THE EFFECT OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT ON ADJUDICATION PROCEDURES IN THE DEPARTMENT OF THE INTERIOR AND JUDICIAL REVIEW OF ADJUDICATION DECISIONS

Newton Frishberg*
Michael C. Hickey**
James R. Kleiler***

The purpose of this article is to examine the effect of the Federal Land Policy and Management Act of 1976 [FLPMA][1] on adjudication procedures within the Department of the Interior and judicial review of departmental adjudication.[2] Four provisions of FLPMA deal expressly with adjudication, three with administrative adjudication and one with

* Chief Administrative Judge, Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior. B.A., 1950, Lehigh University; LL.B., 1956, Harvard University. Member of both the Arizona and the Oregon Bars.

** Staff Attorney, Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior. A.B., 1970, Boston College; J.D., 1974, Georgetown University. Member of the California Bar.

*** Staff Attorney, Board of Land Appeals, Office of Hearings and Appeals, U.S. Department of the Interior. A.B., 1971, Georgetown University; J.D., 1974, George Washington University. Member of both the Maryland and the U.S. Supreme Court Bars.

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1. 43 U.S.C. §§ 1701-1782 (1976).

2. Due to the scope and number of issues addressed, discussion of each is necessarily limited; many questions that inevitably arise from such an analysis will not be discussed. For example, should the scope of review continue to be de novo or should it be more limited? Should the same scope apply to review of formal and informal initial decisions? Would the time saved by discretionary review by the Board of Land Appeals outweigh increased public frustration at summary denial of petitions for review? Is the increased inefficiency of collegial boards (over, for example, a single judicial officer atop a hierarchy) sufficiently compensated for by the greater probability of fairness, breadth of view, and safety? Assuming the desirability of a collegial board, what is its optimum number of members? What should their tenure be?

judicial review. The first two are hortatory.[3] Section 102(a)(5) of FLPMA declares it to be the policy of Congress that the Secretary of the Interior be required to structure adjudication procedures to assure adequate third party participation, objective administrative review, and expeditious decisionmaking.[4] Section 102(a)(6) provides that judicial review of public land adjudications be provided by law.[5]

The third and fourth provisions appear to be self-executing. Section 302(c) requires that the Secretary insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing its revocation or suspension, after notice and hearing, for certain violations.[6] Similarly, section 506 provides for the suspension or termination of rights-of-way and easements in the event of abandonment or noncompliance with a number of statutory, regulatory, or contractual requirements "after due notice to the holder of the right-of-way and, and [*sic*] with respect to easements, an appropriate administrative proceeding pursuant to section 554 of title 5, [of the United States Code]."[7]

Part I of this Article, dealing with administrative adjudication,[8]

3. *See* 43 U.S.C. §§ 1701(a)(5),(6)(1976). The language chosen by Congress in section 102 of FLPMA suggests that the policies enunciated therein are not self executing. For example, Congress declared it to be the policy of the United States that "the Secretary *be required* . . . to structure adjudication procedures . . ." and "judicial review . . . *be provided* by law. . . ." *Id.* § 1701(a)(5),(6) (emphasis added). Section 102(b) contributes to the same conclusion: "The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation. . . ." *Id.* § 1701(b).

4. *Id.* § 1701(a)(5).

5. *Id.* § 1701(a)(6).

6. *Id.* § 1732(c).

7. *Id.* § 1766.

8. "Administrative adjudication" may perhaps best be defined by contrasting it with administrative rulemaking. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970) [hereinafter cited as PLLRC] contrasts the two as follows:

> (1) *rulemaking* . . . [is] the development and promulgation of substantive and procedural regulations designed to announce the standards under which a statute will be administered; and (2) *adjudication* . . . [is] the application of statutes and regulations to particular factual situations on a case-by-case basis to determine whether applicants are entitled to the various rights or privileges provided for by law.

Id. at 251.

Robert L. McCarty poses the distinction in more pragmatic terms:

> A workable solution to these problems involves a subtle blending of the ideal and the practical. This is particularly true of a Cabinet agency like the Department of Interior in which vast areas have been trusted to the discretion of the Secretary and other areas left only to his administration. Decisions must be made in both areas, but the process of decision must be different in each case. The former requires the development of policy which will undoubtedly vary as conditions change; the latter is more traditionally judicial, requiring the application of statutory standards to particular cases. For example, the decision of whether a particular tract is to be leased is a policy decision left by the statute to the Secretary's discretion. However, once the decision to lease has been made, the process of deciding to whom the lease should issue is administrative and governed by purely legal questions.

McCarty, *A View of the Decision-Making Process Within the Department of the Interior*, 12 ROCKY MTN. MIN. L. INST. 269, 303 (1967).

Adjudication does not include land use planning and management decisionmaking under Title II of FLPMA. *See* 43 U.S.C. § 1712 (1976). These activities, being of more general applica-

examines objective administrative review of initial decisions as well as some aspects of expeditious decisionmaking. Part II addresses third party participation; part III discusses notice and opportunity for hearing; and part IV, judicial review.

I. OBJECTIVE ADMINISTRATIVE REVIEW AND HISTORICAL OVERVIEW

In subsection 102(a)(5) of FLPMA, Congress declared it to be the policy of the United States that "in administering public land statutes and exercising discretionary authority granted by them, the Secretary [of the Interior] be required . . . to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking."[9] This policy statement closely parallels Recommendation 109 of the Public Land Law Review Commission [PLLRC]:[10] "Congress should direct the public land agencies to restructure their adjudication organization and procedures in order to assure: (1) procedural due process; (2) greater third party participation; (3) objective administrative review of initial deci-

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bility, are in the nature of rulemaking. Such planning and management decisions are to be implemented through permits, easements, rights-of-way, and other instruments providing for the use and occupancy of the public land. *Id.* § 1732(b) (1976). For the purposes of this Article, adjudication will include decisions on applications for such permits or other instruments, as well as those decisions that revoke, suspend, or modify the interests of users of the public land under such instruments.

The above definitions may be insufficient. Numerous commentators have criticized the Department for using adjudication as a vehicle for rulemaking or policymaking. *See generally* C. MCFARLAND, ADMINISTRATIVE PROCEDURES AND THE PUBLIC LANDS (1969); PLLRC, *supra* at 251-52; Carver, *Administrative Law and Public Land Management*, 18 AD. L. REV. 7 (1965); Carver & Landstrom, *Rulemaking as a Means of Exercising Secretarial Discretion in Public Land Action*, 8 ARIZ. L. REV. 46 (1966); McFarland, *The Unique Role of Discretion in Public Land Law*, 16 ROCKY MTN. MIN. L. INST. 35 (1971); Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflection on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974). The problem is endemic to all judicial or administrative adjudications, and the various solutions proposed create as many difficulties as they resolve. *See id. supra* at 1266-74. Nor is the problem a new one. Secretary of the Treasury Alexander Hamilton, whose jurisdiction included the public lands, informed the House of Representatives in 1790 of the need for, and limitations of, rulemaking:

> That the Commissioners of the General Land Office shall, as soon as may be, from time to time, cause all the rules and regulations, which they may establish, to be published in one gazette, at least, in each State, and in each of the Western Governments where there is a gazette, for the information of the citizens of the United States. Regulations like these will define and fix the most essential particulars which can regard the disposal of the Western lands, and where they leave any thing to discretion will indicate the general principles of policy intended by the legislature to be observed: for a conformity to which the Commissioners will, of course, be responsible. They will, at the same time, leave room for accommodating to circumstances, which cannot, beforehand, be accurately appreciated, and for varying the course of proceeding, as experience shall suggest to be proper, and will avoid the danger of those obstructions and embarrassments in the execution, which would be to be apprehended from an endeavor at greater precision and more exact detail.

28 AM. STATE PAPERS (Public Lands, I) 8-9 (1832), quoted in MCFARLAND, *supra* at 232.

9. 43 U.S.C. § 1701(a)(5) (1976).

10. The PLLRC was established in 1964. Act of September 19, 1964, Pub. L. No. 88-606, §§ 1-10, 78 Stat. 982 (1964).

sions; and (4) more expeditious decisionmaking."[11] An historical overview of public land adjudication within the Department of the Interior and its predecessor is necessary to understand Recommendation 109 and section 102(a)(5) of FLPMA.

Originally, the public lands were administered by the General Land Office [GLO][12] within the Treasury Department.[13] In December 1848, Robert J. Walker, Secretary of the Treasury, submitted to Congress a plan for the creation of a Department of the Interior,[14] after complaining that he found himself deciding more judicial questions than financial ones.[15] Congress responded by creating the Department on March 3, 1849.[16]

Since its creation, the adjudicatory system within the Department has consistently provided a right of appeal to the Secretary from decisions made by subordinate employees in public lands cases.[17] Over the

11. PLLRC, *supra* note 8, at 253. Although there is no legislative history specifically tying section 102(a)(5) with Recommendation 109, other references in the legislative history demonstrate that Congress relied heavily upon the Report in drafting and passing FLPMA. SENATE COMM. ON NATURAL RESOURCES, 95TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 100-01, 111 (1978) [hereinafter LEGISLATIVE HISTORY]. See text & note 45 *infra*.

12. The administrative process of the Department of the Interior is of more ancient vintage than that of the independent regulatory agencies.

> The General Land Office and the position of Commissioner of the General Land Office were established on April 25, 1812, and shortly thereafter registrars and receivers of the Land Office were adjudicating land claims under the preemption laws.
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> When the Department of the Interior was established on March 3, 1849, the Land Office was transferred to its jurisdiction. Since that time, the Department has been adjudicating claims to the public lands. It provided its own rules of practice for adjudications and hearings which were patterned generally after the rules of court.

Geissinger, *Rules of Procedure Governing Department of the Interior Contests*, 7 ROCKY MTN. MIN. L. INST. 477, 478 (1962). (footnote omitted).

For an excellent historical summary of the development of the Department's procedures regarding hearings and rules of practice, including a memorandum of instruction under the preemption law of June 19, 1834, see *id.* at 481-85; *see also* decisions, letters, opinion, memoranda, circulars, and regulations regarding hearings and appeals collected in H. COPP, DECISIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE AND THE SECRETARY OF THE INTERIOR UNDER THE UNITED STATES MINING STATUTE OF JULY 26, 1866, JULY 9, 1870, AND MAY 10, 1872 (1874). *See generally* Rules of Practice, 51 Interior Dec. 547 (1926); Rules of Practice, 39 Interior Dec. 395 (1910); Rules of Practice, 4 Interior Dec. 37 (1885); 43 C.F.R. §§ 1840.0-3 through 1855.9-2 (Supp. 1964) (superceded); 43 C.F.R. §§ 221.1-.107 (1963) (superceded); 43 C.F.R. §§ 220.1-223.13 (1954) (superceded); 43 C.F.R. §§ 220.1-223.13 (1949) (superceded); 43 C.F.R. §§ 220.1-224.8 (1940) (superceded). T. DONALDSON, THE PUBLIC DOMAIN 559-67 (1883); U.S. DEP'T. OF THE INTERIOR, CIRCULARS AND REGULATIONS OF THE GENERAL LAND OFFICE 1077-1129 (1930) [hereinafter CIRCULARS].

13. T. DONALDSON, *supra* note 12, at 164; U.S. DEP'T. OF THE INTERIOR, CREATION OF THE DEPARTMENT OF THE INTERIOR (1976) [hereinafter CREATION OF INTERIOR].

14. CREATION OF INTERIOR, *supra* note 13, at 3-6.

15. *Id.* at 4. "Because decisions by the Commissioner of the General Land Office on land issues could be appealed to the Secretary, the latter faced more judicial, rather than financial, questions. Walker reminded the House that he personally pronounced judgment in more than 5,000 land title cases between March 1845 and December 1848." *Id.*

16. Act of March 3, 1849, ch. 108, § 3, 9 Stat. 395 (1851). President Polk signed the bill the same night. CREATION OF INTERIOR, *supra* note 13, at 12.

17. Rules of Practice, 51 Interior Dec. 547, 559-61 (1926); Rules of Practice, 39 Interior Dec. 395, 407-409 (1910); Rules of Practice, 4 Interior Dec. 37, 46-48 (1885); T. DONALDSON, *supra* note 12, at 565; Geissinger, *supra* note 12, at 479-82 (referring to a departmental regulation of January

years this review authority has been delegated to different persons within the Department. The Solicitor held the review power from 1947 to 1970;[18] he in turn delegated it to an Assistant Solicitor for Land Appeals.[19]

Before an initial public land decision could be appealed to the Secretary, however, an intermediate appeal was required. Prior to 1947, the General Land Commissioner decided this intermediate appeal, and from 1947 to 1970 the Director of the Bureau of Land Management [BLM] held such power.[20] Thus, before 1970, different members of the Office of the Solicitor, all of whom were under the supervision of the Solicitor, would advise BLM in making its initial decision in nonhearing cases,[21] represent BLM in hearings involving mining, land entry, and grazing cases,[22] and review the intermediate appellate decisions of

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24, 1859, requiring the filing of specifications of error in appeals from the Commissioner of the General Land Office to the Secretary); CIRCULARS, *supra* note 12, at 1124.

The Supreme Court acknowledged and defined the judicial role of the Secretary: "Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and quasi judicial functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands." Plested v. Abbey, 228 U.S. 42, 52 (1913).

> [T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States . . . "The statutes in placing the whole business of the Department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the Department . . . by direct orders or by review on appeals. . . ."

Knight v. United States Land Assoc., 142 U.S. 161, 178 (1891). For similar expressions, *see* Cameron v. United States, 252 U.S. 450 (1920); Ness v. Fisher, 223 U.S. 683 (1912); Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 324 (1903).

18. 24 Fed. Reg. 1348 (1959); 14 Fed. Reg. 307 (1949) (revised 17 Fed. Reg. 6794 (1952)); 43 C.F.R. § 4.23 (1947) (superceded).

19. 27 Fed. Reg. 6851 (1962).

20. 43 C.F.R. §§ 1840.0-3 through 1855.9-2 (Supp. 1964) (superceded); 43 C.F.R. §§ 221.1-.107 (1963) (superceded); 43 C.F.R. §§ 220.1-223.13 (1954) (superceded); 43 C.F.R. 220.1-224.8 (1940) (superceded); T. DONALDSON, *supra* note 12; CIRCULARS, *supra* note 12. The General Land Office (GLO) and the Grazing Service were abolished on July 16, 1946, and their functions transferred to the new Bureau of Land Management by Reorganization Plan No. 3 of 1946, 11 Fed. Reg. 7876 (1946). After July 1970, appeals of initial public lands decisions have gone to the Board of Land Appeals, which renders the final decisions for the Department. *See* text & note 53 *infra*.

21. Approximately 85% of the initial decisions appealed have been made by BLM officials on the basis of written applications, reports, and records; no hearings, however informal, are held. *See, e.g.*, U.S. DEP'T OF INTERIOR, PUBLIC LANDS STATISTICS 160 (1976). These cases involve applications for a great variety of interests in public lands under thousands of public land laws, ranging from one day permits for off-road-vehicle rallies, 43 C.F.R. § 2920 (1978), to multi-million dollar mineral lease bids in the outer continental shelf, 43 C.F.R. § 3300 (1978). Registers and receivers of GLO, district managers of the Grazing Service, and adjudicators of BLM frequently sought and received advice from lawyers in the Office of the Solicitor, which, in addition to its Washington staff, is composed of Regional and Field Offices throughout the country. This practice continues today. Before the reorganization of the Office of the Solicitor by secretarial order of August 5, 1953 (followed on May 3, 1954, by a memorandum from the Solicitor, Clarence Davis), BLM had its own General Counsel with lawyers throughout the west.

22. Departmental hearing procedures began in 1834 to handle land preemptions. Geissinger, *supra* note 12, at 481. Subsequently, rules were promulgated to provide for contests and hearings before registers and receivers of the General Land Office, district land office officials of the Grazing Service, and later field commissioners and hearing examiners of the BLM. The cases involved homestead and timber-culture entries, mining claims, desert land entries, and grazing licenses. T.

BLM.[23] At the same time, different BLM officials, all responsible to the Director, would investigate similar cases, render the initial decision,

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DONALDSON, *supra* note 12; CIRCULARS, *supra* note 12; Taylor Grazing Act of 1934, 43 U.S.C. § 315h (1976); 43 C.F.R. § 501.19 (1940) (superceded).

The Department's obligation to grant hearings in certain cases was made clear by the Supreme Court:

> The party who makes proofs, which are accepted by local land offices, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

Orchard v. Alexander, 157 U.S. 372, 383 (1895).

Quoting the above portion from *Orchard* with approval 25 years later, Justice Van Devanter added:

> And to the same effect is *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy the equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. . . ."

Cameron v. United States, 252 U.S. 450, 461 (1920).

On June 11, 1946, the Administrative Procedure Act (APA) was enacted. Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§ 500-576 (1976)). Originally the Department felt the APA did not apply to most of its functions, but in 1955 groups appointed by the Secretary to survey the operations of BLM and the Office of the Solicitor reported concern about the fusion of functions in bureau and departmental adjudications. Wheatley, *A Study of Administrative Procedures—The Department of the Interior*, 43 GEO. L.J. 166, 167-68 (1955); Parriott, *The Administrative Procedure Act and the Department of Interior*, 4 ROCKY MTN. MIN. L. INST. 431, 433-34 (1958).

In 1956 the Department held that, because a mining claim is a claim to property, constitutional due process requires that it may not be declared invalid without proper notice and opportunity for hearing before an impartial adjudicator under the APA. United States v. O'Leary, 63 Interior Dec. 341 (1956). Subsequently, hearings involving mining claims, United States v. Middleswart, 67 Interior Dec. 232 (1960), homestead and desert land entries, United States v. Shearman, 73 Interior Dec. 386 (1966), and grazing licenses, E.L. Cord, 64 Interior Dec. 232 (1957), were conducted by hearing examiners (now administrative law judges) appointed pursuant to 5 U.S.C. § 3105 (1976).

Lawyers attached to Regional and Field Offices of the Office of the Solicitor and, before 1953, to BLM's Office of General Counsel represented BLM in contesting such claims and entries and in trying cases involving grazing licenses.

23. Since the appellate duties of BLM were to review its own initial decisions, which frequently were based upon the advice of a member of the Office of the Solicitor in nonhearing cases, the Solicitor—through the Assistant Solicitor of Land Appeals—was reviewing the initial work of one of his subordinates. In hearing cases, BLM was invariably represented by a member of the Office of the Solicitor. Here, too, while the initial decision in these cases was that of a BLM hearing examiner, and the intermediate appellate decision that of BLM, ultimate agency review was under the supervisory authority of the Solicitor. Although the lawyers representing BLM at the hearing and the appellate review were insulated from each other, each was responsible to the Solicitor. Thus, while it may never have happened, the appellate structure permitted the Solicitor to participate in the initial decisionmaking process and the ultimate review process. Such an actual exercise of his supervisory authority in those cases governed by the APA would certainly appear to constitute a violation of 5 U.S.C. § 554(d) (1976): "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not . . . participate or advise in the decision, recommended decision, or agency review. . . ." Where the General Counsel of the Post Office Department was the final reviewing officer and the Assistant General Counsel supervised the prosecution, Judge Learned Hand held that the format violated the APA. Columbia Research Corp. v. Schaffer, 256 F.2d 677, 679-80 (2d Cir. 1958). *See also* Twigger v. Schultz, 484 F.2d 856, 859 (3rd Cir. 1973); *but see* Withrow v. Larkin, 421 U.S. 35, 56-57 (1975); Jonal Corp. v. District of Columbia, 533 F.2d 1192, 1197 (D.C. Cir.), *cert. denied*, 429 U.S. 825 (1976); Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1263-64 (9th Cir. 1977), discussed *infra* at note 50.

and make the intermediate appellate determination for the Department.[24]

The apparent fusion of functions within both BLM and the Office of the Solicitor produced a lack of confidence in the Department's adjudicatory process and elicited widespread criticism.[25] Other objections focused on the delays and increased costs both to litigants and to the government occasioned by the two-step appellate process.[26] Responding to such criticism, Senator Gruening and twelve western Senators in 1963 proposed S. 758, which would have established a Board of Public Lands Appeals in the Office of the Secretary of the Interior.[27] Section 4

24. From 1956 to 1970, the administrative law judges who presided over public land hearings were employees of the BLM and under the administrative control of the Director. DEP'T OF THE INTERIOR, DEPARTMENTAL MANUAL, Part 135.2E(1) (1958). Intermediate appellate review authority of the Director was delegated to the Office of Appeals and Hearings within BLM.

25. *See* PLLRC, *supra* note 8, at 253-55; Day, *Administrative Procedures in the Department of the Interior*, 17 ROCKY MTN. MIN. L. INST. 1, 2 nn. 3 & 4 (1972).

Critics differed. While Mr. Geissinger felt trial and appellate functions within BLM should be separated and administrative law judges placed in the Office of the Secretary, Geissinger, *supra* note 12, at 489-93, he was not disturbed by the fusion of investigative, trial, and appellate review functions within the Office of the Solicitor:

> [I]t makes little practical difference whether the ultimate adjudicator of the Department is an isolated Deputy Solicitor in the office of the Secretary or a Board of Appeals in the same office. When you are that close to the man who wears all hats, the claimant should perhaps rely on faith, hope and a measure of charity.

Id. at 509. *See also* Parriott, *supra* note 22, at 447-53. *But see* McCarty, *supra* note 8, at 302-06 (1967):

> Only through an established organizational structure can the public be assured that the official who decides did not also advocate, investigate, or advise in the same case.
>
> The deficiencies in the existing system could be remedied in a variety of ways. An independent Board of Review or Board of Appeals is one solution which could be made workable as an administrative rather than a statutory creation.

Id. at 305.

The PLLRC contractor on departmental procedures, Professor Carl McFarland, was unimpressed by criticism of the fusion of functions in BLM and the Office of the Solicitor. C. MCFARLAND, *supra* note 8, at ¶ 220A. Referring to the existing arrangement as the "judge-prosecutor syndrome," McFarland disapproved of an independent (of the Secretary), final decisionmaking board of review as it would deprive the agency head of necessary review authority, and recommended instead the elimination of one of the two existing appellate steps as the most effective method for reducing delay while retaining control. *Id.* at ¶¶ 236-38. He did suggest, however, as a less desirable alternative, the establishment of a Board of Land Appeals in the Office of the Secretary rather than in that of the Solicitor. *Id.*

Criticism of fusion of functions within the Office of the Solicitor was not confined to public lands adjudication. Deciding in 1966 to remove the Board of Contract Appeals from the Solicitor's Office, the Department was responding to criticism from contractors and that segment of the private bar involved in government procurement:

> Boards of contract appeals should be as independent of contracting and legal activities of the agencies within which they are established as possible. Only by doing this will the necessary confidence in their objectivity be developed. This means that board members should not be organizationally associated with contracting offices, procurement policy offices, or the office of general counsel, which in most agencies has the responsibility of defending against claims before the boards. No matter how carefully an agency may try to isolate board members from the other activities within the office of general counsel, having the board organizationally within that office inevitably casts a shadow on its independence.

REPORT PREPARED FOR THE SENATE SELECT COMMITTEE ON SMALL BUSINESS, S. DOC. No. 99, 89th Cong., 2d Sess. 148 (1966).

26. C. MCFARLAND, *supra* note 8, at ¶¶ 235, 236.

27. S. 758, 88th Cong., 1st Sess., 109 CONG. REC. 1960-61 (1963), introduced by Senators

of this bill provided that all final decisions of BLM and Geological Survey "concerning the uses of or claims to public lands under the jurisdiction of the Department . . . may be appealed to the Secretary, and the Board shall hear and determine such appeals on behalf of the Secretary."[28] Final decisions would be made by a majority of the Board "after giving the appellant an opportunity for a hearing."[29] Section 9 provided for appeals from final decisions of the Board to the United States Court of Appeals for the circuit in which the land involved was situated.[30] The Secretary was to have no authority to review Board decisions.

The Department opposed the bill, arguing that it would have seriously impaired the Secretary's statutory responsibility for administration and supervision of the public lands and would have fractionated the Solicitor's authority on questions of law.[31] S. 758 died in Commit-

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Gruening, Bartlett, Bennett, Bible, Cannon, Church, Goldwater, Jordan, McGee, Morse, Moss, Mundt, and Newberger. *Id.* at 1958. The bill was introduced because:

> [The equitable and uniform interpretation and application of the public land laws] can be accomplished only if the initial decision is subject to objective administrative review, with ultimate recourse to the courts . . . .
>
> A second equally serious objection to the existing procedural operations is that there is no sharp division between the administrative power and the quasi-judicial power thus exercised in the name of the Secretary of the Interior.
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> Both the Associate Solicitor responsible for providing legal advice to the Bureau of Land Management and the Assistant Solicitor responsible for advising the Secretary of the Interior on the appeal from the decision of the Director of the Bureau of Land Management are responsible directly to the Solicitor.
>
> Thus, the attorney advising on the initial decision and the attorney advising on the appeal are responsible to, and act under, the direction of the same individual.

Id. at 1960.

28. 109 CONG. REC. at 1961.

29. *Id.*

30. *Id.* at 1960-61.

31. S. 758 does not preclude the Secretary from delegating authority, but does say, in effect, that if the Secretary does so delegate, he cannot review and supervise the manner in which the delegated authority is exercised. Such review and supervision, under the bill, would be vested in the board which would constitute, for all practical purposes, a super Secretary of the Interior, as to much of the responsibility for administration and supervision of the public lands and their resources.

> . . . .
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> Similarly, the bill would diffuse and fractionate the responsibility of the Solicitor upon legal questions before the Department. The Solicitor is appointed by the President with the advice and consent of the Senate as the chief legal officer of the Department. The Board under S. 758 would have authority to make legal determinations on issues involving public lands and their resources. Who would determine the law to govern actions of subordinate lawyers and officers of the Department, the Solicitor, or the board? The evils of divided responsibility and unclear lines of authority S. 758 would engender on the policy side would be paralleled on the legal side.
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> . . . .
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> S. 758 would create a board which, in effect, would have authority to override the Secretary in matters of policy and discretion. This arises from the provisions in section 4 of the bill that the board shall determine appeals to the Secretary and the final decisions on such appeals shall be made by a majority of the board. Section 9 further provides that appeal "from final decisions of the board" shall be made to the U.S. court of appeals for the circuit in which the land involved is situated. These provisions preclude the Secretary from changing any decision of the board which he believes to be inconsistent with or contrary to policies the Secretary may have established.

tee. Within a year, however, the Public Land Law Review Commission [PLLRC] was created,[32] and its report[33] helped provide the impetus for creation of the Department's Office of Hearings and Appeals [OHA] and the Board of Land Appeals [IBLA] in 1970.[34]

In June 1970 the PLLRC issued its report.[35] One month later the Department published delegations of authority of OHA and its constituent boards.[36] While drafted before the PLLRC report was received, the delegations were not published until the PLLRC's observations and recommendations regarding the restructuring of administrative procedures were studied.[37] It was felt that the delegations accurately re-

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Letter from Secretary Udall to the Chairman, Senate Commission on Interior and Insular Affairs (May 2, 1963) [hereinafter cited as Udall]. *Hearings on S. 758 Before the Subcomm. on Public Lands on Interior and Insular Affairs*, 88th Cong., 1st Sess. 2-7 (1963).

Without mentioning the authority of the Solicitor, the Public Land Law Review Commission also opposed such an independent board, because it "would dilute the Secretary's managerial and supervisory authority over public matters." PLLRC, *supra* note 8, at 254; *see* text & notes 42-43 *infra*. Professor Strauss thinks even the present Board of Land Appeals, which is subject to the Secretary's supervisory authority, is too independent. Strauss, *supra* note 8, at 1257-58, 1264.

32. *See* note 10 *supra*.

33. The report was entitled ONE-THIRD OF THE NATION'S LAND. *See* note 8 *supra*.

34. Day, *supra* note 25, at 2.

In 1969, following the enactment of the Coal Mine Health and Safety Act, Pub. L. No. 91-173, § 2, 83 Stat. 742 (1969) (amended Pub. L. No. 95-164, § 102(a), 91 Stat. 1290 (1977), the judicial activity of the Department extended to four areas: contract appeals, see note 25 *supra*; Indian probate; public lands; and mine safety. Memorandum from the Solicitor to the Secretary of the Interior (Jan. 30, 1970) [hereinafter cited as Melich Memorandum]. Solicitor Mitchell Melich and Deputy Solicitor Raymond Coulter perceived the need to consolidate administratively the diverse judicial functions within the Department and to separate those functions from advisory, investigative, and prosecuting functions. *Id.* at 3-4. Thus, in January 1970, Mr. Melich proposed creation of the Office of Hearings and Appeals. *Id.* With respect to public lands, the Solicitor advocated the elimination of appeals to BLM, the transfer of appellate review from the Office of the Solicitor to a new Board of Land Appeals, and the reassignment of BLM hearing examiners to a new Hearings Division within OHA. Secretary Hickel approved the proposal February 4, 1970, and the Board of Land Appeals came into existence the following July.

The organization [OHA] and the authority delegated by the Secretary to its Director and to the component boards are set forth in 35 Fed. Reg. 12081 (1970). The recodification and establishment of Part 4 of 43 C.F.R. was published at 36 Fed. Reg. 7186-7208 (1971). The delegation of the authority to the IBLA is found at 43 C.F.R. § 4.1(3) (1978).

Since its creation in 1970, OHA has experienced a number of changes. Originally, it was composed of the Boards of Contract Appeals, Indian Probate Appeals, Land Appeals, Mine Operations Appeals, and a Hearings Division. Thereafter, in 1973 the Alaska Native Claims Appeal Board [ANCAB], situated in Anchorage, Alaska, was created for the purpose of deciding appeals arising from implementation of the Alaska Native Claims Settlement Act of 1971. 43 U.S.C. §§ 1601-1628 (1976). In March 1978, the Board of Mine Operations Appeals ceased to exist in accordance with the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C.A. §§ 801-962 (West Supp. 1979), which transferred coal mine health and safety functions to a new Commission in the Department of Labor. *Id.* § 823. In April 1978, however, the Board of Surface Mining and Reclamation Appeals came into existence, 43 Fed. Reg. 34376 (1978), for the purpose of reviewing for the Secretary of the Interior appeals from decisions of administrative law judges arising from the many APA hearings required by the Surface Mining Control and Reclamation Act of 1977. 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978).

35. See note 8 *supra*.

36. See note 34 *supra*.

37. The present chief administrative judge of IBLA participated in the drafting of the delegations. Solicitor Melich was a member of the Advisory Council of PLLRC. PLLRC, *supra* note 8, at vi.

flected those recommendations.[38] The PLLRC criticized the manner in which officials processed applications and submission of bids for a right or privilege (so-called discretionary or nonhearing adjudication), because the applicant or bidder was not allowed sufficient participation in the decisionmaking process, concluding that "[t]here is little assurance that due adjudicative process will be afforded most applicants for public land disposition."[39]

After discussing the need for and recommending greater third party participation in initial decisionmaking,[40] the PLLRC examined administrative appeals. It stated that perhaps the most consistent complaint which it had received was that the existing review procedures were largely illusory:

> [T]hose who sat in judgment on 'appeal' were part of the establishment that had made or participated in the initial decision. With respect to appeal of initial decisions in nonhearing cases from a Bureau of Land Management land office to the BLM Director, it was argued that the Director could hardly be expected to render an objective decision on appeal in a matter involving one of his subordinates who was carrying out official BLM policy. As noted later in this chapter, available evidence does not fully substantiate this claim. . . .
>
> Similar complaints were voiced with respect to appeals from the BLM Director to the Secretary. Since the appeal is in fact taken to the Office of the Solicitor, the Department's chief legal officer to whom the Secretary has delegated his authority respecting appeals, it is claimed that an objective decision is made difficult because the Solicitor's office also serves as legal advisor to the BLM Director and field personnel. Although we recognize the fundamental difference between the administrative review function and a judicial appellate system, we find that these complaints have merit. The decision-making structure is certainly conducive to the vices complained of, al-

38. *Compare* observations and recommendations of Melich Memorandum, *supra* note 34, at 3-6, upon which the delegations of authority were based, *with* PLLRC, *supra* note 8, at 253-56.

39. PLLRC, *supra* note 8, at 253.

> The fact that Congress may leave certain necessary matters to the Secretary's discretion does not mean that such discretion should not be exercised in accordance with procedural due process, *i.e.*, upon full and fair consideration of all the facts that can be brought to bear on a case, including those that might be adduced by the applicant. Nor is it necessary or fair to exercise such discretion in reliance on secret reports or oral communications, of which the applicant has had no notice nor an opportunity to answer. In this regard, we believe that express provision might well be in administrative appeals for direct and open participation by the Government official rendering the initial decision below to help eliminate complaints about *ex parte* communications to the appellate level.

Id. While recognizing the advantages of formal, trial-type hearings in allowing the applicant to adduce and rebut evidence and to cross-examine witnesses, the Commission also found that such formal hearings are costly, time consuming, and unnecessary in most cases. Hence, it recommended that informal procedures be required in so-called discretionary cases, giving applicants "full opportunity to participate in the making of a factual record, to know its content, to offer rebuttal information, and to participate in any oral presentations." *Id.*

40. *Id.* at 253-54.

though we think they are not as prevalent in actual practice as has been argued.[41]

The reaction to the existing structure was a "rather widespread demand for independent boards to render final decisions in public land matters."[42] The independent boards recommended to PLLRC were similar to those proposed in S. 758.[43] Concluding its discussion of administrative review, the Commission recommended that:

> *Congress provide for Secretarial review adequately insulated from management officials and legal advisors who have participated in decisions below, except for direct, open presentation of argument in support of their decisions.* This might be an independent adjunct to the Secretary's office staffed by specialized reviewing personnel free from the influence of subordinate officials and legal advisors to such officials.[44]

In the prior discussion, careful examination has been given PLLRC's chapter on administrative procedure, because it appears to be the basis for subsections 102(a)(5) and (6) of FLPMA. While there is little discussion of specific PLLRC recommendations in the official legislative history of FLPMA, a comparison of the PLLRC report with FLPMA supports Senator Jackson's statement that FLPMA "is in accordance with over one hundred recommendations of the Public Land Law Review Commission Report."[45] The similarity of language in PL-

41. *Id.* at 254. The Commission continued:

> However, the fact that the advisory and adjudicatory functions are carried out by separate branches of the Solicitor's office (at lease with respect to BLM and Geological Survey appeals) appears to be generally unknown to the public. Moreover, it does not fully mitigate the appearance that a single office of the Secretariat baldly serves as both advocate and judge in the same case, and appearances are important, whatever the reality may be.

Id.

42. *Id.*

43. See text & notes 27-31 *supra*. While agreeing with the need for a "better separation of the adjudicative functions within the agencies," PLLRC, *supra* note 8, at 254, the Commission considered such an approach undesirable; it would dilute the Secretary's supervisory authority and thus weaken "the element of public responsibility which accompanies his authority." *Id.*

The Commission criticized the Department of Agriculture's recently established appellate system and the limited jurisdiction of its Board of Forest Appeals, because (a) the system affords no right of appeal "in situations where it is most needed (decisions in which permission for . . . use of the national forests is altogether denied), and (b) . . . informal appeal routes are apparently available outside the formal system, which weakens the utility of the latter and opens possibilities for discriminatory treatment." *Id.* at 255.

44. *Id.* (Emphasis in original).

45. LEGISLATIVE HISTORY, *supra* note 11, at 100. Senator Jackson was referring to S. 507, passed by the Senate February 25, 1976. The language relating to adjudication procedures was not in the Senate's version, but in H.R. 13777, passed by the House July 22, 1976. 122 CONG. REC. H 7630 (daily ed. July 22, 1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 11, at 716. The absence of this language, however, was not included among the differences between the two versions listed by Senator Jackson. LEGISLATIVE HISTORY, *supra* note 11 at 743-45. The Conference Report described its acceptance of the House language as follows: "The declarations of policy in the Senate bill and House amendments were essentially the same. The House amendments expressed the policies in more specific detail in some instances. With minor changes, the conferees adopted the House amendments." *Id.* at 927.

LRC Recommendations 109 and 110 (regarding adjudication procedures and judicial review) and in FLPMA subsections 102(a)(5) and (6) hardly seems coincidental.[46] Indeed, PLLRC and Congress addressed the subjects of rulemaking, adjudication, and judicial review in the same order.[47]

Moreover, the phrase "objective administrative review," was used both in S. 758 in 1963 and in the PLLRC report in 1970. It meant the same in each: review of all initial public land adjudication, however discretionary or informal, that is structurally insulated from management officials and legal advisors who participated, or could have participated, in the initial decisionmaking process.[48] The phrase was so construed by the Department in 1970 when it created the Board of Land Appeals [IBLA]. There is every indication that it had the same meaning for the drafters of FLPMA: the right to objective review is to be assured in all public land adjudications.[49]

In recognizing the need for objective review, even in informal adjudication involving the exercise of discretion, PLLRC, the Department, and Congress have shown far greater sensitivity than the courts to the problem of bias arising from the fusion of functions.[50] Adjudica-

46. Absent is "(1) procedural due process," contained in PLLRC's Recommendation 109. See text at note 11 *supra*. With minor exceptions the remaining adjudication language in § 102(a)(5) and Recommendation 109 is identical: in § 102(a)(5) "adequate" has been substituted for "greater" in modifying "third party participation," and "more" has been deleted before "expeditious decisionmaking." *Compare* text & note 9 *supra, with* text & note 11 *supra*. PLLRC next recommended that "[j]udicial review of public land adjudications should be expressly provided for by Congress." PLLRC *supra* note 8, at 256 (Recommendation 110). Congress did precisely that in § 102(a)(6), albeit in hortatory language: "[J]udicial review of public land adjudication decisions be provided by law."

47. Rulemaking (PLLRC Recommendation 108) is Congress' first concern in § 102(a)(5), adjudication (PLLRC Recommendation 109) occupies the remainder of that section, and judicial review (PLLRC Recommendation 110) is the subject of § 102(a)(6). The conclusion is unavoidable that §§ 102(a)(5) and 102(a)(6) of FLPMA are derived from Recommendations 108, 109, and 110 of PLLRC.

48. *See* text & notes 27-30, 44 *supra*. The Senator's added ingredient, independence from secretarial control, was rejected by PLLRC.

49. Were it confined to cases where tangible interests or injury necessitated formal adjudication under the APA, the objective administrative review requirement would be redundant, for it already applies to those public land adjudications where more formal hearings under the APA are necessary. 5 U.S.C. § 554(d) (1976). *See* note 23 *supra*.

50. *Compare* Jonal Corp. v. District of Columbia, 533 F.2d 1192, 1198 (D.C. Cir.), *cert. denied*, 429 U.S. 825 (1976), *with* the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (1978). In *Jonal*, the court rejected a contractor's claim that the composition of the District of Columbia Contract Appeals Board violated due process standards. Two members of the Board were subordinates of and appointed by the District's General Counsel. One of these members appointed the third Board Member. The District was represented before the Board by another subordinate of the General Counsel, appointed by the latter to defend the District against Jonal's claim and to prosecute its claim against Jonal for liquidated damages. The Contract Disputes Act provides for the establishment of agency contract appeals boards whose members will be selected and appointed in the same manner as administrative law judges appointed pursuant to 5 U.S.C. § 3105 (1976). Additionally, under § 8(g)(1)(B) of the Contract Disputes Act an agency head may not overturn a board decision, but must appeal such decision with the approval of the Attorney General to the Court of Claims. This process is similar to that proposed by Senator Gruening. *See* text & note 30 *supra*.

tive structures and procedures that do not offend a court are not necessarily those which will satisfy Congress or the clientele of a federal agency. Courts typically are concerned not with ideal models, but with constitutionally acceptable minimums. A court's purpose is not to legislate, but to define permissible boundaries. For an agency and Congress, however, the concept of fairness in administrative adjudication arises not only from due process requirements, but also from the sensitivities and demands of the public that is affected by the agency's decisions.[51] Indeed, the adjudication recommendations of the PLLRC report were based in large part on complaints and suggestions voiced by members of the public at hearings held around the nation.

Since 1970, parties who have been aggrieved by the disposition of claims to public lands and of applications for leases, licenses, permits, easements, and rights-of-way,[52] have had a right to appeal to the IBLA the decisions of BLM officials.[53] The IBLA is a separate unit within the Office of the Secretary, "adequately insulated from management officials and legal advisors who have participated in decisions below."[54] Its decisions are final for the Department,[55] and while the IBLA is subject to the supervisory authority of the Secretary,[56] he has exercised it

In *Withrow* v. *Larkin*, 421 U.S. 35 (1975), and *Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977), the Supreme Court and the Ninth Circuit held that fusion of certain investigative and adjudicative functions at the initial decisionmaking level did not violate due process. However, the initial decision in *Marathon* was subject to appeal to the agency head, and the Court in *Withrow* strongly implied that review of an initial decision by the same decisionmaker might well violate due process. 421 U.S. at 58, n.25.

51. In Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 279 (1978), the author discusses the desirability of procedural elements on the basis of "fairness, efficiency and satisfaction."

From 1947 to 1970, a period when the Solicitor reviewed all decisions of BLM, no question of due process violation or impropriety was raised by the courts, even as to APA cases. Of course, review by the agency may not be required at all. Absent statutory or regulatory requirements to the contrary, an agency may delegate its final decisionmaking authority to subordinate officials and is bound by that delegation until it is revoked. United States v. Nixon, 418 U.S. 683, 696 (1974); Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Service v. Dulles, 354 U.S. 363 (1957); Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

Not all appeals within the Department of Interior are subject to objective review. For example, the Department has delegated final review authority of decisions by subordinate National Park Service officials regulating mining activities in national parks to the Director of the National Park Service. 36 Fed. Reg. 57822, 57831 (1978) (to be codified at 36 C.F.R. § 9.49). It is assumed that IBLA will review similar mining decisions of BLM upon BLM's issuance of appropriate regulations. While FLPMA's definition of "public lands," 43 U.S.C. § 1702(e) (1976), appears not to include land administered by the National Park Service, it would seem that the principle of objective review should be applied equally to similar interests and activities regulated by the Department. *See* PLLRC, *supra* note 8, at 255 for a criticism of Forest Service procedures.

52. The class of aggrieved parties includes not only those whose applications are rejected, *e.g.*, United Park City Mines, 33 IBLA 358 (1978); Henry E. Reeves, 31 IBLA 242 (1977), but also those parties whose protests regarding another party's application have been rejected. The latter group may be composed of competing applicants. *See e.g.*, George Jalbert, 39 IBLA 205 (1979); D.E. Pack, 84 Interior Dec. 192, 30 IBLA 166 (1977), *aff'd on rehearing*, 85 Interior Dec. 408, 38 IBLA 23 (1978); Crooks Creek Commune, 10 IBLA 243 (1973).

53. 43 C.F.R. §§ 4.410, 4.450-.452 (1978).

54. PLLRC, *supra* note 8, at 255. See 43 C.F.R. §§ 4.3(b), 4.27 (1978).

55. 43 C.F.R. § 4.1(3) (1978).

56. *Id.* § 4.5.

"only on rare occasions."[57] Thus, the IBLA appears to meet all the criteria proposed by PLLRC and implicitly adopted by Congress.[58]

While no formal procedure exists for appeal to the Secretary, he may review the Board's decision *sua sponte*[59] or preempt the IBLA by deciding the appeal in the first instance.[60] If the Secretary is advised sufficiently early in the adjudicatory process of a case upon which he wishes to rule, he may sign or approve the initial decision,[61] which then becomes the Department's final decision, thereby depriving the IBLA of jurisdiction.[62]

Shortly before the OHA was created, a formal procedure providing the right to petition the Secretary for discretionary review of the IBLA's decisions was considered and rejected. Such a procedure would likely result in hundreds of petitions for review, making personal consideration by the Secretary physically impossible, and thus leading eventually to the delegation of this responsibility. Continuing authority over all phases of the IBLA's work was considered sufficient insurance of ultimate control by the Secretary. The same objections to fusion of functions that prompted PLLRC Recommendation 109 and

57. In adopting the revision to 43 C.F.R. § 4.5, the Acting Secretary observed: "In the past, the Secretary has exercised his reserved authority on rare occasions. Promulgation of this rule should not be construed as a change of law." 43 Fed. Reg. 37689 (1978).

58. Some confusion has arisen regarding the extent of the IBLA's jurisdiction and authority. While the Board is intended only to apply existing policy, *see* Professor Freedman's "judicial model," Freedman, *Review Boards in Administrative Process*, 117 U. PA. L. REV. 546, 558-59 (1969), the language of the regulations, coupled with the lack of further departmental appellate review, has led some to the conclusion that the intention was otherwise. *See* Strauss, *supra* note 8, at 1256-57. The rules provide that OHA may consider and determine appellate matters "as fully and finally as might the Secretary." 43 C.F.R. § 4.1 (1978). IBLA "decides finally for the Department appeals to the head of the Department." *Id.* § 4.1(3). "No further appeal will lie in the Department from a decision of . . . an appeals board . . . ." *Id.* § 4.2(c). These regulations, however, must be read with 43 C.F.R. § 4.5 (1978), which was recently amended to dispel any uncertainty as to the Secretary's reserved authority to intervene in and review administrative proceedings at all levels. *Compare id.* § 4.5 (1977) *with id.* § 4.5 (1978). The 1978 version now reads:

> § 4.5 Power of the Secretary and Director.
>
> (a) *Secretary.* Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The authority reserved to the Secretary includes, but is not limited to:
>
> (1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, and render the final decision in the matter after holding such hearing as may be required by law; and
>
> (2) The authority to review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision.
>
> (b) *The Director.* Pursuant to his delegated authority from the Secretary, the Director may assume jurisdiction of or review any case before any board of the Office or direct reconsideration of any decision by any board of the Office.

59. *See, e.g.*, Alaska Oil and Minerals Corp., 84 Interior Dec. 114, 29 IBLA 244 (1977).

60. In 1974 the Secretary assumed jurisdiction over a number of cases pending before the IBLA involving oil and gas leases on the Outer Continental Shelf.

61. Since 1974, the Secretary has approved a number of initial decisions involving oil and gas leases on the Outer Continental Shelf.

62. 43 C.F.R. § 4.410 (1978); Southern Oregon Citizens Against Toxic Sprays, No. 79-279 (IBLA April 4, 1979).

subsection 102(a)(5) of FLPMA would apply to a delegation of this discretionary review authority to the Solicitor or OHA. A delegation to the appropriate Assistant Secretary would also be objectionable, for he is the officer supervising the bureau whose initial decision is reviewed by IBLA. Moreover, personal review by the Assistant Secretary would also be impossible, considering his manifold duties. Thus, the Secretary might be required to add new people to his staff to review IBLA. The advantages of an additional appellate layer, however, are difficult to perceive.

In certain classes of cases, three appellate layers would exist within the Department.[63] PLLRC recommended that there be no more than two administrative appeals.[64] This recommendation is echoed in the proposed Reform of Regulation Act of 1979,[65] and appears likely to have been what Congress had in mind when it recommended "expeditious decisionmaking" in FLPMA.[66] One reason for merging the former two-step appellate process into one was to reduce costs and delay. To this extent, at least, it has succeeded.[67]

II. THIRD-PARTY PARTICIPATION

FLPMA directs the Secretary "to structure adjudication procedures to assure adequate third-party participation."[68] A number of

63. A decision by an officer of the Conservation Division of the United States Geological Survey [USGS] must first be appealed to the Director of USGS. This decision, in turn, may be appealed to the IBLA. 30 C.F.R. § 290.2 (1977). Applicants for, or holders of, grazing leases or permits must first appeal a decision of a BLM officer to an administrative law judge who will conduct a hearing. 43 Fed. Reg. 29075 (1978) (to be codified in 43 C.F.R. § 4160.4). The decision of the administrative law judge may be appealed to the IBLA.

64. PLLRC, *supra* note 8, at 256.

65. S. 262, 96th Cong., 1st Sess., § 205(d)(1), 125 Cong. Rec. 858 (1979): "[N]o agency may subject any decision of the presiding employee to more than two levels of review, including any review conducted by the agency itself."

66. 43 U.S.C. § 1701(a)(5) (1976).

67. As of December 31, 1967, the average time required for the BLM Director to issue a decision on appeal was approximately five months. In 1968, appeals from BLM to the Solicitor were disposed of in six to twelve months. PLLRC, *supra* note 8, at 255 n.8. The average time for disposition by IBLA is approximately six months.

While no figures are available, it is safe to assume that legal fees and other costs have been lowered considerably by reducing two appeals to one.

The unhappy experience of the Federal Communications Commission (FCC) corroborates Interior's concern in deciding against the procedural right to petition for Secretarial review from the IBLA. Since 1962, the FCC has provided for review of initial ALJ decisions by an intermediate appellate review board, 47 C.F.R. § 0.161 (1978), with the right to seek discretionary review by the Commission. *Id.* at § 1.115. At first the intermediate board appeared to expedite agency review by reducing the amount of appeals to the Commission. *See* Freedman, *supra* note 58, at 552-58. However, a study during the 1970s disclosed that the time between the ALJ decision and the board decision averaged 350 days, that 52 per cent of the board's decision were appealed to the Commission, and that almost 300 additional days elapsed before the Commission finally decided those appeals. Task Force on Adjudicatory Reregulation, FCC, Report to Chairman of the Federal Communications Commission, at 90 (July 18, 1975), *cited in* S. COMM. ON GOVERNMENTAL AFFAIRS, DELAY IN THE REGULATORY PROCESS, S. DOC. NO. 95-71 at 88, 95th Cong. 1st Sess. 88 (1977).

68. 43 U.S.C. § 1701(a)(5) (1976).

questions are posed by this brief phrase: (1) In what type of action should third-party participation be permitted? (2) At what level of decisionmaking should participation be allowed? (3) Who should be permitted to participate? (4) How much participation should be allowed?

The statute's directive that the Secretary structure *adjudication* procedures provides a partial answer to the first question.[69] Hence, activities customarily outside the Department's adjudicative reach, such as classification, withdrawal, inventory, and rulemaking, would appear to be beyond the scope of this requirement.

The PLLRC report, relied upon extensively by the drafters of FLPMA,[70] recommends that Congress require the appropriate agencies to provide for intervention and participation in all proposed public land transactions.[71] This recommendation was prompted by the Commission's finding that meaningful participation by third parties in the adjudicative process, whether formal or informal, had not been adequately provided by the responsible agencies.[72] Given this broad recommendation in the PLLRC report and its apparent adoption by the Congress,[73] the further directive to the Secretary "to establish comprehensive rules and regulations [for the administration of public land statutes and the exercise of discretion thereunder] after considering the views of the general public"[74] displays a clear congressional intent to allow public participation across the broad spectrum of public land administration.[75]

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69. 5 U.S.C. § 551(7) (1976) defines "adjudication" as "agency process for the formulation of an order" and 5 U.S.C. § 551(6) (1976) defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *See also* note 8 *supra*, for a definition suggested by the PLLRC report.

70. *See* text & notes 45-47 *supra*.

71. PLLRC, *supra* note 8, at 254. "Consequently, we recommend that Congress require the agencies to give meaningful public notice of all proposed public land transactions to the maximum extent feasible, and to provide for the intervention and participation by interested economic competitors, state and local governments, and members of the public." *Id.*

72. *Id.* at 253.

73. *See* text & notes 45-47 *supra*.

74. 43 U.S.C. § 1701(a)(5) (1976).

75. Interim guidelines approved by the Secretary of the Interior appear to support this intention:

> 2.4 *Responsibility*
>
> A. Officials at every level of the Secretariat and all bureaus and offices are responsible for considering public participation early in decisionmaking processes leading to actions or policies which:
>
> (1) could have a significant effect on the public or be of significant interest to them;
>
> (2) could appear to the public as being significant . . . .
>
> 2.7 *Administration, Oversight and Evaluation*
>
> A. Each Assistant Secretary and each head of bureau or office is to establish effective procedures allowing public participation early and at intervals throughout decisionmaking processes which may significantly effect or interest them.

Regulations presently in effect reflect the Department's efforts in providing for third-party participation in numerous adjudicative areas: Land exchanges;[76] applications for patent under color-of-title;[77] state grants for schools;[78] transfer of lands for airports;[79] applications for Alaska Native selections[80] and Native village selections;[81] applications for patent under the Recreation and Public Purposes Act;[82] placer mining operations in powersite vithdrawals;[83] mining claims under the general mining laws;[84] and applications for grazing leases.[85] Proposed regulations governing rights-of-way under the Mineral Leasing Act[86] have also been prepared that would authorize public participation in hearings attendant upon applications for rights-of-way grants along the Trans-Alaska Pipeline.[87]

The adequacy of third-party participation, however, depends in large part upon the level of decisionmaking at which participation is allowed. Participation occurring after a decision has been made or after an agency has wrestled with an issue for years does not allow a third party a full and fair opportunity to have his views considered.[88]

Ideally, participation should occur prior to an agency decision that

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43 Fed. Reg. 35755-56 (1978). *See also* 43 U.S.C. § 1702(d) (1976); *Id.* §§ 1712(a), 1712(f) (1976); *Id.* § 1714(c)(2) (1976); *Id.* § 1739(e).

76. 43 C.F.R. § 2203.6 (1978).
77. *Id.* § 2541.5.
78. *Id.* § 2621.3.
79. *Id.* § 2641.3.
80. *Id.* § 2650.7.
81. *Id.* § 2651.2.
82. *Id.* § 2741.5. The Act itself is found at 43 U.S.C. §§ 869 through 869-4 (1976).
83. 43 C.F.R. § 3736.2 (1978).
84. *Id.* §§ 3871.1-3872.5.
85. *Id.* § 4125.1-1(e); *Id.* § 4131.5-1 (1978).
86. 30 U.S.C. § 185 (1976).
87. Proposed regulation § 2882.3 requires the publication of a notice for a right-of-way grant unless pipeline impact will be minor. The notice must state where the application may be available for review and must be sent to the governor of each state within which the pipeline may be located, to the head of each local government within which the system may be located, and to each agency head for review and comment.

Section 2882.3(f) authorizes the responsible officer to hold public meetings or hearings if he determines that such hearings are appropriate and that sufficient public interest exists to warrant the time and expense. Notice of any such meetings or hearings must be published in the *Federal Register* and in local newspapers.

See draft regulations §§ 2802.4 and 2806.4 for similar provisions affecting right-of-way grants under FLPMA.

See also David Smith Ranches, 33 IBLA 7, 15 (1977), for the proposition that FLPMA's policy favoring third party participation may be satisfied by a public hearing conducted by an agency other than BLM (citing Area G Home & Landowners Organization, Inc. v. McVee, No. A-77-64 (D. Alaska, April 29, 1977)).

88. For example, the Federal Power Commission [FPC] has granted immediate utility rate increases with no opportunity for participation by third parties until after the proposed utility rate increases have gone into effect. The Nuclear Regulatory Commission [NRC] will have worked with an applicant utility for a year or more before notice of the utility's application for license is published in the *Federal Register*. SENATE COMM. ON GOVERNMENTAL AFFAIRS, PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 95-71, 95th Cong., 1st Sess. 54 (1977).

would allow or prohibit certain conduct on public land.[89] Participation at this time is more effective, because the agency's investment in time and resources is still relatively low. Without a more substantial investment, the agency is less likely to have developed a position or recommendation to defend and would more likely be receptive to third parties.[90] The investment of private interests adverse to the third party is also relatively low at this level. Hence a motion to stay a proposed action in order to permit participation by third parties will not be met with the legitimate objection by private interests that considerable time and resources have already been devoted to the proposed action. Fair-

89. Of course, the opportunity to participate at any level of decisionmaking is rendered meaningless if notice of proposed agency action is not conveyed to potential third parties or participants. Recognizing this fact, the Administrative Conference in 1971 recommended that methods of notice ought to extend far beyond simple publication in the *Federal Register*:

> Among the techniques which should be considered are factual press releases written in lay language, public service announcements on radio and television, direct mailings and advertisements where the affected public is located, and express invitations to groups which are likely to be interested in and able to represent otherwise unrepresented interests and views.

Administrative Conference of the United States, Recommendation 71-6, set forth in Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 550 (1972).

The great majority of notice provisions set forth in public land regulations require publication in a newspaper of general circulation in the vicinity of the affected lands. *See, e.g.*, 43 C.F.R. § 1824 (1978), final proof on entries; *Id.* § 2203.6, land exchanges; *Id.* § 2521.6(c), desert land entries. Notice provisions of this type comport with the PLLRC Recommendation. "Notice to the public should be accomplished at least by prominent publication in a newspaper of general circulation in the area involved." PLLRC, supra note 8, at 254.

Proposed regulations implementing resource management plans authorized by § 202 of FLPMA, 43 U.S.C. § 1712 (1976) are less rigid and call for methods of notice as are "appropriate to the areas and people involved and the stage of planning (preparation, amendment or revision)." Proposed regulation § 1601.3(b), 43 Fed. Reg. 58767, 58769 (1978). Consistent with the recommendation of the Administrative Conference, the proposed regulations provide that notice be given to "individuals or groups known to be interested in or affected by a resource management plan. *Id.* at § 1601.3(f). While flexibility in notice procedures is desirable to achieve a high level of participation, it denies to the individual seeking to stay informed of agency action a single source of information upon which to rely. Optimal notice would call for a fixed and a flexible notice procedure operating simultaneously.

90. The problems confronting a third party in an NRC license application proceeding are described in SENATE COMM. ON GOVERNMENTAL AFFAIRS, *supra* note 88, at 54:

> Not only does . . . [NRC's] process give the agency staff [a] vested interest in the application as it stands, but the public is usually shut out of the early, and often determinative, stages of the process. In the case of a highly complex and technical procedure such as nuclear licensing, this process is highly crippling to intervenors because the completed application usually runs to 10 to 20 volumes of complex data—and intervenors may have as little as 30 days to respond. This is not only a problem for intervenors, but for the decisionmaking process itself. Allowing intervenors into the process earlier and giving them more time to respond would focus their concerns on the most important issues. As it now stands, intervenors are sometimes forced to clutch at straws and critical issues may be missed or considered in a cursory manner.
>
> There is also the problem of momentum. By the time the public can get involved in a decision, so much money has usually been spent by the utility in planning and studying the site that it becomes uneconomical to change the course of action. For example, in the Seabrook nuclear plant licensing proceeding, the denial from the Atomic Safety and Licensing Appeal Board to halt the construction pending review of the case contained reference to the fact that $73 million had already been spent on the plant for studies and engineering.

Id. (Footnote omitted.)

ness to these private interests also compels third party participation at an early stage of the decisionmaking process.[91]

Regulations proposed for the implementation of resource management plans acknowledge the importance of public participation at an early stage: "The proposed planning process relies heavily on public involvement early in and throughout the planning process to help identify issues and concerns which should be addressed. . . . Public assistance in identifying issues early will add to the efficiency of the planning process by helping the District Manager concentrate data collection . . . ."[92]

The need for "expeditious decisionmaking"[93] sought by FLPMA can be furthered if regulations providing for participation are drafted so that those third parties having an opportunity to participate at the planning stage of a proposed activity be required to do so at that time. Thereafter, at an adjudicatory proceeding opposing the implementation of such activity, the participation of these third parties should be limited, absent extraordinary circumstances, to offering any evidence that was unavailable during the earlier planning stages. In this way, participation at an adjudicatory proceeding will not extend the proceeding indefinitely.

Among public land procedural regulations,[94] there is but a single general provision establishing a right, albeit limited, to participate in adjudicative matters.[95] This provision seems to allow a protest by any individual who takes the time to express his views, evidencing a policy in harmony with the PLLRC report recommendation in favor of increased public participation. No case has yet arisen to test this interpretation.[96]

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91. That the expenditure of time and resources in reliance upon agency action can influence a request to reconsider the agency's decision is apparent in a decision of the Federal Power Commission, Pacific Northwest Power Co., 31 F.P.C. 247 (1964), granting a license to Pacific Northwest Power Company to build a hydroelectric project on the Snake River on the Idaho-Oregon border. The Commission alluded to the "substantial and expensive investigations looking toward development of the river" expended by the licensee in 1962 and amounting to almost $5,000,000. *Id.* at 265.

92. 43 Fed. Reg. 58764, 58765 (1978) (setting forth regulations proposed for the implementation of § 202 of FLPMA, 43 U.S.C. § 1712 (1976)). *See* MCFARLAND, *supra* note 8, at 44 n.27, for an early example of public participation in rulemaking in which miners were authorized by statute to formulate regulations for taking up claims on public lands.

93. 43 U.S.C. § 1701(a)(5) (1976).

94. The term "public lands" as used here is defined in § 103(e) of FLPMA:

> The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except—(1) lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702(e) (1976).

95. 43 C.F.R. § 4.450-2 (1978).

96. *See* Crooks Creek Commune, 10 IBLA 243, 255 (1973) (Stuebing, J., dissenting).

The regulation falls short, however, of the PLLRC report recommendation that a third party enjoy procedural due process rights equal to those afforded the principal applicant, both at the initial decision level and on appeal.[97] Although an appeal from a dismissal of a protest is available,[98] the IBLA has stated that standing is an *a priori* requirement for an individual to raise any substantive matter within the Department's appellate structure.[99] Hence, a protestant without a sufficient nexus to confer standing would find an appeal from the denial of his protest routinely dismissed, whereas the principal applicant would have a right to appeal a successful protest in order to have his views fully considered.

By allowing any person to protest any proposed action, the protest regulation has proved to be expensive to administer and a source of considerable delay in administrative action. In *D.E. Pack*,[100] for example, the IBLA noted that a written protest "ordinarily stays the action being protested until such time as a decision on the protest is issued, and under 43 CFR § 4.21, [until the expiration of] the time in which a person adversely affected may file a notice of appeal therefrom."[101]

Greater costs and delay can be expected to accompany any growth in third-party participation. The attendant delay is contrary to FLPMA's policy in favor of "expeditious decisionmaking." A solution to these problems may be suggested by the Court of Appeals for the

97. PLLRC, *supra* note 8, at 253.

98. 43 C.F.R. § 4.410 (1978) extends to any party who is adversely affected by a decision of an officer of the BLM or of an administrative law judge a right of appeal to the IBLA.

In Citizens' Comm. to Save Our Public Lands v. Kleppe, No. 76-32 (N.D. Cal. Jan. 23, 1976), Judge Conti construed the phrase "party to a case" to hold that the Committee had administrative standing to appeal a decision of the BLM granting a right-of-way to the Louisiana Pacific Corporation. Basing his decision on an analysis of departmental procedures and decisions of the United States Supreme Court, Judge Conti ruled that the Committee was a party to the case for four reasons: (1) The members of the group used the affected land; (2) the action of the Department of the Interior was reviewable by the district court; (3) the pertinent regulations did not define the term "party," nor was the court shown any law on the subject; and (4)

> [w]here an individual or group such as the Citizens' Committee uses the Federal land in question and is recognized by the Federal Land Management as a bona fide representative of the community and is provided with notice of all proceedings and actions by the Bureau of Land Management regarding the land in question, and actively and extensively participates in formulating land use plans for the land in question, and takes the position in a dispute concerning the use of the land in question contrary to another individual or group, that individual or group is a party within the meaning of 43 C.F.R. 4.410.

Two subsequent decisions of the IBLA have cited this interpretation with approval: California Ass'n of Four Wheel Drive Clubs, 30 IBLA 383, 386 (1977); Headwaters, 33 IBLA 91, 94 (1977).

99. *See* United States v. United States Pumice Co., 37 IBLA 153, 159 (1978). This requirement is in apparent harmony with the requirement in 43 C.F.R. § 4.410 (1978), that a party be adversely affected to establish a right to appeal.

100. 31 IBLA 283 (1977).

101. *Id.* at 286. In D. E. Pack, the protestant objected to the issuance of an oil and gas lease by BLM. The filing of this protest stayed BLM's issuance of the lease until the protest had been decided. Under 43 C.F.R. § 4.21(a) (1978), issuance was further delayed until the expiration of the time during which an appeal from the protest decision could be filed.

District of Columbia in reviewing a similar problem posed by the Federal Communications Commission:

> We recognize . . . [that public participation] will create problems for the [Federal Communications Commission] but it does not necessarily follow that "hosts" of protestors must be granted standing to challenge a renewal application or that the Commission need allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests. The Commission can avoid such results by developing appropriate regulations by statutory rulemaking.[102]

No departmental regulation establishing a right to intervene in ongoing adjudication involving public lands presently exists.[103] In three recent cases before the IBLA,[104] however, it has granted leave to intervene in government contests of mining claims. In each case, the IBLA granted intervention at a hearing before an administrative law judge.

These three cases carefully address the questions as to who will be allowed to participate and how much participation will be permitted in government initiated mining contests. In *United States v. Kosanke Sand Corp.*,[105] various environmental groups and government agencies appeared before the IBLA urging reversal of its decision.[106] In remanding for a rehearing, the IBLA allowed Contra Costa County, wherein the contested land was located, and the East Bay Regional Park District, an applicant for the contested land under the Recreation

102. United Church of Christ v. F.C.C., 359 F.2d 994, 1005 (D.C. Cir. 1966).

103. United States v. United States Pumice Co., 37 IBLA 153, 156 (1978). Regulations do exist, however, that allow intervention before the Board of Surface Mining Appeals and the Alaska Native Claims Appeal Board [ANCAB]. Under 43 C.F.R. § 4.1110 (1978), any person may petition for leave to intervene at any stage of a surface mining proceeding, and such petition shall be granted where either there exists a statutory right by the individual to initiate the proceeding or the individual "[h]as an interest which is or may be adversely affected by the outcome of the proceeding." 43 C.F.R. § 4.909(b) (1978), states: "Any person may petition the Board [ANCAB] to intervene in an appeal. Upon a proper showing of interest under § 4.902 [requiring the claim of a property interest in the subject land], such person may be recognized as an intervenor in the appeal."

A very limited regulation allowing for intervention upon the appeal of a decision by a BLM district manager in grazing proceedings is set forth at 43 C.F.R. § 4.471 (1978).

104. United States v. United States Pumice Co., 37 IBLA 153 (1978); United States v. Pittsburgh Pacific Co., 84 Interior Dec. 282, 30 IBLA 388 (1977), *aff'd*, South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978); United States v. Kosanke Sand Corp., 80 Interior Dec. 538, 12 IBLA 282 (1973).

105. 80 Interior Dec. 538, 12 IBLA 282 (1973), *rev'g* 78 Interior Dec. 285, 3 IBLA 190 (1971).

106. In United States v. Kosanke Sand Corp., 78 Interior Dec. 285, 3 IBLA 190 (1971), the IBLA reversed a decision by Administrative Law Judge Graydon E. Holt that had held various mining claims null and void. Following the IBLA's decision, the East Bay Regional Park District, Contra Costa County, the Environmental Defense Fund, Inc., the California Native Plant Society, and the Sierra Club, none of whom had formerly participated in the case, petitioned for leave to file briefs in support of the government's petition for reconsideration. The American Mining Congress also petitioned for leave to file a brief opposing the argument of the environmental groups and state agencies that the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976), required the filing of environmental impact statements in mining claim contests. All were granted permission to file briefs at the rehearing before the IBLA as amici curiae.

and Public Purposes Act,[107] to intervene as third parties.[108] The environmental groups appearing before the IBLA were not permitted to intervene as parties, because their interest in the proceedings was found to be based upon only a general concern for the environment of the area and for the application of the mining law.

In *United States v. Pittsburgh Pacific Co.*[109] the IBLA considered the appeal of the United States seeking a reversal of the dismissal of a government initiated contest involving mining claims in South Dakota. The IBLA granted petitions of the State of South Dakota and the American Mining Congress to file briefs as amici curiae. Because the mining operation at issue allegedly would involve the disposal of some 6.2 million tons of waste earth, the construction of a railroad spur, and the possible pollution of air and water, the State was admitted as a party to the contest on remand, but was limited to presenting "new evidence as to environmental requirements, the cost of compliance, and other pertinent factors."[110]

The third case, *United States v. United States Pumice Co.*,[111] involved an interlocutory appeal to the IBLA from the denial of a request by twelve environmental groups to intervene as full parties in a government mining contest, and hence, the issue of third party participation was placed squarely before the IBLA. The IBLA held that intervention as a full party was available as a matter of right only to those individuals who could independently maintain a private contest[112] against the identical mining claims.[113] To maintain a private contest, an individual must "claim title to or an interest in land[114] adverse to any other person claiming title to or an interest in such land."[115] Not possessing such title or interest, the twelve environmental groups were denied intervention as full parties as a matter of right. The IBLA noted that intervention within the administrative context embraced a wide range of participation, extending from the filing of briefs to presenting one's

107. 43 U.S.C. §§ 869 through 869-4 (1976).
108. 80 Interior Dec. at 540.
109. 84 Interior Dec. 282, 30 IBLA 388 (1977), *aff'd*, South Dakota v. Andrus, 462 F. Supp. 905 (D.S.D. 1978).
110. *Id.* at 291, 30 IBLA at 405.
111. 37 IBLA 153 (1978).
112. A private contest of a mining claim is authorized by 43 C.F.R. § 4.450-1 (1978):
> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land . . . may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

113. 37 IBLA at 157.
114. The IBLA construed the phrase "interest in land" as an interest which must be grounded on a specific statutory grant. *Id.* at 159 n.4. See examples of interests listed in 43 C.F.R. § 4.450-1 (1978).
115. 43 C.F.R. § 4.450-1 (1978).

own evidence and cross-examining witnesses presented by other parties.[116] The IBLA explicitly recognized the grant to the environmentalists of the right to file briefs as a grant of limited intervention.[117] The extent of participation rested in the sound discretion of the judge.[118] Factors to be considered include "the desires of the original parties, the likelihood that the parties seeking intervention will provide information which would not be forthcoming without their participation, and the cost which must be borne by both the contestant and the contestee by the nature and scope of the intervention granted."[119]

Shortly before *United States Pumice Co.* decision, the Court of Appeals for the District of Columbia suggested that a functional analysis be used to determine who may intervene in an administrative proceeding. In *Koniag, Inc. v. Andrus*,[120] the court of appeals reversed the district court, which had held that the Forest Service, the U.S. Fish and Wildlife Service, and the State of Alaska lacked standing to appeal an adverse decision of the Bureau of Indian Affairs [BIA]. Under the relevant regulations, "any interested party"[121] could protest to BIA the BIA's initial decision regarding the eligibility of an Alaskan village to take land and revenues under the Alaska Native Claims Settlement Act [ANCSA],[122] and "any party aggrieved"[123] could appeal BIA's final decision to the Secretary of the Interior.

In a lengthy concurrence, Judge Bazelon reviewed several cases[124]

116. 37 IBLA at 160.
117. *Id.*
118. *Id.* at 161.
119. *Id.* Each of the original parties, the government and the mining claimant, opposed intervention. Parallel considerations were enunciated by the Supreme Court in Matthews v. Eldridge, 424 U.S. 319, 336 (1976), to determine whether due process required an evidentiary hearing prior to termination of Social Security disability benefit payments. Therein, the Court set forth three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. See text & notes 189-206 *infra*, for an analysis of the factors in *Eldridge*.

The IBLA also quoted from the APA at 5 U.S.C. § 555(b) (1976): "So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."

120. 580 F.2d 601, 611 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979). Judge Bazelon in his concurring opinion acknowledged that a functional analysis of the issue of administrative standing had been suggested by various commentators. *See, e.g.*, Crampton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

121. 43 C.F.R. § 2651.2(a)(3) (1978).
122. 43 U.S.C. §§ 1601-1627 (1976).
123. 43 C.F.R. § 4.700 (1978).
124. Martin-Trigona v. Federal Reserve Bd., 509 F.2d 363 (D.C. Cir. 1975); National Welfare Rights Organization v. Finch, 429 F.2d 725 (D.C. Cir. 1970); United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

of the District of Columbia Circuit which had applied judicial standing concepts to determine whether a party had standing before an agency.[125] While acknowledging that Congress could require an agency to apply judicial standing concepts, Judge Bazelon could find no justification for the wholesale application of such concepts to the administrative process.[126] He based his conclusion upon the theoretical foundations that distinguish judicial and administrative standing.[127]

The concept of judicial standing is shaped by two general types of limitations: "[C]onstitutional limitations derived from the 'case or controversy' requirement of Article III, and prudential limitations formulated by the Supreme Court in its supervisory capacity over the federal judiciary."[128] Neither set of limitations is applicable to the administrative process.[129]

Hence, in its discretion, Congress could ease administrative standing requirements by dispensing with the judicial standing requirements of "injury in fact"[130] and "arguably within the zone of interests to be protected or regulated."[131]

In the absence of a statute or regulation providing specific standing requirements for a hearing, appeal, or intervention before an agency, Judge Bazelon advocated the use of a functional analysis to examine "the nature of the asserted interest, the relationship of this interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions."[132] More specifically, in a functional analysis of administrative standing the following factors would be considered: (1) The nature of the interest asserted by the potential participant; (2) the relevance of this interest to the goals and purposes of the agency; (3) the qualifications of the potential participant to represent this interest; (4) whether other persons could be expected to represent adequately this interest; and (5) whether special considerations indicate that an award of standing would not be

125. Koniag, Inc. v. Andrus 580 F.2d 601, 611-16 (Bazelon, J., concurring). Although the issue before the court was standing to appeal, Judge Bazelon repeatedly spoke in terms of a general administrative standing requirement. His reasoning would seem to be applicable both to standing to appeal within the agency and standing to intervene before an agency. *Contra id.* at 616 n.13, wherein Judge Bazelon draws a distinction in setting forth his functional analysis. *See also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721 (1968), and cases cited therein that recognize a distinction between a right to intervene in federal court and a right to appeal from an adverse decision on the merits.

126. 580 F.2d at 611-12 (Bazelon, J., concurring).

127. *Id.*

128. *Id.* at 611.

129. *Id.*

130. *See id.* at 611-14.

131. *Id.* at 611. Other major prudential limitations recognized by the Supreme Court are the requirements that plaintiff assert more than "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" and that plaintiff assert his own rights and interests, rather than those of third parties. Warth v. Seldin, 422 U.S. 490, 499 (1975).

132. 580 F.2d at 615 (Bazelon, J., concurring).

in the public interest.[133]

As applied to a third party, the analysis would focus on: (1) Whether the potential third party represents a point of view that would assist in illuminating the issues; (2) whether it is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.[134]

Koniag is an important case for two reasons. For all administrative bodies, it challenges the notion that concepts of judicial standing must be used in determining administrative standing. Agencies are not bound by this "arcane doctrine from another area of the law"[135] but instead may apply more meaningful standards to allow such public participation that will advance the agencies' purposes.

For the Department of the Interior, *Koniag* suggests standards that, upon further reflection, may be appropriate for adoption as a regulation setting forth the rights of third parties in public land adjudications. The immense diversity of BLM activities on the public lands would seem to require a regulation expressed in general terms in order to be of any value. Thought should also be given to a provision limiting participation at an adjudicatory proceeding if an opportunity for participation by the third party has been previously extended at the planning stage. Lest such a regulation be construed as an opening of the doors to a host of third parties and the destruction of agency efficiency, Judge Bazelon offers the following thought: "Efficient and expeditious hearings should be achieved, not by excluding parties who have a right to participate, but by controlling the proceedings so that all participants are required to adhere to the issues and to refrain from introducing cumulative or irrelevant evidence."[136]

III. HEARINGS UNDER SECTIONS 506 AND 302(C) OF FLPMA

Congress enacted FLPMA six years after the Supreme Court's decision in *Goldberg v. Kelly*,[137] which marked a new effort by the courts to educate various agencies, including the Department of the Interior, about the expanding scope of procedural due process.[138] The PLLRC

133. *Id.* at 616.
134. *Id.* at 616 n.13.
135. *Id.* at 616.
136. National Welfare Rights Organization v. Finch, 429 F.2d 725, 738 (D.C. Cir. 1970) (quoting Virginia Petroleum Jobbers Ass'n v. F.P.C., 265 F.2d 364, 367 n.1 (D.C. Cir. 1959)).
137. 397 U.S. 254 (1970). In this case, the Court analyzed the elements of procedural due process in holding that a state welfare recipient was entitled to an opportunity to be heard before his benefits were terminated.
138. Writing in 1975, Judge Friendly observed that "we have witnessed a greater expansion of

report, issued the same year as *Goldberg*, recommended that the Department provide due process in public land adjudications.[139] Congress implemented this recommendation by including in FLPMA two provisions that expressly require adjudicative hearings.[140] When the Department decides to terminate a right-of-way subject to Title V of FLPMA,[141] it must comply with the following provision of section 506:[142]

> Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation of the Secretary concerned may be grounds for suspension or termination of the right-of-way if, after due notice to the holder of the right-of-way and, and [*sic*] with respect to easements, an appropriate administrative proceeding pursuant to section 554 of Title 5, the Secretary concerned determines that any such ground exists and that suspension or termination is justified. No administrative proceeding shall be required where the right-of-way by its terms provides that it terminates on the occurrence of a fixed or agreed-upon condition, event, or time.[143]

A less precise requirement for a hearing applies to revocation or suspension of any instrument[144] providing for use, occupancy, or devel-

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procedural due process in the last five years than in the entire period since ratification of the Constitution." Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1273 (1975). Cases affecting the Interior Department include Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977); Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976); Fox v. Morton, 505 F.2d 254 (9th Cir. 1974).

139. PLLRC, *supra* note 8, at 253. The Commission's recommendation that the Department provide due process in adjudications, however, was not included in § 102(a)(5) of FLPMA. Perhaps it was dropped as redundant since courts will review procedures to ensure compliance with procedural due process. The omission does not indicate a lack of concern on the part of Congress, and such procedural requirements for a hearing may be properly considered as intended to implement Recommendation 109. *See* S. REP. NO. 94-583, 94th Cong., 1st. Sess. 46 (1975), *reprinted in* LEGISLATIVE HISTORY, *supra* note 11, at 111. Nevertheless, Congress did not implement the entirety of PLLRC's due process recommendations. For example, there is no statutory provision requiring hearings in the processing of initial applications despite PLLRC's concern that applicants have greater involvement in such adjudication.

140. *See* 43 U.S.C. §§ 1732(c), 1766 (1976). FLPMA contains other hearing provisions which are not related to adjudication. *See id.* § 1712(f).

141. 43 U.S.C. §§ 1761-1771 (1976).

142. *Id.* § 1766.

143. *Id.*

144. Because § 506 requires an APA hearing only for easements, the status of rights-of-way other than easements is unclear.

Neither the statute nor the legislative history offers any clue to explain why an APA hearing is required for suspension and revocation of easements, but is not required for other forms of rights-of-way which may sometimes involve similar interests. FLPMA provides no definition of "easement," but § 103(f) defines "right-of-way" to include "easement," among other things: "The term 'right-of-way' includes an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in subchapter V of this chapter." 43 U.S.C. § 1702(f) (1976).

The distinction between easements and other rights-of-way did not appear in § 405 of S. 507, the provision similar to § 506 of FLPMA as finally enacted, when that bill was read before the House on July 22, 1976. 122 CONG. REC. H 7636-37 (daily ed. July 22, 1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 11, at 722-23. That bill would have required an APA hearing for revocation or suspension of any right-of-way. The distinction, however, appears in the parallel provision, § 506 of H.R. 13777, which was considered on the same day, and it was retained when

opment of public lands. Subsection 302(c)[145] requires the Secretary to "insert in any instrument providing for the use, occupancy, or development of the public lands a provision authorizing revocation or suspension, after notice and hearing, of such instrument upon a final administrative finding of a violation" of a term or condition of the instrument.[146]

Sections 506 and 302(c) give the Department the authority to suspend or revoke land use permits for violations of its regulations as well as those of other federal and state agencies.[147] Thus, land use instruments issued by the Department may now become a tool for the enforcement of pollution standards of other federal and state agencies. This authority to suspend or revoke land use instruments ostensibly extends to all interests in land administered by the BLM. The notice and hearing requirements of sections 506 and 302(c) are intended to ensure administrative due process in the exercise of this authority. Nevertheless, this procedural requirement appears to apply only in the absence of any other statutory procedure for suspension or revocation applicable to a particular land use instrument.[148]

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the House amended S. 507 by substituting the provisions of H.R. 13777. 122 CONG. REC. H 7640, 7651 (daily ed. July 22, 1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 11, at 726, 737. The presence of the distinction was not noted by the Senate in considering the differences between the two bills. 122 CONG. REC. S12931-33 (daily ed. July 30, 1976), *reprinted in* LEGISLATIVE HISTORY, *supra* note 11, at 743-45.

The Department has not yet defined the difference between easements and other rights-of-way, and one may question the appropriateness of doing so, given this murky legislative history.

145. 43 U.S.C. § 1732(c) (1976).

146. *Id.*

147. *See id.* §§ 1766, 1732(c).

148. Section 302(c) of FLPMA provides that specific provisions of other applicable law will govern the suspension, revocation, or cancellation of permits issued under those other laws. *See* 43 U.S.C. § 1732(c) (1976). The Mineral Lands Leasing Act, 30 U.S.C. §§ 181-287 (1976), provides several mechanisms for the cancellation, suspension, revocation, or forfeiture of interests held under that act. Several provisions specify that judicial action is necessary to cancel certain interests. *See, e.g., id.* §§ 184(h)(1), 188(a).

Other interests are subject to cancellation with no specific requirement for an opportunity for a hearing. *See, e.g.*, Boesche v. Udall, 373 U.S. 472, 485 (1963) (cancellation of oil and gas lease granted in violation of the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1976)); 30 U.S.C. §§ 183, 188(b) (cancellation of prospecting permit, cancellation of oil and gas lease). 30 U.S.C. § 183, however, only covers prospecting permits that are to be cancelled for lack of diligent prospecting and makes no requirement for a hearing. While § 302(c), 43 U.S.C. § 1732(c) (1976), appears to require a hearing if the permit is suspended or revoked for violation of other conditions, why would it not also apply to cancellation for lack of diligent prospecting?

Similarly, 30 U.S.C. § 188(b) provides for the cancellation of oil and gas leases for land not known to contain valuable oil or gas deposits after thirty days notice with no requirement for a hearing. One may argue that Congress did not intend that a hearing be required, thereby establishing a system into which § 302(c) was not intended to intrude. On the other hand, one may argue that 30 U.S.C. § 188(b) is not really a comprehensive procedural provision, so that the proviso of 302(c) does not prevent the notice and hearing requirement from attaching to such cancellations. An oil and gas lease of land on which there is not a well that is capable of producing paying quantities terminates by operation of law and not by the action of the government if the annual rental payment is not received timely by the BLM. 30 U.S.C. § 188(b) (1976). Under 30 U.S.C. § 188(c), such terminated leases *may* be reinstated, but the statute makes no requirement for a hearing in those cases.

The lack of an express Administrative Procedure Act [APA] hearing requirement in section 302(c) raises the question as to what type of hearing is required. Because the APA by its terms applies only when a hearing is required to be "on the record"[149] the omission of this requirement in section 302(c) raises a question of legislative intent.[150] The fact that Congress expressly required APA hearings for revocation and suspension of easements in section 506, but omitted such a requirement in section 302(c), suggests that less formal procedures were contemplated. To the extent Congress intended section 302(c) to implement the due process provision in Recommendation 109 of the PLLRC Report,[151] informal procedures were apparently intended.[152]

Certain elements of due process[153] have been routinely provided. Anyone who does business with the Department has the right to be represented by an attorney,[154] although there is no right to have one provided at the Department's expense.[155] While administration of an oath may be useful psychologically, a witness in an informal situation need only be reminded that the willful submission of false information constitutes a criminal offense, regardless of whether or not an oath is

149. 5 U.S.C. § 554(a) (1976).

150. United States Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1977); *see* Phillips Petroleum Co. v. F.P.C., 475 F.2d 842, 851 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974).

151. See note 139 *supra*.

152. *See* PLLRC, *supra* note 8, at 253.

In the absence of a statute setting forth the elements required for a particular type of hearing, judicial decisions and commentators provide valuable help in determining what elements might be necessary in a § 302(c) hearing. In Goldberg v. Kelly, 397 U.S. 254 (1970), for example, the Court held that a welfare recipient was entitled to: A notice of proposed termination and a statement of reasons therefor; the right to appear with counsel; present evidence, confront and cross-examine adverse witnesses; and a final decision based solely on the record of a hearing by an impartial decisionmaker. *See id.* at 264-71. To this list, Judge Friendly adds for consideration the right to counsel paid by the government, to public attendance, and to judicial review. *See* Friendly, *supra* note 138, at 1279-95. Professor Davis discusses these and additional elements drawn from criminal procedure: Evidence under oath, jury trial, verbatim transcript of evidence, a right to subpoena witnesses and evidence, a right to discovery, proof beyond a reasonable doubt, and protection against undue delay. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 7.00 (1976). Which elements should a section 302(c) proceeding include? Clearly, some of these elements are neither necessary nor desirable in any administrative proceeding. A jury trial is not required since an administrative action is neither a suit at common law nor a criminal prosecution. Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 455 (1977); Bureau of Land Management v. Babcock, 84 Interior Dec. 475, 482, 32 IBLA 174, 187-88 (1977). The requirement of proof beyond a reasonable doubt applies only in criminal proceedings, not in civil proceedings. Edwards v. Mazor Masterpieces, Inc., 295 F.2d 547, 549 (D.C. Cir. 1961); Bureau of Land Management v. Babcock, 84 Interior Dec. at 479, 32 IBLA at 183. The Department normally requires those who appear before it to establish their factual assertions by a preponderance of the evidence, a standard which will tend to produce a correct result in most cases. The APA places the burden of proof upon "the proponent of a rule or order." 5 U.S.C. § 556(d) (1976). This burden is properly placed on the party asserting a claim against the United States for an interest in the public lands. *See, e.g.*, United States v. Springer, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974); United States v. Taylor, 82 Interior Dec. 68, 73, 19 IBLA 9, 22-23 (1975).

153. See note 152 *supra*.

154. *See* 43 C.F.R. § 1.3 (1978).

155. Eldon Brinkerhoff, 83 Interior Dec. 185, 24 IBLA 324 (1976); *see* Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* DAVIS, *supra* note 152, at § 8.10.

administered.[156] A party aggrieved by an initial decision has the right to an administrative appeal[157] and generally enjoys the right to judicial review.[158]

The APA provides for an impartial decisionmaker,[159] a decision based solely on the record,[160] an opportunity to confront and cross-examine witnesses,[161] the availability of a transcript,[162] evidence under oath,[163] and the use of a subpoena to the extent authorized by law.[164] When an agency may use less formal procedures, which of these may be sacrificed without denying due process?

Since 1956, the Department has provided an APA hearing when it determines that due process requires a hearing.[165] If due process did not require a hearing, the Department generally did not provide one. Non-APA adjudications were generally based on reports of field examinations at which the affected party may or may not have been present.[166] In determining whether due process requirements applied, the

156. 18 U.S.C. § 1001 (1976); *see* Robert C. Leary, 27 IBLA 296, 301 n.4 (1976); 43 C.F.R. § 1821.3 (1977).

157. 43 C.F.R. § 4.410 (1978).

158. *See* text & notes 231-232 *infra.*

159. 5 U.S.C. § 554(d) (1976).

160. *Id.* § 556(d). 43 C.F.R. § 4.24 (1978) parallels the APA with regard to hearings and limits departmental review of internal decisionmaking to those records, statements, files, and documents open to inspection by the parties.

161. 5 U.S.C. § 556(d) (1976).

162. *Id.* § 556(e).

163. *See id.* § 556(c)(1).

164. *See id.* § 556(c)(2).

165. Donald Peters, 83 Interior Dec. 308, 26 IBLA 235 (1976), *aff'd*, 83 Interior Dec. 564, 28 IBLA 153 (1978); *see* United States v. O'Leary, 63 Interior Dec. 341 (1956) (citing Wong Yang Sung v. McGrath, 334 U.S. 33 (1950)).

166. These procedures have been described in the PLLRC, *supra* note 8, at 253. Critics of these procedures overlook the role of the agency appeals system in determining whether certain due process elements are available. Although a court may be reviewing a final departmental decision from the IBLA in considering due process requirements, it will tend to concentrate on the procedures used in initial decisionmaking rather than examine the complete decisionmaking structure. The deprivation of an interest, however, does not usually occur as the result of an initial decision, since the effect of that decision is suspended pending further action on appeal. 43 C.F.R. § 4.21(a) (1978). The oversight may be crucial because the agency appeals system often adds several critical procedural elements to initial decisionmaking. If a reviewing court ignores these added elements, it cannot properly determine whether or not the agency has met procedural due process requirements. For example, in Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977), the court ordered a hearing to allow Stickelman an opportunity to provide evidence on her eligibility for an extension of time in which to submit proof on her desert land entry, an action which the court agreed was discretionary with the Department. The court focused its review on the initial decision, ignoring the IBLA's explicit determination that even if Stickelman could prove her assertions, the Department would not be justified in granting her an extension, Elaine S. Stickelman, 9 IBLA 327, 331 (1973). Stickleman v. United States, 563 F.2d 413 *passim* (9th Cir. 1977).

Even if an applicant has not had an opportunity to rebut information in an initial BLM decision, he does have an opportunity to examine the administrative record and make an offer of proof in support of his appeal. If the facts asserted are material and would support a decision in favor of the appellant, then the IBLA considers it proper to order a hearing to give an appellant an opportunity to establish those facts. 43 C.F.R. § 4.415 (1978). *See, e.g.*, Jack J. Bender, 40 IBLA 26 (1979); Donald E. Jordan, 35 IBLA 290 (1978); Domenico A. Tussio, 30 IBLA 92 (1977). Sometimes, it is only necessary to remand the case to the initial decisionmaker for reconsideration. Afterwards, if it appears that a decision will ultimately rest on resolution of an issue of fact, a hearing may be required. Manhattan Resources, Inc., 34 IBLA 346 (1978); Universal Resources

Department used the now discarded rights-privileges dichotomy.[167] Thus, an interest was not deemed to be a right when it was subject to the discretionary authority of the Department, and hearings were not required for actions affecting such interests.[168]

Congress' invitation to provide non-APA hearings poses questions similar to those addressed by the Department in recent decisions.[169] In *Donald Peters*,[170] for example, the Department determined hearing procedures for the adjudication of applications under the Alaska Native Allotment Act.[171] The Alaska Native Allotment Act authorized the Department to issue patents for up to 160 acres of public land to Alaska Natives who had used and occupied the land for at least five years prior to filing an application. The Department considered the issuance of an allotment to be discretionary;[172] hence, an applicant did not have a right to an allotment. Absent a right to an allotment, the Department held that due process did not require a hearing.[173] Nevertheless, in *Pence v. Kleppe*,[174] the Ninth Circuit held that due process required a hearing in such cases, but it stopped short, however, of imposing APA requirements. The court instructed the Department as follows:

Corp., 31 IBLA 61 (1977). If the factual assertions undermine the rationale of the decision below but would not necessarily support a decision in favor of appellant, the IBLA will remand the case for readjudication by the BLM. California Geothermal, Inc., 37 IBLA 172 (1978); Vern K. Jones, 26 IBLA 165 (1976). The BLM should not be required to rescind an adverse decision if it has valid reasons which it failed to raise in its first decision. This is especially true in such discretionary activities as oil and gas leasing. *See generally* Vern K. Jones, 33 IBLA 74 (1977).

167. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). Instead of a right, one need only have "a legitimate claim of entitlement." *Id.* at 577. In Stickelman v. United States, 563 F.2d 413, 416-17 (9th Cir. 1977), the court held that one who applied for extension of time in which to make final proof on a desert land entry, an action which is discretionary, has a " 'legitimate claim of entitlement' to the Secretary's exercise of discretion." Having found a "right" subject to due process protection, the court imposed several procedural requirements on the agency. Id. at 417. How this right differs from the right to judicial review is difficult to discern. If there is no difference, would it not be better if the court sidestepped the constitutional issue and imposed procedural requirements only as necessary to ensure an adequate record for judicial review? This approach was taken in Young v. Regional Manpower Adm'r, 509 F.2d 243, 246 (9th Cir. 1975).

168. *See* text & notes 172-73 *infra*.

169. Circle L, Inc., 36 IBLA 260 (1978); Donald Peters, 83 Interior Dec. 308 (1976), *aff'd*, 83 Interior Dec. 564 (1978); American Telephone & Telegraph Co., 25 IBLA 341 (1976).

170. 83 Interior Dec. 308, 26 IBLA 235 (1976), *aff'd*, 83 Interior Dec. 564, 28 IBLA 153 (1978).

171. Act of May 17, 1906, ch. 2469, 34 Stat. 197 (1906) (repealed 1970).

172. The Native Allotment Act provided:

> [T]he Secretary of the Interior is hereby authorized and empowered, *in his discretion* and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until other wise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

Act of May 17, 1906, ch. 2469, 34 Stat. 197 (1906) (repealed 1970) (emphasis added).

173. *See* Alexandra Atchak, 23 IBLA 81 (1975).

174. 529 F.2d 135 (9th Cir. 1976).

> [A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. The specific problems involved and the demands placed upon the Bureau of Land Management are best judged initially by the Secretary.[175]

The Department perceived two choices: (1) Adopt new informal procedures, but with the attendant risk of delayed decisionmaking relying on increasingly stale evidence if the procedures were not found adequate on judicial review; or (2) apply procedures which had previously withstood judicial scrutiny.[176] In *Peters*, a decision expressly approved by the Secretary, the IBLA chose the latter in requiring the use of contest procedures that had been applied to mining claims and applications for patents under other public land laws.[177] The IBLA was influenced by the analogy drawn by the court between welfare recipients and Alaska Natives and by the arguments of Alaska Natives that due process required allotment applicants to have the same contest and hearing rights that have been afforded to homesteaders, trade and manufacturing site entrymen, and mining claimants.[178]

In *American Telephone and Telegraph Co. [AT&T]*,[179] and *Circle L. Inc.*,[180] the IBLA considered the use of non-APA hearings in the revision of charges for use of existing rights-of-way. The pertinent regula-

175. *Id.* at 143.

176. Unquestionably, courts should not impose detailed requirements in remanding a case, because the agencies should first consider what procedural elements are appropriate on the basis of the private interest affected and the nature of the government function. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). An administrator may be forgiven, however, if he acts in such a manner as to doubt the reliability of a court's statement that only certain minimal elements are necessary.

177. 83 Interior Dec. 308, 312, 26 IBLA 235, 242, *aff'd*, 83 Interior Dec. 564, 28 IBLA 153 (1976). In Pence v. Andrus, 586 F.2d 733, 744 (9th Cir. 1978), the court held that the procedures complied with its mandate in *Pence*. The court, however, did not rule on the constitutional adequacy of the procedures because it deemed that issue not ripe. *Id.*

In Eluska v. Andrus, 587 F.2d 996, 998 n.3 (9th Cir. 1978), the court noted that an unresolved question remained as to whether the Department adopted those procedures in the proper manner. Apparently, rulemaking may have been contemplated. If so, this is a concern of form rather than of substance. As the second *Peters* decision points out, about 95% of the allotment applicants were represented by the same organization which conducted the class action in *Pence*. 83 Interior Dec. 564, 570, 28 IBLA 153, 166, *aff'g*, 83 Interior Dec. 308, 26 IBLA 235 (1976). In numerous individual appeals, procedural preferences were indicated by attorneys from Alaska Legal Services Corporation, as the second *Peters* decision shows. *Id.* at 570-71, 28 IBLA at 166. Because the IBLA granted reconsideration of the first *Peters* decision, the parties have had essentially the same opportunity to participate in determining the proper procedures that they would have had if the Department had proceeded by rulemaking.

178. *See id.* at 567, 28 IBLA at 158 (1976).

179. 25 IBLA 341 (1976).

180. 36 IBLA 260 (1978).

tion in each case provided for imposition of new charges "after reasonable notice and opportunity for a hearing."[181] In *AT&T*, the IBLA skirted the issue by ordering an APA hearing in the exercise of its discretion,[182] but carefully avoided holding that the regulation required such.[183] Because the hearing was to be a consolidation of cases from several BLM State Offices, the IBLA felt that the matter could be most expeditiously resolved in a single APA hearing, with an administrative law judge making a recommended decision to the Director of the BLM.[184]

Circle L, however, makes clear that an APA hearing will not be the norm for reappraisals of rights-of-way. Although the IBLA disclaimed any attempt to impose a rigid or universal format for reappraisals, it offered these guidelines:

> First, we believe it is absolutely essential that when a licensee objects to a proposed reassessment he be provided with a copy of the appraisal report which served as a basis for the increase . . . Then, after permitting the licensee sufficient time in which to peruse the appraisal as well as develop those arguments and data which he believes might bring the appraisal into question, he must be afforded an opportunity to present his views to the decision-maker. The author of the appraisal should be available for interrogation at that time. What is crucial is that the deciding officer cannot be the same person who made or approved the appraisal upon which the request for increased rental was based.
>
> When the licensee desires to exercise his right to present his views in person, the State Office must endeavor to preserve a clear record of what transpired at the meeting. This does not mean that each such encounter must be recorded or a verbatim transcript thereof provided, though either of these two procedures would clearly be permissible. What is necessary at a minimum is that notes be taken, and included in the case file, which indicate the specific contentions of the licensee. Should any documentary support for his position be presented by the licensee such submissions must also be

181. 43 C.F.R. § 2802.1-7(e) (1978).

182. The IBLA based its action on 43 C.F.R. § 4.415 (1978), which provides:

> Either an appellant or an adverse party may, if he desires a hearing to present evidence on an issue of fact, request that the case be assigned to an administrative law judge for such a hearing. Such a request must be made in writing and filed with the Board within 30 days after answer is due and a copy of the request should be served on the opposing party in the case. The allowance of a request for hearing is within the discretion of the Board, and the Board may, on its own motion, refer any case to an administrative law judge for a hearing on an issue of fact. If a hearing is ordered, the Board will specify the issues upon which the hearing is to be held and the hearing will be held in accordance with §§ 4.430 to 4.439, and the general rules in Subpart B of this part.

183. 25 IBLA at 358.

184. *Id.* at 358-59. The Director's decision could be appealed to the IBLA. 43 C.F.R. § 4.410 (1978).

preserved in the case file.[185]

These procedures differ little from those required in *Goldberg v. Kelly*,[186] although the IBLA did not expressly require that the decision be based solely on evidence presented at the hearing.[187] The IBLA, however, made clear that it was not stating universal requirements, even for reappraisals of rights-of-way.[188] The procedural requirements are flexible. It is thus conceivable that 302(c) hearings might sometimes include more elements, sometimes less.

In *Mathews v. Eldridge*,[189] the Supreme Court reviewed its earlier decisions on procedural due process and devised a balancing of interests test to be used in determining the "specific dictates of due process:"[190]

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[191]

The private interest that is affected by government action may be measured by its legal nature and its economic significance to the holder of the interest.[192] Sections 302(c) and 506 require hearings only for adjudications affecting interests that have been granted, but not those for which an application is pending. Hearings are not required for the

185. 36 IBLA at 264.
186. 397 U.S. 254, 261-71 (1970). *See* note 152 *supra*.
187. 36 IBLA at 264.
188. *Id.*
189. 424 U.S. 319 (1976).
190. In an earlier decision, Cafeteria and Restaurant Workers Local 476 v. McElroy, 367 U.S. 886, 895 (1961), the Court stated: "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action."
191. 424 U.S. at 335. Although the balancing of private and governmental interests appears to be an obvious test, it may be difficult for the agency to determine the exact balance in a given case. The agency may be tempted to provide more procedures than necessary to avoid reversal upon judicial review and the delay that would ensue in reaching an ultimate decision. As *Eldridge* suggests, however, the agency may be doing the public a disservice by spending money on unnecessary procedures:

> [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.

Id. at 348.
192. In Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972), the Court stressed that the legal nature of the interest as well as its economic weight must be considered. *Compare* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976) *with* Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970), for insight into how due process requirements may vary with the economic significance of the interest to the holder.

loss of interests which terminate upon occurrence of an agreed condition, event, or time, but are required where suspension or revocation is proposed because of a violation of a condition of the permit itself. If a permit provides that it may be revoked should the Department need the subject land for another purpose, section 302(c) may not require a hearing.[193]

The economic significance of the interest to the individual must also be considered. Because section 302(c) arguably covers suspension or revocation of all uses for which statutory termination procedures have not been provided,[194] interests subject to that provision may vary from those that are temporary and insubstantial to those that are nearly permanent and involve a sizeable economic investment. For example, section 302(c) may cover relatively temporary recreation uses or other temporary uses for which no permanent improvements are made.[195] If section 302(c) extends to rights-of-way other than easements,[196] interests involving significant investments would be affected.[197] As indicated above,[198] the section would also appear to cover entries on public land or settlement authorized under published rules which may involve investments which are sizeable to a given individual.

The government interest refers not only to the avoidance of undue fiscal and administrative burdens, but also to the agency's mission and the exact type of decisionmaking involved. In *Cafeteria and Restaurant Workers Local 476 v. McElroy*,[199] for example, the Court distinguished between proprietary and regulatory functions[200] and indicated that due

193. *See* LaRue v. Udall, 324 F.2d 428, 432 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964). The permittee, however, would have an opportunity to make his views known during land use planning or management decisionmaking. *See* 43 U.S.C. § 1712 (1976).

The phrase "instrument providing for the use, occupancy, or development of the public lands" arguably could extend to all legal interests in public lands. Subsection 302(b) suggests that the term "instrument" is not limited to formal documents, such as easements, permits, leases, and licenses, but also refers to published rules. Thus, the notice and hearing requirement would ostensibly extend to those parties who use public land not only under individual permits, but also pursuant to published rules. *See* 43 U.S.C. § 1732(b) (1976).

194. See text & note 148 *supra*.

195. An example would be a temporary use permit under § 302(b) of FLPMA. 43 U.S.C. § 1732(b) (1976).

196. *But see* note 144 *supra*.

197. *See, e.g.*, the numerous purposes for which rights-of-way may be granted. 43 U.S.C. § 1761 (1976).

198. *See* note 193 *supra*.

199. 367 U.S. 886 (1961).

200. *Id.* at 896. Public land matters would appear to be almost solely proprietary, since the government is only administering what it owns. Nevertheless, the Department's responsibilities go far beyond those that normally concern a private proprietor. The mission of the Department under FLPMA may be summarized as the management, development, and protection of all of the resources on the public lands. The substantive and policy provisions of FLPMA suggest a regulatory mandate rather than solely a proprietary one. *See, e.g.*, 43 U.S.C. §§ 1701(a), 1712(c) (1976). For example, § 302(b) requires the Secretary to "*regulate*, through easements, permits, leases, licenses, published rules, or other instruments . . . the use, occupancy, and development of the public lands." *Id.* § 1733(b) (emphasis added). Section 302(c) establishes that the Department's concerns go beyond those of a private proprietor because it makes those land use instruments a

process requirements are not so strong in proprietary matters.[201]

Under *Eldridge*, specific consideration of the nature of the inquiry and the type of evidence upon which the decision is based is needed to determine the value of a safeguard in avoiding the erroneous deprivation of a private interest.[202] The *Eldridge* inquiry related to medical disability, and the issue was decided on "routine, standard, unbiased medical reports by physician specialists."[203] The Court contrasted this kind of a determination with the wider inquiry in the termination of welfare benefits under *Goldberg*, "where issues of witness credibility and veracity are critical to the decisionmaking."[204]

The nature of the inquiry and evidence in section 302(c) hearings depends on the nature of the alleged violation for which suspension or

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tool for the enforcement of environmental standards imposed by other agencies as well as requirements imposed under the Department's authority. Such concerns are not usually manifest in private land use instruments.

201. 367 U.S. at 896. Perhaps the most useful classification of administrative activity is one where the categories themselves suggest substantive and recognizable differences in due process requirements. Dean Paul Verkuil contends that most administrative decisions fall within one of six categories: (1) Imposition of sanctions; (2) ratemaking, licensing, and other regulatory decisions; (3) environmental and safety decisions; (4) awards of benefits, loans, grants, and subsidies; (5) inspections, audits, and approvals; and (6) planning and policymaking. Verkuil, *supra* note 51, at 294. He suggests that procedural requirements may be determined by weighing the needs of fairness, efficiency, and the satisfaction of those who appear before the agency. *Id.* at 279. Any of these factors may become paramount as the nature of the administrative action varies. For example, Dean Verkuil regards satisfaction and fairness as the key elements in procedures leading to imposition of a sanction; trial-type procedures appear best suited for these actions. *Id.* at 295. On the other hand, he regards efficiency as the dominant value where planning and policymaking is involved and recommends that less formal procedures be used. *Id.* at 302.

Under which category do § 302(c) proceedings fall? Decisionmaking under § 302(c) will primarily involve resolution of matters of fact, rather than considerations of policy. The anticipated result is the loss of an interest on the basis of a private party's past conduct. These considerations suggest that § 302(c) proceedings should resemble those for the imposition of sanctions.

5 U.S.C. § 551(10) (1976) defines sanction as

> includ[ing] the whole or a part of an agency—
>
> (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
>
> (B) withholding of relief;
>
> (C) imposition of penalty or fine;
>
> (D) destruction, taking, seizure, or withholding of property;
>
> (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
>
> (F) requirement, revocation, or suspension of a license; or
>
> (G) taking other compulsory or restrictive action.

Verkuil suggests limiting this definition to exclude licensing. Verkuil, *supra* note 51, at 296 n.189. Revocation or suspension of land use permits involve the withholding of an interest in property. Fairness and satisfaction of the public's perception of fairness are of great importance in such cases, and hence, trial-type procedures would be most appropriate under Dean Verkuil's analysis. *Id.* at 295.

Judge Friendly also provides insight in determining when due process should require a hearing. He believes that one must distinguish those "cases in which government is seeking to take action against the citizen from those in which it is simply denying a citizen's request," and that due process requirements probably should be imposed when actions are taken against a citizen. Friendly, *supra* note 138, at 1295. Clearly, § 302(c) concerns taking action against a citizen, and the statute appropriately requires a hearing.

202. 424 U.S. at 343-44.

203. *Id.* at 344 (citing Richardson v. Perales, 402 U.S. 389, 404 (1971)).

204. *Id.* at 343-44.

revocation is proposed. Possible violations include failure to pay proper use charges and the overuse of a particular resource beyond a limit stated in a permit as well as the violation of an environmental or safety condition. At such a hearing, the permittee normally should be allowed to present evidence to rebut the charge and evidence against him. Nevertheless, section 302(c) makes clear that several terms in any land use permit will require compliance with requirements subject to the jurisdiction of agencies other than the department. For example, if a permittee does not comply with state and federal pollution standards, his permit may be suspended or revoked by the Department. If the violation has already been established in proceedings satisfying due process by the agency charged with enforcing the environmental laws, there is no justification for reopening the matter in a section 302(c) hearing. The sole issue should be the appropriateness of the suspension or revocation.

In order to determine the need for a particular procedural safeguard to ensure an accurate decision, one might ask whether the absence of the procedural safeguard would prevent the party affected from providing the agency with the information and understanding necessary for a reasoned, fair decision. If the answer to this question is negative, there is little justification for imposing a procedural requirement. Even if the answer is affirmative, however, it does not necessarily follow that the procedural safeguard must be provided. Under *Eldridge*, the need for a safeguard depends in part on whether the expense of providing it is justified by the private interest at stake.[205]

Although formal procedures might be appropriate in cases where the individual's economic loss from the government action would be significant, they may be inappropriate where the procedures are more expensive than the interest to be affected. This is particularly so where the particular use is primarily for the benefit of the user rather than for the public generally. If the courts are to require adjudication procedures that exceed the value of the interest under review, the agency may be tempted to exercise its discretion and deny the application in the first place rather than incur disproportionate adjudication expenses during the life of the permit.[206]

Determining the elements of a section 302(c) hearing should not be the responsibility of the IBLA; the Department should promulgate regulations that identify decisionmakers and state specific procedures that may be used. It may be wise for the Department to indicate ex-

205. *Id.* at 347-48.
206. *See generally* 31 U.S.C. § 483(a) (1976).

press procedural alternatives, including the advance submission of documentary evidence, from which the decisionmaker may select.

One fundamental due process requirement is that the adjudicator be impartial, but there are various measures to ensure impartiality, ranging from the requirement that the deciding official have no prior involvement in the case[207] to the requirement that he be institutionally independent of the BLM or Solicitor (*i.e.*, an administrative law judge).[208] This requirement of independence is perhaps the most significant difference between APA and non-APA hearings.[209] Congress, however, did not require an APA hearing under section 302(c), and both FLPMA and the PLLRC Report anticipate that most initial decisions will be made by employees of the BLM. Any possibility of overreaching or bias by BLM officials is presumably cured by "objective administrative review."[210]

Although a court probably would require no greater assurance of impartiality than a decisionmaker's lack of prior involvement in a case, there may be some question whether this would satisfy the Department's clientele.[211] Although it would involve added expense, an added measure of impartiality may be provided by using BLM decisionmakers from offices other than the one which is proposing the suspension or revocation.

In *Circle L, Inc.*, the Department did not require the preparation of verbatim transcripts but instead it permitted the record to consist of the decisionmaker's notes and the documentary submissions of the parties.[212] Another alternative to verbatim transcripts would be to record the proceedings on tape and allow a party to purchase a transcript should it seek review of the decision.

There should be little objection to providing a participant in a hearing with an opportunity for cross-examination. At times, it can be a valuable technique under which a witness may significantly qualify or contradict statements he made in his direct testimony. Nevertheless, an eminent commentator regards it as an obstruction rather than as an aid to the search for the truth.[213] In hearings involving many parties, cross-examination may add to the cost of the proceedings for all parties while yielding few benefits. It may only yield cumulative evidence, or

207. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
208. Judge Friendly suggests that less rigorous procedures would be necessary if the adjudicator were not an employee of the agency. Friendly, *supra* note 138, at 1279-80.
209. *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 41-45 (1950); United States v. O'Leary, 63 Interior Dec. 341, 343-45 (1956).
210. *See* 43 U.S.C. § 1701(a)(5) (1976).
211. *See generally* text & note 41 *supra*.
212. 36 IBLA 260, 264 (1978).
213. *See* Friendly, *supra* note 138, at 1283-85.

worse, confuse the record rather than clarify it. In such instances, a decisionmaker should have the authority to restrict cross-examination and control the level of participation of various parties.

In conclusion, procedures such as those recommended by the IBLA in *Circle L* provide a basis for considering requirements for section 302(c) adjudications. Such procedures would provide an efficient but fair way to ensure that even the holders of relatively minor interests receive ample protection and a full measure of participation in decisionmaking. In more complex cases, an administrative law judge may be desirable because his skills better enable him to ensure the orderly development of a complex record.

Those who design section 302(c) procedures should be mindful that suspensions and revocations will likely be subject to judicial review. Reviewing courts impose procedural requirements not only to guarantee due process to private parties, but also to ensure an adequate record for their review.[214]

IV. JUDICIAL REVIEW

Section 102(a)(6) of FLPMA states: "The Congress declares that it is the policy of the United States that . . . judicial review of public land adjudication decisions be provided by law."[215] Although, this policy on its face appears to represent a departure from a considerable body of statutory and case law,[216] in fact it reflects the current attitude of most courts in favor of judicial review of administrative action. Federal courts today, most particularly the Ninth Circuit,[217] are likely to

214. *See* note 167 *supra*.

215. 43 U.S.C. § 1701(a)(6) (1976). Section 102(b) of FLPMA provides:

> The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

Id. § 1701(b). Although § 102(a)(6) may not be self-executing, cases cited herein suggest that the courts have been moving in the direction of increased, albeit limited, review of public land adjudication decisions even prior to the enactment of FLPMA. *See* Stickelman v. United States, 563 F.2d 413 (9th Cir. 1977). "[O]ver the years, the courts have evolved a concern for citizens pressing applications upstream against a distant bureaucracy. Courts now review many agency activities that Congress probably did not initially consider reviewable, if indeed it considered the question of judicial review at all." *Id.* at 415. See text & note 219 *infra* discussing the presumption in favor of judicial review.

216. *See, e.g.*, 5 U.S.C. § 701(a) (1976) and cases collected in note 225 *infra*.

217. *See* Stickelman v. United States, 563 F.2d 413, 415 (9th Cir. 1977). The Ninth and Tenth Circuits, which now review the great majority of Department decisions, did not always do so. Prior to the passage of the Act of October 5, 1962, Pub. L. No. 87-748, § 2, 76 Stat. 744 (1962) (codified at 28 U.S.C. § 1391 (1976)), the availability of judicial review of public land adjudications was often of little value to the potential plaintiff who was compelled by existing venue laws to sue in Washington, D.C. A plaintiff seeking review of a decision of the Secretary of the Interior could at that time bring an action "only in the judicial district where all defendants reside, except as otherwise provided by law." Act of June 25, 1948, ch. 646, 62 Stat. 935 (1948).

This situation was changed in 1962 to allow an action to be brought "in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real prop-

give at least a limited review of agency action, regardless of the fact that a statute might preclude review or that agency action might be committed to agency discretion.[218]

The policy set forth in section 102(a)(6) obviates the need for the presumption which courts have frequently enunciated favoring judicial review: "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[219] This presumption is further reflected in the APA, wherein it is stated that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[220]

In contrast, however, to the unqualified language in section 102(a)(6) of FLPMA, the presumption in favor of review is limited by two specific provisions in the APA[221] and by numerous practical and policy considerations.[222] Read literally, 5 U.S.C. § 701(a) excludes from judicial review administrative decisions to the extent that (1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.[223]

The Supreme Court has stated that the exception for those actions committed to agency discretion is a very narrow one, "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' "[224] Nevertheless, there are a number of cases affecting the administration of public lands where re-

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erty involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e) (1976). As a practical matter, this Act substantially increased the likelihood that a party would seek judicial review, because the costs of travelling to Washington, D.C. and retaining local counsel could be avoided. Professor McFarland has called the Act "the most important piece of federal administrative law legislation in half a century (with the possible exception of the Administrative Procedure Act.)" MCFARLAND, *supra* note 8, at 55.

218. *See, e.g.*, cases collected in notes 231, 232 *infra*.

219. Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1966).

220. 5 U.S.C. § 702 (1976).

221. *Id.* §§ 701(a)(1)-(2).

222. Courts have declined to review administrative action on the following grounds: Vaca v. Sipes, 386 U.S. 171, 191 (1967) (prosecutorial discretion); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948) (involvement with international diplomacy); Morton v. Dow, 525 F.2d 1302, 1307 (10th Cir. 1975) (lack of knowledge of technical subject); Davis Associates, Inc. v. Secretary, Dep't of Housing and Urban Dev., 498 F.2d 385, 390 (1st Cir. 1974) (social policy and economic forecasting); Hahn v. Gottlieb, 430 F.2d 1243, 1251 (1st Cir. 1970) (impairment of administrative efficiency); Curran v. Laird, 420 F.2d 122, 132-33 (D.C. Cir. 1969) (national defense strategy).

223. 5 U.S.C. § 701(a) (1976) provides: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

Section 701(a) does not preclude review entirely, but only to the extent that the events in (a)(1) or (a)(2) occur. Seldom do the courts recognize this fact. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), the Supreme Court misquoted § 701(a) by substituting the phrase "except where" for "except to the extent that." *See* K. DAVIS, *supra* note 152, at § 28.16.

224. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1970). The Court here was quoting from the legislative history of the APA, S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945).

view has been denied on this ground.[225] Section 102(a)(6) would appear to supersede these holdings and their statutory[226] support.

Unfortunately, the legislative history of section 102(a)(6) provides little assistance in determining whether the section should be read literally. The 1,779 page legislative history of FLPMA[227] contains few references to judicial review, but frequently mentions the PLLRC report. Recommendation 110 of the report states: "Judicial review of public land adjudications should be expressly provided for by Congress."[228] The Commission's comments are valuable for an understanding of its recommendation:

> [I]n accordance with traditional concepts of separation of powers, it is not our intent that the courts would substitute their judgment for that of the agencies in matters committed by Congress to agency discretion. Indeed the courts traditionally have not attempted to, and as a practical matter cannot, substitute their views for those of the agencies in such matters. What judicial review does assure, however, is that (1) discretion is exercised evenhandedly; (2) its exercise is not arbitrary or discriminatory; and (3) guidelines in statutes or regulations are followed. In this context the availability of judicial review should pose no threat or burden to legitimate public land management.[229]

The intent of the Commission, therefore, in recommending judicial review of public land adjudications appears to be to provide for judicial review even of those agency actions that are committed to agency discretion. Judicial review would not, therefore, be limited to those agency actions not so committed to discretion in accordance with traditional standards of review set forth in the APA.[230]

Recent cases reviewing decisions of the Department reflect a similar willingness to review agency action committed to agency discretion.[231] These cases, however, limit review in such matters and

225. Arizona Power Auth. v. Morton, 549 F.2d 1231, 1253 (9th Cir. 1977); Strickland v. Morton, 519 F.2d 467, 472 (9th Cir. 1975); Pallin v. United States, 496 F.2d 27, 34 (9th Cir. 1974); Lutzenhiser v. Udall, 432 F.2d 328, 329 n.A (9th Cir. 1970); Mollohan v. Gray, 413 F.2d 349, 352 (9th Cir. 1969); United States v. Walker, 409 F.2d 477, 480 (9th Cir. 1969); Ferry v. Udall, 336 F.2d 706, 714 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965); Sellas v. Kirk, 200 F.2d 217, 220 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953).

226. 5 U.S.C. § 701(a) (1976).

227. *See* LEGISLATIVE HISTORY, *supra* note 11.

228. PLLRC, *supra* note 8, at 256. The similarity of the language in § 102(a)(6) in FLPMA, *see* text & note 215 *supra* and Recommendation 110 of the Commission suggests that the origin of § 102(a)(6) was the Commission's report.

229. PLLRC, *supra* note 8, at 256. The Commission expressed its concern that any legislative or administrative improvements in rulemaking and adjudication procedures would be largely only advisory without the availability of judicial review. It recommended that an express statutory provision favoring judicial review be included to remove the defense that the doctrine of sovereign immunity precluded suit against the United States. *Id.*

230. 5 U.S.C. § 706 (1976).

231. Arizona Power Auth. v. Morton, 549 F.2d 1231, 1240 (9th Cir. 1977); Ness Investment Corp. v. United States, 512 F.2d 706, 718 (9th Cir. 1975); Strickland v. Morton, 519 F.2d 468, 470-

arguably do not extend review to the full limits of section 102(a)(6) as interpreted above. The policy of limited review reflected in such cases has also been applied when statutes expressly preclude review.[232]

This policy of limited review is aptly demonstrated by the Ninth Circuit in *Ness Investment Corp. v. United States Department of Agriculture*.[233] In *Ness*, the issue was whether a federal court could review a decision of the Forest Service denying a special use permit[234] to a group of investors for operation of a resort in a national forest. To the Government's argument that the trial court had no jurisdiction to review the Forest Service's denial, the Ninth Circuit responded:

> Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory, regulatory or other legal mandates or restrictions; (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.[235]

The court found that the question of who is entitled to receive a permit for construction or operation of a recreational facility was entrusted to Forest Service expertise without any standards by which acceptance or rejection of a particular applicant could be tested.[236] It therefore held that the trial court had no jurisdiction to review this decision.

The trial court did have jurisdiction, however, to review allegations that the Forest Service had failed to comply with applicable law and regulations in handling the application for permit.[237] This limited

71 (9th Cir. 1975); Nat'l Forest Preservation Group v. Butz, 485 F.2d 408, 414 (9th Cir. 1973); Bronken v. Morton, 473 F.2d 790, 794-95 (9th Cir. 1973); Hi-Ridge Lumber Co. v. United States, 443 F.2d 452, 456 (9th Cir. 1971); Nelson v. Kleppe, 457 F. Supp. 5, 9 (D. Idaho 1976).

232. *See* Johnson v. Robison, 415 U.S. 361, 373-74 (1974); Ralpho v. Bell, 569 F.2d 607, 622 (D.C. Cir. 1977).

233. 512 F.2d 706 (9th Cir. 1975).

234. Issuance of term special use permits is authorized by 16 U.S.C. § 497 (1976). Applicable regulations are set forth in 36 C.F.R. § 251.1 (1978).

235. 512 F.2d at 715.

236. *Id.* at 716.

> Agency expertise and knowledge is deeply involved in the decision to award a special use permit. What is needed, and where, are questions best answered by the forest service, which is involved on a daily basis with the management and use of the national forests. The federal courts have no such expertise, nor, in this case, do the courts have any standards by which acceptance or rejection of a particular applicant could be tested. These factors imply that the decision to award a special use permit for construction and operation of a recreational facility was left with the issuing authority and that Congress did not intend for the federal courts to redetermine the question of who was qualified to receive a permit. We hold that the decision here involved was committed to agency discretion by law and that federal courts have no jurisdiction to review such a decision.

Id. (citation omitted).

237. *Id.* at 714, 717.

review of agency action was properly confined to review of well-defined regulations, permit provisions, and case law.[238]

This policy of limited review of agency action determined to be committed to agency discretion has been adopted in other cases and noted by the commentators.[239] Its virtue is in allowing courts to do what they do best: interpreting and applying the law, rather than making decisions requiring expertise in fields unknown to them.[240] Cor-

238. *Id.* at 715. "This approach accords with the suggestion of the Supreme Court in *Overton Park* that review is required where there is law to apply." *Id.* at 714.

239. *See* Krueger v. Morton, 539 F.2d 235, 238 (D.C. Cir. 1976); Pena v. Kissinger, 409 F. Supp. 1182, 1187 (S.D.N.Y. 1976), and cases collected in note 231 *supra. See also* K. DAVIS, *supra* note 152, at § 28.16-1; 5 B. MEZINES, J. STEIN, & J. GRUFF, ADMINISTRATIVE LAW, § 44.03 (1978); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 369-70 (1968).

240. In a number of decisions involving mining claims, the courts have considered agency expertise in determining the question of primary jurisdiction. In these cases, the Government initially avoided the administrative process by seeking direct relief in the courts. Thus, these cases do not involve the precise question of judicial review. In Best v. Humboldt Placer Mining Co., 371 U.S. 334, 334-35 (1963), the United States sued to condemn outstanding mining claims on public land and to obtain immediate possession of the land. The district court granted the Government a writ of possession, but determined no other issue, thereby allowing the Government to institute administrative proceedings before BLM to resolve the validity of the mining claims. *Id.* at 335. The mining claimants sought to enjoin the Department from further proceeding before BLM, but the district court granted summary judgment for the United States. Humboldt Placer Mining Co. v. Best, 185 F. Supp. 290, 292 (N.D. Cal. 1960). The Ninth Circuit vacated the district court's decision, Humboldt Placer Mining Co. v. Best, 293 F.2d 553, 558 (9th Cir. 1961), holding that since the United States went into the district court to condemn the land and obtain immediate possession, the determination of the validity of the mining claims was within the exclusive jurisdiction of the court.

The Supreme Court reversed the court of appeals, stating:

> If a patent has not issued, controversies over the claims "should be solved by appeal to the land department and not to the courts."
>
> . . . .
>
> We conclude that the institution of the suit in the District Court was an appropriate way of obtaining immediate possession, that it was not inconsistent with the administrative remedy for determining the validity of the mining claims, and that the District Court acted properly in holding its hand until the issue of the validity of the claims has been resolved by the agency entrusted by Congress with the task.

371 U.S. at 338, 340 (footnote & citation omitted).

Thereafter in United States v. Nogueira, 403 F.2d 816, 817-18 (9th Cir. 1968), the Government, relying on *Best*, sought ejectment of defendants from unpatented mining claims contending that defendants were not occupying the claim in good faith or for permissible purposes under 30 U.S.C. § 612 (1976). The Ninth Circuit, reversing the district court's summary judgment for defendants, expressly avoided the question of the court's primary jurisdiction to determine validity and thus title. United States v. Nogueira, 403 F.2d 816, 823 (9th Cir. 1968). The court, nevertheless, held that the courts have jurisdiction to determine possessory rights in the land, stating, "[N]othing in *Best* indicates that there is a lack of jurisdiction in the district court to properly determine the government's right to possession of the land apart from the validity of the mining claim." *Id.* at 825.

Citing *Nogueira* and *Best* as not foreclosing "the government's entering federal court to vindicate its title to public lands," the Tenth Circuit in United States v. Zweifel, 508 F.2d 1150, 1155 (10th Cir. 1975), affirmed a district court decision invalidating the mining claims of some 267 claimants in an action by the United States to quiet title. The court reasoned as follows:

> Certainly the Interior Department is charged with primary responsibility for determinations of the validity of mining claims. [Citing *Best*]. But we believe that the court below correctly refused to insist upon a prior administrative inquiry to the challenged Zweifel claims for two reasons.
>
> First, the agency to which appellants would have the court turn was itself very much a part of this litigation, and the agency's position with respect to the claims was clear. The suit was filed at the behest of the Secretary of the Interior. . . .

rectly applied, the policy will protect individual interests against an abuse of the considerable discretion vested in the Secretary by FLPMA[241] without unduly interfering with administrative action.

The policy enunciated in section 102(a)(6), as interpreted herein, may provide for judicial review of cases which a court applying the *Ness* principles[242] would decline to review for lack of jurisdiction. Where agency action is committed to agency discretion by law, a court applying the *Ness* principles cannot justify review unless it can apply relevant statutes, regulations, or other legal mandates.[243] An appellant who is unable to allege violation of a law, but can point to inconsistent agency action in the grant or denial of a permit, for example, will likely be denied review by a court applying the *Ness* principles, but may obtain such review under the policy of section 102(a)(6).[244] In this regard, the policy of section 102(a)(6) may represent a departure from the Ninth Circuit's practice of review of Department decisions.

The invitation for review extended by section 102(a)(6) must be accepted cautiously by those courts called upon to review agency action committed to agency discretion. In the absence of reasonably precise standards by which to review such action, a court applying the policy of section 102(a)(6) runs the risk of undue interference in agency administration.[245]

CONCLUSION

As FLPMA marks its third anniversary, it is apparent that the statute has led to few changes in the Department's adjudication procedures. The statute's directive to provide objective administrative review was fulfilled nine years ago when PLLRC made a similar recommendation and the Secretary created the Board of Land Appeals. No regulation implementing the recommendation for third-party participation in adjudication has been forthcoming, although Departmental decisions show some evolution toward the statutory goal. There is

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Second, the conclusion of the court below, that Zweifel did not locate appellants' claims in good faith for mining purposes did not involve a factual inquiry with respect to which courts, because of their relative inexperience in the area, must defer to the expertise of the Interior Department.

Id. at 1156.

Notwithstanding the exceptional nature of the facts in *Zweifel*, the Department's election to go directly to court and the Tenth Circuit's decision represent a considerable departure from the position of the Department and the Supreme Court in *Best*. It remains to be seen whether Zweifel is the beginning of the erosion of the Department's primary jurisdiction on the issue of discovery.

241. *See, e.g.*, 43 U.S.C. § 1713 (1976) (sales); *Id.* § 1716 (exchanges); *Id.* § 1752 (grazing permits and leases); *Id.* § 1761 (rights of way).

242. See text & notes 233-237 *supra*.

243. *See* text & note 235 *supra*.

244. *See* text & note 229 *supra*.

245. *See* Saferstein, *supra* note 239, at 375.

presently a need for the Department to establish hearing procedures for the suspension and revocation of land use permits under section 302(c). Formulation of these hearing procedures should not await ad hoc determination by the IBLA, but should be developed in a rulemaking process providing for widespread participation by the public. FLPMA's policy favoring judicial review arises at a time when courts generally presume agency adjudication to be reviewable. Notwithstanding its hortatory language, section 102(a)(6) may well render the presumption irrebuttable.