THE PUBLIC PARTICIPATION REQUIREMENTS OF THE FEDERAL LAND POLICY AND MANAGEMENT ACT

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The Federal Land Policy and Management Act [FLPMA][1] initiates a new era for the Bureau of Land Management [BLM]. The Act statutorily affirms the existence of the BLM which was created by Executive Reorganization in 1946[2] and long ignored by both Congress and the general public. After three decades during which the BLM's authority over land being held "pending disposition" was drawn from more than 3,000 statutes, Congress committed the government to retaining the remnants of the public domain in federal ownership and authorized the BLM to manage the approximately 350 million acres of public lands to achieve "multiple use values."[3] The new legislation is thus a significant departure from previous land disposition statutes and policies. The impact of this statute, however, is far from clear.

The BLM comes of age in a period when standards for administrative programs are often vague. In the major statutes of this environmental decade, Congress has focused on defining agency decision making procedures. Accordingly, while FLPMA gives the BLM clear and needed authority in many areas such as real estate management,

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1. 43 U.S.C. § 1701-1782 (1976).
2. Reorg. Plan No. 3 of 1946, 3 C.F.R. 1065-73 (1943-1948 Compilation), *reprinted in* 5 U.S.C. app., at 726 (1976) *and in* 60 Stat. 1097 (1946).
3. 43 U.S.C. § 1732(a) (1976). *See* 16 U.S.C. § 528 (1976).

finance, and land use inventories, it provides little substantive guidance. Congress failed to establish priorities for accommodating and balancing competing land uses and failed to give precise directions in administrative procedure and land use planning. These ambiguities are central to implementing the policies underlying the Act, to the BLM's daily routine, and to judicial review of agency activities.

This article will focus on the BLM's new public involvement mandate which requires public participation in management decisions.[4] Citizen participation is, however, neither a new aspect of BLM activities, nor a new problem to the Bureau. Concern with the BLM's relationship with citizen advisory boards is probably the most familiar focus of public attention to public lands issues.[5] Critics fault the BLM for failing to follow established administrative procedures in its legislative and adjudicative functions. The BLM, like many other agencies, is often criticized for its cumbersome rules, for its refusal to adopt rules on many policy matters, and for the undue influence of traditional public land users.[6] These problems were reflected in the Public Land Law Review Commission's [PLLRC] recommendations calling for increased utilization of rules and regulations,[7] for adjudication procedures assuring third-party participation,[8] for objective administrative review of initial decisions,[9] for state and local government coordination,[10] and for public participation.[11] Congress responded to these criticisms in FLPMA by including both general and specific public participation and other administrative procedure requirements.

The public participation and administrative procedure requirements of FLPMA are significantly different from similar requirements found in congressional enactments in the 1940's, 50's, and 60's. They are based on the explicit assumption that increased public involvement will lead to improved decisions and on the implicit assumption that ill-defined and frequently conflicting policy goals can be met if proper procedures are followed. These assumptions are not unique to FLPMA; they underlie many recent statutes and the public involve-

4. 43 U.S.C. § 1739(e) (1976).
5. *See* P. FOSS, POLITICS AND GRASS 140-70 (1960).
6. *See generally* McCarty, *A View of the Decisionmaking Process within the Department of Interior*, 19 AD. L. REV. 147 (1966); Strauss, *Mining Claims on Public Lands: A Study of Interior Department Procedures*, 1974 UTAH L. REV. 185; Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787 (1973).
7. *See* PUBLIC LAND LAW REVIEW COMMISSION, ONE-THIRD OF THE NATION'S LAND 251 (1971).
8. *See id.* at 253 (Recommendation 109).
9. *See id.* at 256 (Recommendation 110).
10. *See id.* at 61 (Recommendation 13).
11. *See id.* at 57 (Recommendation 11).

ment programs of other agencies.[12] This new emphasis on direct public involvement has created problems both for the agencies and for courts reviewing agency activities. These problems stem largely from Congressional failure to define goals or parameters for public involvement. Particularly troubling for the courts is Congress' apparent inability to distinguish consistently between traditional Administrative Procedure Act [APA][13] concepts of public participation, which distinguish adjudication from rulemaking and legislative from interpretive rules, and the wide variety of public participation strategies and formats developed and employed in the last fifteen years. Rather, Congress, in FLPMA and elsewhere,[14] directs the broadest possible participation in every decision, but has failed to set clear standards about the nature of participation envisioned or its place in public decision making.

Several major scholarly treatments of the conceptual and procedural morass, suggest that the public involvement movement's impact on administrative law has been and will continue to be profound.[15] Generally speaking, commentators have noted signs in early decisions that the Federal courts will neither continue to adhere to the previously articulated distinction between adjudicative and legislative administrative functions, nor the distinction made in the APA between legislative and interpretive rules.[16] Instead, the courts have looked to whether public participation requirements have been met, rather than the substantive merits of particular cases.[17]

This article focuses on the evolution of new public involvement requirements and criteria in the specific case of the BLM's participation program under FLPMA. The first section reviews the development of public involvement with specific reference to the administration of the public lands. Key assumptions underlying the rush to public involvement are explored in terms of the problems they create for agency decision makers. The agency response is then discussed in the context of evolving criteria for judicial review. Conflicts between traditional judicial approaches to review of agency decisions and recently evolved con-

12. *See, e.g.*, 16 U.S.C. § 1601(c) (1976); 12 U.S.C. § 1715(l) (1976); 16 U.S.C. § 1456(c) (1976). These all include similarly broad public participation mandates.

13. 5 U.S.C. §§ 551-559 (1976).

14. *See* note 12 *supra*.

15. *See generally*, Asimov, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 521 (1977); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978); Williams, *Hybrid Rulemaking under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

16. See Asimov, *supra* note 15, at 521; Robinson, *supra* note 15, at 536; Stewart, *supra* note 15, at 1671; Verkuil, *supra* note 15, at 260; Williams, *supra* note 15, at 403.

17. *See* Stewart, *supra* note 15, at 1688, 1712.

cepts of public involvement are analyzed with an emphasis on scholarly and judicial recognition of the need to revise the APA. The second section describes the range of congressional objectives for public involvement in FLPMA and analyzes their relationship to BLM decisions and programs. Areas where Congress has stated new but unclear criteria for public involvement will be emphasized to illustrate potential problems for the BLM and the courts. The final section considers alternative strategies available to the BLM in responding to these problems in terms of probable judicial reception. The paper concludes that the courts must eschew traditional legal paradigms in reviewing the adequacy of evolving participation methods. Similarly, the BLM must be both specific and realistic in developing regulations regarding public involvement in order to avoid over-proceduralization of decisionmaking.

THE DEVELOPMENT OF PUBLIC PARTICIPATION IN AGENCY DECISION MAKING

History

Public involvement in agency decision making is not a new idea. Throughout our political history, we have developed and adjusted structures for balancing citizen involvement in government decisionmaking with recognized needs both for technical competence and efficiency in administration and for effective leadership. In the nineteenth century, the emphasis shifted from extensive but indirect involvement in administration through the electoral process, characterized by the long ballots and spoils systems of the Jacksonian period, to the good government advocates' concern with administrative independence and non-partisan technical competence of the early twentieth century. Civil Service reforms and the creation of independent regulatory commissions typify the good government era.[18]

Post New Deal reform efforts focused on the need for elected executives to control mushrooming government activities and agencies. Reorganization was championed as a means of increasing responsiveness in government by clarifying agency responsibilities and chains of command.[19] Recently, however, citizens have largely disdained electoral forms of control and despaired of effective leadership, opting instead to participate directly in administrative deliberations.[20]

18. *See* Kaufman, *Emerging Conflicts in the Doctrines of Public Administration*, 50 AM. POLITICAL SCI. REV. 1057, 1068 (1956).

19. *Id.*

20. *See* Fairfax, *The Forest Service and Public Involvement*, 73 J. FORESTRY 657, 659 (1975). *See generally* K. WARNER, PUBLIC PARTICIPATION IN WATER RESOURCE PLANNING (1971); Arnstein, *The Ladder of Citizen Participation*, 35 J. AM. INST. OF PLANNERS 216 (1969); Creighton, *The*

Late 1960's calls for public involvement in government activities were made initially by advocates of the black, the poor, and others outside the political mainstream.[21] The important aspect of these demands was that the new reformers did not want merely to be consulted or to communicate their needs to the government. They wanted to change the system by allowing those affected or likely to be affected by government decisions to be directly involved in the decisionmaking process along with the civil servants and experts. They argued that the experts were inherently unable to understand and respond to the needs and values of the recipients and users, and therefore, the reformers demanded a role in the actual decisionmaking.[22]

1. *Environmentalism, Public Involvement, and the Public Lands.* This demand for public involvement in administrative decision making was elaborated simultaneously with increased public, congressional, and agency concern about many environmental and natural resource issues. In the 1960's and early 1970's Congress confronted a broad range of technical land management policy questions related to issues such as timber harvesting techniques, air and water pollution, energy planning, and pesticide use.

Under pressure from citizen activists, government administrators recognized that traditional public involvement methods no longer would suffice. The environmental movement has been, in general, characterized by unusually explicit procedural goals. Environmentalists have tended to view themselves as a group as outsiders,[23] and have

Limitations and Constraints on Effective Citizen Participation, in AT SQUARE ONE: PROCEEDINGS OF THE CONFERENCE ON CITIZEN PARTICIPATION IN GOVERNMENT DECISION MAKING (1977). The curious situation has even occurred in which one government agency publishes a brochure telling citizens how to get involved in the decisionmaking process of other agencies. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, DON'T LEAVE IT ALL TO THE EXPERTS: THE CITIZEN'S ROLE IN ENVIRONMENTAL DECISION MAKING (1972).

21. *See generally* D. MONYIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY (1969); English, *The Trouble with Community Action*, 32 PUB. AD. REV. 224 (1972); Kaufman, *Administrative Decentralization and Political Power*, 29 PUB. AD. REV. 3 (1969); Miller & Rein, *Participation, Poverty and Administration*, 29 PUB. AD. REV. 15 (1969); Peterson, *Forms of Representation: Participation of the Poor in the Community Action Program*, 64 AM. POLITICAL SCI. REV. 491 (1970); Zimmerman, *Neighborhoods and Citizen Involvement*, 32 PUB. AD. REV. 201 (1972).

22. *See generally* H. PITKIN, THE CONCEPT OF REPRESENTATION (1967); Sewell & O'Riordan, *The Culture of Participation in Environmental Decision Making*, 16 NAT. RESOURCES J. 1 (1976); Wengert, *Citizen Participation: Practice in Search of a Theory*, 16 NAT. RESOURCES J. 23, 29-36 (1976); sources cited at note 21.

23. *See generally* J. SAX, DEFENDING THE ENVIRONMENT (1970); L. CALDWELL, L. HAYES & J. MACWHIRTER, CITIZENS AND THE ENVIRONMENT (1976); J. QUARLES, CLEANING UP AMERICA 171-72 (1976). In spite of this viewpoint, environmentalists generally are not those who have been denied access to the system as in the cases of the civil rights and welfare reform movements. *See* R. NEUHAUS, IN DEFENSE OF PEOPLE (1971); Harry, Gale & Hendee, *Conservation: An Upper Middle Class Social Movement*, 1 J. LEISURE RESEARCH 246 (1969); Wildavsky, *Aesthetic Power or the Triumph of the Sensitive Minority over the Vulgar Mass*, 96 DAEDALUS 115 (1967); Zwerdling, *Poverty and Pollution*, THE PROGRESSIVE, January 1973, at 25.

diagnosed environmental problems in terms of values and interests that have been excluded from decisionmaking.[24] Therefore, they have consistently advocated an open process in order to gain access for previously ignored values.[25] A second reason for the procedural emphasis of environmental reform has been its judicial orientation. Following the civil rights movement, environmentalists went to the courts when their views were initially inadequately supported in the legislature by the administrative agencies.[26] The courts have generally supported environmentalists' efforts by allowing them to use procedural wedges to press their substantive goals.[27]

2. *Agency Response.* Confronted by public criticism, demands for citizen involvement, and the threat of litigation, agencies responded by developing new and different public involvement techniques, such as workshops, field trips, and meetings with interested groups. The evolution was at first slow and painful for agency personnel.[28] The critics doubly threatened land managers' professional values, first by denying their expertise, and second by threatening political controversy. Many of the agencies with responsibilities in the environmental and land management areas, including the BLM, were staffed largely by technically trained professionals. The tradition of most land management agencies and professions emphasizes consciously and explicitly avoiding political considerations, basing decisions on non-partisan technical competence.[29] This emphasis on professionalism was not apolitical, but it encouraged agency personnel to ignore or underesti-

24. *See* Stewart, *supra* note 15, at 1684-87 & n.71.

25. It is interesting to speculate on the tendency of outsiders and reformers to overstate the access and influence of the opposition. Groups making appeals in terms of the "public interest" or "the people" tend to believe that when access is gained, their own views will enter the newly opened door and triumph. Often, however, the "ins" are not nearly as satisfied, nor the "outs" so blockaded as this scenario suggests. Public involvement becomes extremely complex when the participants diversify, the old "ins" begin to use the new channels, and fractures become apparent in the old out group. *See* Hall, *What are Wildlands For?*, in LEGAL ASPECTS OF WILDLANDS MANAGEMENT 28-29 (1977). *See also* Fairfax & Andrews, *Debate Without and Debate Within*, 19 NAT. RESOURCES J. 505 (1979).

26. Fairfax & Achterman, *The Monagahela Controversy and the Political Process*, 75 J. FORESTRY 485 (1977)

27. *See, e.g.*, Scientists' Inst. for Pub. Information v. Atomic Energy Comm'n, 481 F.2d 1079 (D.C. Cir. 1973); Students Challenging Regulatory Agency Procedure v. United States, 346 F. Supp. 189 (D.D.C. 1972). *See also* Ingram & Dreyfus, *The National Environment Policy Act: A View of Intent and Practice*, 16 NAT. RESOURCES J. 243 (1976). Elaboration of the environmental impact statement [EIS] requirements of the National Environmental Policy Act (42 U.S.C. §§ 4321-4347 (1976)) is the most pervasive example of this procedural emphasis in the environmental movement. *See* Fairfax, *A Disaster in the Environmental Movement*, 100 SCIENCE 743 (1978); Note, *Implementation of the Environmental Impact Statement*, 88 YALE L.J. 596 (1979).

28. *See, e.g.*, Folkman, Public Involvement in the Decision Making Process of Natural Resource Management Agencies, Institute of Governmental Research University of Washington Public Affairs Paper No. 3 at 3-5 (1973).

29. *See* H. KAUFMAN, THE FOREST RANGER (1960); W. MCWHINNEY, THE NATIONAL FOREST SERVICE: ITS ORGANIZATION AND PROFESSIONALS (1970); *See also* P. Culhane, Politics and the Public Lands, Ch. 6 (Unpublished Ph.D. Dissertation, Northwestern University, 1977).

mate the importance of public preferences, social values, and the economic and political aspects of their activities. Under sustained attack from citizen activists who challenged the dominant values of the land management professions, agency experts recognized, perhaps belatedly, their omissions. Both Congress and the courts encouraged agency programs to rectify the oversights, but the transition has not been an easy one. Land managers have historically thought it was improper to involve themselves in political controversy. Moreover, environmentalists sought to introduce into decisionmaking such factors as esthetics, social values, and economic impacts, which the land managers had no training or competence to evaluate, thus exacerbating the threat of explicit political involvement. These pressures must be added to the fact that land managers are not typically skilled in or comfortable with running group meetings. These factors all combined to create considerable initial administrative reluctance to expand public participation.

The Assumptions

Too many social scientists and agency administrators sought to encourage the hesitant land managers with uncritical praise for the virtues of public involvement. During the political disruption and disaffection of the late 1960's, public involvement was seized upon by beleaguered bureaucrats and observers as a panacea for eliminating painful confrontations. Numerous unexamined assumptions were repeated so frequently that they became incantations, and took on the mantle of revealed truth.[30]

These conceptual errors and fond hopes have been written into statutes such as FLPMA. For example, both analysts and agency manuals asserted that public involvement would lead to better and easier decisions. It was assumed that agency personnel would find it easier to make wise decisions if they were aware of the full range of relevant facts and opinions regarding alternatives.[31] Second, they assumed that

30. *See* Wengert, *supra* note 22, at 24 which underscores this lack of scrutiny of citizen participation assumptions.

31. *See, e.g.*, U.S. FOREST SERVICE, A GUIDE TO PUBLIC INVOLVEMENT IN DECISION MAKING 7 (1971); [hereinafter FOREST SERVICE GUIDE]; U.S. BUREAU OF LAND MANAGEMENT, PUBLIC PARTICIPATION IN THE ENVIRONMENTAL ASSESSMENT PROCESS TRAINING SESSION NOTEBOOK 27 (1975) [hereinafter PARTICIPATION NOTEBOOK]; U.S. FOREST SERVICE, INFORM AND INVOLVE 19 (1972). *See generally* J. HENDEE, PUBLIC INVOLVEMENT AND THE FOREST SERVICE: EXPERIENCE, EFFECTIVENESS AND SUGGESTED DIRECTION (1973). In addition to ignoring the obvious possibilities that public involvement may simply introduce more data, more variables to weigh and more interests to compromise, while effectively mobilizing and activating dissent, the easier decisionmaking rationale also overlooks the fact that some participants actively seek to create conflict. *Compare* Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a 'No-Win' Agency Proceeding*, 1 ECOLOGY L.Q. 495 (1971) *with* IRELAND & UNICENT, *Citizen Participation in Decision Making: A Challenge for Public Land Managers*, 27 J. RANGE MANAGEMENT 182 (1974).

decisions made with appropriate public involvement would be accepted by the public and those involved, thus reducing conflict.[32] Underlying these assumptions was the unstated premise that the agency could respond to public preferences in a way that the public would recognize as responsive.[33] These assumptions filled the official arguments to field personnel and were accepted uncritically as a justification for the expense and effort of public involvement, as a standard of success, and as a reason for extending public involvement in all directions.

These assumptions are, unfortunately, largely unfounded. More information, particularly about conflicting preferences and social and economic impacts, does not necessarily make decisionmaking easier. Nor does it enable managers to avoid undesirable consequences when they face hard choices. Data cannot eliminate difficult trade-offs and probably makes them difficult and less certain.[34] Furthermore, there is no reason to assume that the opportunity to participate leads to more readily accepted decisions. Public involvement programs, especially if effectively run, may easily mobilize dissent and heighten polarization, public frustration and dissatisfaction. This result is almost inevitable if an agency cannot respond to expressed public preferences. Some preferences are, however, mutually exclusive. No matter how sensitive and well-informed BLM personnel become, wilderness preservation, off-road vehicle use, and timber harvesting cannot be accommodated in the same area at the same time. Moreover, as users and their demands multiply and intensify, conflicting preferences cannot be met by segregating uses and allocating an area to each.[35]

Beyond these obvious physical limitations of the resource base, the BLM's ability to mount either a sophisticated planning program or the extensive efforts required to ameliorate user conflicts is also restricted by budget allocations, available personnel, and its present data base. Hence, the assumptions underlying much of the enthusiasm behind the public involvement movement are upon cursory examination, highly questionable. Nevertheless, the enthusiasm of scholars and many others has resulted in increasing congressional reliance on public involvement as an alternative to substantive specificity in legislation.

32. *See* FOREST SERVICE GUIDE, *supra* note 31, at 7; J. HENDEE, *supra* note 31, at 16; Wengert, *supra* note 30, at 27; J. DONOVAN, THE POLITICS OF POVERTY 41-43 (1967); Burke, *Citizen Participation Strategies*, 34 J. AM. INST. OF PLANNERS 287, 291-92 (1968). *See generally* Ingram & Ullery, *Public Participation in Environmental Decision Making: Substance or Illusion?*, in PUBLIC PARTICIPATION IN PLANNING 123 (1977).

33. S. VERBA & N. NIE, PARTICIPATION IN AMERICA 7-8 (1972); PARTICIPATION NOTEBOOK, *supra* note 30, at 27; R. CLARK, G. STANKEY & J. HENDEE, AN INTRODUCTION TO CODINVOLVE 1, 1-7 (1974).

34. *See generally* Ingram, *Information Channels and Environmental Decision-Making*, 13 NAT. RESOURCES J. 150 (1973).

35. Vaux, *Problems in Legislating Federal Forest Policy in Crisis*, FEDERAL FOREST LAND MANAGEMENT 11-13 (1977).

Predictably, the same divisions and disagreements that gave rise to the calls for more extensive public involvement, occasioned extensive congressional activity during the mid-1970's. In addition to FLPMA, the basic charter for the Forest Service, essentially untouched since 1905, was rewritten twice.[36] The statutes of the 1970's do not resolve the conflicts of the previous decade; they simply reflect them. Congressional guidance to both the Forest Service and the BLM consists primarily of a mandate to plan. The relevant statutes emphasize multiple use values and public involvement. Invocation of the multiple use slogan unfortunately sets virtually no priorities for agency action.[37] Moreover, the public involvement requirements invite and require the agencies to become brokers among competing political interests, rather than professional managers efficiently achieving social goals expressed through the representative mechanism of Congress.

Professor Stewart notes that "[t]oday, the exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests as affected by agency policy."[38] The legislative analogy is apt but ultimately misleading. It is apt because administrative agencies have been required to fulfill many of the information gathering, mediating, and value compromising roles of the legislature. The interdisciplinary planning teams required by the National Environmental Policy Act [NEPA][39] and FLPMA, however, have neither the authority nor the composition of representative legislative bodies. The public that turns out at citizen participation sessions to interact with a planning team is necessarily especially interested in the issues at hand and therefore necessarily unrepresentative of the public at large.[40] These difficulties stem from the uncritically accepted assumptions underlying public involvement, as presently defined. Attempting to deal with the problems has led agen-

36. Organic Act of 1897, ch. 2, 30 Stat. 11, 34 (1897) *as amended by* the Transfer Act of 1905, ch. 288, 33 Stat. 628 (1905). The two new amendments were the Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. 93-378, 88 Stat. 477 (1974) and the National Forest Management Act of 1976, Pub. L. 94-588, 90 Stat. 2949 (1976) (both of which are codified at 16 U.S.C. §§ 1600-1676 (Supp. VII 1977)).

37. *See generally* Behan, *The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management*, 7 NAT. RESOURCES J. 473 (1967); Dana, *Multiple Use Again*, 41 J. FORESTRY 703 (1943); Note, *The Multiple-Use Sustained-Yield Act of 1960*, 41 ORE. L. REV. 49 (1961); McConnell, *The Multiple-Use Concept in Forest Service Policy*, 44 SIERRA CLUB BULL. 14 (1949); Martin, *Conflict Resolution Through the Multiple-Use Concept in Forest Service Decision-Making*, 9 NAT. RESOURCE J. 228 (1969); Whaley, *Multiple-Use Decision Making: Where Do We Go From Here?* 10 NAT. RESOURCES J. 557 (1970); Zivnuska, *The Multiple Problems of Multiple Use*, 59 J. FORESTRY 555 (1961); Editorial, *Multiple Use, Biology and Economics*, 41 J. FORESTRY 625 (1943); Note, *Managing Federal Lands: Replacing the Multiple-Use System*, 82 YALE L.J. 787 (1973). *See also* J. KRUTILLA & J. HAIGH, AN INTEGRATED APPROACH TO MULTIPLE-USE SUSTAINED-YIELD IN NATIONAL FOREST MANAGEMENT (1978).

38. Stewart, *supra* note 15, at 1683.

39. 42 U.S.C. §§ 4321-4347 (1976).

40. Stewart, *supra* note 15, at 1684.

cies to redefine involvement methods and priorities, which in turn, has led to problems in review of agency programs.

Changes in Traditional Public Participation Methods

When technical competence was the paramount basis for agency decisions,[41] public involvement was a relatively simple, well-defined undertaking, and participation formats were clearly understood in relationship both to the nature of the decision being made and the type of information sought by the decisionmaker. Three main types of public participation techniques were used: formal adjudication,[42] notice and comment rulemaking,[43] and informal contact.

Ever since the General Land Office was established in 1812, the Department of the Interior has adjudicated the rights of various private parties to use the public land. Conflicts between private applicants or between private parties and the government required formal adjudications on a record before a hearings officer.[44] The only people involved in these proceedings were public land users directly affected economically by a government decision. Although the decision could have significant impact on utilization of public resources, other potentially interested citizens were excluded. For many years, these hearings and appeals were handled internally by line officials of the BLM. Due to the mixing of adjudicative and decisionmaking responsibilities, the process gave rise to charges that the BLM was dominated by traditional range users. In response to growing criticism, the Office of Hearings and Appeals, which includes the Board of Land Appeals, was established in 1971.[45]

Notice and comment rulemaking procedures are almost as well established among BLM personnel as formal adjudication. The APA does not require the BLM or other land management agencies to follow its rulemaking procedures. Virtually all public land management activities fit within the public property exception of the APA.[46] The De-

41. The BLM was not established during the heyday of nonpartisan competence around the turn of the century; it is therefore evolving a different management style which, when combined with its limited budget and the diversity of resources it manages, gives the agency a different flavor than the Forest Service. *See* PROCEEDINGS OF A CONFERENCE ON REORGANIZATION (F. Convery, ed. forthcoming 1979) (article by Fairfax). *See also* Culhane & Friesma, *Land Use Planning for the Public Lands*, 19 NAT. RESOURCES J. 43, 44-50 (1979).

42. 5 U.S.C. § 554 (1976).

43. *Id.* § 553.

44. *Id.* § 554.

45. *See* 36 Fed. Reg. 15116 (1971). The Interior appeals procedures, 43 C.F.R. §§ 4.1, 4.4-4.478 (1978) should be compared to the Forest Service procedures, 36 C.F.R. §§ 211.1 through 211.119 (1978), which provide for review by line management officials.

46. 5 U.S.C. § 553(a)(2) (1976). *See generally* Bloomenthal, *Administrative Procedures*, 6 LAND AND WATER L. REV. 241 (1970); Bonfield, *Report of the Committee on Rule-making in Support of Recommendation No. 16*, in RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 306 (Jan. 8, 1968-June 30, 1970).

partment of the Interior, however, has long waived the exception and adopted legislative rules regulating its activities in public land administration.[47] The regulations promulgated, however, were generally limited to BLM activities that affected private users themselves. Rules were adopted for right-of-way applications, public land entries, grazing use, mineral leases, and land sales.[48] No regulations governed land use planning or other similar activities affecting the BLM internally or the general public equally.

Among land managing agencies, the most pervasive method of public involvement has been close contact on an informal basis between public land users and agency personnel. Although BLM managers were directly involved in the more formal public contact strategies upon occasion, the most typical approach to citizen involvement was to view it as a relatively undefined, undifferentiated aspect of living and working among persons interested in the public lands. At the local and state level, land managers deal with ranchers, miners, foresters, and recreation users of the public lands on a daily basis and naturally discuss matters of common concern. Many managers maintain key man lists of concerned citizens and community leaders with whom they consult informally when important decisions are being made. The grazing advisory boards were simply a formalization of these natural informal contacts.[49]

These traditional approaches to public and agency interaction have not sufficed to meet the present emphasis on public participation. Informal contacts and general sensitivity to public reactions were not sufficiently systematic either to satisfy concerned groups that they were indeed part of a process, or to create a record adequate to meet judicial criteria of completeness.[50] Moreover, notice and comment rulemaking and formal adjudications do not facilitate the kind of input both the BLM and the public seek. The BLM began to hold more public hearings and broadened the composition of the local advisory boards. It also began to substitute workshops, field trips, and regular meetings with interested groups, for traditional public hearings. Mailing lists of affected state and local government agencies and interested citizen

47. 43 Fed. Reg. 58298 (1979) (to be codified in 43 C.F.R. § 14.5(b)(3)).

48. *See, e.g.*, 43 C.F.R. §§ 2800.0-1 through 2802.5 (1978); 43 C.F.R. § 2020.1 through 2520.0-8 (1978); 43 C.F.R. § 4100.0-1 through 4170.2-2 (1978); 43 C.F.R. §§ 3500.0-3 through 3509.1 (1978); and 43 C.F.R. §§ 2740.0-1 through 2741.8 (1978).

49. *See* P. Foss *supra* note 5, at 81-82.

50. *See generally* Natural Resources Defense Council v. Nuclear Regulatory Agency, 547 F.2d 633 (D.C. Cir. 1976); Sierra Club v. Foerhlke, 534 F.2d 1289 (8th Cir. 1976); Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975); National Forest Preservation Group v. Butz, 485 F.2d 408 (9th Cir. 1973); Cape Fox Corp. v. United States, 456 F. Supp. 784 (D. Alaska 1978).

groups were developed so that more people would be notified of formal BLM actions.

The Problems

These innovations cannot disguise the fact that public involvement in land use planning is a descendant of the notice and comment rulemaking procedures required by the APA. Recent pressures, however, have altered the original concept profoundly. These alterations have led, among other things, to a troubling confusion of public authority and private influence,[51] which falls outside of the traditional categories by which the courts have defined their agency review responsibilities. Therefore, traditional judicial definitions of due process may not apply well to many of the new procedures. The changes that have occurred introduce serious theoretical and operational problems into the citizen participation idea. Three aspects of these changes are fundamental.

First, traditional concepts of involvement put the burden for getting involved on the affected public by forcing interested persons vigilently to protect their own interests. This strategy is not true of current public involvement methods. The first skirmishes of the present participation movement were fought in the urban civil rights arena, where a basic goal was to attract outsiders into the system. Participation was not simply information sharing; it was specifically aimed at being therapeutic, hopefully leading to cooptation.[52] From this aim, an affirmative responsibility developed on the part of the agency to actively solicit participants. Today it is no longer sufficient to listen to the opinions of the alert; new public involvement requires that agencies aggressively seek out the opinions of the public.[53]

This emphasis on the active solicitation of public involvement raises additional problems. The nature of the public to be involved has changed. A responsibility has developed to seek input from the general public, the mass public, the so-called man in the street. The mandate is no longer to provide an opportunity for those who will be affected by a decision to be heard. Under the new theory, the goal is to involve everybody. This goal is impossible, which most agencies recognize immediately. The goal, however, presents serious problems regarding the sufficiency of the sample of the participants. Did enough people, enough blacks, women, trappers, and snowmobilers turn out? All of the theoretical problems surrounding the definition of "representative-

51. *See generally* G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966); T. LOWI, THE END OF LIBERALISM (1979).

52. *See* note 21 *supra.*

53. *See* notes 20-21 *supra.*

ness" and all of the practical difficulties of achieving it, once the term is defined have been thrust upon the administrative agencies.

The problem of representativeness is acutely reflected in confusion regarding the appropriate effect of citizen involvement on agency decisions. Much hostility has been generated in all quarters by confusion over how the public's suggestions are to be received, evaluated, and utilized. For example, under the APA, attentive and affected publics are to participate by commenting on agency proposals.[54] The public provides information regarding the potential impact of the proposed rule and proffers suggestions.[55] Again, growing out of its association with the civil rights protests of the 1960's, the idea developed that the public was going to do more than make suggestions—they were going to make decisions. This confusion potentiates the problems regarding representativeness. Almost inevitably the agency appears to be holding a plebescite.

A third and final change away from the earlier model concerns the elusiveness of the decisionmaker and the decision. Under both formal adjudication and APA rulemaking procedures there is little difficulty in locating either. A specific agency announces that rules on a specific and predetermined topic are about to be promulgated and invites public comment on that limited but critical activity. Citizen participation, currently conceived, has a much more diffuse target. The public will be involved in agency planning and decisionmaking. Thus the focus, the timing, the purpose, and the issues become almost infinitely dispersed.

Implications for Administrative Law

The BLM's use of new public participation strategies is merely one example of a growing tendency in administrative agencies.[56] In reviewing agency procedures based on new involvement methods, the courts have been confronted both by an array of informal mechanisms for consulting with the public and by new public expectations about such consultation. In the view of several recent commentators, the courts have responded by developing new concepts of administrative law.[57] The traditional model of American administrative law has deteriorated in light of broad grants of discretion to administrative agencies as exemplified by FLPMA and new standards of judicial review are emerging. Under the traditional model, reflected in the APA, the legislature

54. 5 U.S.C. § 553(b) (1976).

55. *Id.* § 553(c).

56. *See generally* FOREST SERVICE GUIDE, *supra* note 30; U.S. FOREST SERVICE, INFORM AND INVOLVE (1972).

57. *See* note 15 *supra* (especially Verkuil). *See generally* Strauss, *Rules, Adjudications, and Other Sources of Law in the Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974).

had to specifically authorize the imposition of administrative sanctions on private individuals in the statutes authorizing agencies to act. Agency procedures were designed to assure compliance with their legislative authority. The emphasis was on accurate, impartial, and rational application of legislative directives.

In recent years, however, many courts have begun to reconsider the relative efficacy of adjudicatory proceedings. In the wake of broad statutory delegations of authority by Congress to the implementing agencies, the bi-polar adjudicatory model has strained in case after case to effect fair and efficient administrative conflict resolution. The 1970's can be called the rulemaking decade as the courts have turned from adjudication to requiring rulemaking, but even in rulemaking the courts have turned from formal rulemaking on a record toward notice and comment rulemaking.[58] The courts have developed new standards for review of rules, setting them aside if the factual record is inadequate in some critical way, if the agency has failed to respond to important comments, if the public has not had a sufficient opportunity to know and respond to facts considered by the agency, or if the agency's statement of the basis and purpose of the rules is unduly vague or not based on recorded facts.[59]

The judicial search for an independent and more flexible due process model was confirmed in the adjudicatory arena by a recent Supreme Court decision, *Mathews v. Eldridge*,[60] which constituted "a major theoretical statement about the framework of administrative procedure."[61] In *Mathews*, the Court validated a procedural balancing process, in effect encouraging administrative agencies to design alternative procedures incorporating the values of fairness and efficiency in a model sensitive to constitutional due process requirements by requiring courts to consider what private interest is affected by an administrative decision, what the value of added procedural safeguards is likely to be, and what government interest will be affected by such safeguards.[62] The repercussions of this decision are just beginning to influence the

58. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:1 (2d ed. 1978). *See also* United States v. Florida E. Coast R., 410 U.S. 224, 245 (1973).

59. *See* 1 K. DAVIS, *supra* note 58, at § 6:38. In spite of the importance of these judicially developed guidelines for rulemaking, a recent Supreme Court decision, in dicta, recently cast some doubt upon the role of the federal courts in advocating or imposing rulemaking requirements. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 520 (1978), in which Justice Rehnquist suggests that reviewing courts may not impose additional procedural requirements, if agencies in the exercise of their discretionary authority have not chosen to grant them. This dicta suggests a limited role for judicial review of agency rulemaking, yet Davis concludes that it will not be followed. *See* 1 K. DAVIS, *supra* note 58, at §§ 6:35-6:37.

60. 424 U.S. 319 (1976).

61. Verkuil, *supra* note 15, at 288.

62. 424 U.S. at 334-35.

lower courts, where informal rulemaking has gradually been displacing adjudication as the preferred procedural device.[63] In sum, adjudicatory procedure is declining in both the traditional adjudication proceedings and in rulemaking under the combined pressures of vague congressional mandates, administrative backlogs, and increased multiparty interest in substantive agency concerns.

Any new model, if such there be, must contend with similar administrative problems. Rulemaking as an alternative suffers from a critical constitutional malady: It does not "control and validate the exercise of essentially legislative powers by administrative agencies that do not enjoy the legitimation of one-person one-vote election."[64] Thus, the tension between administrative discretion and the constitutional parameters of the delegation doctrine remains acute under this approach.[65] While rulemaking will likely retain its widespread appeal as an administrative method, it is apparent that informal administrative procedures must be developed that ensure fair, efficient decisionmaking while simultaneously broadening public involvement in such decisions. It is just this type of procedural mechanism which the APA lacks. The courts have begun to respond by developing a more flexible concept of due process, responsive to a broad range of decisionmaking contexts.

Interest representation is identified by both Professor Stewart and Professor Verkuil as foremost among emerging models. Both scholars suggest that rather than addressing the substantive merits of agency decisions, the courts now seek to assure fair representation of all affected interests in the exercise of agency authority, and balance interest representation against efficiency, timeliness and other administrative values.[66]

Interest representation generates a hybrid approach to administrative decisionmaking.[67] Under the premise that justice results when all interests are considered, multi-polar controversies evolve from the interest representation scheme. Both the common law and statutory expansion of standing and participation rights before the agency have circumscribed administrative discretion and dictated the modernization of agency procedure. This development may have rendered the traditional distinction between rulemaking and adjudication obsolete, although Davis contends that a new type of rulemaking has resulted.[68]

63. Verkuil, *supra* note 15, at 289.
64. Stewart, *supra* note 15, at 1688.
65. *See id.*
66. *Id.* at 1766-80; Verkuil, *supra* note 15, at 303-11.
67. *See generally* Williams, *supra* note 15, at 401.
68. *See* 1 K. DAVIS, *supra* note 58, at § 6:4.

The result is an essentially legislative process of adjusting competing claims of various private interests affected by agency policy.

If a new standard of judicial review of agency decisions is evolving based on review of agency public participation procedures, it is important for Congress to be fully aware of the opportunities and limitations of public involvement, and to be explicit about what it requires. In FLPMA and other recent legislation, Congress seems to be trying to develop a statutory framework for the kind of informal administrative procedures which reformers recognize are needed.[69] Yet, as will be discussed below, Congress' directive is not clear. To the extent that Congress fails to provide adequate guidance and tools, the courts must allow the agencies sufficient flexibility to meet congressional and public expectations as well as their own planning and program requirements. Agencies, such as the BLM, should announce clear and realistic rules for conducting their public involvement programs and then follow them strictly.

Congress has concluded, and Stewart and Verkuil suggest that the courts concur, that the traditional standard of administrative due process, requiring only that parties and persons affected by agency actions be heard before decisions affecting them are made, is not sufficient. Congress has sounded a new but unclear note in defining new agency public participation responsibilities. The challenge to the courts, and to the legal profession generally, is to avoid imposing concepts developed to deal with previous concepts of agency decisionmaking on an emerging planning process that is necessarily ambiguous and that is hopefully evolving from a confrontation mode toward one that is more discursive. All of the potential problems and ambiguities of this evolving process are readily apparent in FLPMA.

THE PUBLIC INVOLVEMENT REQUIREMENTS OF FLPMA

The scope of congressionally mandated public involvement under FLPMA is broad; its role, however, in BLM decision making must be weighed against FLPMA's other requirements. Review of these other provisions reveals that a lack of specific direction gives rise to the need for public involvement, but there are other congressional mandates that are in tension with public involvement. The BLM is to manage the public lands on the basis of multiple use and sustained yield,[70] yet no precise guidance is given as to which multiple uses are most important. Conversely, the Act gives special privileges to grazing permittees and

69. *See* Hamilton, *Procedures for Adoption of Rules of General Applicability*, 60 CAL. L. REV. 1276, 1315 (1972).

70. 43 U.S.C. § 1732(a) (1976).

lessees,[71] sets aside special land use management areas,[72] and seeks to preserve the vested interest of all those now occupying or using the public lands.[73] The statutory mandate of FLPMA is so broad that the balance of uses on the public lands is left almost wholly to the BLM's discretion. Public land management issues are so controversial that Congress refused to make judgments about them. Instead, it turned to the procedural requirements epitomized by the public involvement requirements of FLPMA.

Congress included many references to public participation in FLPMA ranging from broad policy statements[74] and directives to specific requirements for certain procedures.[75] Congress made no effort to use the familiar words and phrases of the APA, in which careful distinctions are made between a hearing on a formal record, rulemaking, and adjudication. In fact, Congress' failure to discriminate between these procedures arguably confirms the suggestion made above that the old distinctions are obsolete. Yet it is important to determine precisely what Congress envisioned when it wrote the public participation requirements in FLPMA, since they are more detailed on their face than the APA. This section will discuss the public involvement objectives evident in FLPMA, relate these objectives to specific BLM programs and decisions and identify areas which present potential problems for the BLM and the courts.

Objectives

In FLPMA, Congress declared that the United States' policy is to administer the public lands on the basis of comprehensive rules and regulations developed after considering the views of the general public.[76] Congress directed the Secretary to structure adjudication procedures, to assure adequate third-party participation, objective administrative review of initial decisions, and expeditious decisionmaking.[77] These policy declarations are not operative until they are implemented by specific additional statutory authority, yet they reflect congressional concern with public participation. In addition, these declarations reveal the tension between assuring consideration of the views of the general public (including third-party intervention in adjudications) and the desire for objective, expeditious decisionmaking. Both

71. *Id.* §§ 1751-1753.
72. *Id.* §§ 601-602.
73. *Id.* § 1701 note.
74. *Id.* § 1701(a)(5).
75. *See id.* § 1739.
76. *Id.* § 1701(a)(5).
77. *Id.* § 1701(a)(5)-(6).

needs are recognized, but Congress gives no guidance as to how to balance them.

Congress seemingly wants the BLM to use all conceivable techniques necessary to obtain the public's views in a particular instance. Thus "public involvement" is defined as

> the opportunity for participation by affected citizens in rulemaking, decisionmaking and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.[78]

It should be noted that this definition mentions involvement in everything from planning to rulemaking, yet its overall focus is on obtaining the public's comments, particularly the comments of those near the affected lands.

The policy directives and definition evince the general nature of congressional concern, but it is necessary to analyze the methods Congress chose to achieve its objectives. Analysis reveals that Congress imposed some specific requirements operative immediately. These provisions direct continued use of traditional public involvement methods, specifically advisory committees and rulemaking. Congress goes a step further, however, and in section 309(e)[79] directs a new type of public involvement. As will be shown, this type of public involvement will be difficult to implement immediately since it requires both administrative and judicial interpretation to be clear.

BLM's historic reliance on grazing advisory boards has been criticized,[80] yet the multiple use advisory board system established in the wake of the Federal Advisory Committee Act [FACA][81] was working well enough for Congress to direct that it be continued and expanded. Section 309(a) authorizes the Secretary to continue to use advisory councils representing the various major citizens' interests concerned about public land management in the local area for which the council is established.[82] At least one member of each council must be an elected local official.[83] The councils operate under the FACA and their agendas are controlled by the BLM.[84] The statutory language indicates that Congress envisioned the councils advising on land use planning

78. *Id.* § 1702(d).
79. *Id.* § 1739(e).
80. *See generally* W. CALEF, PRIVATE GRAZING AND PUBLIC LANDS: LOCAL MANAGEMENT OF THE TAYLOR GRAZING ACT (1960); P. FOSS, *supra* note 5.
81. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app. 1 (1976)).
82. 43 U.S.C. § 1739(a) (1976).
83. *Id.*
84. *Id.*

issues primarily.[85] Congressional insistence on including an advisory council provision in FLPMA at a time when the use of and need for such councils was under broad attack,[86] reflects Congress' belief that such councils are an important part of public involvement. They bring together local community leaders on a regular basis to comment on the BLM's key land use decisions.

Congress also directed that traditional APA rulemaking procedures should be followed in adopting rules and regulations to implement FLPMA and other laws applicable to the public lands.[87] The only unusual aspect of this provision is that Congress did not simply repeal the public property exception of the APA, thus applying the standard APA rulemaking requirements to the BLM's activities. It may be that Congress wanted the BLM to use rulemaking more than the APA would require. Congress, in this provision, also may have rejected the often criticized APA distinction between legislative and interpretive rules.[88]

The specific requirements of FLPMA pertaining to advisory committees and rulemaking do not mark any change in past objectives or procedures. The need to involve local leaders in BLM decisionmaking, as reflected in the advisory committee provision, is obvious. Advisory committees, though often criticized, can be very useful. The only change in FLPMA is that the role of the committees is clearly defined and limited so that they can be utilized effectively in those areas in which they are useful, without interfering in other matters. Similarly, Congress recognized the need for and the utility of rulemaking as a way to involve those who may be concerned about a particular aspect of public land management. In rulemaking, the only change over traditional procedures seems to be a congressional belief that rulemaking should be used more broadly by the BLM than it has been in the past. As noted above, the BLM has limited its rules historically to those activities, policies, and procedures that involve private parties directly.[89] The FLPMA rulemaking requirement, in its rejection of APA

85. *Id.* § 1739(a)-(d). The Secretary is required to establish an advisory committee for the California Desert Conservation Area. *Id.* § 1781(a). If requested to do so by local grazing permittees or lessees, the Secretary must also establish grazing advisory boards. *Id.* § 1753. The Public Rangelands Improvements Act of 1978 made the grazing boards mandatory. 43 U.S.C. §§ 1901-1908 (1976) (section 10 specifically amended 43 U.S.C. § 1753 (1976)). It should be noted that the functions of the committees and the boards are limited statutorily to advice on planning in the former case and advice on grazing plans and use of range betterment funds in the latter. *See* 43 U.S.C. §§ 1781(g)(2), 1753(b) (1976).

86. *See generally* Markham, *Federal Advisory Committee Act*, 35 U. PITT. L. REV. 557 (1974); Tuerkheimer, *Veto by Neglect: The Federal Advisory Committee Act*, 25 AM. U. L. REV. 53 (1975).

87. 43 U.S.C. § 1740 (1976).

88. Davis believes that this type of language, typical of many recent statutes, does reflect some decay in the old distinctions. *See* 1 K. DAVIS, *supra* note 58, at § 6:4.

89. See text & note 43-44 *supra*.

distinctions, implies that rules should be adopted governing even internal BLM functions and policies. It seems clear that rules are now required on matters affecting the general public, like land use planning.

FLPMA contains no specific directives about when formal adjudicatory procedures are to be used. General mention of them is made in the policy directives to "structure adjudicative procedures to assure adequate third party participation" and obtain "objective administrative review of initial decisions."[90] These goals are not elaborated elsewhere in the Act, but seemingly Congress again envisioned continuation of the existing system with appeals from BLM decisions made to an impartial hearings officer whose decision may be reviewed by an appeals board. Unfortunately, the existing Department regulations do not provide for third party intervention. Changes will have to be made in these regulations to respond to FLPMA's goals, but in this area, again, Congress relied on traditional public involvement methods.

In section 309, however, Congress recognized that the old methods were not adequate; more people should be involved and they should be involved throughout the land management process, not just in planning. More than any other, it is this provision that reflects Congress' belief that the old public involvement mechanisms were inadequate and that more must be done to open the public land management decision making process to the public.

Section 309(e) must be studied carefully in order to determine what Congress envisioned. Such analysis reveals that both administrative and judicial interpretation of this provision are needed. Section 309(e) states:

> In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.[91]

This section refers to notice, opportunity to comment, and public hearings, which are all standard in various types of APA rulemaking. The unusual aspect is the directive that the public is to comment upon and participate in not only the development of standards, criteria and plans, but in the actual preparation and execution of plans and programs.

The official reports do not elaborate other than to note that Congress intended to adopt the PLLRC recommendations.[92] The debate

90. 43 U.S.C. § 1701(a)(5) (1976).
91. *Id.* § 1739(e).
92. *See* S. REP. No. 94-583, 94th Cong., 1st Sess. 40 (1975).

about section 309(e) did focus on the language, though, that directed the Secretary to "establish procedures. . . to give. . . the public adequate notice and an opportunity. . . *to participate in. . .the management of*, the public lands."[93] While agreeing that public participation in the development of standards and criteria for management and land use planning is appropriate, the Department of the Interior objected to the reference to public participation in the management of public lands, contending that actual management should be left up to the BLM.[94] Nevertheless, the reference to participation in public land management was retained. The rejection of the Department's views suggests that Congress had a radical objective; it wanted procedures to be established that would involve the public actively in formulating plans and implementing them through on-going management decisions. Unfortunately, Congress did not indicate how this objective is to be achieved.

Thus, Congress has given the BLM a broad new mandate, but without giving it any new tools or even suggesting tools to use. Congress directs the BLM to continue using advisory boards in order to involve the local officials and groups most interested in the public lands. Rulemaking is to be used widely, following traditional APA procedures. But beyond these familiar mechanisms, Congress wanted the BLM to do more. It wanted the BLM to obtain public comments from more and different people and it directed the BLM to obtain such comments even on management decisions. The traditional references to notice, comment, and hearings were made, but a new directive was given to expand the audience and make the audience participate. It is clear that the old ways are no longer adequate and that Congress has struck a balance between participation and efficiency in favor of participation. The problem now confronting the BLM is how to obtain such participation in light of very real agency constraints and the recognized limitations of effective public involvement. Because Congress has not addressed this question, it is necessary that the BLM resolve it, or else the courts will. In developing a solution, it is useful to array typical BLM decisions from those requiring the most formal involvement procedures, such as adjudication, to those requiring the least. This analysis will focus on the major problem areas the BLM and the courts confront.

BLM Decisions: A Typology

Both Verkuil and Stewart suggest that the courts are now develop-

93. 43 U.S.C. § 1739(e) (1976) (emphasis added).
94. *See* S. REP. NO. 94-583, 94th Cong., 1st Sess. 106-107 (1975).

ing a standard of judicial review of agency decisionmaking based upon the balancing of public and private interests in particular cases. Verkuil categorized typical administrative decisions and considered which of the traditional values of fairness, efficiency, or participant satisfaction were the most important in each situation.[95] He concluded that the procedures used by administrators ought to be chosen on the basis of the nature of the issue involved.[96] For example, if human rights are affected, the fairness assured by formal adjudicatory procedures is most important. In contrast, efficiency is most important when an agency is awarding grants.

Stewart suggests that no new comprehensive theory of government may be available to solve many of the problems now plaguing the administrative process.[97] Although there is no magic formula, he believes the interest representation principle may be one approach to specific problems of administrative justice if it is applied by the courts in suitable cases, but not in situations where efficiency and clear statements of principle are all that should be required.[98]

The typology developed below relies on the insights of Stewart and Verkuil to categorize major types of decisions made by the BLM according to the nature of private and public interests involved. The first category of decisions is the granting of privileges to private applicants allowing them to use the public lands. The second category of decisions involves regulating the use of the public lands by those already authorized to use it. The third type of decisions involves land use planning which affects everyone, not just private users of the public lands. The various types are then analyzed in light of past judicial decisions to determine which values will be regarded as most important by the courts: fairness, participant satisfaction, or efficiency. Based on this analysis, the likelihood of the courts applying an interest representation model in each category of decisionmaking will be discussed.

1. *Private Privileges and Rights.* Many different individuals and corporations depend upon the public lands and resources for their livelihoods. They are authorized to use the lands by the BLM which issues them permits, licenses, or leases. Some permits are for long terms, up to ninety-nine years, while others are issued annually. Permits and leases are issued for many different purposes. Stockmen get grazing permits or leases for ten years, unless sound land management dictates a shorter term. Mineral leases for coal, oil, and gas are customarily

95. Verkuil, *supra* note 15, at 293-311.
96. *Id.* at 295.
97. Stewart, *supra* note 15, at 1807-08.
98. *Id.*

issued to mining companies for ten years, although terms and conditions may be reviewed more frequently. Lumbermen buy timber from the BLM. The sales are made each year and the successful bidder usually has three years to complete the harvest. In each case, the BLM offers to sell a resource to a private party and the private party purchases the resource, whether it is timber, forage, or minerals. The private party, having a direct economic interest in the BLM's decision to sell, seeks efficiency and predictability. Simultaneously, however, any decision to sell resources to one private party forecloses others' use of the land, at least temporarily.

Certain laws, like the old homestead laws, limit the Secretary's discretion regarding private use of the public lands. Under the Desert Land Act,[99] for example, once the land is classified as suitable for entry and the statutory conditions are met by the entryman, the Secretary must transfer the land into private ownership.[100] Similarly, the Mineral Leasing Act of 1920 created a category of leases known as preference right leases. Once the lessee shows that a valuable deposit of minerals has been discovered, the Secretary is obligated to issue the lease.[101] In comparison, timber sale schedules are developed by the BLM alone and it decides what should or should not be sold.[102]

Typically, commentators view the award of benefits, loans, and grants as discretionary with the government. The need for administrative efficiency is emphasized, rather than the protection of private rights or interests. The BLM privilege granting programs are not easy to characterize; some permits and leases are wholly discretionary, yet in other cases private individuals have economic rights.

In the economic regulatory arena, the courts have been most inclined to over-judicialization because of the magnitude of the private interests involved. In all cases of private use of the public lands, the economic interest of the private parties is great. For example, in timber sales and grazing permits, no one has a right to use the resources, yet often only a few operators are actually able to use the resource because of geographic considerations. Local ranchers and sawmills depend upon the forage and timber on the public lands around them. To deprive them of it in many instances would mean economic ruin.

Recognizing this, the BLM has traditionally allowed such private users of the public lands formally to appeal administrative decisions

99. 43 U.S.C. §§ 321-329 (1976).
100. *Id.* § 329.
101. *See* 30 U.S.C. § 201(b) (1970) (*as amended* by section 4 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. 94-377, § 4, 90 Stat. 1085 (1976)). *See also* Natural Resources Defense Council v. Berklund, 458 F. Supp. 925, 926 (D.C. 1978).
102. 43 C.F.R. § 5410.0-6 (1978).

that adversely affect them. Most of the cases heard by the Interior Board of Land Appeals [IBLA] and by the Department's hearings officers are brought by private commercial users of the public lands. Formal hearings are held on the record and appeals are made to a separate appeals board within the Department.[103] The procedures take time, but they provide important protection to users dependent upon the public lands. The main criticism of the proceedings is that there is no effective mechanism for third party participation.

Although the policy statement at the beginning of FLPMA mentions the need for third party participation in adjudicative proceedings, the Department has not taken any steps to revise the existing rules, which do not discuss intervention. Thus, groups representing the general public, which may be affected by a particular sale or lease, have difficulty participating in these formal hearings as intervenors. Congress encouraged the Secretary to allow such intervention recognizing that such participation will not unduly complicate an already formal and complicated administrative review procedure. One way to achieve the desired third party intervention may be to base the decision on each particular sale or lease on the land use plan, in which public involvement is emphasized. Yet on the local level in zoning proceedings, courts have held that more formal quasi-adjudicative procedures must still be used in deciding upon private applications for variances from land use plans.[104] As a result, formal adjudicatory proceedings will continue to be the rule in this type of case, even though an argument can be made that such procedures are not necessary since a privilege, not a right, is involved.

2. *Regulating Private Operations.* Once a permit or lease is issued, the BLM continues to monitor the private operations to assure that the terms and conditions of the permit or lease are being met. Given the BLM's limited staff and budget, it has historically been very weak in this regulatory area. The BLM does have responsibilities though, which Congress explicitly recognized in section 302 of FLPMA:

> The Secretary shall 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 any term or condition of the instrument, including, but not limited to, terms and

103. *Id.* §§ 4.400 through 4.478.

104. *See* Fasano v. Bd. of Comm'r, 264 Or. 574, 578, 507 P.2d 23, 27 (1973) as applied in Auckland v. Board of Comm'r., 21 Or. App. 596, 601-02, 536 P.2d 444, 447 (1975). *See generally* Sun Oil Co. v. Young, 327 N.Y.S.2d 211, 37 App. Div. 2d 969 (1971); Hamilton v. Board of Supervisors, 269 CA.2d 64, 75 Cal. Rptr. 106 (1969).

> conditions requiring compliance with regulations under Acts applicable to the public lands and compliance with applicable state or federal air or water quality standard or implementation plan. . . . *Provided further*, that the Secretary may order an immediate temporary suspension prior to a hearing or final administrative finding if he determines that such a suspension is necessary to protect health or safety or the environment. . . .[105]

Here, more than in any other section, Congress used language suggesting the need for an adjudicatory hearing on the record. Yet, the traditional APA language signaling the need for such a review, "on the record after an opportunity for a hearing,"[106] was not used. Nevertheless, the Congress' intent is clear; it did not want any revocation or suspension of a license or a permit authorizing the use, occupancy, or development of the public lands to occur without the permittee being given a formal hearing.

Traditionally, the BLM has afforded applicants under category one, and individuals in category two, the same appeal privileges. Section 302 indicates that Congress wants these privileges to continue.[107] Regulatory decisions of the BLM are unlike the decisions of independent regulatory agencies which determine whether companies may enter particular businesses and how the businesses are to operate. Essentially, BLM authorizes private use of publicly owned resources and the private party takes its lease or permit subject to certain conditions. It is the monitoring of these conditions which can be characterized as regulatory action. Verkuil suggests that such monitoring or audit functions demand efficiency most of all, not even the level of formal adjudicatory protection provided when the grant, lease, or permit is initially given.[108] Yet in the public land field, Congress' insistence on adjudicatory procedures is appropriate—often the private users make substantial financial commitments on the basis of permit issuance. They deserve a full hearing before their use is terminated to assure fairness.

The outstanding problem here, as in the category one cases, is third party participation. For example, in *Diamond Ring Ranch v. Morton*[109] the BLM sought to cancel a rancher's grazing permit on the basis of his use of pesticides in violation of his permit and his killing of raptors.[110] The Audubon Society was very interested in the case and pressed for cancellation of the permit. Yet, the Society was only allowed to participate as an amicus curiae in the administrative proceed-

105. 43 U.S.C. § 1732(c) (1976) (emphasis added).
106. 5 U.S.C. § 554(a) (1976).
107. *See* 43 U.S.C. § 1732(c) (1976).
108. Verkuil, *supra* note 15, at 284.
109. 531 F.2d 1397 (10th Cir. 1976).
110. *Id.* at 1398-1401.

ings.[111] Thus, even when interested third parties actively seek to participate, they cannot under existing regulations. While full third-party participation will slow the process, it is necessary, at least in the modified form adopted by the Environmental Protection Agency for its decisions on environmental disputes presenting similar clashes between individual economic interests and the broad public interest.[112]

3. *Land Use Planning.* The lynch-pin of the FLPMA is land use planning. Most other decisions are conditioned on conformity with land use plans adopted under section 202.[113] Land use plans or other decisions affecting land availability, like withdrawals, affect everyone in the country to some extent and yet such decisions directly impact local private users of the lands economically. Planning is thus neither purely legislative, nor purely adjudicatory. Recognizing the diverse interests, state courts have grappled with the question of how land use planning should proceed administratively.[114] Should it be viewed as a legislative or an adjudicatory function? Are general public hearings sufficient? Must they be on the record? Is cross-examination of witnesses to be allowed? Clearly, land use planning demands new public participation methods.

Commentators on federal administrative law tend to consider all agency planning to be the agency's business, requiring at most a clear statement of the reason for the decision and public hearings.[115] While recognizing that program planning may impact the public less directly than land use planning, the courts, nevertheless, have been loath to review agency land use planning decisions in detail.[116] In FLPMA, Congress has explicitly imposed broader public participation requirements than the courts themselves seemingly would have required.

The main section of FLPMA dealing with land use planning, section 202, prefaces the requirement that plans be developed with the directive that the Secretary involve the public.[117] Special emphasis is placed on coordinating BLM plans with the land use plans of other Federal agencies and state and local governments.[118] In fact, the Act directs the Secretary to

> provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for

111. 12 I.B.L.A. 358 (1973).
112. *See, e.g.*, 40 C.F.R. 104.1-.16 (1978).
113. *See* 43 U.S.C. § 1713(a) (1976).
114. *See* cases cited note 89 *supra.*
115. *See generally* note 15 *supra.*
116. *See* Sierra Club v. Morton, 421 F. Supp. 638, 641 (D.D.C. 1974).
117. 43 U.S.C. § 1712(a) (1976).
118. *Id.* § 1712(c).

> public lands, including early public notice of proposed decisions which may have a significant impact on non-federal land.[119]

Section 202 also requires general public notice and opportunity to comment upon the plans, including public hearings where appropriate.[120] The choice of public involvement method is discretionary, but the Secretary is required to make special efforts to involve state and local government officials.[121]

The legislative history of this section shows that Congress considered much stricter requirements. An earlier Senate bill would have required the BLM to send written notices of any proposed change in the permitted uses on any public lands that would affect private use authorizations to all persons holding leases, licenses, or permits in the affected area.[122] Notice was to be sent sufficiently in advance to permit them to initiate formal administrative review processes.[123] No reports explain why this provision was deleted, but it reflects Congress' belief that such a notice requirement was too demanding. General public hearings and advance notice to state and local officials seemed sufficient to obtain the type of public input necessary for effective land use planning.

Implications

In FLPMA, Congress directed the BLM to involve the public in every phase of decisionmaking affecting the public lands, while requiring continued use of the tested techniques of the past, such as advisory committees, rulemaking, and formal adjudication. Some elaboration is required such as control of advisory committee agendas, broader use of rulemaking, and third party participation in adjudication; the use of these devices and Congress' goals in using them, however, are fairly clear. Yet in FLPMA, Congress went a step further and required the BLM to seek out more people and to involve everyone more thoroughly, even unto implementation of management decisions. No new tools were provided to achieve this, but the objective is clear.

The typology of typical BLM decisions assists us in determining how the BLM can obtain such participation. In the first two types of decisions, i.e. the authorization and the regulation of private use, adjudicatory procedures have been used traditionally and FLPMA requires that they be continued. Third-party participation methods are now inadequate, but this deficiency can be solved without adopting radically

119. *Id.* § 1712(c)(9).
120. *Id.* § 1712(f).
121. *Id.*
122. S. 507, 94th Cong., 1st Sess. § 103(c) (1975).
123. *Id.*

new techniques. If interested third parties are allowed to intervene formally, participation can be assured. The only outstanding question is whether section 309 may be viewed as requiring the BLM to actively seek out and fund the participation of such intervenors.

The real problem confronting the BLM through Congress' new public involvement directive is in the area of land use planning, the third category in the typology of BLM decisions. It is in this crucial area, which underlies virtually all other decisions made by the BLM, that the courts are most likely to apply an interest representation model of review since it is the kind of BLM decision that is most clearly legislative. Recognizing the challenge presented by the new public participation mandate of FLPMA, the BLM must consider its alternatives.

ALTERNATIVES

The Problem

In FLPMA, Congress has directed the BLM to design public participation procedures that are efficient and yet provide sufficient public input to ensure that decisions are based upon full consideration of the public's views. Congress expressed this objective while relying on both traditional public participation methods, such as advisory committees, rulemaking, and formal adjudication, as well as on a wholly new mandate. While such involvement can be provided to some extent within the existing legal framework by broadening intervention and using rulemaking more often, meeting Congress' basic goal presents real difficulties if it is to be achieved effectively in areas of decisionmaking traditionally left to the discretion of the BLM. Involving the public in land use planning, the kind of decisionmaking that underlies all other land management decisions, poses the greatest challenge for the BLM.

In order to avoid judicial imposition of standards for adequate public participation in informal administrative proceedings like land use planning, the BLM must be encouraged to write realistic regulations to govern its own efforts. If the BLM adopts such regulations, the courts will defer to them in the absence of clear statutory guidelines or definitive legislative history to the contrary.[124] As we have seen, the statutory mandate in FLPMA sets out a clear policy, but it gives few clues as to how the BLM is to implement it. In this sense, the very ambiguity of the statute gives the BLM a greater opportunity to define the standards by which its program will be reviewed.

If the BLM fails to take advantage of this opportunity, it is likely

124. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 520 (1978).

to confront the application by the courts of an interest representation standard of review.[125] In FLPMA, as rarely before, such a standard would be appropriate. Land use planning, the underlying basis for virtually all other decisions, poses the unique mix of legislative and judicial functions to which this new standard of review is most applicable.[126] The courts should focus both on whether the administrative record shows that all views presented were actually considered by the decisionmaker and whether the agency actually sought out the views of all those who might conceivably be interested in the proposed action.

The difficulty with judicial review will be, that in the absence of more practical guidance from the agency, the courts will turn to their own expertise for answers. This tends to do three things which are inappropriate in light of Congress' overall objectives in FLPMA: It leads to adversarial confrontations, over-proceduralization, and inappropriate standards of representation.

Traditionally, the courts address questions in an adversarial context. The assumption underlying the judicial system is that the kinds of questions appropriate for judicial resolution present resolvable conflicts, or at least issues that can be compromised equitably.[127] While some realize that in the area of public law, the adversarial model is no longer fully applicable,[128] the courts have not developed alternative approaches to any degree. Yet, in FLPMA, the Congress emphasized the need for BLM to arrive at its decisions through land use planning based on resource inventories and analysis, not adversarial debates. The Act is very management, not judicially, oriented. Congress insisted that the public be involved throughout the process by being given an opportunity to be heard, but not necessarily in adversarial proceedings. In light of this overall focus, the adversarial approach is inappropriate except where traditionally used.

Second, the courts tend to over-proceduralize administrative decisionmaking. The APA itself was an effort to combat this tendency; although the courts, in interpreting the APA in light of their own procedures tend to require adjudicatory procedures. As commentators have noted, the courts have driven the agencies to build bigger records, allow for more formal examination of witnesses, and otherwise turned what were to be quasi-legislative proceedings into trials.[129] Even while emphasizing the need for rulemaking, the courts' focus on judicial pro-

125. See text & notes 66-68 *supra.*
126. See text & notes 67-68 *supra.*
127. *See generally* note 15 *supra.*
128. *See generally* Stewart, *supra* note 15; Verkuil, *supra* note 15.
129. *Id.*

cedures remains. The BLM cannot afford this result, as it is too expensive and too time consuming. Moreover, judicial procedures are not necessary in order to achieve the congressional objectives discussed above.

Finally, some aspects of the judicial approach to interest representation are ill-adapted to the overall goals of FLPMA. The courts are most familiar with representation issues in the civil rights area. In developing civil rights remedies and in determining whether discrimination has occurred, the courts have used indicators such as participant numbers, sample size, and demographic representativeness.[130] These concepts are of marginal utility in assessing the adequacy of public involvement in public land management decisionmaking. Only a small segment of the general populace is directly affected by public land decisions. The primary interest is in the west, where most of the public lands are located. The courts should focus on whether the BLM actually considered all of the viable alternatives presented and whether the views of those affected were presented, but not whether a certain percentage of the population was involved or whether the appropriate racial, ethnic, sexual, or age composition was reflected by the participants.

The importance of judicial review is recognized in the preamble to FLPMA,[131] but in order to achieve the underlying objective of the Act, and in order to develop on-going public participation of an informal type, the BLM must act to guide the courts by adopting regulations. These regulations must emphasize the need to balance administrative efficiency and management needs with the need to involve the public. This will require the BLM to focus on ways to achieve what Congress intended and what the court themselves strive for: procedures designed to allow the public to suggest all possible viable alternatives to the action the BLM proposes so that the BLM may evaluate them fully before making its final decision. The process must be designed in recognition of the BLM's goals, its obvious constraints, and its own ultimate responsibility to make the final decisions. If the BLM takes such action, the courts will be fully justified in taking a more cautious approach to review and letting the BLM develop a new process to meet its challenging new goals.

An Alternative to Avoid

The BLM's task is not easy. The path of least resistance beckons and it presents public involvement as a panacea. The most obvious

130. *See* Stewart, *supra* note 15, at 1689.
131. *See* 43 U.S.C. § 1701(a)(6) (1976).

model for the BLM to follow is the Department's own public involvement guidelines, which have already gone this route. On August 11, 1978, the Department of the Interior published interim guidelines for public participation in decisionmaking.[132] The guidelines view participation even more broadly than FLPMA does. Participation is defined as "[s]ystematic opportunity for the public to know about and express their opinions on possible departmental actions and policies; and to know that their views are considered in shaping decisions and become part of the record of the decisionmaking process."[133] The definition of participation and the statement of purpose for the guidelines emphasize the need to involve the public in the ongoing decision making processes of the Department, the need to hold departmental officials accountable for public participation and efforts, the need to consider public views in making decisions, and the need to record the public views and the Department's process.[134] While all these needs are important, they fail to recognize obvious agency and public constraints. This lack of realism is even more obvious in the guidelines on techniques.

Although prefaced with the statement that the participation technique adopted should be appropriate to both the mission of the administrative unit and to the extent of possible public interest, the actual guidelines are flawed because they fail to recognize some of the inherent limitations of public participation discussed above. Specifically, the guidelines emphasize the need for frequent public participation contacts.[135] Officials should consider involving the public "earlier or more frequently than mandated, or than has historically been done."[136] The guidelines also suggest continuing feedback to public groups,[137] a draining activity for agencies. The guidelines recognize that problems arise if the interested public is offered so many involvement opportunities that they cannot participate fully.[138] This recognition is specious, however, in light of the continued emphasis on frequent involvement. The general public has a very limited amount of time available to participate in following agency decisionmaking. Early and frequent public participation sessions exhaust the public's interest and doom the effort to contacting only those persistent folks whose special interests require their attention.

Similarly, the guidelines fail to recognize that the public most interested in particular BLM decisions tends to consist of those who are

132. 43 Fed. Reg. 35754 (1978).
133. *Id.* at 35755 (Dept. Manual, Part 301, § 2.2B).
134. *Id.* (Dep't Manual, Part 301, § 2.3).
135. *Id.* (Dep't Manual, Part 301, § 2.5B).
136. *Id.*
137. *Id.* at 35756 (Dep't Manual, Part 301, § 2.6G (4)).
138. *Id.* at 35755 (Dep't Manual, Part 301, § 2.6D).

directly affected or interested. A nod in this direction is given in the definition of public, "those affected or interested individuals, including consumers; organizations and special interest groups; officials of local, state, and Indian tribal governments; and officials of other federal agencies."[139] Nevertheless, special efforts to reach and involve "reluctant or unknown segments of the public," are required.[140] Minorities, young people, the aged, the handicapped, and the disadvantaged are specifically mentioned.[141] While attention does need to be paid to reaching all those likely to be affected by BLM decisions, many of the groups referred to in the guidelines are probably not going to be affected directly by most BLM land management decisions or at least not in any way other than those specially interested. It seems a waste of time and money to undertake special efforts to reach groups who are uninterested in the BLM's activities.

The emphasis in the departmental guidelines on recording public views and the agency officials' response may make the entire process unduly cumbersome. The guidelines state that the public record can be brief and feedback can amount to simple action or no-action decisions.[142] The repeated statement of need to record views and respond to comments,[143] however, may result in extensive and expensive record keeping in areas where it is unnecessary.

Finally, the guidelines require agency public participation procedures, where possible, to provide for conflict resolutions between legitimate public interests.[144] Although difficult, if not impossible, to implement, the idea that agencies can utilize public participation methods as a means of conflict resolution is an intriguing one. Even though FLPMA contains broad statutory mandates for public participation, the Act does not envision the BLM acting as a mediator between competing public interest groups. While recognizing that public participation may serve a conflict resolution function, the suggestion in the guidelines that the BLM attempt to affirmatively involve itself in conflict resolution[145] is troublesome.

These new departmental guidelines are based on precisely the same ill-conceived assumptions about public participation that made for the unrealistic expectations and the ultimate serious rethinking of the participation programs of other government agencies. Rather than following this approach, the BLM must design public participation

139. *Id.* (Dep't. Manual, Part 301, § 2.6A).
140. *Id.* (Dep't. Manual, Part 301, § 2.6E).
141. *Id.*
142. *Id.* at 35756 (Dep't Manual, Part 301, § 2.7A(2)).
143. *Id.* at 35755-56 (Dep't. Manual, Part 301, § 2.6).
144. *Id.* at 35756 (Dep't. Manual, Part 301, § 2.7A(4)).
145. *Id.*

procedures that will allow for efficient decisionmaking, yet still provide enough public input in order that its decisions cannot be viewed as arbitrary and capricious. The courts will assess the success of the BLM's efforts in terms of the specific standards and requirements given to the BLM by Congress in FLPMA. Since few standards and requirements are provided, the courts will turn to the adequacy of public participation as a measure of judicial review. The type of involvement chosen will largely be up to the BLM. Under these circumstances, the BLM should develop and publish explicit public participation guidelines modifying those adopted by the Department generally, in order to guide the courts in reviewing BLM decisions.

Alternatives

1. *Constraints.* While recognizing the need to adopt public participation techniques appropriate both to the BLM's management goals and to the extent of the public interest, it is imperative to consider the constraints on the BLM's public participation program, including human participation limits. No public participation program will be effective unless it accounts for these limitations. Human participation limits are universal and have been discussed above. The unique limits on the BLM deserve additional discussion.

The BLM has been criticized in the past for its inability to carry out its basic land management mandate. Although it is probably not true, the public widely fears that the public lands are rapidly deteriorating because of poor range management practices and that many mineral lessees are operating without adequate supervision.[146] The recognition of such problems has led to lawsuits and new legislation. These problems cannot be ignored in a zealous pursuit of public involvement. The most important mission of the BLM is not to involve the public in decisionmaking, but to effectively and efficiently manage the public resources of the country. The major constraints on its ability to perform this function are personnel and budget limitations. The BLM manages four times the amount of land as the United States Forest Service,[147] and yet is has approximately one-seventh the number of employees and one-fourth the budget of the Forest Service. Since the manpower of the BLM is spread extremely thin, any employee-intensive public participation methods may not be effective. Under these circumstances, it will be extremely important for the BLM to adopt

146. Natural Resources Defense Council v. Hughes, 454 F. Supp. 148 (D.D.C. 1978); Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1975).

147. U.S. BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS (1977).

public involvement methods which are inexpensive and which do not require much employee time. Any other approach will be futile.

2. *Advisory Boards.* The BLM could better use the multiple use advisory committees required by the Act[148] to obtain a good deal of the needed input. Advisory committees should be used more than they are now as a public participation device. The BLM should try to place individuals on the committees who represent major interest groups, as well as neutral state and local officials and other citizens. The interest group representatives should be encouraged to share the information they hear at the meetings with other members of their organizations so that the agency can obtain the broadest possible response to its proposals to the advisory committees. Special care should be taken to involve the committee in plan implementation as well as planning, since advisory boards are particularly well-suited to provide such input.

By carefully choosing advisory board members so that all major interest groups affected by BLM decisions are represented, the major management alternatives could be explored during advisory board meetings. The boards also provide an excellent way to involve the public in on-going implementation of land use plans once they are adopted, since they avoid expensive public hearings. The proposed implementation decisions can simply be raised as a regular agenda item for the board to consider. Board membership also overcomes the problem of limited public resources and tolerance since the members are compensated for their time.

While this method has real advantages for the BLM and should be explicitly looked to as a major public involvement device, it will never be acceptable as fully meeting the BLM's obligations. First, advisory committees are in considerable disfavor today because of their expense and because of their past history as devices for coopting agency decisionmakers. In addition, advisory boards are required by statute to be locally oriented.[149] While in many areas, most of the major national interests in the public lands are reflected locally, this is not true in some public land areas. Thus, not all interests will be represented. Finally, Congress itself felt that advisory committees were not enough, as is reflected in the fact that it added the general public participation requirement to section 309.[150]

3. *State and Local Government Coordination.* Coordination of federal land management activities with state and local governments is

148. 43 U.S.C. §§ 1739(a), 1753 (1976).
149. *Id.* §§ 1739(a), 1753(c).
150. *Id.* § 1739(e).

a major theme of FLPMA. Not only is the need to involve them mentioned in section 309,[151] it is also specifically required in the provisions on land use planning.[152] In addition, section 210 requires notification of state and local government officials if the federal government proposes to transfer land out of federal ownership.[153] While the application of this requirement is narrow, it reflects Congress' belief that the BLM should always coordinate its activities carefully with state and local officials.

Because state and local government officials are the elected representatives of the local community, they have credibility as public representatives. To the extent that the BLM can combine the required coordination with consulting with representatives of the people, it can deemphasize formal public hearings and other time-consuming and costly public participation methods. While such coordination can be improved, and the BLM has been directed to do so, it has been a standard procedure for some time through mechanisms, such as A-95 clearinghouse review and NEPA coordination. Expanding the involvement of state and local governments is limited, however, by their own staff time and resources. Moreover, such coordination will not, alone, be sufficient to meet all of the BLM's obligations. The Act envisions coordination with state and local government as being one method among many.

4. *Public Hearings and Workshops.* FLPMA directs the BLM to hold public hearings whenever necessary to obtain the public's view about the BLM's proposed plans and programs.[154] In addition, the definition of public involvement included in the Act, refers to meetings, advisory mechanisms and such "other procedures as may be necessary."[155] As noted above, the BLM has used these methods in the past, although not as frequently nor as well as they can be. For example, hearings were often held on proposed land use plans, but rarely, if at all, on specific management actions such as timber sale plans. The BLM has improved its use of these standard public involvement techniques over the past several years and is working to involve the public in less formal ways such as in workshops where the representatives of key interest groups meet to discuss problems.

The difficulties of relying on this technique are three-fold. First, because such meetings are formal, they require careful notice, public-

151. *Id.*
152. *Id.* § 1712(f).
153. *Id.* § 1720.
154. *Id.* § 1701(a)(5).
155. *Id.* § 1702(d).

ity, and organization. The tendency is to ask participants to make statements orally and submit written comments for the record. This formality tends to make communication go one way, from the public to the agency. It is difficult for the BLM to explain its proposals in such a context without sounding like it has already decided what it will do.

Second, the formality of the setting and the fact that participants must take their own time to attend a meeting and prepare a statement means that only the most interested people will attend. The audience is self-selected to represent only those most directly affected by the BLM's proposal. While this may lead to identification of the viable alternatives and provide the agency with the opportunity to hear from the people and organizations who are most likely to appeal or protest the decision later, these methods do not involve the general public in the way envisioned by section 309.

Finally, formal public meetings or workshops are time-consuming and expensive. The BLM cannot afford to hold them as often as they might like to in order to obtain needed input. In fact, even if the BLM did hold meetings as often as input would be useful, the public would soon stop attending. Even those who are especially interested in an area cannot spend all of their time attending meetings. Implementation decisions are made so frequently that it is impossible to fully involve the public in them through the use of this method.

As the discussion above indicates, none of the traditional public involvement methods is a cure-all. Advisory committees, state and local government coordination, and public meetings can all be used more effectively than they have been in the past. Through well-planned utilization of traditional involvement strategies, the BLM can meet its fundamental obligation—the identification of all viable alternatives to its proposed actions. The BLM's regulations on public involvement should recognize these methods as important parts of its public involvement program. Nevertheless, the BLM must be aware of the strengths and weaknesses of each method and state the rationale behind each method so that a reviewing court will understand their interrelationship. All of these traditional involvement strategies, however, are BLM controlled; the BLM decides when to hold meetings, and to a certain extent, who will attend and what will be discussed. As noted above, FLPMA requires more.

5. *Open Public Involvement Formats.* In order to obtain the type of input envisioned by section 309 of FLPMA, the BLM needs to develop new participation formats designed to give self-selected members of the public an opportunity to comment, not only on BLM proposals,

but to speak as well on what they view as the general priorities and key specific decisions in public land management. In addition, the BLM must take steps to meet with and hear the views of the general public who are not so interested in public land issues that they would attend a special meeting.

In order to obtain the views of interest group representatives and others who are likely to be particularly interested in public land management issues, the BLM must develop more varied involvement opportunities. People with important ideas are not always able or willing to make formal statements at public hearings. General open houses in district and state offices can be a good way for the BLM staff to meet with interested individuals to discuss general issues. Another method which can be expensive, but useful, is to send out questionnaires. Questionnaires have the advantage of reaching more of the membership of particular groups, and they do not require anyone to take the time to come to a meeting or prepare a statement. Another technique useful in this area is a variation of the workshop approach—the planning session on specific issues. Unlike the usual workshop, the BLM need not have any particular proposal to present for people to respond to in a planning session.

These methods allow the BLM to provide a way for those interested in the public lands to give the agency their general ideas and views without having to respond to a specific BLM developed plan. Various techniques must be used in order to obtain this kind of response, but in every situation the BLM must be aware both of its own limits and those of the participants. The objective of such strategies is not to spend unlimited amounts of time; it is to obtain information which the BLM needs in order to develop all of the viable alternative management options for the lands, as well as to be able to respond to public criticism of its choices.

A more difficult task facing the BLM is creating ways to involve the general public in its decisionmaking. These are the people who do not attend meetings and probably do not know very much about the public lands. Yet, these people are often just as much affected by public land management decisions as many of those who will attend a meeting or open house. In fact, some of the interest groups claim to represent just these folks. One way to involve them is to use survey research techniques. Questionnaires can be developed to address the various trade-offs confronting land managers. Such questionnaires would enable the BLM to obtain the kind of information it needs on the public's views, but there are real limitations on this technique. First, the use of survey research methods by the government is strictly

controlled by Office of Management and Budget guidelines, as well as privacy restrictions. Second, whenever this technique is used, the technique itself and how the questions were posed becomes as much an issue as the results. It looks too much like a vote was taken for the self-perceived losers to do anything other than attack the methodology. Third, this is a costly method which can only be used occasionally. Finally, the use of questionnaires does not look like public involvement to either Congress or the courts. It provides public input, but it does not resemble the familiar hearings most recognize as involvement. The use of survey research techniques will not solve the BLM's problem of obtaining the views of the general public, but it may be useful under certain special circumstances.

A much more promising approach for the BLM would be a systematic program of approaching a full spectrum of community, regional, and national groups who are not uniquely interested in the public lands. The Forest Service in the past has encouraged its employees to become actively involved in community groups locally, yet this effort was never very well focused. The BLM should have a well-defined program of making speeches to all kinds of groups ranging from broad natural resource oriented organizations to groups like the Rotary and other service or hobby clubs. The BLM should seek invitations to these groups, and should not just wait to be asked. The speakers have the opportunity to educate the public about the BLM and to hear what the general public thinks about the BLM and its programs. If this exchange of ideas is to be useful, the speaker must report to the BLM on the audience response, so that others in the organization can become aware of the public's questions and concerns. The advantage of this type of program is that it would reach people other than those who are so interested that they are self-selected to attend BLM initiated meetings. This method also can bring out public views on general priorities, rather than specific issues. Finally, rather than being controlled by the BLM, the location and context are controlled by the group itself.

A disadvantage of this approach is that no matter how well-organized the effort, it can never be very systematic. It does not, moreover, contribute to building a record that would adequately show proper representation of public views as to a particular decision. It does, however, constitute part of an essential pattern of openness and discourse with the public which will be vital in making defensible decisions capable of implementation in the years to come.

CONCLUSION

There is an understandable reluctance on the part of many admin-

istrators to be overly specific about procedure in regulation writing. They fear, not without some justification, that they will be locked into an unwise course of action by rigid requirements or be faulted by the courts for failure to cross every "t" and dot every "i." There is to be sure, risk in specificity. Hesitant BLM officials, however, must be aware that failure to translate the glittering banalties of the departmental guidelines into those that are reasonable and implementable for public involvement planning is not simply risky—it virtually invites litigation. Congress has explicitly required that the BLM transcend APA and other traditional consultation formats, but it has left the agency free to define its own new directions. The courts know that Congress has found the old ways inadequate. The courts, however, are at a disadvantage, in that the Congress has said little about why the previous standards were wanting or what would be preferable. Unless the BLM defines a pattern, the courts will impose one of their own. The BLM cannot afford to lose the initiative in creating a new relationship with the courts and the public.