PUBLIC LAND ADMINISTRATION IN ARIZONA: THE NEED FOR CONGRESSIONAL ACTION NOW

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Slightly over one hundred years ago what is now the State of Arizona became a Territory of the United States.[1] From that time until the Territory became a State by Joint Resolution of Congress approved August 21, 1911,[2] and the Proclamation of Admission was signed by President Taft February 14, 1912,[3] admitting the Territory of Arizona into the Union on an equal footing with the other states of the Union, long and bitter debates took place in the halls of Congress. Some of these debates were motivated by political reasons; some by the questioned economic feasibility of admitting Arizona into the Union as a separate state or by joint statehood with New Mexico.

The attitude of the members of Congress opposing statehood for Arizona, and particularly proposing joint statehood with New Mexico was, to a great extent, based upon the fact that the large land area of Arizona, constituting over 72 million acres of land, was largely a waste land suitable, as expressed by many members of the Congress, only for rattlesnakes, scorpions and centipedes, and could not support a state government. By narrow votes in Congress these proposals were defeated, and in January of 1906 a bill passed the House of Representatives to join Arizona and New Mexico as one state; but the Senate amended it to provide that the people of the two Territories should be allowed to express themselves on joint statehood by ballot. At the regular election in November of 1906 the people of Arizona overwhelmingly repudiated the joint statehood proposal.

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[1] An Act enacted by the 37th Congress of the United States December 1, 1862, entitled "An Act to Provide a Temporary Government for the Territory of Arizona and for other Purposes; approved February 24, 1863, by President Abraham Lincoln.

[2] Joint Resolution Nc. 8, 37 Stat. 39 (1911).

[3] 37 Stat. 1728 (1912).

The population in Arizona in 1900, as shown by the census of that year, was 122,931, or a population density of only 1.8 persons per square mile. The 1960 census shows Arizona had a population of 1;302,161, a 73.7% increase over the 1950 population of 749,587, with an approximate population density of 11.5 persons per square mile. This population density is continuously and rapidly increasing.

The exact acreage of federally-owned land and fee-owned land out of the total area of 72,688,000 acres at the time Arizona was admitted into the Union and the respective percentages thereof is unknown, but undoubtedly, privately owned land constituted a comparatively small percentage of the total area.[4] This small acreage of land in private ownership was a result of railroad grants made by Congress, Spanish land grants and lands obtained from the federal government under existing land disposal legislation. Pursuant to the provisions of the Enabling Act of Arizona,[5] the people inhabiting the proposed state forever disclaimed all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes. The State of Arizona, however, did receive certain grants under the provisions of Section 24 of the Enabling Act for the support of common schools and other institutional purposes, the acres of the land granted by the federal government for such purposes amounting to 10,543,753. On the other hand, New Mexico was granted 12,794,659 acres.[6]

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[4] It is known that under the Act of July 27, 1866, the Atlantic and Pacific Railroad Company (now the Atchison, Topeka and Santa Fe Railroad) was granted some 7,790,128.85 acres of land in Arizona (See Table 6, PUBLIC LAND STATISTICS, 1964, Bureau of Land Management, U.S. Dept. of the Interior). It also appears from statements made by Howard J. Smith, State Land Commissioner of Arizona representing the State of Arizona at hearings held on the Taylor Grazing Act legislation April 20, to May 2, 1934, by the Senate Committee on Public Lands and Surveys, that approximately 25% of the total area was in private ownership (See Hearings on H.R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong. 2d Sess. (1934), while as of the beginning of 1965 only 15.37% of the total area of Arizona was in private ownership. In other words, in a period of some thirty years Arizona has lost over 10% of its taxable wealth in fee lands. This in indeed an alarming situation. The loss of this acreage undoubtedly is due to increasing activities by the federal government in acquiring large areas for governmental purposes through condemnation or purchase procedures and by acquisition of lands by the Bureau of Land Management through the private exchange features of Section 8 of the Taylor Grazing Act. In the latter case there have been many instances in exchanges whereby the Bureau of Land Management demanded and received in order to equalize values more land than was conveyed under the exchange applications. For instance during the year 1964, in Arizona, there were three exchanges consummated whereby the federal government received 6,142.48 acres and issued patents to the three exchange applications of 4,236.54 acres (See Table 25, PUBLIC LAND STATISTICS, 1964, Bureau of Land Management, U.S. Dept. of the Interior).

[5] Act of June 20, 1910, 36 Stat. 557.

[6] PUBLIC LAND STATISTICS, 1964, at 8 (Bureau of Land Management, U.S. Dept. of the Interior).

Today, out of the total land area of 72,688,000 acres, we find the federal government owns or controls 52,089,582.60 acres, or 71.66%, the State of Arizona owns as trust lands under the provisions of the Enabling Act 9,166,781.43, or 12.61%, while there is in private ownership only 11,431,635.97 acres, or 15.73%.[7] The latter figure relating to lands in private ownership includes land owned by the State in its proprietary capacity and not as trustee, and by the counties and local governments. Based upon these figures it can been seen that 84.3% of the total land area in Arizona is tax-exempt, which does not include lands owned by the state and by the counties and local governments and land exempt from taxation for special reasons.

Of the 52,089,582.60 acres of federally owned, controlled, managed and trust lands, the Department of the Interior controls and manages 17,390,511.70 acres, and out of this total area there is, under the jurisdiction and management of the Bureau of Land Management, 12,984,393.0 acres.[8] The administration of these 12,984,393.0 acres is what we are concerned with today.

It has often been said that Arizona is the land of the three "C's" — copper, cotton and cattle — and its economic survival has been dependent upon these three "C" enterprises. However, in recent years, and particularly since World War II, the economic growth of Arizona has not been dependent upon the three "C's." Because of climatic conditions existing in Arizona, industry is continuously seeking plant sites and individuals are continuously seeking home sites and jobs. The additional wealth brought in by industry and new residents, however, is seriously offset by the rising cost of state, county and local governments whose main source of revenue is dependent upon ad valorem taxes on fee lands. While the population density since 1900 has increased from 1.8 persons per square mile to 11.5 persons per square mile today, the land in private ownership is only 11,431,635.97 or 15.73% of the total area. Therefore the economic future and survival of Arizona, as well as the other western states facing the same population growth problems, must look to the relinquishment by the federal government, through disposal methods, of some of its unreserved public lands; and, it appears that we now are facing a new era in what to do about the problem.

Throughout the years, by piecemeal methods, Congress has enacted into law land disposal statutes providing means of acquiring fee title to unreserved public lands. In the exercise of its constitutional authority

[7] 53d Annual Report of the State Land Commissioner of the State of Arizona, Statistics, p. 27 (1965).

[8] PUBLIC LAND STATISTICS, 1964, Table 9, 19 (Bureau of Land Management, U. S. Dept. of the Interior).

and responsibility[9] Congress, over the years, has abdicated much of its responsibility to the administrative branch of the government by granting administrative authority, especially to the Secretary of the Interior, to make public-land policy. Likewise, Congress has failed to act to change any of these administrative policies by proper legislation or to correct any of the abuses flowing from its exercise.

The last time Congress passed any material legislation relating to the administration of public lands was in 1934, when it enacted the Taylor Grazing Act.[10] While the Taylor Grazing Act was enacted during a period of great economic depression with the express purpose of conserving the public lands and stabilizing the livestock industry, it also, at the insistence of members of Congress from the western states who were fearful of the bureaucratic monstrosity they were creating by the broad discretionary powers granted to the Secretary of the Interior in administering the Act, did provide certain safeguards and protections by granting authority to the Secretary to dispose of public lands by including in the Act the classification provisions of Section 7.[11] Shortly after the passage of the Taylor Grazing Act, on November 26, 1934, the President of the United States *temporarily withdrew* all public lands under the administration of the General Land Office (now the Bureau of Land Management) from settlement, location, sale or entry, pending classification.[12] The effect of this withdrawal was to stop and halt all forms of land disposal for an indefinite period of time, and it actually repealed and abrogated the provisions of Section 14 of the Act,[13] which authorized the sale of isolated tracts of land. At this point it is interesting to note that while the aforesaid executive withdrawal order was supposed to be "temporary" only, it is still in existence today.

After the promulgation of this temporary withdrawal order, the western members of Congress became alarmed over the situation, and as a result, several amendments were offered in May of 1935, less than a year after the passage of the Taylor Grazing Act. These amendments included an amendment to Section 7 of the Act. The purpose of amending Section 7 was to authorize the Secretary of the Interior, in his discretion, to examine and classify lands withdrawn by the Executive Order of November 26, 1934, and a subsequent one of February 5, 1935,[14] for uses and purposes other than grazing, both inside and outside grazing districts. This amendment was approved on June 26, 1936, and now appears as Section 315f, 43 U.S.C.[15]

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[9] U. S. Constitution, art. IV, cl. 3.
[10] Act of June 28, 1934, 48 Stat. 1274, 43 U.S.C. § 315 (1964).
[11] 48 Stat. 1272 (1934), 43 U.S.C. § 315f (1964).
[12] 54 I. D. 539 (1934).
[13] 28 Stat. 687 (1895), 43 U.S.C. § 1171 (1964).
[14] 55 I. D. 188 (1935).
[15] Act of June 26, 1936, 49 Stat. 1976, 43 U.S.C. § 315 (1964).

The question as to the wisdom of vesting discretionary powers in the Secretary to make such classifications or whether or not such classifications should be made mandatory was brought sharply into focus in hearings had on on the amendment before the Committee on Public Lands and Surveys in the United States Senate.[16] It was decided that if classification was made mandatory, funds would have to be provided by Congress to do the work, and no one was certain whether or not appropriations would be made for such purpose; furthermore, pending the completion of a mandatory classification everything would be tied up.[17]

Therefore, since the enactment of the Taylor Grazing Act, the only method of disposal of public lands to individuals, except under the mining laws, is for a person to file an application with the Land Office under some type of applicable land law and thereby request the Secretary of the Interior, through the Bureau of Land Management, to exercise discretionary powers vested in the Secretary and classify the land as suitable for disposal. Of course the Secretary can classify lands for disposal on his own motion without application. Only recently has Congress implemented the classification provisions of Section 7 of the Act by the enactment of temporary legislation providing for classification procedures, the authority under the Act expiring June 30, 1969.[18]

Current regulations of the Department of the Interior relating to the administration of public lands consist of a work of over 714 finely printed pages. Although these regulations prescribe the administrative means of acquiring fee ownership of public lands under the administration of the Bureau of Land Management, it is a well-known fact that the existing policy of the Department, particularly in Arizona, has been and is to halt all forms of disposal. Also, before a person attempts to acquire any interest in public lands under the administration of the Bureau of Land Management, he should carefully read the regulations applicable to its particular case and ascertain at the same time if there are any current amendments, because the regulations are frequently amended and changed. Every person is charged with full knowledge and understanding of these regulations to the same extent as he is charged with knowledge of the law, and he acts at his own peril if he relies upon verbal information furnished him by employees of the Land Office, who, although acting in utmost good faith, could be in error in their interpretation of the regulations.

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[16] Hearings on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess. (1935) to amend Sections 1, 8 and 15 of, and to add section 17 to the Taylor Grazing Act.

[17] See statement of Senator Carl Hayden and other Senators, Hearings on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess. 8 (1935).

[18] Public Law 88-607, 78 Stat. 988 (1964), 43 U.S.C. § 1416 (Supp. 1965).

As previously stated, Congress undoubtedly has been derelict in its constitutional responsibility and authority in allowing the Secretary of the Interior to adopt arbitrary policies and rules and regulations under the guise of discretionary power and authority. Unfortunately the courts have upheld the Secretary in his exercise of these discretionary powers and have refused to review his decisions under the Administrative Procedure Act,[19] for the reason that the powers being discretionary in nature, the courts are powerless to review such discretionary acts, no matter how harsh, arbitrary or capricious they may be. The horrifying results of these unbridled powers of discretion, unless positive action is taken by Congress, have no foreseeable end.

A classic example of this unreviewable discretionary power is found in the cases of *Ferry v. Udall* and *Freeman v. Udall*,[20] two consolidated cases seeking judicial review of the Secretary's respective decisions involving sales of public lands under the Isolated Tract Act.[20a] In the *Ferry* case the land was offered for sale for $24,238.55, the appraised value thereof set by the Department, and Ferry bid and paid $32,500.00; in the *Freeman* case the appraised value of the land set by the Department was $39,516.40 and the bid price and the amount paid was $39,517.00. The Ferry sale was held on April 18, 1958, and the Freeman sale was held on August 28, 1958. In each case on the date of the sale Ferry and Freeman were declared the high bidders but cash certificates were withheld for a period of thirty days after the date of sale for the filing of other preference right applications by owners of contiguous lands as prescribed by law. Both Ferry and Freeman owned contiguous lands to their respective tracts purchased and were, therefore, qualified preference-right applicants. In both cases other preference right applications were filed, which resulted in a series of administrative appeals lasting in the *Ferry* case until July 17, 1961, and in the *Freeman* case until October 26, 1960, at which time Freeman was declared to be the purchaser by a final decision of the Secretary of the Interior as against opposing conflicting applications. In the *Ferry* case the sale was cancelled on March 18, 1963, by departmental decision for the reason that it appeared the land was not offered for sale at its true market value. In the *Freeman* case the sale was cancelled for the same reason by the Secretary on June 8, 1962. A period of almost five years had elapsed from the date of sale to the final decision cancelling the sale in the *Ferry* case and almost four years had elapsed in the *Freeman* case. During this period of time the purchase money in each case remained on deposit with the Department and the government had the use and benefit thereof.

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[19] 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964).
[20] 336 F.2d 706 (9th Cir. 1964), *Cert. denied* 381 U. S. 904 (1964).
[20a] Section 14 of the Taylor Grazing Act, 43 U.S.C. § 1171 (1964).

The basis of cancellation in each case was predicated upon a *secret* appraisal which was made by the Department without affording either Ferry or Freeman an opportunity to refute the same. And, the cancellation decisions were founded upon unpublished policies of the Department in the form of the Anti-Speculation Policy and Public Land Conservation Policy, hereinafter discussed, which were applied retroactively to each of the instant cases. The right of cancellation was founded upon the fact that no cash certificate had been issued by the Department to either Ferry or Freeman.[21]

The Anti-Speculation Policy mentioned above, adopted by Secretary Seaton in February of 1960, was prompted by a Congressional investigation on land appraisal practices conducted by a special Subcommittee of the Committee on Government Operations of the House of Representatives. After hearings were held in Phoenix in January of 1960, the Subcommittee, by Interim Report,[22] condemned the appraisal practices of the Bureau of Land Management of Arizona made in connection with the disposal of public land through private exchange transactions.[23] The Report specifically eliminated public sales under the Isolated Tract Act as being the subject matter of its investigation, stating: "A public auction generally eliminates, or at least mitigates, problems arising from faulty appraisal."

When Secretary Udall succeeded Secretary Seaton, he adopted, on February 14, 1961, what he called the Department's Public Land

[21] Such certificates, called cash certificates in cash sales and final certificates in other entries such as homestead, etc., are not documents which create rights. The Supreme Court of the United States has said they are simply papers to which a claimant is "entitled" when he "acquires a vested interest" in public lands. The Yosemite Valley Case, 82 U.S. (15 Wall.) 77, 87 (1872). They furnish "prima facie evidence of an equitable claim upon the government for a patent," Guaranty Savings Bank v. Bladow, 176 U. S. 448, 454 (1900). Prior to the District of Columbia Court of Appeals decision in Willcoxson v. U. S., 313 F.2d 884 (1963), cited and followed by the Ninth Circuit Court in Ferry v. Udall, *supra* note 20, and as far back as 1845, the Supreme Court of the United States had held to the principle in an unbroken line of decisions that the United States "has no right to refuse a patent to a bona fide purchaser of land offered for sale" absent fraud or mistake, and that once the purchase price had been paid "it was no longer the property of the United States, but of the purchaser . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser." See Carrol v. Sanford, 44 U.S. (3 How.) 440, 461 (1845); United States v. Hughes, 52 U. S. (11 How.) 552 (1850); Witherspoon v. Duncan, 71 U.S. (4 Wall.) 210, 219 (1866); Atherton v. Fowler, 96 U. S. 513 (1877); Simmons v. Wagner, 101 U. S. 260 (1879); Cornelius v. Kessel, 128 U. S. 456 (1888); Benson Mining Co. v. Alta Mining Co., 145 U. S. 428 (1892); Cameron v. United States, 252 U. S. 450 (1920); Payne v. New Mexico, 255 U. S. 367 (1920); Wyoming v. United States, 255 U. S. 489 (1921). However, both the courts in *Willcoxson* and *Ferry* distinguished these cases as having been decided on sales held under other types of disposal acts distinguishable from the Isolated Tract Act (Section 14 of the Taylor Grazing Act, 43 U.S.C. § 1171 (1964).

[22] Interim Report, Land Appraisal Practices, Dept. of the Interior, Bureau of Land Management, 18th Report by the Committee on Government Operations, 86th Cong., 2d Sess., House Report No. 180.

[23] 48 Stat. 1272 (1934), 43 U.S.C. § 315g (1964).

Conservation Policy, supplementing the Anti-Speculation Policy of his predecessor, Secretary Seaton. Neither the Anti-Speculation Policy nor the Public Land Conservation Policy were published in the Federal Register, but both were announced through the medium of the press. At the same time Secretary Udall promulgated an eighteen-month moratorium which decreed that from and after the date the order was published in the Federal Register no petitions for classifications and applications to acquire lands under Sections 7, 8 and 14 of the Taylor Grazing Act would be accepted. (Sections 8 and 14 relate to private exchange and public sale disposals respectively.)

Notwithstanding the aforesaid finding by the Subcommittee that a public auction generally eliminates, or at least mitigates, problems arising from faulty appraisal, the Department arbitrarily cancelled and vacated in a wholesale manner sales involving hundreds of thousands of dollars without affording the purchasers, who had in good faith paid the purchase price, the right of a hearing to determine whether or not the land had been offered for sale by the Department at the fair market value. Since Secretary Udall's declared moratorium and the wholesale cancellation of public land sales already consumated (except for the issuance of cash certificate), very few disposal applications have been processed to patent by the Arizona Land Office. This fact can probably be explained by three reasons: (1) that current appraisals of land values by the Bureau of Land Management are unrealistic and too high; (2) that the buying public is fearful of the treatment they may receive at the hands of the disposal authority, or the Department of the Interior; and (3) that the attitude of the present administration is not to dispose of any land to the general public at least until the Public Land Law Review Commission makes its recommendations to the President and Congress.[24]

The foregoing is not the only example indicating that Arizona has been singled out by the Department of the Interior to deny the citizens of the State means of acquiring title to public lands under existing law. For years the Homestead Law[25] has been inoperable in Arizona due to the fact that there is practically no land available where a person could make his home and livelihood due to the change in economic conditions, one of the requirements of the Homestead Law being, of course, that the homesteader establish and maintain residence on the public lands selected. However, until 1955 the provisions of the Desert Land Act[26] were fully operative and actively functioning in Arizona. Virtually hundreds of Arizona residents have filed upon public lands

[24] Public Law 88-606, September 19, 1964, 78 Stat. 982, 43 U.S.C. § 1391 (Supp. 1965).
[25] 26 Stat. 1097 (1891), 43 U.S.C. § 3161-302 (1964).
[26] 19 Stat. 377 (1877), 43 U.S.C. § 321-339 (1964).

under the provisions of this Act. Many entries have been proved up and gone to patent.

On February 23, 1955, there were over 800 allowed desert land entries pending in the State, many of which had reached the point where the entrymen had fully developed the land through the drilling of irrigation wells, clearing and leveling of the land and planting it to crop, and they were ready to make their final proof and obtain patent. On this date, however, the Secretary of the Interior, through his Solicitor, without warning to the hundreds of allowed desert-land entrymen and without affording them an opportunity to be heard (and without notifying those hundreds who had pending applications — there being nearly 600 pending applications before the Arizona Land Office), in an opinion directed to the Director of the Bureau of Land Management, completely repealed and nullified the Desert Land Act in Arizona and directed the cancellation of all desert land applications and entries in Arizona if the sources of water for the reclamation of the land came from irrigation wells whose waters were percolating in nature.[27] The basis for this alarming and catastrophic decision was the second opinion of the Arizona Supreme Court in the case of *Bristor v. Cheatham*,[28] which held on rehearing that percolating waters (such as irrigation well water) was not subject to appropriation under the laws of the State of Arizona, but was subject only to the doctrine of reasonable use, although for more than forty years the Department had recognized irrigation well water in Arizona as being qualified to meet the reclamation requirements of the Desert Land Act.

While the Department's decision related only to Arizona desert land entries, it had an electrifying effect on other western states, particularly California. Apparently due to heavy political pressure from California, the Solicitor rendered on March 21, 1957, a decision validating desert land entries in California, reasoning that, under California law, the doctrine of correlative rights rather than the doctrine of reasonable use prevailed in relation to percolating waters, thereby qualifying percolating waters for reclamation of the land under the Desert Land Act.[29]

After the decision by the Solicitor invalidating all desert land entries in Arizona (which had the effect of cancelling all allowed desert land entries, representing investments of hundreds of thousands of dollars), Congress, at the insistence of the Arizona delegation, by special legilsation,[30] validated all desert land entries which had theretofore been al-

[27] 62 I. D. 49 (1955).
[28] 75 Ariz. 227, 255 P.2d 173 (1953).
[29] Ruby E. Huffman *et al.*, 64 I. D. 57 (1957).
[30] Act. of August 4, 1955, 69 Stat. 491, 43 U.S.C. § 321 (1964).

lowed and were subsisting on the effective date of the Act (August 4, 1955) and which were dependent upon percolating waters for their reclamation. Congress, however, did not see fit at that time to defy the administrative interpretation of the water laws of the State of Arizona relating to percolating waters which affected the validity of the desert land entries in the State; and, unfortunately, no judicial review was ever had of this devastating departmental decision.

In this connection it should be pointed out that competent geologists estimate there are large areas remaining in Arizona which could be reclaimed under the Desert Land Act by the use of ground water, which use, in the opinion of the geologists, not only would not aggravate the critical groundwater areas existing in other parts of the State, but would add taxable wealth both in the form of ad valorem taxes and by monies expended in the development and improvement of these large areas of land. This is not to say, however, that large areas should be indiscriminately opened up for development without thorough and independent geological surveys as to water feasibility and the extent of the groundwater reserve. But it does point out the fact that under existing decisions by the Department of the Interior, this method of land acquisition from the federal government has been forever barred until and unless Congress either amends the Desert Land Act or the Department of the Interior reverses its decision of February 23, 1955, or the Legislature of the State of Arizona enacts groundwater legislation which would meet the requirements of the Department's decisions to qualify the allowance of desert land entries in Arizona.

In another arbitrary decision by the Department, in 1952, two existing allowed desert land entries held in partnership by two prominent Arizonians, on which thousands of dollars had been expended in reclamation and development by the drilling of an irrigation well, clearing, leveling and farming the land, all in accordance with the Desert Land Act, were cancelled without notice and without hearing on the grounds that the witness clause on their applications (which merely certified that the witnesses had examined the land and the same was desert and non-mineral in character) had been executed by the wives of the two partners and in one instance by one of the partners. No opportunty had ever been gven to the desert-land applcants to correct the witness affidavit if it was in error. And, at the time of the cancellation decision, there was no remedy in the local courts to review the decision.

There are other examples of misleading the public in connection with land disposal. When the Gila Bend Gunnery Range lying between Gila Bend and Yuma South of Highway 80 was established in 1941, large areas of private land suitable to cultivation were included within the exterior boundaries of the withdrawal. At the conclusion of World War II, when these lands were to be returned to the owners, before

the owners could plan and prepare to reclaim and develop their land the lands were again taken by the Department of Defense for a gunnery range, and these lands still lie within the exterior boundaries of the Gunnery Range. When it appeared that the need for these lands was to be of a permanent nature for defense purposes, and particularly because of the advent of the jet age in gunnery operations (requiring more maneuverability), the Director of the Bureau of Land Management publicly advocated that people seeking to acquire public lands under the exchange provisions of the Taylor Grazing Act should buy these fee lands within the Gunnery Range and offer them to the federal government as base lands in exchange for public lands. Several exchanges were consummated based upon this recommendation and with the firm approval and recommendation of the Department of Defense in order to prevent the payment of rental for the use of the land. Thousands of acres of these Gunnery Range lands were bought for exchange purposes at high prices and had been in good faith offered to and accepted by the government for such exchange purposes in the public interest. Delay in processing the exchanges brought them within the scope of the Interior Department's retroactively applied Anti-Speculation and Land Conservation Policies, and a change in policy by the Department of Defense resulted in the rejection of all exchange applications involving Gunnery Range lands.

Many other examples which, if related herein would extend this article to an unreasonable length, could be cited of the "on again," "off again" policy of the Department, "stop" and "go" procedures, commitments made by officials of the Department and the general public's reliance and action thereon only to find later, at great expense and loss of time and energy, that their rights were nullified or rescinded by the Department by the retroactive application of a new policy by a new Secretary of the Interior.[31]

Because of many administrative abuses and the need for judicial review of agency decisions, particularly those of the Department of Interior, and because a citizen who had been injured by a decision of the Department could not obtain judicial review of the decision without the burden and expense of filing his action in the District Court of the District of Columbia, Congress, in 1962, enacted Public Law 87-748[32] which vests venue jurisdiction over the Secretary of the Interior and the Bureau of Land Management in the local district courts. In considering the bill, it is interesting to note that Congress was of the

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[31] For an excellent review of the problems facing the Atlantic and Pacific Railroad in connection with its land grants in Arizona and New Mexico, see GREEVER, ARID DOMAIN/ THE SANTA FE RAILWAY AND ITS WESTERN LAND GRANTS (1954).

[32] 76 Stat. 744, 28 U.S.C. § 1361 (Supp. 1965).

opinion that it was desirable from the standpoint of efficient judicial administration, in addition to the convenience of the appellant, to permit these actions to be brought locally. It was stated in the Senate Report:[33]

> Frequently, these proceedings involve problems which are recurrent but peculiar to certain areas, such as water rights, grazing land permits, and mineral rights. These are problems with which judges in those areas are familiar and they can handle expeditiously and intelligently.

The enactment of this law by Congress was, of course, a great step in affording the local citizen the right to be represented by a lawyer admitted to practice in his own state and to address his grievances to a judge of his local district court. However, this gratuitous act on the part of Congress, bringing the Secretary home so that a local citizen could battle it out with him in his own back yard, has become a "dud" and of little or no consequence if the decisions of the Secretary, rendered in the exercise of his discretionary power, are unreviewable by the courts.

Through the leadership of the Honorable Wayne N. Aspinall, Representative of the House of Representatives from Colorado and Chairman of the Committee on Interior and Insular Affairs, Congress enacted into law and the President signed on September 19, 1964, an Act establishing a commission to be known as the Public Land Law Review Commission.[34] In Section 1 of the Act[35] the congressional declaration of policy is expressed in the following language:

> It is hereby declared to be the policy of Congress that the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public.

Section 2 of the Act[36] provides:

> Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of the public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary.

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[33] Senate Report No. 1992, U. S. Code Cong. Ad. News. 2784-87 (1962).
[34] Public Law 88-606, 78 Stat. 982, (1964), 43 U.S.C. § 1391 (Supp. 1965).
[35] 78 Stat. 982 (1964), 43 U.S.C. § 1391 (Supp. 1965).
[36] 78 Stat. 982 (1964), 43 U.S.C. § 1392 (Supp. 1965).

Section 4 of the Act[37] charges the Commission with the study of existing statutes and regulations governing the retention, management and disposition of the public lands; to review the policies and practices of the federal agencies charged with administrative jurisdiction over such lands insofar as such policies and practices relate to the retention, management and disposition of those lands, and to recommend to the President and to the Congress not later than December 31, 1968, such modifications in existing laws, regulations, policies and practices as will, in the judgment of the Commission, best serve to carry out the policy expressed in Section 1 of the Act. Section 10 of the Act[38] defines the term "public lands" as used in the Act to not only include the public domain, which is under the administraton of the Bureau of Land Management, but all other reservations, excluding Indian reservations, and lands which have from time to time been permanently or temporarily withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws, including the mining laws.

This Committee has been organized under the Chairmanship of Congressman Aspinall and public hearings in the western states have been scheduled for this summer, although no date for public hearings in Arizona has been set.

The task facing the Public Land Law Review Commission is tremendous, but not insurmountable if the citizens of Arizona and other western states, and particularly the members of the bar, will offer their aid to the Commission in finding and reaching a solution to the problems at hand. In line with the policy of Congress in creating the Commission, considerable thought and study should be given as to whether the public lands of the United States should be perpetually retained and managed or disposed of in a manner to provide the maximum benefit for the general public. The answers to these alternative questions should not be left up to the administrators of the public land laws, to selfish groups or interests or even to the Public Land Law Review Commission itself. Congress has finally challenged the public to cast aside all personal reasons and beliefs and to sit down with the Commission and reach a solution to the problems. Unless something is done in Arizona within a comparatively short period of time to extend fee ownership of lands in order to provide a broad tax base through acquisition means from the public-land reserve, whether the lands be administered by the Secretary of the Interior or other executive branches of the government, it is certain Arizona will face an economic situation which will lead only to bankruptcy of the State, the counties and cities and the people.

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[37] 78 Stat. 983 (1964), 43 U.S.C. § 1394 (Supp. 1965).
[38] 78 Stat. 985 (1964), 43 U.S.C. § 1400 (Supp. 1965).

At the same time, in considering land disposal methods and procedures, the rights of the present users of the public lands must be carefully safeguarded and protected and those users who have a substantial investment must be fully protected in their investment in public lands by virtue of their use. Public land policy should be both a leasing and a transfer to private ownership. In giving consideration to these uses; it should be determined whether leasing or private ownership is preferable in a given situation, and also, consideration must be given to the multiple-use concept, the wise use of natural resources and long-range future planning for all uses. As mentioned before, Section 4 of the Act charges the Commission with the duty not only of studying existing statutes and regulations governing the retention, management and disposition of the public lands but also of reviewing the policies and practices of the federal agencies charged with administrative jurisdiction over such lands and of recommending such modifications in existing laws, regulations, policies and practices as will, in the judgment of the Commission, best serve to carry out the policy declared by Congress.

This leads to the necessity that the Commission determine in its recommendations to the President and to Congress whether or not the present unbridled powers of the Secretary of the Interior and other governmental administrative agencies such as the Department of Agriculture in its administration of forest lands and permits, now unreviewable by the courts, being under the guise of the exercise of discretionary power, should be allowed to continue. It is believed that the members of the bench and bar, as well as the thinking public, will unanimously demand an immediate halt to such practices and the grant of such powers. It is recognized that a certain amount of discretionary power must of necessity be imposed upon administrative agencies, but this does not mean that a person feeling himself aggrieved or injured by the exercise of such discretionary powers should not have his day in court.

In addition to the Act of 1962 granting venue jurisdiction to the local district courts, discussed earlier, there have been several bills introduced in Congress to provide for some type of judicial review of decisions of the Interior Department or ther government agencies administering public lands. However, none of these bills give the "little guy" with limited resources but much at stake the opportunity for a full scale hearing before a local federal district judge who is familiar with the problems at hand. In order to fully accomplish this objective the Public Land Law Review Commission should recommend to the President and to Congress that all decisions of administrative agencies, whether involving exercise of discretion or otherwise, are subject to appeal to the federal district court of the state in which the land is

situate, and the law should clearly provide that the appeal shall be set set for trial de novo by the court without a jury, the court to hear evidence and make independent findings of fact and conclusions of law from the evidence submitted, and either affirm, reverse or modify the decision of the administrative agency. The decision of the district court would be appealable to the Circuit Court of Appeals in the manner final judgments or decisions are appealable to that Court.

Unless these provisions are clearly set forth and written into the law judicial interpretation will undoubtedly temper and nullify their purpose. For instance, in Arizona, in appeals relating to decisions of the State Land Commissioner in his administration of state lands, it was until 1952 provided that an applicant to lease state land could appeal from a decision of the Commissioner to the Department, and from the Department to the superior court of the county in which the land is situate.[39] It was contemplated that a trial de novo be heard by the court without a jury. However, the Supreme Court of Arizona in *Manning v. Perry*[40] limited the power of the court, even though a trial de novo was prescribed by the statute. This decision held the court's power to review a decision of the State Land Department was limited and the decision of the Land Department should be accepted by the court unless unsupported by or contrary to evidence or the result of fraud or misapplication of law. In 1952 the Legislature, being dissatisfied with this decision, amended the appeal section and made all decisions of the Commissioner (except those involving reclassification and appraisal) subject to appeal, and required the court to try the case de novo without a jury, the court to hear evidence and make independent findings of fact and conclusions of law from the evidence submitted and either affirm, reverse or modify the decision of the Commissioner.[41]

Although there has been some criticism the broad scope of these appeal provisions, there have been many successful appeals wherein the decision of the Commissioner was either reversed or modified, and the fact that it has been law for more than fourteen years is certainly prima-facie evidence that our State Land Department appeal provisions are workable and satisfactory.

Under the existing regulations of the Department of the Interior no hearing is afforded as a matter of right except in certain specific cases such as contest matters and cases involving grazing problems under Section 3 of the Taylor Grazing Act and the Federal Range Code.[42] In

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39 ARIZ. CODE ANN. § 11-303 (1939).
40 48 Ariz. 425, 62 P.2d 693 (1936).
41 ARIZ. REV. STAT. ANN. § 37-134 (1956).
42 43 C.F.R. Part 4110 (1965).

fact, a review of the decisions of the Department will disclose that in case after case the right of a hearing has been denied. Theoretically the decisions are based upon the record before the reviewing officer, whether he be the Director of the Bureau of Land Management, the Solicitor, or the Secretary himself, but in many instances the case can be decided (although the regulations appear to provide otherwise[43]) upon an inter-office manual or report not made available to the party appealing. Therefore, it is of utmost importance that the "little guy" way out here in the far West have a chance to be heard in a trial de novo proceeding in the local federal district court.

Finally, it is strongly recommended that consideration be given by the Public Land Law Review Commission to clearly define when agency discretion begins and when it ends. Furthermore, there must be some finality to agency decisions and the doctrine of res judicata must be forcibly imposed on all decisions of the Department in the absence of fraud or gross mistake of fact or law so that public rights as well as private rights cannot be indefinitely suspended because further litigation may some day be initiated. Such a limitation of power and the requirement of finality to agency decisions and the doctrine of res judicata would have prevented the action taken by the Department of the Interior in the *Freeman* case, *supra,* after the final departmental decisions declared Freeman to be the purchaser of the public lands involved in that particular public sale.

It is believed the words of the late Justice Alfred C. Lockwood, spoken in two cases involving the right of the State Land Department to reconsider its final decisions, is most apropos in support of the foregoing recommendations. On rehearing in *Hunt v. Schilling,*[44] decided in 1925, Justice Lockwood wrote:

> I am well aware of the rule in the federal Land Office, permitting the Secretary of the Interior to change his decisions at will. *This rule is so contrary to general principles of law that I do not feel it should be followed, unless there are imperative reasons for doing so.* (Emphasis supplied.)

In the later case of *Alberts v. McGirk,*[45] involving sale of state lands, he again wrote:

> The question of whether state lands shall or shall not be sold depends on the statute. Without going into detail, we think that there can be no doubt that it is made discretionary with the land department, in the absence of a statute specifically commanding the sale. When, therefore, one desires to pur-

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[43] 43 C.F.R. § 1840.0-8(b) (1965).
[44] 27 Ariz. 235, 232 Pac. 554 (1925).
[45] 51 Ariz. 510, 78 P.2d 483 (1938).

> chase state lands and makes application therefor to the commissioner in the manner provided by law, it is discretionary with the department whether the land shall or shall not be sold, but, as we have said, *when this dicretion is once exercised and a decision made, the latter cannot be set aside by either the commissioner or the department* . . . .
>
> We are of the opinion that when the land had been struck off and the purchase price paid, the discretion of the commissioner had been fully exercised and exhausted, and all that remained for him was the purely ministerial act of executing the certificates after they had been signed by the purchasers. (Emphasis supplied.)

The Supreme Court of the United States has, in at least two cases, stated that there must be some point at which discretion ceases and obligation takes it place.[46] Furthermore, in order to restore full faith and confidence of the public in the administration of public lands, in the absence of fraud, gross mistake of fact or a decision contrary to law, the government should be held to its bargain in dealing with public lands, particularly with any exchange or public sale disposal, and its rights and duties therein governed to the same extent as the law applicable to contracts between individuals.[47]

In the recent case of *Lewis v. Udall*,[48] before the United States District Court for the District of Arizona, involving another action relating to cancellation of a public sale, the Honorable Walter E. Craig, after finding in his opinion and order that the Secretary had the discretion to accept or reject the offer of purchasers up to the time a cash certificate was issued, and basing his decision on *Ferry v. Udall, supra,* makes this very pertinent and important statement which sums up in very few words what the writer has attempted to outline:

> Notwithstanding the foregoing and the resulting judgment in this matter, it appears to this Court *that either the statutes or the regulations of the Department are sorely in need of revision.* This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, are not summarily cast aside by a change in policy or a summary decision to withhold the cash certificate. *The remedy for this unhappy situation rests, however, with the Congress of the United States, or the Executive Department, and not with the Courts.* (Emphasis supplied.)

Notwithstanding any inference to the contrary, nothing said in this

[46] United States v. Purcell Envelope Co., 249 U.S. 313 (1919); Garfielde v. United States, 93 U.S. 242 (1876).
[47] See Lynch v. U.S., 292 U. S. 572 (1934).
[48] No. Civ-5451-Phx.

article should be construed as personal criticism of either the present Secretary and his staff or his recent predecessors. Secretary Stewart L. Udall, a graduate of the College of Law of the University of Arizona (1948), and his predecessors have inherited a bureaucracy which, through the years, has arrogated unto itself powers never contemplated by Congress. The point has been reached where any Secretary of the Interior assuming his position finds himself bound to the system and to the exercise of unlimited powers which have been condoned and approved by the courts and acquiesced in by Congress by inaction on its part to curb and restrain the continual growth of such powers.

Arizona has been honored by the Truman, Eisenhower and Kennedy-Johnson administrations by having leading citizens of this state, well trained and qualified for the job, appointed in administrative capacities in the Department of the Interior. In the Truman administration Richard E. Searles, a prominent Scottsdale businessman, farmer, and former President of the Salt River Valley Water Users' Association, served for sometime as Under Secretary of the Interior; in the Eisenhower administration, Arizona was honored by having one of its native sons, Orme Lewis, Jr., a prominent Phoenix attorney, appointed as Assistant Secretary of the Interior in Charge of Public Lands, and upon his resignation Arizona State Land Commissioner Rogert Ernst was appointed Assistant Secretary of the Interior in Charge of Public Lands. President Kennedy appointed Secretary Stewart L. Udall and he in turn appointed Frank J. Barry, also a graduate of the College of Law of the University of Arizona (1946), to the all-important post of Solicitor of the Department. All of these outstanding citizens of this state are simply not the type of individuals that figure as the prime actors or bureaucratic dictators who have brought about some of the incidents mentioned above. They all inherited a system of bureaucratic government grown so strong and powerful over the years that no Secretary could possibly restrain and curb it. Only Congress now has the power to enact curbing and restraining legislation, and it is its duty to do so.

Again, it cannot be over-emphasized that now is perhaps the only time we will have in our lifetime as members of the general public and bar to provide Congress with suggestions and recommendations on the problems herein discussed. Now is the time to act and to provide the Public Land Law Review Commission with the benefits of our carefully considered thoughts and recommendations based upon sound and unselfish grounds to see that, as Judge Craig calls it, "this unhappy situation" is corrected once and for all. If we fail to act now, we will all be guilty of an inertia and complacency which condones and encourages the continued exercise of unlimited bureaucratic power and abuse.