RULE-MAKING AS A MEANS OF EXERCISING SECRETARIAL DISCRETION IN PUBLIC LAND ACTIONS

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INTRODUCTION

Government today operates substantially through actions and decisions of its administrative departments and agencies. As the number, size, and scope of Federal agencies has grown, the administrative process has become vast and complex. But basic organizational, operational, and legal problems remain to be solved if the process is to operate as a "system of justice."[1]

President Johnson recently said that the "first principle of democratic government" is "tolerance of the other man's viewpoint."[2] An administrator cannot be tolerant of views he has never received. So a prime requirement where administrative rulemaking affects the rights and privileges of citizens is to provide for public participation.[3]

Administrative law applied to public lands has far to go in meeting modern concepts because it is plagued with "cobwebs" inherited from the past. Exceptional administrative burdens have been caused by the uncoordinated status of the public land statutes. This status was described in 1952 by the House Committee on Interior and Insular Affairs as follows:

> The public land laws are a body of laws which have been enacted from time to time as separate laws without adequate consideration being given to the relationship of the new law or amendment to the prior laws . . . Undoubtedly the process of piecemeal changes of the public land policy and laws of the United States, while fruitful in part, has resulted basically

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[1] Fisk, *Legislation and Administrative Law*, 17 AD. L. REV. 115 (1965).

[2] Remarks at the swearing-in ceremony of Lawrence F. O'Brien at Hye, Texas. 1 WEEKLY COMP. OF PRES. DOCS. 452, 454 (1965).

[3] See Landstrom, *Citizen Participation in Public Land Decisions*, 9 ST. LOUIS U. L.J. 372 (1965).

> in an incongruous land-law system, containing no clear-cut policy to guide the administration of this vast body of laws. Each law enacted is an independent unit containing its own policy which may or may not permit its operation in accord with the policy contained in other laws which may be applicable to the same land . . . .[4]

That the situation had not been rectified as of 1963 is verified in an exchange of correspondence between Chairman Wayne N. Aspinall of the House Committee on Interior and Insular Affairs and the late President Kennedy. Chairman Aspinall invited the President to submit views on legislation in the 88th Congress that "would permit Congress to fulfill its constitutional responsibility to make rules governing the use and disposition of Federal property and at the same time not hamper effective administration of that property . . . ."[5] President Kennedy, concurring that "the system warrants comprehensive revision," stated in part:

> [T]he public land laws constitute a voluminous, even forbidding, body of policy determinations within which the land management agencies must operate . . . Uncoordinated and disjointed and containing conflicts and inconsistencies on the one hand, this statutory framework has relied upon administrative construction in order to serve the needs of orderly management.[6]

This exchange of correspondence was a key element in enactment the following year of Public Law 88-606 establishing the Public Land Law Review Commission.[7] The report of the Commission's study, said the framers of the Act, will be made to the President *and* the Congress. The report, they contemplated, will lead not only to legislative reforms but to administrative reforms as well. The administrative effectiveness of the report will depend mainly upon its persuasive effect upon the Executive Branch; thus the importance of study and research leading to sound administrative as well as legislative recommendations.

Our purpose here is to assist in this line by supplying certain information on the extent to which public rulemaking has been used as a means of exercising administrative discretion in matters dealing with the tenure status of public lands. Some possibilities and limitations of greater use of public rulemaking, compared with case-by-case development of rules, are described.

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[4] H.R. REP. No. 2511, 82d Cong., 2d Sess. 1 (1952).

[5] Letter from Congressman Wayne N. Aspinall to President John F. Kennedy, Oct. 15, 1962, Aspinall, *The Public Land Law Review Commission, Background and Need.* HOUSE COMM. ON INTERIOR & INSULAR AFFAIRS, 88th Cong., 2d Sess. 119 (Comm. Print 1964).

[6] Letter from President John F. Kennedy to Congressman Wayne N. Aspinall, Jan. 17, 1963, Aspinall, *op. cit. supra* note 5, at 120, 121.

[7] 78 Stat. 982 (1964), 43 U.S.C. §§ 1391-1400 (1964).

The power to provide rules and regulations for the disposition of Federal properties clearly resides in the Congress.[8] But it is well recognized that the legislative power of Congress, under appropriate safeguards, may be delegated to administrative departments or agenies.[9]

The complexity and volume of government activities with respect to public land tenure transactions, as in many other contexts, make it impracticable for the Congress to provide in detail for every transaction, or for the courts to pass judicially upon the rights and obligations of citizens in every instance. Hence the need for administrative process, including the administrative exercise of legislative discretion.[10]

Among the expressly delegated legislative powers held by the Secretary of the Interior is the authority to act within certain limits in certain classes of public land matters, or to refuse to act, in the exercise of discretion. The words of delegation in such statutes often state: "The Secretary is authorized to . . . ," or "the Secretary in his discretion is authorized to . . . ." The substance often refers to making lands available, or declining to make them available, for leasing, entry, selection, sale, or exchange for other lands. Until the lands are made available by a discretionary action, most forms of leasing and alienation are barred.

The Secretary cannot be required, for example, to grant title to public land after the high bidder has been declared in a public sale, but before a final certificate has been issued.[11]

As a matter of note, the discretionary authority of the Secretary in such matters has been held to carry with it the implied power to place reasonable conditions or restrictions in the instrument by which the interests in the property are conveyed.[12] For example, the Department's regulations require an applicant for an easement for an electric transmission line of 33 kilovolts or higher to agree to allow the govern-

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[8] U.S. CONST. art. IV, § 3, cl. 2. As used in the property clause, the words "dispose of" do not vest in the Congress the power only to sell property, but also to lease it. United States v. Gratiot, 39 U.S. 526, 538 (1840). The power to dispose of property and make needful rules and regulations, a "trust for the people of the whole country," is not limited to setting aside public lands for settlement, agriculture, or grazing, but includes the establishment and disestablishment of public land reserves and the devotion of property to a national and public purpose. Light v. United States, 220 U.S. 523 (1911).

[9] Yakus v. United States, 321 U.S. 414 (1944); Currin v. Wallace, 306 U.S. 1 (1939); Hampton v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911).

[10] See VAN COTT, ADMINISTRATIVE LAW 1 (1951).

[11] Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

[12] Board of Commissioners, City and County of Denver, A-27748 (1959); Southern Calif. Edison Co., 71 I.D. 405 (1964).

ment to use any surplus capacity of the applicant's entire line and interconnection facilities, and to increase the capacity of the line and facilities at government expense.[13] Similarly, the oil and gas regulations direct that no leases will be issued on certain classes of lands, and that certain restrictions and conditions shall be applied to leasing on other classes. These regulations have been upheld as a valid exercise of Secretarial discretion.[14] A regulation requiring that an offer for a noncompetitive oil and gas lease must include not less than 640 acres,[15] with certain exceptions, has been upheld as a reasonable exercise of discretion.[16]

Delegated legislative authority, of course, is not the only class of authority available to the Secretary under which choices from among alternative administrative determinations may be made.[17] For analytical purposes, Secretarial authority to make determinations may be classified under three headings: (1) legislative discretion, as described above, (2) interpretative discretion, and (3) procedural discretion.[18] In this formulation, Departmental rules may be classified as (1) legislative rules, (2) interpretative rules, and (3) procedural rules. In actual practice the various kinds of rules are mixed together.

Legislative rulemaking, thus distinguished, carries with it an important connotation not generally applicable to the other classes. This is that acts committed to agency discretion are not subject to judicial review.[19] Among the statutes granting to the Secretary the authority to exercise legislative discretion are the following:

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[13] 43 C.F.R. § 2234.4-1(c)(5) (1965).

[14] *Validity of Regulations Relating to Oil and Gas Leases on Wildlife Refuges, Game Range and Coordination Lands,* 65 I.D. 305 (1958); Hunt Petroluem Corp., A-30131 (1964).

[15] 43 C.F.R. § 3123.1(d) (1965).

[16] W. H. Burnett, William Weinberg, A-28037 (1959).

[17] A comprehensive listing of authorizations under which the Secretary of the Interior, as of 1957, might issue regulations pertaining to public land matters is contained in STAFF OF HOUSE COMM. ON GOV'T OPERATIONS, 85th Cong., 1st Sess., SURVEY AND STUDY OF ADMINISTRATIVE ORGANIZATION, PROCEDURE AND PRACTICE IN THE FEDERAL AGENCIES, Pt. 5—Department of the Interior 525-527 (Committee Print 1957) [hereinafter cited as SURVEY AND STUDY].

[18] The terms "legislative rules" and "interpretative rules" are used here in the sense accorded to them in 1 DAVIS, ADMINISTRATIVE LAW 358 (1958). The term "procedural rules" is added as a means of reference to rules, not falling in the above two classes, which are administratively established to supplement any procedures specified in the statutes. A classic example of a major body of interpretative rules derived from administrative public land decisions relates to the U. S. mining laws, especially the "rule of discovery." See generally Landstrom, *Administration of the Mineral Patent Laws,* NINTH ANNUAL ROCKY MT. MIN. L. INST. 67, 72-78 (1964); Twitty, *The Erosion of the Law of Discovery,* A.B.A. PROCEEDINGS, SECTION ON MINERAL AND NATURAL RESOURCES LAW 138 (1962).

[19] The diversified activities of executive and administrative agencies that are committed to their discretion or that do not impinge on private rights remained unaffected by the provisions of the A.P.A. Snyder v. Buck, 75 F. Supp. 902 (D.D.C. 1948), *vacated on other grounds,* 179 F.2d 466 (D.C. Cir. 1949), *aff'd,* 340 U.S. 15 (1950). Generally, agency action which is by law committed to agency discretion

1. The Recreation and Public Purposes Act, authorizing the the lease or sale of certain classes of Federal lands for recreational and public purposes.[20]
2. Various statutes authorizing the right-of-way permits across Federal lands.[21]
3. Section 8(b) of the Taylor Grazing Act, authorizing exchanges of public lands for privately owned lands.[22]
4. Various statutes and other authorities providing that public lands may be "temporarily" or "permanently" withdrawn or reserved from settlement, location, sale, or entry.[23]
5. Section 7 of the Taylor Grazing Act, authorizing the classification and opening to entry, selection, or location of certain classes of public lands which are (a) more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants; or (b) more valuable or suitable for any other use than providing for protection, orderly use, improvement, and development of the range; or (c) proper fr transfer to satisfy outstanding rights or grants.[24]
6. Section 1 of the Classification and Multiple Use Act, authorizing the Secretary to determine which of the public lands and other Federal lands exclusively administered by him through the Bureau of Land Management shall be (a) sold because they are required for community growth or are chiefly valuable for residential, commercial, agricultural, industrial, or public uses; or (b) retained, at least during a temporary period, in Federal ownership.[25]
7. The Mineral Leasing Act, authorizing the issuance of leases and permits for gas, oil, and certain other minerals.[26]

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is not judicially reviewable, although this rule will be qualified to permit review of fundamental jurisdictional constitutional issues. An action which merely denies a governmental benefit may more properly be held unreviewable than one which denies a vested property right or imposes a substantial obligation or burden. Hamel v. Nelson, 226 F. Supp. 96 (N.D. Cal. 1963).

[20] 48 Stat. 741 (1926) as amended, 43 U.S.C. §§ 869-869-4 (1964).

[21] Among such statutes are: 28 Stat. 635 (1895), 43 U.S.C. § 956 (1964) pertaining to rights-of-way for tramroads and logging roads; 26 Stat. 1101 (1891) as amended, 43 U.S.C. § 946 (1964) pertaining to rights-of-way for irrigation and drainage purposes; 31 Stat. 790 (1901), 43 U.S.C. § 959 (1964) pertaining to rights-of-way for telephone and telegraph lines, pipe lines, canals, and certain other purposes; 36 Stat. 1253 (1911) as amended, 43 U.S.C. § 961 (1964) pertaining to rights-of-way for electrical power lines and communications facilities; and 41 Stat. 449 (1920) as amended, 30 U.S.C. § 185 (1965) pertaining to rights-of-way for oil and gas pipe lines and pumping plants.

[22] 48 Stat. 1272 (1934) as amended, 43 U.S.C. § 315g (1964).

[23] Citations to authorities, limitations, and exceptions pertaining to withdrawals and reservations of public lands are given in 43 C.F.R. § 2311.0-3 (1965). The terms "temporarily" and "permanently" in reference to withdrawals and reservations do not necessarily connote anticipated passaged of time before the action may be modified or revoked. They connote the relative degree of finality of current Departmental action with respect to land tenure status. 47 I.D. 361, 363 (1920); 60 I.D. 54, 57 (1947).

[24] 48 Stat. 1272 (1934) as amended, 43 U.S.C. § 315f (1964).

[25] 78 Stat. 986 (1964), 43 U.S.C. § 1411 (1964).

[26] 41 Stat. 437 (1920) as amended and supplemented, 30 U.S.C. § 181 *et seq.* (1964).

Citizens coming into contact with public land actions for the first time sometimes express amazement at the far-reaching extent of the discretionary powers of the Department. Critics have referred to similar powers in other contexts as unwarranted delegations from the legislative branch.[27] Departmental officials, however, have not ordinarily regarded the delegations as either excessive or requiring more specific statutory standards.[28]

The fact is that the Department has authority to resort to either public rulemaking or case-by-case adjudication in applying broad legislative discretion in public land tenure matters. This fact is not likely to be changed in any short period of time. The question raised here is whether greater exercise of legislative powers through public rulemaking is feasible and whether it would be desirable.

Rulemaking Requirements

The major statutory delegations to the Department of legislative discretion affecting public land tenure transactions date mainly from 1920 (the Mineral Leasing Act) and 1934 (the Taylor Grazing Act), antedating the Administrative Procedure Act[29] by some years. These statutory authorizations at first were exercised personally at the Secretarial level. For example, each lease issued under the Mineral Leasing Act for some time was personally approved by a member of the Secretariat. Now most mineral leasing and land classification actions may be finally approved by career employees working in local offices, absent appeal or request for administrative review. Administration of myriad duties in large numbers over a wide territory would be impossible without delegations to field officials.

The grazing provisions of the Taylor Act, in contrast with its land classification provisions, were carried into effect mainly through public rulemaking, although many of the rules were later extended or modified by case decisions. The "Federal Range Code" was drafted by the first administrators of the Act, based heavily upon the "Use Book" of the Forest Service, which had been originally published in 1907. A distinctive feature of the Code was its establishment of grazing district ad-

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[27] See, *e.g.*, Davis, Administrative Law Text 20-24 (1960).

[28] In 1956, the House Government Operations Committee asked a number of Federal agencies to state, among other things: "Where matters are left to agency discretion, are there any areas in which you believe greater statutory specification of standards would be desirable?" The Department of the Interior's reply with respect to the Bureau of Land Management stated: "No matters left to agency discretion in the field of adjudication have been encountered which are believed to need greater statutory specification of standards." Survey and Report, *op. cit. supra* note 18, at 583.

[29] 60 Stat. 237 as amended (1946), 5 U.S.C. §§ 1001-1011 (1964).

visory boards, later engrafted into the statutes as a mandatory feature.[30]

Before the A.P.A. was enacted, decisions of the United States Supreme Court left to administrative agencies the choice whether administratively-devised legislative rules would be applied by (1) issuing rules in advance, or (2) establishing precedents in case-by-case adjudication.[31] Behind the mandatory rulemaking provisions of the A.P.A., however, were assumptions that greater use of agency rulemaking powers would be desirable and would not voluntarily take place.[32] The A.P.A. has been in effect for nearly two decades. But the extent to which rulemaking is employed by Federal agencies generally is still considered by many to be insufficient.[33]

The A.P.A. by its own terms excepted public property and certain other matters from its rulemaking requirements.[34] Hence, the extent to which the Secretary of the Interior follows the A.P.A. rulemaking procedures in issuing rules concerning public land matters is a matter of discretion. The Department has long followed a voluntary practice of proposing public land regulations through notices published in the Federal Register. Comment is allowed by any person. This practice

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[30] See McGowen, *Cowboy Joe, Administrator,* 11 U. WYO. PUBLICATIONS 65 (1944).

[31] American Power and Light Co. v. S.E.C., 329 U.S. 90 (1946); S.E.C. v. Chenery Corp., 318 U.S. 80 (1943).

[32] See *Hearings Before the Subcommittee on the Study of S. 674, S. 675, and S. 918, of the Senate Committee on the Judiciary,* 77th Cong., 1st Sess. (1941).

[33] After a study applicable to certain Federal agencies, not including the Department of the Interior, the Committee on Agency Rule Making of the A.B.A. Section of Administrative Law concluded in part as follows:

> 1. Very little attempt has been made by the administrative agencies studied to conform their substantive rule-making procedures by consultation among agencies. . . .
> 2. Insufficient notice is given to the public by agencies issuing important rules before the rules are promulgated. . . .
> 3. The agencies do not adequately codify their statements of policy and their interpretative rules. . . .
> 4. In most instances only paper filings are permitted. . . .

A.B.A. Admin. Law Section, Comm. on Agency Rule Making, *1963 Report,* 16 AD. L. REV. 302, 321-23 (1964).

In the same year the Administrative Law Section adopted a resolution concluding that administrative agencies should (1) "as fixed policy" prefer and use rulemaking to reduce case-by-case adjudication, (2) codify established precedent, and (3) promulgate as rules or statements of policy any general principles enumerated in specific cases. Fisher, *Rule Making Activities in Federal Administrative Agencies,* 17 AD. L. REV. 252 (1965). The Chairman of the Committee on Agency Rule Making wrote, in 1965, however, that "to generalize that agencies should utilize rule making rather than adjudication wherever possible is not only bad policy, but more important fails totally to take into account the complexities of the administrative process and the conflicting policy considerations." Fisher, *supra,* this note, at 252.

[34] 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1964). See Wade McNeil *et al.,* 64 I.D. 423 (1957). Under certain pending legislation proposing revision of the A.P.A., the public-property exemption from rulemaking requirements would be eliminated. S. 1336, 89th Cong., 1st Sess. Under other pending legislation, the exemption would be retained. S. 1879, 89th Cong., 1st Sess.

of the Department has been formally described as follows:[35]

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

Extent to Which Legislative Discretion Has Been Exercised in Public Land Regulations

Some of the more significant issuances of regulations partially exercising delegated legislative discretion concerning the tenure of public lands are listed as follows:

1950: Policy and criteria for road right-of-way permits across "O. & C." and "Coos Bay" lands in Oregon; 15 Fed. Reg. 1971.

1951: Common carrier stipulation for natural gas pipeline rights-of-way; 16 Fed. Reg. 7570.

1952: Special stipulations for mineral leases for lands under jurisdiction of the Department of Agriculture and lands in reclamation projects; 17 Fed. Reg. 5566. Policy and criteria for road right-of-way permits across public lands; 17 Fed. Reg. 5569. Terms and conditions for rights-of-way other than for railroads and logging roads on "O. & C." and "Coos Bay" lands in Oregon; 17 Fed. Reg. 5896. Criteria and standards for withdrawals and reservations of public lands; 17 Fed. Reg. 7368. Provision for government use of surplus capacity of holders of power-transmission line rights-of-way; 17 Fed. Reg. 9825.

1953: Common carrier stipulation for oil pipeline rights-of-way; 18 Fed. Reg. 2953. Sales, leases, or permits to trespassers prohibited under certain circumstances; 18 Fed. Reg. 4913.

1954: Conditions to be attached to sales and leases under the Recreation and Public Purposes Act; 19 Fed. Reg. 9121.

1957: Further criteria and standards for withdrawals and reservations of public lands; 22 Fed. Reg. 6614. Terms and conditions for leases, permits and easements for public works; 22 Fed. Reg. 6614.

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[35] Letter from Assistant Secretary of the Interior, D. Otis Beasley, to Senator James O. Eastland, July 8, 1965, *Hearings on S. 1160 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 426 (1965).

1958: Criteria for oil and gas leasing of wildlife refuge, game range, and coordination lands; 23 Fed. Reg. 227, 12352. Anti-discrimination condition for sales and leases under Recreation and Public Purposes Act; 23 Fed. Reg. 227.

1959: Standards for recreational use of "O. & C." and "Coos Bay" lands in Oregon; 24 Fed. Reg. 7873. Billboard control provision for public-works, recreation and public purpose, and special land-use permit regulations; 24 Fed. Reg. 8649.

1962: Program and criteria for sales of lands to residential occupants of unpatented mining claims; 27 Fed. Reg. 12368.

1963: Provision for government use of surplus capacity of holders of power-transmission line rights-of-way; 28 Fed. Reg. 2906. Policy and criteria for land classification; 28 Fed. Reg. 3352.

1964: Program and criteria for acceptance of gifts of land under certain authorities; 29 Fed. Reg. 4355.

1965: Program policies for public land disposal and management; 30 Fed. Reg. 12913. Criteria for sales of public lands; 30 Fed. Reg. 12914. Revised criteria for land classification and segregation; 30 Fed. Reg. 12916.

The cumulative extent to which legislative discretion has been exercised to date by means of regulations is reflected in the following summaries of sample current land tenure regulations:

1. *Recreation and public purposes.*[36] Title will not be granted and use will not be permitted unless the land has been classified as (a) suited for the purpose applied for, (b) not needed for any other public purpose, and (c) not more suitable for other use. Classification for lease or sale may be made only for established projects, or for proposed projects duly authorized. Established billboard—control standards must be applied, or the Departmental officer in charge may impose a higher standard. Leases must contain (a) terms and conditions required by law, public policy, and Departmental procedure, and (b) conditions which the Departmental officer or the administering agency considers necessary for land development, protection of Federal property, and protection of the public. Patents must contain a reverter which would be activated by (a) attempted transfer of title or diversion of land use without consent of competent authority, or (b) discrimination in employment. The general land classification regulations apply. (See below.)

2. *Rights-of-way.*[37] Specified terms and conditions apply to all classes of permits unless waived by the Secretary in a particular case. Permittees must consent: (a) to

[36] 43 C.F.R. Subpart 2232 (1965).
[37] 43 C.F.R. § 2234.4 *et seq.* (1965).

clear the lands and dispose of materials as the local officer may specify; (b) to take resource conservations as requested; (c) to engage in fire prevention and suppression as requested; (d) to provide replacements for destroyed roads, fences, and trails; (e) upon abandonment, to restore the land to the satisfaction of the local officer; (f) not to discriminate in employment because of race, creed, color, or national origin; and (g) to comply with additional conditions that may be imposed in the individual case. Regulations applicable to rights-of-way for tramroads and logging roads over "O. & C." and "Coos Bay" lands require a private logging operator, if judged necessary by the authorized officer, to grant to the United States reciprocal rights-of-way across the applicant's lands. Examples of situations requiring reciprocal grants are provided. Guidelines are provided for such matters as: (a) location and extent of use to be made of reciprocal rights-of-way; (b) rate of compensation for use of constructed roads; (c) resource conservation measures; and (d) non-discrimination provisions.

3. *Land classification.* Regulations implementing the Classification and Multiple Use Act, and consolidating regulations under Section 7 of the Taylor Grazing Act and other statutes, became effective October 7, 1965.[38] Rules are provided pertaining to: (a) pricing policy;[39] (b) criteria for land classification;[40] (c) criteria for retention of lands in Federal ownership for disposal;[41] and (d) criteria for temporary segregation of lands from operation of the public land laws.[42]

4. *Mineral Leasing Act.* Consent of offerors is required to stipulations intended to protect the surface resources of lands administered by the Department of Agriculture and lands withdrawn for reclamation, for power purposes, or as game ranges, fish and wildlife coordination lands, and Alaska wildlife areas.[43] Exclusions, limitations, and conditions are specified with respect to oil and gas leasing of wildlife refuge, game range, and wildlife coordination lands.[44]

Relation of Public Rulemaking to Adjudication

Historical analysis of the growth of regulations containing discretionary rules for public land matters is difficult because the subject

[38] 43 C.F.R. Subparts 1725 and 2410, 30 Fed. Reg. 12913, 30 Fed. Reg. 12916 (1965).
[39] 43 C.F.R. § 1725.2-1, 30 Fed. Reg. 12913 (1965).
[40] 43 C.F.R. § 2410.1-1, 30 Fed. Reg. 12918 (1965).
[41] 43 C.F.R. §§ 2410.1-2 and 2410.1-3, 30 Fed. Reg. 12918 (1965).
[42] 43 C.F.R. § 2410.1-4, 30 Fed. Reg. 12919 (1965).
[43] 43 C.F.R. § 3103.2 (1965).
[44] 43 C.F.R. § 3120.3-3 (1965).

matter is complex and the evolution has taken place over an extended period. Until relatively recent times, however, the Department's regulations were almost devoid of such rules. The formal exercise of discretion in prospective terms was generally denied by preoccupation with the disposition of individual cases and the issuance of internal directives.[45] Formal opportunity for public participation was not generally supplied when a change in the direction of legislative discretion was proposed.

So far as Bureau of Land Management activities are concerned, subjects in which regulations containing discretionary rules have not been substantially provided include:

1. Criteria, such as economic considerations, related to the withholding of lands from mineral leasing (except oil and gas leasing on certain classes of lands);
2. Criteria related to the withholding of rights-of-way and special land-use permits (except permits for advertising displays);
3. Surface-conservation conditions to be inserted in oil and gas leases (except leases on certain classes of lands);
4. Title restrictions running with the land to be inserted in patents for the benefit of the grantees or for public benefit, such as "scenic easements";
5. Public-interest considerations affecting the authorization of exchanges for private lands;[46]
6. Standards for the approval of withdrawals and reservations;
7. Locational and mineral-economic considerations related to mineral leasing on the Outer Continental Shelf; and
8. Criteria related to the use of public recreational sites (except on "O. & C." lands).

Uncounted numbers of interpretative and procedural rules, established in case decisions and inter-office correspondence, exist without having been incorporated into the regulations. A technician's manual, for example, prepared in a local office of the Bureau of Land Management, indexes over 1,000 interpretative and procedural items, citing over 700 cases and other authorities, under the heading "General Mining Laws."[47]

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[45] The traditional "internal directive" concept of administrative guidelines is illustrated in remarks of Edward Woozley, former Director of the Bureau of Land Management, in a colloquy with Congressman Al Ullman. *Hearings on H.R. 7042 before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs*, 86th Cong., 1st Sess. 28-29 (1959).

[46] The current regulation directly pertaining to land exchanges under section 8(b) of the Taylor Grazing Act states: "Whether [a private] exchange will benefit the public interest shall be determined by the officer authorized to act." 43 C.F.R. § 2441-1(a) (1965). Other regulations provide applicable general criteria for land classifications, including the following provision: "Lands may be classified for exchange under appropriate authority where they are found to be chiefly valuable for public purposes because they have special values, arising from the interest of exchange proponents, for exchange for other lands which are needed for the support of a Federal program." 43 C.F.R. § 2410.1-3(c)(4) (1965).

[47] U.S. Bureau of Land Management, State Office, Sacramento, Cal., Minerals Field Manual, Subject Index for General Mining Laws [c. 1964].

RULEMAKING BY "POLICY" PRONOUNCEMENTS

Resort has sometimes been had to informal "policy" pronouncements having the effect of formally exercised legislative discretion. Such announcements at times have appeared as press releases. For example, a release was issued in 1958 by the Director of the Bureau of Land Management describing "BLM desert land policies."[48] The release stated that "poor soil" and "insufficient water" might be considered reasons that would warrant refusal to classify lands as more suitable for agriculture than for other uses. Similarly, in 1958 an "anti-speculation policy"[49] was announced. Under it, discretionary authority to order land into market under the provisions of R.S. 2455[50] was not to be used where it was known, before a final certificate had been issued, that competition in bidding had been retarded by collusion among bidders or by abuse of statutory preferences.[51]

Some students of administrative law are favorably inclined to policy statements. For example, Judge Friendly has written:

> Even if the power to make rules is plain, the policy statement may still be preferable when the principle does not lend itself to, or is not ripe for, precise articulation, or when the agency desires to retain some freedom to modify its views without the formalities prescribed by the Administrative Procedure Act for rules having the force of law.[52]

Policy determination by press release has continued in the Department of the Interior. For example, in 1961 a "public land conservation policy" was announced.[53] The Director of the Bureau of Land Management subsequently issued internal instructions to carry out the policy.

Later in the same year a further "land conservation policy" was announced. Under it lands would not be classified as more valuable for agriculture than for other uses where irrigation from ground water was contemplated and the available water was being depleted.[54] Another announcement set the price at which State and local governments could purchase park lands at $2.50 per acre.[55] The substantive policies originally established in these releases were later mainly incorporated into the regulations.[56]

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[48] Press release of September 19, 1958.
[49] Press release of February 23, 1960.
[50] 43 U.S.C. § 1171 (1964).
[51] This "policy" was incorporated with supplementary materials into the Bureau of Land Management Manual on May 2, 1960.
[52] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 1297-98 (1962).
[53] Press release of February 14, 1961.
[54] Press release of September 24, 1961.
[55] Press release of May 31, 1961.
[56] See 43 C.F.R. Subpart 2410, 30 Fed. Reg. 12916-19 (1965).

Other informal means traditionally used by Departmental officials in publicly communicating intentions concerning the use of delegated legislative discretion include speeches, articles, statements in meetings of advisory boards, and reports made or testimony presented to Congressional committees. Views reflecting citizen opinions resulting from such expressions take many forms as they affect or influence subsequent actions.

SHOULD PUBLIC RULEMAKING BE EXTENDED?

Secretary Udall has pointed out that great leadership in enacting conservation legislation is not in itself enough:

> [T]his leadership needs equally strong citizen participation if we are to implement the laws which now mark the trail . . . . [L]andmark legislation—especially when there is a torrent of it—must be "bird-dogged" by a concerned citizenry. Creative legislation still requires creative shepherding . . . .[57]

Planning for natural resources which generate administrative alternatives must be accompanied by broad public discussion. It must be conducted responsibly, bringing out values that all segments of society place upon the uses involved—production of minerals, foods, and fibers, generation of electricity, provision of recreation and wilderness values, and others.

Public rulemaking within the spirit of the A.P.A., voluntarily employed, offers an effective route for citizen participation as new public land statutes are implemented and administrative precedents under old statutes are codified and revised. The people need and demand a voice in administrative rulemaking. They are entitled to the orderliness and stability provided where feasible by formally stated legislative, interpretative, and procedural rules in the development of administrative decisions and the conduct of administrative affairs.

But rulemaking is no panacea. And some who have criticized failures to substitute rulemaking for adjudication as a means of applying decisions to public land matters may have exaggerated the significance of the alternative choice.[58]

One advantage of rulemaking is that it is conducted in the light of public knowledge. The citizen's "right to know" is preserved. But the course of least resistance is to await the cases before procedures are devised, interpretations are made, or discretion is applied.[59] An-

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[57] Address by Secretary of the Interior Stewart L. Udall before U.A.W., A.F.L.-C.I.O., Detroit, Mich., Nov. 6, 1965.

[58] A comprehensive discussion of this general problem as it relates to the so-called "administrative agencies" is given in Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

[59] See Beelar, *Procedural Essentials for Agency Lawmaking*, KRISLOV AND MUSOLF, THE POLITICS OF REGULATION 199-204 (1964).

other advantage is that the problems of "standing"[60] and of *ex parte* communication are avoided.[61]

The limitations and weaknesses of rulemaking tend to vary under different situations. The methods used to bring about Secretarial control of land tenure case decisions have much to do with the effectiveness and acceptability of the decisions themselves. If Secretarial determinations are weak or incomplete, subordinate officers may misinterpret or misapply statutory or administrative policy, use inefficient or wasteful procedures, or engage in arbitrary acts. But if Secretarial determinations are strong or excessive, subordinate officers may lack opportunity to apply expertness or provide flexibility to meet individual conditions.

To interpret doubtful meanings and to prescribe procedures is one thing. To exercise legislative discretion in advance of evidentiary facts is another. The needs of the parties in land tenure cases not yet present are not always evident to those attempting to formulate standards in advance. Some think, in fact, that institutional "policy" can be made only concurrently with execution.[62]

Also, we must realize the limitations of top management in matters of technical or geographic detail. Nor is the head of the agency alone in his subjection to external forces that would shape the way in which he would exercise discretion. Administrators at subordinate levels are likewise "enveloped by a matrix of contending policy initiators."[63] The need to allow subordinates a chance to exercise certain kinds of discretion may outweigh the need to exercise it at the top level. Decision-making is not a science but an art. Hence a top-level official should confine himself to fairly general guidance, leaving flexibility for particular decisions to be made where the time, knowledge, and expertise exist.[64]

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[60] Standing of any person to intervene in a public land case before the Bureau of Land Management has long been granted by regulation, but the privilege is not widely known or understood. Any person may object to any administrative action proposed to be taken in the Bureau. 43 C.F.R. § 1852.1-2 (1965). If the protest is dismissed, it is appealable to the Director of the Bureau and to the Secretary of the Interior. 43 C.F.R. Subparts 1842-44 (1965).

[61] Relatively few public land adjudication cases fall within the category of "on-the-record proceeding," concerning which the Administrative Conference of the United States has recommended agency codes of behavior to avoid ex parte contacts with persons outside the agency. S. Doc. No. 24, 88th Cong., 1st Sess. 169 (1963). In "contests" affecting the validity of private claims in public lands, no decision by a Departmental officer may be based on any material which is not open to inspection by the parties to the contest. 43 C.F.R. 1850.0-8(a)(4) (1965).

[62] See Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79-88 (1959).

[63] See BOYER, BUREAUCRACY ON TRIAL 67 (1964).

[64] See Appleby, *Reflections on Institutions and Their Ways*, PUBLIC ADMINISTRATION AND DEMOCRACY 2, 23 (1965); see also Appleby, *Public Administration and Democracy*, *id.* at 333, 342-45.

Part of the answer must be in the ability of different people to exercise discretion available within the statutes and regulations more or less according to practical needs as they arise. Ultimately much of this must be done through individual actions. Related to this but not fully understood is the extent to which the head of a department may become unmanageably bound by legislative rules once they have been issued as regulations.

It is worthy of note, on the one hand, that the doctrine of stare decisis is not generally applicable to case decisions of administrative tribunals.[65] When an administrative agency "creates law" by means of adjudication it generally retains power to make a reversal of doctrine in deciding a later case.[66] Stare decisis is not generally applicable to discretionary or procedural rules inferred from public land adjudications. Prior statutory interpretations cannot be thoroughly relied upon.[67] But, on the other hand, after the agency issues formal rules it may have lost its power to reverse the legislative discretion and procedures committed therein in a case begun thereunder.[68] Within the Department of the Interior, the device ordinarily used when a minor procedural requirement of the regulations bars an otherwise valid action is a Secretarial "waiver."[69] But whether the Secretary has the power to waive a major procedure or a rule of legislative discretion is not certain.

Actually, rulemaking on the one hand, and adjudication on the

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[65] Kentucky Broadcasting Corp. v. F.C.C., 174 F.2d 38 (D.C. Cir. 1949).

[66] N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2d Cir. 1963).

[67] See Letter, Administrative Assistant Secretary, D. Otis Beasley, to Congressman William L. Dawson, May 23, 1957, SURVEY AND REPORT, *op. cit. supra* note 18, at 585:

> The doctrine of stare decisis is followed in adjudication in the Bureau of Land Management and in decisions of the Director without distinction as to classes of cases. However, prior decisions may not be followed if distinguished on facts or law, or where an established interpretation of law is erroneous. Departure also may be made where policy or public interest requires.

[68] *E.g.*, where a regulation provides that the rates charged for a right-of-way across public lands may be revised only after notice and an opportunity for hearing, it has been held to be improper to increase the rates without following such procedure even though the statute delegating authority to fix the rates did not require notice and opportunity for hearing. Texas Gas Transmission Corp., A-29856 (1964).

[69] The waiver rule, as applied to public land cases, has not been codified in the regulations or Departmental Manual but has been officially stated as follows:

> Existing rules are generally modified, amended, or repealed, or suspended by the general rule-making process. However, in particular cases, where equity so dictates, compliance with a rule may be waived by the Secretary, providing no rights of third parties intervene, no loss or injury will result to the United States, and no law has been violated, and providing rights and privileges are not diminished thereby. These instances generally involve noncompliance with technicalities where compliance with the regulations is otherwise substantial.

Letter from Administrative Assistant Secretary, D. Otis Beasley, to Congressman William L. Dawson, May 23, 1957, SURVEY AND REPORT, *op. cit. supra* note 18, at 523, 529.

other, are not mutually exclusive. Both approaches may, and perhaps must, be relied upon simultaneously by those in charge of public land administration. The solution lies in pursuing both rulemaking and adjudication within their respective spheres, but managing both within an integrated system which will meet the needs of an effective and a just administration.

Summary and Conclusions

As the study of the Public Land Law Review Commission proceeds, increasing attention will be given not only to the system of public land laws but to the system of land-law administration. Good and effective administration of the public land laws is less glamorous than good and effective legislation. It is a prosaic, demanding, even exasperating job. But only through good administration can the will of the people, translated through legislation, be realized in a manner consistent with democratic process.

Public participation in public land decision making, distinguished from participation by parties at interest, has been thought by some to be largely lacking.[70] Others think that citizen participation is much more common.[71] In any avent, the procedural arrangements for citizen participation are now more fully developed than at any time in history.

The rulemaking provisions of the A.P.A., although not directly applicable to public land matters, provide a conceptual procedural standard applicable to the making of administrative rules in public land matters. This standard has been followed to an increasing degree by the Department of the Interior. We think a continued trend will give many kinds of benefits, such as (1) more uniformly and accurately applying the policies embodied in the statutes; (2) allowing greater public participation in establishing legislative, interpretative, and procedural rules; (3) more directly and openly applying the policies of Secretarial officers; (4) simplifying case adjudications; and (5) reducing costs of administration.

At the same time some detriments may be incurred. There is no certainty that the recent trend toward greater use of public rulemaking in public land tenure matters will be continued in the Department of the Interior. Much will depend on the degree of success with which the recently issued regulatory standards for land classification[72] are applied to cases and actions. More will depend on the findings and recommendations of the Public Land Law Review Commission con-

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[70] See Reich, Bureaucracy and the Forests 13 (1962).
[71] See Landstrom, *Citizen Participation in Public Land Decisions*, 9 St. Louis U. L.J. 372, 373 (1965).
[72] See note 40, *supra*.

cerning the administrative aspects of public land management.

Many ups and downs have occurred in the long history of public land administration—too many to allow us the comfort of presuming that greater use of public rulemaking will necessarily provide substantial solutions to the exercise of delegated legislative discretion in public land matters. But progressive management is the watchword we advise. We want to assure that public land tenure decisions continue toward achieving worthwhile goals. We want to assure an efficient, economical operation. And the administrative system must correspond to the best traditions of a democratic society.

This is a large order. It calls for creativity. There is much unfinished work ahead.