challenging proposed lands classifications concern the question of administrative discretion and the proper relationship of the judiciary to matters relating to administrative discretion. Few imaginable functions of the Department of the Interior are more policy-related or involve more discretion than does classification. The fundamental question, then, is whether it is proper for courts to become involved at all in matters so inherently discretionary. Indeed, there may be some very serious doubts that it would be wise to characterize as questions of law such delicate decisions as the balancing of the interests of conservationists against the interests of the public and the nation in the development of resources and in the supply of low-cost building materials and fuels. The nation’s needs and policies in this area are volatile, and reduction of those issues to questions of law might result in stifling the flexibility necessary to meet national needs. Such decisions, it may reasonably be argued, should be left to political determination.

Yet one may question whether these decisions are really made by political determination in the sense desired. Indeed, in view of the fact that low-level administrators apparently have broad discretion for classification—due in part perhaps to the lack of adequate secretarial regulations—one might question how responsive classification proposals are to political direction except in the very broadest sense. First, it is uncertain how far down into the bureaucratic complex the political pressures can extend effectively. The frequent allusions to the control of the executive by the bureaucracy suggest that effective political control may be an illusory goal. Second, even if political pressures are felt by the administrators who collectively wield the power of bureaucracy, it is doubtful that those

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347. 43 U.S.C. §§ 1411-18 (1964). Conservation interests which arguably are recognized in that Act are found in the criteria for classification, which include, but are not limited to, fish and wildlife development and utilization, outdoor recreation, wilderness preservation, and ecology.
pressures will be of the sort envisaged by proponents of political control. That doubt is based not on any devil theory of corrupt politics, but simply on the likelihood that, as a practical matter, whatever pressures are felt by low-level administrators in a geographically decentralized administrative structure are likely to be parochial in nature and hence not responsive to political guidance from the executive policy makers, except perhaps in those very large cases which assume the proportions of a national scandal.

In this connection, limited judicial activity could promote an appropriate balance. By exerting pressure on administrative agencies to reach their decisions in an open manner and to afford a voice to the interested public, the courts could encourage a more responsive administration and at the same time could avoid excessive judicial interference in questions of discretionary policy. That pressure could be brought through judicial emphasis not on the substantive policy issues involved, but rather on the procedures by which decisions are made.

The device available for such an approach is that of remand, and indeed there is a significant degree of precedent for that approach. Many state courts have extensively utilized the device of remand to enforce upon administrators of the public resources what has been termed the public-trust doctrine.\(^\text{348}\) In fact, state courts have applied that doctrine even to legislatures as a positive limitation on the powers of those bodies.\(^\text{349}\) Federal courts have not so applied the doctrine as a check on the Congress, and probably neither can nor should go that far. But federal courts have increasingly used the remand device to express dissatisfaction with certain administrative procedures and to prod agencies into greater consideration of a broad range of interests, including conservational interests, in making administrative decisions. In \textit{Udall v. FPC},\(^\text{350}\) for example, a decision of the Federal Power Commission was remanded for further consideration on the ground that the Commission had not exercised the "informed judgment" required by a relevant statute. Similarly, remand was utilized in \textit{Scenic Hudson Preservation Conference v. FPC}\(^\text{351}\) and \textit{Citizens Committee for the Hudson Valley v. Volpe}.

\[\begin{align*}
350. & \text{387 U.S. 428 (1967).}\\
351. & \text{354 F.2d 608 (2d Cir. 1965).}\\
352. & \text{302 F. Supp. 1058 (S.D.N.Y. 1969).}
\end{align*}\]
Admittedly, these cases involved special circumstances and statutes and are hence distinguishable from situations relating to the activities of the Department of the Interior. But even with respect to review of the decisions of the Department of the Interior, remand as a gesture of judicial dissatisfaction is not unknown, even when the power exercised by the Secretary is entirely discretionary. 353

IV. Conclusion

In the next few years, controversies over the public lands are likely to reverse their long-term declining trend and to increase in attention and importance. If nothing else, the current political popularity of environmental issues seems to ensure that increased attention will be given to the uses made of the federal public lands. Moreover, the report and recommendations of the Public Land Law Review Commission, due June 30, 1970, is certain to spark new debate concerning uses and dispositions of the public lands. 354 Indeed, many of the current laws and practices, such as those relating to classification, are nominally temporary pending the recommendations of the Commission. 355 Nevertheless, current practices remain important, for decisions made now will have long-range effects, and current practice seems likely to continue at least until Congress acts on the Commission's recommendations.

Current practices could benefit greatly from reform. The practice of lands administration seems to be one of paternalism and broad discretion throughout the administrative structure, with inadequate procedures and public information for persons dealing with the public-lands agencies. Departmental appeals procedures are frequently inadequate, and the availability of judicial review of wrongful or arbitrary action is hampered by numerous artificial barriers which serve little or no rational purpose. As a result, there is a substantial need for increased judicial and legislative attention to the practices of the lands agencies, in order to encourage better rule-making and adjudicatory procedures and in order to ensure that when the Department exercises its discretionary authority over the public lands, it gives adequate consideration to the various public interests at stake.

353. See, e.g., Tagula v. Gorsuch, 411 F.2d 589 (9th Cir. 1969); Presentin v. Seaton, 284 F.2d 195 (D.C. Cir. 1960) (Secretary directed to consider appeal of mining claimant whose filing had been rejected as untimely). See also Denison v. Udall, 248 F. Supp. 942 (D. Ariz. 1965) (court reversed Secretary's denial of application for mining patent and remanded for further proceeding); accord, Richardson v. Udall, 223 F. Supp. 72 (D. Idaho 1966) (homestead application).

354. The legislation of 1964 created the Public Land Law Review Commission, 43 U.S.C. §§ 1391-400 (1964), the purpose of which is to make a systematic study of long-term needs concerning the public lands and then to report to Congress with recommendations for future use and disposition of the public lands.