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PUBLIC LAND REVIEW

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HEARINGS BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

S. 758

A BILL TO ESTABLISH IN THE OFFICE OF THE SECRETARY OF THE DEPARTMENT OF THE INTERIOR A BOARD OF PUBLIC LANDS APPEALS, AND FOR OTHER PURPOSES

PART 1

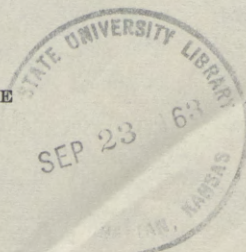
MAY 6 AND 7, 1963

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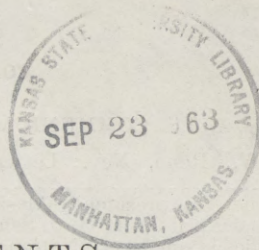
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PUBLIC LAND REVIEW

MONDAY, MAY 6, 1963

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 3110, New Senate Office Building, Senator Alan Bible (chairman) presiding.

Present: Senators Bible, Gruening, Moss, Allott, Jordan, and Simpson.

Also present: Stewart French, chief counsel, and Robert Wolf, professional staff member.

Senator BIBLE. The subcommittee will come to order.

This is the time that has been regularly set by notice for the hearing on Senate 758, a bill that was introduced by our distinguished colleague of this committee, Senator Gruening, on behalf of himself and his colleagues, Senator Bartlett, Senator Bennett, the two Nevada Senators, Senator Church, Senator Goldwater, Senator Jordan of Idaho, Senator McGee, Senator Morse, Senator Moss, Senator Mundt, and Mrs. Neuberger.

This bill would establish in the Office of the Secretary of the Interior a Board of Public Lands Appeals. The Board would consist of a Chairman and two members who would be appointed by the Secretary with the approval of the President. Their jurisdiction would be to review any final decision of the Bureau of Land Management or the Geological Survey on behalf of the Secretary. The bill provides an opportunity for local hearings by the Board. The bill also points out who may file appeals and provides the authority to establish rules and regulations in accordance with the Administrative Procedure Act, as well as providing that a single member or an employee of the Board could be designated by the Board Chairman to conduct a hearing.

The Board's decisions shall be bound by the applicable regulations issued by the Secretary, although it could recommend the revision of regulations by the Secretary and delay decisions until the regulations by the Secretary and delay decisions until the regulations had been changed. Appeals from the decisions of the Board shall be to the court of appeals for the circuit where the lands are located.

(S. 758 follows:)

[S. 758, 88th Cong., 1st sess.]

A BILL To establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established in the

Office of the Secretary of the Department of the Interior (hereinafter called the "Secretary") a Board of Public Lands Appeals (hereinafter called the "Board"), under the administrative control and supervision of a Chairman.

SEC. 2. The Board shall consist of a Chairman and two associate members, appointed without regard to the civil service and classification laws, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board.

SEC. 3. Members of the Board (including the Chairman) shall be appointed by the Secretary, with the approval of the President, and shall receive compensation at the annual rate of \$

SEC. 4. Any final decision of the Bureau of Land Management or the Geological Survey of the Department of the Interior concerning the uses of or claims to public lands under the jurisdiction of the Department of the Interior may be appealed to the Secretary, and the Board shall hear and determine such appeals on behalf of the Secretary. Final decisions on such appeals, after giving the appellant an opportunity for a hearing at a location convenient to the appellant, shall be made by vote of a majority of the Board on the basis of the entire record.

SEC. 5. An appeal under this Act may be filed with the Secretary only by an individual, partnership, corporation, or other organization or a State (or political subdivision thereof) materially affected by the appealed decision.

SEC. 6. The Secretary shall establish rules and regulations governing the Board's procedures and activities, which rules and regulations shall be in accord with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011).

SEC. 7. Hearings may be held before the entire Board or before a single member thereof or before an employee of the Board designated by the Chairman to conduct such hearings.

SEC. 8. The Board shall be bound in its decisions by the applicable regulations issued by the Secretary: *Provided*, That, if the Board finds that, as applied to a particular case or group of cases, the regulations issued by the Secretary would lead to an inequitable, unjust, or unintended application of the law, it shall recommend to the Secretary appropriate and legally justifiable changes in such regulations and shall delay its decisions on affected appeals until the Secretary has considered the changes suggested and has made a decision as to whether or not to promulgate such changes in the regulation.

SEC. 9. Appeals from final decisions of the Board shall be to the United States court of appeals for the circuit in which the land involved is situated.

Senator BIBLE. We have before us this morning the report of the Interior, dated May 2, 1963, addressed to the chairman of the full committee and signed by the Secretary of Interior and the report of the Bureau of the Budget.

(The reports referred to follow:)

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., May 2, 1963.

HON. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR JACKSON: This responds to your committee's request for our views on S. 758, a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes.

We recommend that the bill not be enacted.

This bill, in the main, would create a board with authority to make final administrative decisions "concerning the uses of or claims to public lands under the jurisdiction of the Department, arising from decisions of the Bureau of Land Management or the Geological Survey."

The effect of the bill would be to diffuse and impair the statutory responsibility of the Secretary of the Interior over the public lands and their resources. Individual case decisions have to be made in the context of the national responsibilities of the Secretary. For example, no one would seriously contend that the granting of homestead entries should rest upon the same considerations as they did 75 years ago. In the exercise of the discretion granted the Secretary

by section 7 of the Taylor Grazing Act, as amended (43 U.S.C. 315f), cognizance must be taken of the other or competing demands for the land. It is within the framework of statutory guidelines prescribed by the Congress that the Secretary recognizes the social and economic factors of our dynamic society. Some cases turn upon the legal effect of certain factual situations, but others involve the element of discretion. The Congress has fixed the boundaries of the exercise of this discretion and to interfere with it would impair the pattern of public land administration.

Where cases involve matters of judgment, they can be decided more than one way and the ultimate decision should be the responsibility of the Cabinet officer who is accountable. The proposed legislation would make it impossible for the Secretary of the Interior to exercise that such responsibility. It would substitute the judgment of the board composed of officials who do not have the responsibility, and hence are not accountable, for the administration of public land which administration is itself basic to this exercise of judgment and discretion.

Apart from a limited class of cases (e.g., 43 U.S.C. 315h), there is no statutory requirement for appeals to the Secretary of the Interior in public land matters. The appellate system is simply a method by which he provides for a review of the decisions of those subordinate officers to whom the authority to make such decisions has been delegated.

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

It is a cardinal principle of public administration that the head of a department must have full responsibility for all activities within the purview of such department and, commensurately, must have full control over such activities.

These principles are explicitly recognized in the Hoover Commission 19th and concluding report (pp. 5 and 7) which, in the chapter entitled "Executive Authority and Accountability," stated in part as follows:

"It was a frequent finding of our various task forces that the President and his department heads do not have authority commensurate with the responsibility they must assume. In many instances authority is either lacking or is so diffused that it is almost impossible to hold anyone completely accountable for a particular program or operation. This tendency is dangerous and can, if extended far enough, lead to irresponsible government. * * *

"Similarly statutory powers have often been granted directly to subordinate officers in such a way as to deny authority in certain areas to the President or to a department head. * * *

"The department heads must be free, with Presidential approval, to reorganize their departments in the ways that, in their judgment, best suit the requirements of efficiency and economy. This means that the internal organization structure of executive agencies should not be prescribed by legislation."

The bill would constitute a breach of these basic principles of sound administration.¹

¹ The Hoover Commission report captioned "General Management of the Executive Branch," vol. I, at p. 1, states in part as follows:

"In this part of its report, the Commission on Organization of the Executive Branch of the Government deals with the essentials of effective organization of the executive branch. Without these essentials, all other steps to improve organization and management are doomed to failure.

"The President, and under him his chief lieutenants, the department heads, must be held responsible and accountable to the people and the Congress for the conduct of the executive branch.

"Responsibility and accountability are impossible without authority—the power to direct. The exercise of authority is impossible without a clear line of command from the top to the bottom, and a return line of responsibility and accountability from the bottom to the top.

"The wise exercise of authority is impossible without the aids which staff institutions can provide to assemble facts and recommendations upon which judgment may be made and to supervise and report upon the execution of decisions.

"Definite authority at the top, a clear line of authority from top to bottom, and adequate staff aids to the exercise of authority do not exist. Authority is diffused, lines of authority are confused, staff services are insufficient. Consequently, responsibility, and accountability are impaired."

The Hoover Commission report on "Reorganization of the Department of the Interior," volume II (p. 10), states "* * * that the foundation of good departmental administration is that the Secretary [of the Interior] shall have authority from the Congress to organize and control his organization, and that the congressional grants of independent authority to subordinates be eliminated."

With respect to the area of responsibility to which the bill is addressed, the Board of Land Appeals would have greater authority than the officer of Cabinet rank, chosen by the President with the advice and consent of the Senate, to exercise stewardship over such matters.

A specific example of the impact of such a board upon the Secretary's authority is found in section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. 315f. That section requires that before most land dispositions may be effected the Secretary classify the lands as proper for the disposition sought. In a very real sense section 7 of the Taylor Grazing Act is the fulcrum upon which public land administration is balanced. The bill would, in effect, divest the Secretary of the authority to determine the availability of land for disposition and lodge it in a board, divorced from staff institutions which on a day-to-day basis are apprised of changing conditions and needs in both the public and private sectors. Thus, the determining decision in the administration of the public lands would be removed from the ambit of responsibility of the officer charged by Congress with public land administration.

Similarly, the bill would diffuse and fractionate the responsibility of the Solicitor upon legal questions before the Department. The Solicitor is appointed by the President with the advice and consent of the Senate as the chief legal officer of the Department. The Board under S. 758 would have authority to make legal determinations on issues involving public lands and their resources. Who would determine the law to govern actions of subordinate lawyers and officers of the Department, the Solicitor or the board? The evils of divided responsibility and unclear lines of authority that S. 758 would engender on the policy side would be paralleled on the legal side.

S. 758 would—

(1) Establish in the Office of the Secretary of the Interior a Board of Land Appeals consisting of a Chairman and two associate members appointed without regard to the civil service and classification laws by the Secretary, with approval of the President (secs. 1 and 2).

(2) Provide that any final decision of the Bureau of Land Management or the Geological Survey in public land cases may be appealed to the Secretary of the Interior and decided by a majority of the Board, after giving the appellant an opportunity for a hearing at a location convenient to the appellant (sec. 4). Hearings would be held before the Board, a single member thereof, or an employee of the Board designated by the Chairman (sec. 7).

(3) Provide that an appeal may be filed with the Secretary of the Interior only by an individual, partnership, corporation, or other organization or a State, or political subdivision thereof, materially affected by the appealed decision (sec. 5).

(4) Provide that the Secretary of the Interior shall establish rules and regulations governing the Board's procedures and activities, which rules and regulations shall be in accord with the Administrative Procedure Act, as amended, 5 U.S.C. 101 et seq. (sec. 6).

(5) Provide that the Board shall be bound in its decisions by regulations issued by the Secretary except that, if the Board finds that application of the regulations to a case would lead to an inequitable, unjust, or unintended application of the law, it shall recommend to the Secretary legally justifiable changes in the regulations and shall delay final decision on affected appeals until the Secretary has made a decision as to whether or not to make such changes (sec. 8).

(6) Provide that appeals from final decisions of the Board shall be made to the U.S. court of appeals for the circuit in which the land involved is situated.

To evaluate the bill properly, it is pertinent to consider the present procedures of the Department and the purpose of the bill.

Under Reorganization Plan No. 3 of 1950 (15 F.R. 3174), all functions of all agencies, officers, and employees of the Department (except the functions vested by the Administrative Procedure Act, as amended, 5 U.S.C. 1001 et seq., in hearing examiners and other functions not material here) were vested in the Secretary. The plan authorized the Secretary to provide for the performance by any agency, officer, or employee of any function of the Secretary. In other words, all func-

tions of the Department (with the stated exceptions) were vested in the Secretary but he was authorized to delegate his authority to perform any function to any subordinate in the Department. This means that the Secretary may delegate his authority to act in public land matters to the Director of the Bureau of Land Management or to any subordinate of the Director, with or without review of the action taken by the delegate by way of appeals or otherwise.

The procedures relating to public land appeals now in effect in the Department fall into two categories: (1) those applicable in grazing permit and license cases under sections 2 and 3 of the Taylor Grazing Act (43 U.S.C. 315a, 315b); and (2) those applicable in all other cases.

The grazing case procedure is set out in part 161 of title 43, Code of Federal Regulations (the Federal Range Code). It provides for initial adjudications to be made by district managers of the Bureau of Land Management with a right of appeal to a hearing examiner. On the appeal to the examiner, the right to a hearing is provided by the Taylor Grazing Act, 43 U.S.C. 315h. After the hearing examiner's decision, a right of appeal lies to the Director of the Bureau of Land Management and, from the Director's decision, to the Secretary. Thus, three levels of appeal are provided.

Nongrazing cases in turn fall into two categories, the procedures for both being found in part 221 of title 43, Code of Federal Regulations. The first category includes what may be termed contest cases. These are cases involving unpatented mining claims and entries principally under the homestead and desert land laws. Such claims and entries, if valid, constitute rights in land. Therefore, due process requires that a claim or entry cannot be declared invalid for reasons not shown by the official records, until the holder has been given notice and an opportunity to be heard. Accordingly, the Department's rules provide that where a claim or entry is challenged by the Government or a private party, an Administrative Procedure Act hearing must be held before a hearing examiner. From his decision an appeal lies to the Director of the Bureau of Land Management and then to the Secretary, as in a grazing case.

The second category of nongrazing cases are all cases in which the applicant has acquired no rights in land. This category includes applications for oil and gas and other mineral leases, applications for small tracts and sales under the public land laws, applications for agricultural entries requiring classification of land under section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. 315f. Actions in these cases are rendered generally by the personnel in the land offices. Appeals from their decisions lie to the Director of the Bureau of Land Management and then to the Secretary. The greatest volume of appeals by far involves cases in this category.

To summarize at this point, in grazing cases there are three levels of appeal, with an Administrative Procedure Act hearing held on the first appeal. In nongrazing contest cases, there are two levels of appeal, with an Administrative Procedure Act hearing preceding first appeal. In other nongrazing cases there are two levels of appeal, with no Administrative Procedure Act hearings involved.

This bill is directed to appeals to the Secretary primarily from decisions of the Director of the Bureau of Land Management. Although S. 758 also applies to appeals from decisions by the Director of the Geological Survey, such appeals are insignificant in number. Mineral classifications made by the Geological Survey generally are embodied in Bureau of Land Management decisions and as such affect members of the public. Such decisions are subject to review under title 43, Code of Federal Regulations, part 221. We do not believe there is any desire to disturb the procedures for decision and review of any other matters within the responsibility of the Geological Survey.

S. 758 would affect only the last level of appeal, that to the Secretary. It would leave undisturbed the different procedures preceding the appeal to the Secretary.

S. 758 would create a board which, in effect, would have authority to override the Secretary in matters of policy and discretion. This arises from the provisions in section 4 of the bill that the Board shall determine appeals to the Secretary and that "final decisions on such appeals" shall be made by a majority of the Board. Section 9 further provides that appeals "from final decisions of the Board" shall be made to the U.S. court of appeals for the circuit in which the land involved is situated. These provisions preclude the Secretary from changing any decision of the Board which he believes to be inconsistent with or contrary to policies that the Secretary may have established.

For example, on February 14, 1961, the Secretary announced approval of a major land conservation program to govern disposals and utilization of public lands. Paragraph 3 of the program provides that public lands which are marginal for agriculture or more valuable for uses other than agriculture will not be classified for entry under the public land agricultural laws. Many applications are filed each year for entries under the homestead and desert land laws. The allowance of the applications generally requires favorable classification under section 7 of the Taylor Grazing Act (43 U.S.C. 315f). On appeals from decisions of the Bureau of Land Management making adverse classifications and rejecting applications in accordance with the February 14, 1961, program, the Board would have authority to reverse the Bureau of Land Management and allow entries to be made, thus defeating the program.

We do not suggest that the Board would act in open defiance of the Secretary and deliberately frustrate his program. In many areas of discretion the guidelines are subject to interpretation in several ways. With appeals under the direct control of the Secretary as they are now, he can see to it that decisions are rendered which serve to effectuate and implement his programs.

In sum, S. 758 would create an authority in the Department with the power, by decision, to act inconsistently with or directly contrary to departmental policy. This is contrary to Reorganization Plan No. 3 of 1950 which had as its purpose the vesting of all authority of the Department in the Secretary.

A principal objective of the bill appears to be to accord to all appellants the right to a hearing on their appeal to the Secretary. The bill does not define what the term "hearing" means. Presumably, it means a trial-type proceeding at which parties would appeal for the purpose of presenting testimony by witnesses and documentary evidence.

This is objectionable on several grounds. First, we are concerned about the establishment of a universal hearing requirement. Such a requirement would add tremendously to the costs of the appeal system if a substantial number of appellants request hearings. The direct salary costs for handling appeals in the Solicitor's office are running at an annual rate of \$111,000. The appeals average over 400 per year. Assuming that no more than 50 percent of the appellants request a hearing, an additional cost of some \$200,000 can be readily anticipated for the salaries of hearings officers, supporting personnel (i.e., secretarial), reporting charges, and traveling expenses. The Board or its individual members probably could not hold hearings in the field on this scale. Therefore, the additional costs does not include the salaries of the Board members themselves.

Second, the holding of widespread hearings would inevitably delay the disposition of appeals. Unless a sharp increase in personnel is accomplished so that hearings can be held promptly, the result will inevitably be a further delay in the ultimate disposition of appeals. Perhaps the most pressing problem in connection with the present appellate system is the time elapsing before final decisions. S. 758 will not resolve, but rather will compound the problem of delay. In considering the likelihood of funds being made available for substantial increase in personnel to overcome the delay problems it must be borne in mind that in addition to the cost of handling appeals at the Secretarial level dealt with in S. 758, the cost of handling appeals at the level of the Director of the Bureau of Land Management entails a direct salary cost of some \$215,000 per annum.

Third, appellants in grazing and contest cases would be afforded two hearings in the same case.

Fourth, trial-type hearings would serve no purpose in the large number of appeals in which there is no dispute as to the facts and only legal issues are presented. For example, whether the terms of a withdrawal order bars the filing of oil and gas lease applications; whether a small tract lessee can exercise an option to purchase the land after the last day specified for exercising the option; whether the assignment of an undivided interest in part of an oil and gas lease serves to segregate the lease into two leases with an extension of the lease term.

Fifth, we must question the concept that an appellant is automatically to be afforded a hearing even when not required as a matter of due process. The committee will recall the thousands of applicants for desert land entries in southern California, who were the victims of unscrupulous promotions for lands wholly unsuitable for agricultural development. The applications had to be rejected because the lands could not be farmed. The applications were rejected and the rejections were affirmed. The applicants, of course, acquired no rights by the filing of their applications, and they lost nothing from the rejections,

save for nominal filing fees and such amounts as they may have paid to the promoters. Many of the applicants sought hearings on their applications. Hearings in these cases would have been a gross hardship to the applicants because of the added expense they could have encountered. In addition, the cost to the United States would have been staggering. Yet under S. 758, the Department would have been powerless to prevent this added burden.

We would not wish to be understood as deprecating the necessity and propriety of hearings where property rights are involved. And in cases where property rights are not involved, there may be instances where the factual situation can be properly ascertained only through a trial-type hearing. However, in its former situation, a hearing is already provided and in its latter situation does not, in our view, justify a blanket hearing requirement.

Finally, S. 758 would deprive the Department of flexibility in adjusting its procedures to meet changing situations. Established by regulation, the appeal system can be adjusted readily to meet new problems or changing conditions. S. 758 freezes the appellate system into a rigid mold that permits of no deviation.

We note that section 9 of the bill provides that appeals from final decisions of the board may be taken to the U.S. court of appeals for the circuit in which the land involved is situated. It is not clear whether such an appeal would encompass a trial de novo, or would be limited to invocation of special judicial remedies in the nature of mandamus and injunction. If the former is intended, it would be inconsistent with the act of October 5, 1962 (Public Law 87-748). That act provides for judicial review of administrative actions by Federal district courts.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

STEWART L. UDALL,
Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., May 6, 1963.

HON. HENRY M. JACKSON,
*Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for the views of the Bureau of the Budget on S. 758, a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes.

The report which the Secretary of the Interior is submitting details at some length the reasons for his recommendation that the bill not be enacted.

The Bureau of the Budget concurs in that report and, accordingly, recommends that S. 758 not be enacted.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

(Subsequently the following report on S. 758 of the Department of Justice was received:)

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 9, 1963.

HON. CLINTON P. ANDERSON,
*Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning S. 758, a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes.

The bill would establish a Board of Public Lands Appeals, consisting of a Chairman and two associate members appointed by the Secretary of the Interior with the approval of the President. The Board would have jurisdiction to hear and determine on behalf of the Secretary appeals from any final de-

cision of the Bureau of Land Management or the Geological Survey concerning uses or claims related to public lands under the Department's jurisdiction. An appellant would be entitled to an opportunity for a hearing at a location convenient to him, and the Board's decision would be made by a majority vote on the basis of the entire record. The Secretary would be required to establish procedural rules and regulations for the Board which were in accord with the Administrative Procedure Act (5 U.S.C. 1001-1011). Hearings would be held before the entire Board, one Board member, or a Board employee designated by the Chairman. The Board would be bound in its decisions by regulations issued by the Secretary; however, if it found that any regulation would lead to an inequitable or unintended application of the law to a particular case, it would be required to recommend changes to the Secretary.

Appeals from final decisions of the Board would be to the U.S. court of appeals for the circuit in which the land involved is situated.

The Department of Justice defers to the Department of the Interior as to whether the bill should be enacted, although we are not aware of any demonstrated need for such legislation. However, we find several features of the bill objectionable.

Section 4, which would give the appellant an opportunity for hearing, is vague as to the type of hearing contemplated. It does not establish whether the hearing would be a complete *de novo* trial type of proceeding or whether it would be limited to a review of the action appealed from based upon a record of the prior proceeding. Since this section would require the Board's decision to be made on the basis of "the entire record," which would apparently preclude consideration of matters outside of the record, there is an indication that a *de novo* proceeding before the Board is not intended. However, we suggest that this matter be clarified.

Section 6 of the bill would direct the Secretary to prescribe rules and regulations for the Board which "shall be in accord with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011)." Section 4 of that act (5 U.S.C. 1003), which prescribes procedural requirements for rulemaking, excepts from its application rulemaking for "any matter relating to * * * public property." Since the public domain is public property, rulemaking by the Secretary under the public land laws comes within this exception. If section 6 is intended to subject rulemaking concerning appeals to the Board to the procedural requirements of section 4 of the act, notwithstanding the present exception, it would be advisable to clarify this intent.

Section 9 of the bill would provide that an appeal from a final decision of the Board shall be to a U.S. court of appeals. However, it does not expressly vest jurisdiction in the courts of appeals to hear such cases, it does not establish whether the court's review would be limited to a review of the Board's action or whether it would be a trial *de novo*, and it does not provide a time limit for the taking of an appeal to the court.

Further, we question the desirability of granting a right of appeal and vesting it in the courts of appeals. We understand that the Secretary of the Interior now receives about 500 appeals every year. They can involve subjects running from an interpretation of a statute to the number of cattle a grazing-permit applicant should be allowed to graze on a particular number of acres of land. An adverse decision of the Secretary is presently reviewable by the institution of a suit in the U.S. district court, with a right to appeal the court's decision to the court of appeals. The petition which seeks judicial review in such cases must disclose on its face entitlement thereto. Moreover, many appeals to the Secretary involve factual determinations which the courts will not rehear if supported by substantial evidence. This presently available judicial review would appear to be entirely sufficient. This bill, however, would give a right of appeal to the courts of appeals which would be exercisable by the mere filing of a notice of appeal. Permitting appeals of these factual determinations to be lodged with the courts of appeals as a matter of right not only would crowd the dockets of those courts but would encourage much litigation foredoomed to failure.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

Senator BIBLE. The first witness this morning on this particular bill will be the Senator from Alaska, Senator Bartlett. Senator Bartlett, we will be very happy to hear from you at this time.

STATEMENT OF HON. E. L. BARTLETT, U.S. SENATOR FROM THE
STATE OF ALASKA

Senator BARTLETT. Thank you.

Mr. Chairman and members of the committee, because I am a cosponsor of S. 758, and for many other reasons as well, I strongly favor legislation of this kind. I think it would be helpful for appellants, for litigants, and for the Department of the Interior, itself, which, in my view, is now placed in an untenable position, because, in a sense, it is required to act as both judge and jury.

I have here, Mr. Chairman, there is before you, I believe, a prepared statement. I know the committee has a busy morning. I shall not offer to read the statement unless you desire me to do so.

Senator BIBLE. No, it is not necessary. It will be incorporated in full in the record, Senator Bartlett. You may develop it in any manner that you desire.

(The complete prepared statement of Senator Bartlett follows:)

STATEMENT OF HON. E. L. BARTLETT

Mr. Chairman, I appreciate the opportunity to appear in behalf of S. 758 as I am one of the cosponsors of this legislation. I also cosponsored S. 3107 in the 87th Congress which unfortunately was not acted upon.

Having represented Alaskans in the Congress for many years, first as Delegate from the Territory of Alaska and since statehood, as Senator from the State of Alaska, I have had a great deal of experience with public lands problems and with the Department of the Interior. A check through my attic storage locker would reveal a great number of homestead case files. In fact, one might find a greater proportion of land cases than any other type of problem I have handled for my constituents over the years.

I am not unfamiliar with the procedures involved in the acquisition of public lands. I have watched the system operate for a good long while.

Under the present system of appeals, less than 5 percent of cases appealed to the Secretary of the Interior from the Bureau of Land Management or the Geological Survey are reversed by the Secretary.

It has long been my contention that in this system, where some of the same officials are involved in making initial decisions as are consulted in making final decisions, proper procedural safeguards are lacking. Moreover, I have seen many cases where justice was not done for want of a fair and impartial hearing.

Mr. Chairman, S. 758 would establish a Board of Public Lands Appeals in the Office of the Secretary of the Interior. This Board would be independent of those making the decisions on lower levels and it would be authorized to hold hearings "at a location convenient to the appellant." These two features I consider essential to any revision of the land appeals system. The former just plain makes good sense. The latter conforms with the ideal of due process of law considered fundamental to our democratic form of government.

Another point I would like to make is that quite often, to my way of thinking at any rate, Interior officials following the letter of regulations promulgated by the Secretary cause completely unintended applications of the law. For this reason, I am particularly interested in section 8 of S. 758, which authorizes the Board to delay decision in a case where such an unjust application of the law might occur through strict adherence to the regulations. The Board would be allowed to recommend appropriate changes to the Secretary and would act on the case only after the Secretary had considered and either accepted or rejected the recommendations.

At the present time there are in the neighborhood of 600 appeals pending in the Office of the Secretary. I would hope that a Board of Appeals with sufficient staff would both eliminate the present backlog of cases and speed up decision time. I have cases in my files where the appellants filed over a year ago and their appeals have not yet been reached for consideration. In the meantime, they are left sitting on their homesteads, trade and manufacturing sites, or small tracts without patent, not able to make further investment and not knowing if or when the ax will fall.

Mr. Chairman, by way of concluding my remarks, I would like to have included in the record, if this is possible, a resolution passed by the Alaska Senate on April 4, 1963, Senate Resolution 61.

Thank you, Mr. Chairman.

Senator BARTLETT. The statement pretty well covers, Mr. Chairman, my reasons for advocating legislation of this character. I am particularly anxious that there be incorporated as part of my statement Alaska State Senate Resolution 61, which was adopted in the recent session of the legislature, on this very subject, and advocating legislation along these lines.

Senator BIBLE. Without objection, the resolution of the Legislature of the State of Alaska will be incorporated at this point in the record. (The resolution referred to follows:)

SENATE RESOLUTION 61

Relating to the safeguarding of homesteader rights through the establishment of an independent Board of Public Lands Appeals

Whereas there exists no effective right to appeal decisions by the Bureau of Land Management and the Geological Survey concerning the uses of or claims to public lands under the jurisdiction of the Department of the Interior; and

Whereas the lack of such an effective right of appeal adversely affects many actual and potential public land users in Alaska; and

Whereas the lack of such an effective right of appeal thwarts the carrying out of the acts of Congress governing the uses of the public lands; and

Whereas this lack of an effective right to appeal has existed for too many years and should be promptly remedied; and

Whereas a bill to correct these inequities has been introduced in the Senate of the United States by Alaska's Senators, the Honorable Ernest Gruening and the Honorable E. L. Bartlett, and other Senators; and

Whereas this corrective legislation would establish a Board of Public Lands Appeals to hear locally appeals from decisions by the Bureau of Land Management and the Geological Survey concerning the uses or claims to public lands; and

Whereas untold numbers of homesteaders in Alaska, in making original application for land patents, have been advised of the alleged proper procedure to follow by representatives of the Bureau of Land Management only to discover at a later date that such procedure was not proper and that as a result their patent application is invalid; and

Whereas such careless actions have caused homesteaders in Alaska to experience undue hardships and mental anguish; and

Whereas such hardships have cost said homesteaders wasted hours of labor and wasted expenditures of money;

Whereas such action by a Federal agency is intolerable, unnecessary, and inexcusable; and

Whereas such irresponsible actions point up the long overdue need for corrective measures: Be it

Resolved, That the senate supports legislation establishing a Board of Public Lands Appeals established as an independent agency outside the jurisdiction of the Department of the Interior to hear appeals from decisions rendered by the Bureau of Land Management and the Geological Survey concerning the uses or claims to public lands under the jurisdiction of the Department of the Interior; and be it further

Resolved, That copies of this resolution be sent to the President of the United States, the Department of the Interior, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and the members of the Alaska congressional delegation.

Passed by the senate April 4, 1963.

Senator BARTLETT. I think that one helpful result which might flow from enactment of a bill is that it would put this whole matter in better perspective and, among many other things, would speed the processes relating to appeal. Now they are much too slow, and this is generally recognized. I do not think it is the fault of anyone down at

the Department of the Interior. It is just that they are not equipped there to speed these appeals along, as the appellants are entitled to have them sped, and I think that, with a Board of Public Lands Appeals in being, that the whole process would be streamlined, and people who come to Washington on appeal would have a much better chance, much better opportunity for prompter action.

It is required.

I remember calling down just the other day in reference to an Alaska appeal, and being told that it would be months and months before it could be acted upon, because it was somewhere between 200 and 300 on the list of appeals pending.

Aside from that, and to the more important elements of this proposition, Mr. Chairman, as I said before, I think it would divorce from the appeal process the people who work on a daily basis with the Secretary and other high officials of the Department of the Interior and give all of this an independent standing which it does not now have and which would be much more desirable, in my opinion, than the present system.

I have nothing further to submit.

Senator BIBLE. Thank you very much, Senator Bartlett.

Any questions of Senator Bartlett?

Senator ALLOTT. Senator, I have looked at the bill which has been proposed by you and some other Senators, and I hope that the co-sponsorship by some 8 or 9 or 10 persons is a recognition of the problem which has existed, rather than a necessary approval or approbation of the method you have chosen.

I am somewhat concerned that we, No. 1, would set up a Board of Appeals within the Department of the Interior. There is no provision that both parties shall be represented on such Board, and I cannot help but feel that this Board would just eventually bog down in itself, just as the Department of Interior has bogged down on some of these questions in the past.

I have a communication here, a copy of a communication from the Rocky Mountail Oil & Gas Association to the distinguished Senator and chairman of this committee, suggesting another approach.

Assuming that we recognize that the problem does exist, particularly it has existed in the past—I do not know what its present situation is—are you completely wedded to this approach as a solution, or do you think there might be another approach?

Senator BARTLETT. Senator Allott, my answer to that is this: I am not wedded to the language set forth in the bill. I know that the committee, in its judgment and wisdom, will consider the matter which you have just dealt with, and, if it sees fit, as I hope it will, to report out a bill, will make whatever technical and other changes seem desirable.

What I am wedded to is the principle of changing the present systems, because it seems to me that is rather essential.

Senator ALLOTT. I am sure you are wedded to the principle of more speed.

Senator BARTLETT. I am wedded to the principle of more speed, but, even more importantly, I think I am wedded to the principle that these people who come in on appeal are entitled to the judgment of an independent tribunal.

Actually, I am confident that in the Interior Department now there is no desire, and perhaps no resulting effect, of the Secretary merely putting a rubber stamp upon the decision of those within the Department. But the litigants are likely to think this is the case, and, for that reason if for no other, it seems to me rather important than there be a separate office to handle this sort of thing.

I refer you to the fact that the sponsorship of this bill demonstrates a rare note of bipartisanship, because Democratic and Republican Senators alike have joined in urging that something be done constructively relating to this problem.

Senator ALLOTT. I think we recognize the problem, and there are few of us from the western land States who have not been into this matter many times in one way or another. I am concerned that since you ultimately get back into the courts anyway, if there are not quicker and better ways of handling this problem.

You will utilize the letter from the Secretary later, but this is what I wanted to find out from you. This is very akin to a situation, if I may be somewhat personal, that occurred in Colorado many years ago, and that is where we had our district courts and our supreme court completely bogged down. Colorado found out then or decided to establish a court of appeals. This court of appeals existed for quite a few years. But what we found out from this experience was that, by establishing a court of appeals as an intermediary between and before the supreme court, we were simply lengthening the time of decision, and that actually it was so unsatisfactory that we finally disposed of the court of appeals and left our court of general jurisdiction, our district court and our supreme court, and, thereby, got much better judicial administration.

It occurs to me that this is subject to all of the same objections, this particular method.

The Rocky Mountain Oil & Gas Association felt that way and suggested that, since there has been a great improvement generally in the determination of these decisions, and that since the most important are the ones that are usually controversial and they are the ones that are going to end up in court, that we facilitate the expediency with which these may be resolved in the court, either by an appeal from the decision, or, if it has not been decided within a certain time, that it is assumed as a constructive legal matter, that the opinion is adverse, and that the parties may then take it directly to the courts.

It seems to me that this would also have a great virtue, keeping in mind that you and I are both interested in trying to solve the problem.

Senator BARTLETT. Yes.

I am also thinking, and perhaps particularly so, perhaps too much so, I do not know, of the little fellow, so called, who has filed an appeal in a homestead matter after the Bureau has rendered a decision adverse to him, and I assume that in most cases the Secretary affirms that decision.

Senator ALLOTT. The Secretary does what?

Senator BARTLETT. Affirms the decision, and this may very well be the manner in which the decision has to be made from the legal aspects.

But from my correspondence over the years, I gain the impression that the fellow who has been ruled against says, "Well, this is terrible, this is not the American way to do it," because he—"he" being the

Secretary—has been told by the people below him that this decision is right and that the homesteader who has appealed feels that he does not get an adequate review of his case.

I believe he does in the vast majority of cases. But he has a sour feeling about it, there is no doubt about that, and he in most cases is not in a position to go on into court. The matter is concluded right there.

Senator ALLOTT. I do not want to take any more time. I will turn this over to my fellow Senators.

Senator BARTLETT. I will only say finally in response to what you have submitted, Senator Allott, that perhaps a much better mechanism can be evolved. I do not stand upon the language in this bill and say, as far as I am concerned, this is it; not at all.

I am only seeking an improvement for the people, and what I believe would be for the Department, too, in the present system.

Senator ALLOTT. Thank you, Senator.

Senator BIBLE. Thank you, Senator Bartlett.

In connection with what you have just said, I might indicate that I, personally, have some reservations about the present form of the bill, and I note, since somewhat widespread publicity has been given on this particular bill, upon our effort and attempt to work out something that is a little more workable than the present plan of appealing within what I choose to call the vertical line directly within the Department of the Interior, there must be some better substitute for that.

We have received a great number of suggestions. One from the Rocky Mountain Oil & Gas Association. They do say they object to the bill in its present form, although they offer a suggested substitute for it. I think, likewise, this committee will consider it.

I might further add the American Cattlemen's Association has sent a very well written letter indicating a notion, proposal and suggestion for the establishment within each State of a three-man board to be composed of a man appointed by the Secretary of Interior, a man to be appointed by the Governor of the State, a man to be appointed by the user's group to handle some of these appeals, rather than this vertical line which plagues us and causes us so much trouble.

Now, I have no doubt we will receive a great many alternate suggestions. I am not wedded to a particular idea in attempting to handle this problem, but I think somewhere along the way the mind of man can conceive a simpler way of doing it than is presently built into law, and I am sure that we will consider many proposals before we have completed this.

Of course, it has been indicated that there is some desire to have this made a part of our overall public lands review, and we have some theories, a number of which are still to be studied during the coming months, soliciting the people in the field, the ones who have to tangle with this interminable, inexorable, bureaucratic redtape.

I am sure that somewhere along the way we will come up with what I would hope would be a satisfactory solution to the problem. And I do want to incorporate in the record the statement which the distinguished Senator from Colorado has just alluded to.

I am going to make that a part of the record, as well as the suggested proposal which they have submitted. They submit a two-page bill consisting of four sections. I have not had the opportunity of exam-

ining this suggested proposal at any length or depth. This will be done by the committee, as well as by the staff members of the committee.

Without objection, the statement of the Rocky Mountain Oil & Gas Association will be made a part of the record at this point, because the distinguished Senator from Colorado has alluded to it.

(The document referred to follows:)

ROCKY MOUNTAIN OIL & GAS ASSOCIATION,
Denver, Colo., April 12, 1963.

Re S. 758, Board of Public Lands Appeals.

HON. ALAN BIBLE,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR BIBLE: Senator Gruening has informed me that the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs will soon hold hearings on S. 758, which proposes to establish a Board of Public Lands Appeals in the Department of the Interior. We are happy to respond to Senator Gruening's request for a statement from this association on S. 758.

When this proposal was introduced during the last session of Congress a serious problem existed because of the backlog of undecided land appeals pending in the Department of the Interior. We are informed at this time that the number of such pending appeals in the Department has been materially reduced. It is quite possible that this improvement was facilitated by the attention given to the subject by Senator Gruening.

We believe the great majority of cases involving more or less routine administrative matters are handled by the Department fairly, correctly, and with reasonable dispatch. Usually the cases which get bogged down are those involving difficult legal or policy questions. In such cases the decision may be delayed for what appears to be an unreasonable time because the Department is conscientiously trying to reach the correct decision in a hard case. Many of these difficult questions ultimately wind up in court. Accordingly we believe the answer in these troublesome cases is to provide for an appeal directly to the courts after the Department has had a specified reasonable time to make a final decision without requiring that the aggrieved party wait out his administrative remedy unless he desires to do so. In cases which are highly controversial and substantial sums are involved, the way to provide a speedy final decision is to recognize that most of such cases will ultimately be decided by the courts anyway and that decision should not be delayed unnecessarily by prolonged administrative processes.

The legal committee of this association has considered as an alternative to S. 758 an addition to United States Code, title 43, which would expedite direct appeals to the U.S. district courts. A copy of the committee's proposal is attached. We believe such an amendment would provide a better solution to the unreasonable delays in controversial cases than modification of the administrative process. The Department of the Interior appears to be acutely aware of the problem and is taking steps to correct it. In those cases in which the Department in spite of its efforts cannot reach a decision within a reasonable time, the practical answer is to provide for speedy appeal to the courts.

Another means considered for accomplishing the same results would be to amend and expand Public Law 87-748 (76 Stat. 744) which permits an action in the nature of mandamus to be brought against an officer of the United States in the district where the land is located or the dispute arises. A possible objection to this approach however would be that Public Law 87-748 applies to actions against all governmental agencies. It may be neither necessary nor desirable to extend that statute to permit appeals from all decisions of all Government agencies. Accordingly, as an alternative to S. 758, a bill substantially along the lines of the attached draft would be preferable. Its effect is limited to land appeals from the Department of the Interior.

In conclusion, we would be opposed to S. 758 in its present form because most of the appeals causing the delay are those which ultimately are decided by the courts. If the administrative process does not function effectively, then the aggrieved party should be able to take his case promptly (after 6 months) and directly to the courts. If this accelerated appeal to the courts should prove to be unduly burdensome on the district courts, it seems to us that the appointment of a few additional judges would be less expensive and more effective than the establishment of a new separate court.

This association deeply appreciates the interest shown by the members of the Public Lands Subcommittee and their efforts to reach a solution for eliminating unreasonable delays in the handling of public land appeals. If we can be of further assistance at this stage we would be honored to receive your request.

Respectfully yours,

V. P. CLINE,
Chairman, Federal Legislative Subcommittee.

[S. —, 88th Cong., 1st sess.]

A BILL To provide for review, determination, and redetermination of decisions of and matters pending before the Secretary of the Interior involving public lands of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the district courts shall have jurisdiction to hear, review and determine or redetermine the following matters:

(A) Any final decision of the Secretary of the Interior (including any bureau, board, solicitor, hearing officer or other person or agency acting under or for the Secretary) hereinafter called the "Secretary", affecting the ownership or use of the public lands of the United States, provided a petition or complaint by a party aggrieved by such final decision is filed with the court within ninety days after such decision is rendered asking review or redetermination of such decision.

(B) A matter before the Secretary for decision as to the ownership or the use of the public lands of the United States, upon a petition or complaint filed by an interested party who elects to assume an adverse decision after such matter has been pending before the Secretary for a period of more than six months.

(C) An application, offer, or other request whatsoever before the Secretary which has been pending for a period of more than six months upon petition or complaint by the party who has made such application, offer, or other request.

SEC. 2. The district courts shall, in all matters before them pursuant to this Act which involve disputed factual issues, independently find the facts material to the issues. The courts shall be bound by and shall follow the decisions of the Secretary in all matters which they find to have been lawfully determined by the discretion of the Secretary pursuant to general law vesting discretionary powers in the Secretary.

SEC. 3. Any proceeding brought pursuant to the provisions of this Act may be brought in the district court for any jurisdictional district in which any part of the public lands involved or described is located or at the option of the petitioner in the District Court for the District of Columbia.

The summons and petition or complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and petition or complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

SEC. 4. The term "public lands" as used in this Act shall be broadly construed and shall include all lands of the United States, including those lands in which the United States has acquired some interest, whether that interest is fractional or is the entire interest, future or otherwise, and including those lands in which the United States has reserved or retained an interest.

Senator BIBLE. I am going to call on Senator Gruening in just a moment or so, because he is the chief sponsor of the bill. I want him to be heard at such length as he desires. If it meets his approval, I would first ask if the Senator from Utah has any questions at this point.

Senator MOSS. No questions.

Senator BIBLE. Senator Jordan?

Senator JORDAN. I yield.

Senator BIBLE. Senator Simpson?

Senator SIMPSON. Senator Bartlett, this morning there came to the committee a statement by Secretary Udall and one by Mr. Carver. Has the Senator from Alaska had an opportunity to review those?

Senator BARTLETT. No.

After I entered the room, Secretary Carver handed me a copy of the statement he will shortly make before you. I have not had an opportunity to read it yet. Of course, I will.

Senator SIMPSON. It is rather lengthy. I tried to get them last week and could not, although they knew they were going to be presenting something like that here. I was wondering if the Senator would like to have the opportunity of reading it and placing something in the record with respect to rebuttal of some of the things which have been said in these two reports.

Senator BARTLETT. I would welcome that opportunity.

Senator SIMPSON. I would like to request it.

Senator BIBLE. This request will certainly be granted, and I would say to the distinguished senior Senator from Wyoming, the staff has been trying for the past week to secure the official report of the Department of the Interior on this particular bit of legislation.

We constantly run into this problem, I will say to the Senator from Wyoming, and, as one who is chairman, I will do everything I can to overcome it, because it simply does not give us the opportunity of briefing ourselves on the departmental position until we come in here 3 minutes before a hearing, and we have conveyed this to the Secretary of the Interior a number of times in the time I have been here over the period of the last 8 years, but it always comes out this way.

At the last minute we get a report, but we are going to persist in our efforts in an attempt to have the official positions of the Department on every bit of legislation that comes before the committee of which I am chairman at least a week before we have our hearings so that we can analyze their position and be in a better position to question them.

Senator SIMPSON. The distinguished chairman knows that I know the difficulty extends from the Department when they do not bring these things in. I know the distinguished chairman of our committee has been persistent in his efforts to procure them, but it is most difficult to be able to do anything with respect to rebuttal or questioning witnesses, and they know they are going to testify.

It seems to me there is no excuse for delay and waiting until the 11th hour before we have these reports before us.

Senator BIBLE. I could not agree with you more. We are going to move in that direction to see if we cannot expedite this so we do have an opportunity of knowing the position in advance of the actual hearing, and the record certainly will be kept open.

I might say that this is simply one of a series of hearings, and I have no intention of adjourning this hearing today. This hearing will simply be recessed, because there will, of necessity, be the requirement for further hearings in a field as complex and as complicated as this one here.

The Senator from Alaska?

Senator GRUENING. Mr. Chairman, before I make my formal statement, I, first of all, want to call attention to the fact that my colleague has probably had a longer experience in dealing with this problem than anyone here. He was the Delegate from Alaska for 14 years, thereby the sole representative in the Congress of Alaska, and, therefore, for 18 years—14 years as a Delegate and 4 years as Senator—he has been listening to what I think might be properly called an account of the hopes of Americans who have gone to Alaska hopefully, believing in the public land laws, believing in the Homestead Act, and hopeful

of carving out a new life on the last frontier, and it is a long and tragic story.

I want to say now, also, that I agree fully with the statement of the senior Senator from Colorado that, rather than this bill being a formal prescription for remedy, it is an attempt to call attention to a situation of abuse, and maybe this bill is not the proper solution, but we must endeavor, as a committee, to find a solution that will obviate these delays and these great injustices, these frustrations, which our homesteaders we know of in Alaska and we know elsewhere suffer, and I very much welcome a statement to that effect.

I think that presents exactly my view, and, obviously, from the remarks of the Chairman—

Senator BIBLE. Do you have questions of Senator Bartlett?

Senator GRUENING. No, I have no questions of Senator Bartlett, except I would like to call attention to a statement that he has had perhaps more correspondence, more files on this subject than perhaps any other one in his long history of being an able and dedicated representatives of the people of Alaska. Would that be correct?

Senator BARTLETT. Yes, that would be a positive statement of fact, Senator Gruening.

There are times when the correspondence on the cost-of-living allowance in Alaska for Federal employees is much greater in volume, but that is only periodically.

Senator GRUENING. And each one of those represents a serious human problem, does it not?

Senator BARTLETT. That, Senator Gruening, is what has caused me my chief concern. The little fellow, as I have nominated him before, who is not experienced in legal matters, who, perhaps, never before has gone to an attorney for any purpose, who does not know government procedures, who is perplexed and baffled by all of this, who wonders why it is that his appeal pends for months or sometimes for years, who is used to having things done rather speedily and with complete justice always, he is the one who concerns me principally.

I would like to say, Mr. Chairman, before stepping down or standing aside, or whatever one does on leaving this witness chair, that it is obvious that S. 758 has already served a highly useful purpose in that it has focused even more attention upon this very real problem.

Senator BIBLE. I am sure it will serve that purpose, Senator Bartlett.

Do we have further questions of Senator Bartlett?

Senator, we are very happy to invite you to stay. I realize you have many commitments, and so you may just remain if you wish, or, if you have those other commitments, do just as you please.

Senator BARTLETT. I would like to remain, but I do have those commitments. If they did not exist, I would be with you, because this is of great interest to me, and I would like to hear all of the testimony and all of the questions.

Thank you very much for having heard me.

Senator BIBLE. Thank you, Senator Bartlett.

Our next witness will be the distinguished author of the bill, the Senator from Alaska, Senator Gruening, a very valued member of this committee and of the subcommittee.

**STATEMENT OF HON. ERNEST GRUENING, A U.S. SENATOR FROM
THE STATE OF ALASKA**

Senator GRUENING. Mr. Chairman and members of the subcommittee, thank you for giving me this opportunity to testify in behalf of S. 758, the bill I have introduced to establish in the Department of Interior a Public Lands Appeals Board.

The necessity for an impartial reviewing agency to hear and decide appeals from decisions of the Bureau of Land Management has long been clear.

The experience of Alaskans who have gone to the 49th State to homestead in the last decade has fully convinced me there must be a mechanism to exercise jurisdiction over cases in which they have received adverse decisions from the local land offices.

Individuals who have undertaken homesteading in Alaska have generally been aware they face a difficult climate and that the land they must clear and cultivate is some of the roughest terrain in the world. Creating a homestead in the wilderness is always an arduous and often a dangerous pursuit. It always requires courage, enormous physical labor, persistence, careful planning, the expenditure of large sums of money, and eternal vigilance against the hazards of nature.

These difficulties of homesteading can be anticipated.

What many have not been able to imagine are the even greater difficulties encountered in coping with the bureaucratic jungle of the Department of Interior.

The public land laws are complex and difficult of interpretation. To the ordinary member of the public who determines to acquire land in accordance with their provisions, it has been almost impossible to obtain accurate information in readily understandable form. But the problem becomes more baffling when faced with the necessity of dealing with an institution such as the Department of the Interior with its chaotic profusion of rules, regulations, forms and procedures, not to mention personalities.

Having observed the struggles of my constituents with the complexities of the public land laws, and their further "complexification," if I may coin that word, by Bureau personnel, I am convinced we must have a procedure for rescuing hapless individuals whose interests are sacrificed to overly rigid attitudes and arbitrary policies of administration that leave out of account concern for human beings.

Many aspects of the Interior Department administration concern me, but the most shocking, I believe, is the cavalier attitude, engraved in official policy, toward mistakes of employees of the land offices in dealing with applicants for public land.

Cases have been reported to me of an applicant for a homestead or a trade and manufacturing site, or a small tract, after inquiry at the land office as to the status of the land in which he is interested, being informed by the office that the land is available and open for settlement; and then, after expenditure of time, effort, and money in developing a tract, has suddenly received a notice from the land office canceling his entry. The reason for cancellation is the discovery of a clerical error in the records of the office. The error is that the land which earlier was reported as open to entry is not so at all. It is subject to a land withdrawal, or there is a prior application for it excluding the entryman.

Now it would seem to me in cases such as this there should be some remedy for the dispossessed entryman. But, the official position of the Department of Interior is that it has no responsibility for the errors of its employees, and that it is just the tough luck of the entryman there was a mistake.

I call it a policy of "Caveat Homesteader," and I believe it should be changed.

I further believe the existence of the impartial reviewing agency contemplated by S. 758 would make it possible to bring these errors to light and reach an equitable decision in such cases. Although the proposal in this bill for a board appointed by the Secretary of Interior would, I think, be an improvement, it may be that our discussion will lead us to recommend a change in this to provide for Presidential appointment of the Board with confirmation by the Senate. The committee may reach the conclusion this is the means for insuring independent consideration without possibility of departmental review of its own mistakes. Or some other formula may provide a better remedy than the one now proposed, such as the one that the Senator from Colorado has introduced in the record.

It is not alone errors in land descriptions from which our Alaska homesteaders have suffered.

In planning how they will meet requirements of the law for cultivation 1 year they are told it must be done one way. The next year they are told that was wrong and the standards are changed.

If they want to file on a different homestead, they may be told one day they can—and then, months later, after expenditure of time, toil, and money—they are summarily told to move off the homestead because they are not in compliance with the law.

One day they are told a certain form must be completed to make application for an entry. The next week the form turns out to have been the wrong one.

Or they are told a form need not be filed for a particular entry and the next month they are in danger of losing an investment because the form was not filed.

Some times it is a matter of the fees to be paid. An applicant may be told he need not file a fee, and then be subject to cancellation of his entry because he did not.

In Alaska the existence of errors such as these have been such a regularly recurring phenomenon the State itself has passed legislation in an effort to aid victims of these cases.

I have a letter from Governor Egan which I hope to have introduced in the record which calls attention to that and which strongly supports some legislation of this type.

At the first session of the new State legislature, in 1959, legislation was enacted authorizing the State director of lands to give preference rights for purchase of State lands to individuals where this will correct—

past or future errors or omissions of a State or Federal administrative agency where inequitable detriment would otherwise result to a diligent claimant or applicant due to situations over which the claimant or applicant had no control.

I suggest, parenthetically, that this is something new in legislation where the State moves in and corrects the errors of a Federal agency, but, maybe, that might be a possible way out in the 50 States.

It is my belief the existence of the Appeals Board contemplated in S. 758, or some variation thereof, would, by its very existence, eliminate many errors that might otherwise be made. Where officials of land offices and of the Bureau of Land Management know there will be searching, impartial examinations of case files by individuals having no responsibility for creating and administering departmental policy and programs, I believe there will be greater vigilance to see that errors do not occur, and that, if they do, effort will be made to adjust the situation with an equitable result for the individual.

There is, of course, an appellate system of sorts in the Department of Interior now. In fact, there are two levels of appeal established by regulations of the Department, one from a land office to the Director of the Bureau of Land Management and one from that Bureau to the Secretary (whose appellate responsibilities are largely carried out by the Solicitor). It would appear to the layman, and, indeed, to a lawyer, that the existence of a right of appeal would present an individual receiving an adverse land office decision with a chance to tell his side of the case; with an opportunity for dispassionate review; with a chance at obtaining a reversal of the original decision.

The present right of appeal appears, to the inexperienced appellant, to be a genuine exercise of appellate review. However, an examination of its operation reveals nothing of the sort. In fact, it is seriously lacking in the essentials of due process necessary to insure integrity of the decisions produced.

I have alluded above to the importance of obtaining a completely objective, impartial review of land office decisions by a board of individuals detached from the chain of command of the Department who have had no part in creating or administering policies and operations of the agency. At present, this kind of review is not assured appellants who send their cases up to the BLM and then to the Secretary.

Although the Appeals Division of the Bureau and the Branch of Land Appeals of the Solicitor's office are out of the chain of command on the organization chart, and are supposed to be independent of the Bureau and the Secretary, this does not result in decisions divorced from Departmental policy.

Where difficult questions of administration or policy must be resolved in the decision of a case, the appellate reviewers at both levels ordinarily seek advice from the technicians and the policymakers who are responsible for the matters on appeal. There is no safeguard against this kind of ex parte consultation in the regulations.

Thus, an appellant with fond hopes of achieving reversal of a land office decision by an impartial adjudicator, will have his case reviewed by the very same administrators and policy formulators who are responsible for administering the land offices. While this review is made in the capacity of advisers and technicians, it may naturally be expected there is little likelihood of advising a change in the lower decision, since this would of necessity imply the existence of deficiencies of administration—a suggestion found intolerable.

An exasperating aspect of this system is that the appellate procedure becomes an escape hatch for sloppy administrators and a dumping ground for difficult decisions. A land office, faced with a controversial decision to make, can knowingly (or carelessly) make the wrong decision for the wrong reasons, all the while piously pointing

out to a disappointed applicant that, after all, he has a right to appeal. The land office knows this is a fairly safe procedure, since there is unlikely to be any change at a higher level.

There is nothing new about the old game of passing the buck. But there is certainly a new element added when, as here, it is coupled with the self-satisfying defense that the public is really better off for being passed into the oblivion of the appellate process of the Department of Interior.

The right to be informed of the case against oneself is of the utmost importance in any system of adjudication in which interests of an individual are at stake. The present appeals system of the Department of Interior makes it impossible for an appellant to know anything more about the position of the Department or the reasons for its decisions than the bare decisions themselves. There is only limited opportunity to request the supply of documents needed to determine what one is up against in the Department's files. There is never full disclosure of the facts upon which the Department is basing its decisions. Thus, the appellant must present his statements of reasons for appeal to the Bureau and to the Secretary in almost total ignorance of the reasoning and the facts considered by those who decide his case.

Except in certain cases where it is now required by law, there is almost never a hearing on an appeal case where the appellant has a right to present his own case in full and to examine and cross-examine the case of the Department. S. 758 might provide such an opportunity, which I believe is indispensable to proper determination of issues.

By requiring that the regulations of the Board of Public Lands Appeals shall be in accord with provisions of the Administrative Procedure Act, there will be afforded appellants before the Department of Interior the safeguards of due process long recognized as required for fair adjudications in other administrative proceedings of the Federal Government.

Mr. Chairman, I believe it is our duty, as it is that of all officials of the U.S. Government, at every level, to serve the people of the United States. Members of Congress have as great a responsibility for this as officials of the other branches of Government. As for the executive branch, there is accuracy in the appellation of its workers as "civil servants." Citizens of the United States have a right to expect their Government and all its employees to work in their interests. They pay for it. They vote for it, and sometimes they fight and die for it.

That is why I am always especially concerned by actions of Government agencies affecting vital interests of members of the public when those actions are careless, inefficient, and result in damage to individuals who have no control over them and are helpless to protect themselves.

As I believe members of the executive branch should administer the law in a way that is beneficial to the people for whom it is enacted, so I believe it is our duty, as legislators, to act where the need is clear to pass laws that will protect those to whom we are responsible. I believe S. 758 is this kind of legislation, and we will be derelict in our duty if we fail to act upon it or some similar measure.

In closing, I should like to suggest consideration of an amendment to S. 758 which would make it clear it is applicable to all cases on appeal in the Department of Interior at the time of its passage. Further, I suggest we explore the question whether its provisions should not be available for review of cases decided before its passage where there is reason to conclude an inequitable result was reached in the prior action.

Thank you for giving me this opportunity to testify.

Senator BIBLE. Thank you very much, Senator Gruening, for this full statement on the legislation which you have offered.

Do we have questions of Senator Gruening?

Senator JORDAN. No, Mr. Chairman. I just would like to commend Senator Gruening on his very fine statement. He has not only pointed up the difficulties that we face, but he has kept an open mind as to the possible solution.

The bill, of which I happen to be a cosponsor, may not be the final answer, but it is certainly one way toward a solution. I commend him for his fine statement.

Senator BIBLE. Senator Simpson?

Senator SIMPSON. Mr. Chairman, I would like to say to the Senator from Alaska that the same situation occurs in my State of Wyoming, and I concur in what the Senator has said.

Senator GRUENING. I am sorry to hear that they exist elsewhere, but I am glad that this is not uniquely an Alaskan problem.

Senator BIBLE. I thank the Senator from Alaska.

At this point I should like to incorporate in the record statements from Senator Mundt, Senator McGee, John Taylor of the Farm Bureau, and Max Barash.

I would also like to include in the record at this point several statements that were sent in from Mr. Perley Lewis of Phoenix, Ariz.; Eugene Smith of Cohoe, Alaska; Edgar Boyko of Los Angeles, Calif.; Ernest Butler, Culdesac, Idaho; and Eben Lewis of Anchorage, Alaska.

A letter from the American National Cattlemen's Association under date of May 1, indicating that, although there is need for some type of legislation in this field, they feel that, rather than a single national appeal review board, "a much more realistic approach might be the establishment in each State of a three-man board," as I previously indicated, one member appointed by the Secretary of the Interior, another by the Governor of the State, and a third by user groups affected.

This would bring the appeals procedure down to State level where there would be more opportunity for a realistic appraisal made of the problems involved than on the Washington level, a great distance from the field.

Mr. McMillan, who signs the letter, the executive vice president of the American National Cattlemen's Association, makes the suggestion that this might be an area which might very well be the subject of field hearings at some later date.

I would like to incorporate in the record a telegram from Leslie J. Stewart of the Nevada Farm Bureau, member of the National Public

Lands Coordinating Committee. It is a short telegram. I will read it into the record.

My thinking on this bill: One, should be an appeals board within each Western State. Two, Department should answer appeals within 30 days. Three, Department should render decision within 150 days. Four, the United States should pay cost of appeal if appellate is prevailing party. I request that this bill be one of the subjects of any future field hearings held by your committee.

A letter from a former distinguished member of the executive branch and the former Solicitor of the Department of Interior, I believe ultimately the Under Secretary of the Interior, George W. Abbott, now practicing law in my State, Minden, Nev., dated May 2, 1963, making his analysis of this bill. This letter will be incorporated in full in the record. He has indicated that he is representing not only the Nevada State grazing boards, but he is a special counsel to the National Public Lands Coordinating Committee.

This letter is rather lengthy, and I will not burden the committee with reading the entire letter into the record. He, likewise, indicates that there might well be consideration given to the creation of an appeals board within each of the public lands States, taking them to the U.S. district court; a time limit; that the United States be taxed costs when the appellant is the prevailing party; that if a departmental board is created, cases, on the appellant's motion, be submitted for board consideration wholly in writing or orally and in writing, if requested; fifth, that if the departmental board is created, convenience of the parties be the measure of whether hearings are held in the District of Columbia or in the field; and, sixth, that in every case, compliance with the Administrative Procedure Act be required.

He suggests an amendment to the Taylor Grazing Act, a short amendment, which will be read into the record. It read as follows:

The Secretary of the Interior shall provide, by appropriate rules and regulations, for local hearings on appeals from the decisions of the administrative officer in charge to an examiner, and for the appeal by any party adversely affected by the decision of the examiner to an appeals board, one of which shall be established for each State in which grazing districts or leases have been established. Such boards shall consist of three members—

Then he uses the same formula on which there seems to be some agreement—

one to be designated by the Secretary of the Interior, one to be designated by the Governor of the State, and one to be designated by the State [grazing] advisory board. The decision of such appeals board shall be final, subject to an appeal to the United States district court in the manner provided by law.

This is an amendment primarily to the Taylor Grazing Act, and it, of course, is a narrower suggestion than the one we are considering before this committee on all appeals on land matters, but this is a suggestion that has been made.

(If the staff has received any other communications they may be grouped in the hearing record with others that I have referred to.)

Senator GRUENING. Mr. Chairman, may I ask a question? Do I understand that Mr. Abbott is in favor of some reform?

Senator BIBLE. Indeed, he is.

Senator GRUENING. We have a case of a repenting sinner, for whom there is much joy and happiness.

Senator BIBLE. Grappling with these cases day after day, maybe his eyes have been opened.

Senator ALLOTT. Mr. Chairman, it may be the case of a repentant sinner, but I think Mr. Abbott is due at least the credit that I can remember when he came up here and pleaded for some greater length of time for attorneys to clear up their backlog, and I am sure the Senator remembers that, too. He was not completely oblivious. Maybe he did not get all his sins reformed, but he was not oblivious to what the troubles were.

Senator GRUENING. I want to remind the distinguished Senator from Colorado that I remember him very well and his unfailing opposition to all homesteaders' demands.

Senator BIBLE. In any event, we have a letter now that seems to reflect his attitude in this respect.

(The communications and statements referred to follow:)

STATEMENT OF HON. GALE MCGEE, A U.S. SENATOR FROM THE STATE OF WYOMING

Mr. Chairman and members of the subcommittee, I have joined with my distinguished colleagues in sponsoring S. 758 because it has become abundantly clear that we need an impartial reviewing agency to hear and decide appeals from decisions of the Bureau of Land Management. For some time now, I have been concerned by the fact that the Department of Interior's appellate system relating to public land issues has been honeycombed by decisions which do not square with basic concepts of equity. The system is characterized by long and unnecessary delays, bureaucratic indifference to the needs of appellants, and an unfortunate tendency toward rigidity. And most damaging of all, under the present system, land office decisions are reviewed by the same administrators and policymakers who are responsible for administering the land offices.

S. 758 would place public land issues in better perspective by—

(1) speeding up the appeals procedure, thereby giving appellants more prompt action; and

(2) giving the appeals procedure independent status by divorcing the appeals process from the administrators who make Department policy.

I am pleased to note that spokesmen for the Bureau of Land Management agree that the procedure for adjudicating public land issues needs to be reassessed and clarified. Since we are working toward the same goal, I am confident that we can greatly alleviate the nagging and complex problems that confront us.

AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., May 6, 1963.

Hon. ALAN BIBLE,
*Chairman, Subcommittee on Public Lands, Senate Interior and Insular Affairs
Committee, Senate Office Building, Washington, D.C.*

DEAR SENATOR BIBLE: The users, permittees, and lessees of public lands have long needed a review board of some type before which their complaints and disagreements could be heard.

For many years, in fact up to the passage of H.R. 1960 by the 87th Congress, ranchers and farmers had no means of resolving public land problems except by the expensive and time-consuming process of coming to Washington to plead their cases. This legislation now makes adjudication possible in the State of the complainant.

This bill, S. 758, now goes a step further to permit disputes to be heard by a Board in the local area—but it also leaves access to the courts if the Secretary and the complainant fail to agree even after the review by the Board.

We note that there are no qualifications set up for the members of the Board nor are there any terms of office included in the bill. It leaves the whole matter in the hands of the Secretary—the appointments—the rules and regulations—the final determination of appeals, etc. This leads us to the question of whether the Board will serve a real, justifiable, useful purpose or whether it will become a useless puppet of the Secretary.

We like the idea proposed in S. 758 because the need is very apparent, but we would not favor such a move just to create another board and additional jobs.

We have learned also of the unfavorable report of the Department which may be another reason for the establishment of such a Board, provided it can be so set up as to do a good job in adjudicating the appeals of the users of public lands.

The good judgment of the members of the subcommittee is earnestly solicited in the consideration of this proposed legislation.

We would appreciate it if you would make this letter a part of the record.

Yours very truly,

JOHN I. TAYLOR,
Assistant Legislative Director.

WASHINGTON, D.C., May 3, 1963.

HON. ALAN BIBLE,
*Chairman, Public Lands Subcommittee, Interior and Insular Affairs Committee,
U.S. Senate, Washington, D.C.:*

It was my intention to testify at the hearing on May 6 supporting in principle S. 758, a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes. Circumstances now prevent my being present at the hearing. If it will not cause undue delay in the committee's consideration of the bill, I shall appreciate your keeping the record of the hearing open for a period of 30 days so that I may have an opportunity to submit written representations supplementing my views previously submitted to Senator Gruening. Thank you.

MAX BARASH.

PHOENIX, ARIZ., April 8, 1963.

HON. ALAN BIBLE,
*Senator from Nevada, Chairman of the Public Lands Subcommittee, U.S. Senate,
Congress of the United States, Senate Building, Washington, D.C.*

MY DEAR SIR: Herewith I transmit to you the original of my written testimony on the subject bill S. 758, under notary seal.

I respectfully request that my said written testimony be included in the printed transcript of the hearings of the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs.

This I do at the suggestion of Senator Ernest Gruening, U.S. Senator from the State of Alaska.

It will not be possible for me to be present to present oral testimony. Note that I have written my testimony in affidavit form and have subscribed to it under notary seal. I trust that this is satisfactory.

S. 758 is a good and necessary bill. I commend it to your favorable consideration and I hope it is enacted into law.

Sincerely yours,

PERLEY M. LEWIS,
Consulting Engineer.

PHOENIX, ARIZ., April 8, 1963.

HON. ERNEST GRUENING,
*Senator from the State of Alaska,
Washington, D.C.*

MY DEAR MR. GRUENING: Thank you for your letter of the 15th of March about the subject proposed legislation, a bill introduced by yourself for yourself and other Western States Senators, to-wit: Mr. Bartlett, Mr. Bennett, Mr. Bible, Mr. Cannon, Mr. Church, Mr. Goldwater, Mr. Jordon of Idaho, Mr. McGee, Mr. Morse, Mr. Mundt, and Mrs. Neuberger.

I am very, very much in favor of your subject bill. It is vitally needed to protect the potential property rights of the individual American citizen who seeks to acquire for himself a portion of the vast Federal public domain lands through the medium of existing congressional enactments (existing public laws, some of them very old, such as the Homestead Acts, and others such as the Small Tract Act and section 14 of the Taylor Grazing Act, and not to mention the Indian Allotment Acts and also the statutes which govern leasings for oil and gas, and coal, and sulfur (in New Mexico and Louisiana), et cetera).

It will not be possible for me to come to Washington to testify in person. However, I do wish to submit the attached written testimony on this bill for

inclusion in the printed transcript of the hearings, and for that purpose, and by copy of this letter, I send the original of the said testimony direct to Senator Bible.

Sincerely,

PERLEY M. LEWIS,
Consulting Engineer.

STATEMENT OF PERLEY M. LEWIS, CONSULTING ENGINEER

I, Perley Mitchell Lewis, residing at 215 West Harmont Drive, in the city of Phoenix, county of Maricopa, State of Arizona, being first duly sworn, depose and say:

I am a consulting engineer with a downtown office at 225 Luhrs Building, Phoenix, Ariz. I also have purchased and have made applications for purchase and acquisition of public domain lands. I am familiar with the workings of the land offices, Bureau of Land Management, U.S. Department of the Interior, particularly with the procedures involving appeals from decisions of the manager of the local land office to the Director, Bureau of Land Management, and to the Secretary of the Interior, and I am familiar with the conditions in my State of Arizona with respect to public domain lands.

I was born in the town of La Junta, county of Otero, State of Colorado, on September 17, 1898, and first came to the State of Arizona in 1902, where my father worked in the mines at Bisbee, Ariz., and, later, as an adult, after graduation from the College of Engineering of the University of Colorado, returned to my adopted State of Arizona in 1922, and Arizona has been my home for the past 41 years, including the almost 7 years I was absent therefrom, mostly overseas as a commissioned Army officer in World War II, mostly with the Corps of Engineers; I am a retired lieutenant colonel.

The State of Arizona has an area of 72,688,000 acres of land and some 213,760 acres of water; a total of 72,901,760 acres.

Of these lands in Arizona, as of June 30, 1961, 74.29 percent were either owned by the Federal Government or held in trust by it for the Indians; 13.69 percent were State-owned lands; and only 12.03 percent were privately owned lands.

In other words, taxwise, on the various State and county tax rolls, 12.03 percent of the lands in Arizona are all that are taxed to support the entire State of Arizona.

As of 1960, there were 12,422,054 acres of unappropriated public domain lands in Arizona (as of June 30, 1960).

The matter of placing public domain lands into private ownership, wherever legitimately possible and practical to do so, pursuant to existing congressional legislation, is a necessary and a serious matter in Arizona. Private ownership of land is taken seriously in Arizona, and every entryman, every applicant does not file his entry or his application lightly. I would presume this to be the case in other Western States, particularly Alaska, California, New Mexico, Montana, and the others, including my native State of Colorado.

Since 1959, at least, and for protracted periods at times, even prior, it has become harder and harder for a homestead entryman or other applicant to have his application processed to a successful conclusion, at least in Arizona. The fault does not, in my opinion, lie with the local land office, but rather is more basic and on a higher level from which emanate matters of policy, policy pronouncements in lieu of regulations, regulations which are seriously questioned as being in strict conformance with the words and intent of the statutes, and a generally apparent disinclination to dispose of public domain lands, because the Bureau says the statutes are old and outmoded, and this includes the Homestead Acts, and section 14 of the Taylor Grazing Act (although, when the Department suggests doing away with section 14 of the Taylor Grazing Act, it never refers to it as such, but on the contrary refers to it as "section 2455 of the Revised Statutes, as amended (43 U.S.C. 1171)", which is, of course, section 14 of the Taylor Grazing Act.)

The Bureau has grown more and more to also invoke the blanket rulings, over huge areas, of other departments, such as the U.S. Geological Survey, and others, to defeat and preclude homestead entries and other applications.

The decisions of the land office, have, since 1959 and 1960, at least, become more and more abrupt, arbitrary, almost paternalistic in tone (but using that tact to defeat, not further, the applicant).

Appeals from the land office decisions are to the Director, Bureau of Land Management, who bosses the various land offices. Such appeals take time,

usually close to a year; are costly to the applicant in attorney's fees and otherwise; and said appeals have two strikes against them at the start, because the natural tendency of a superior office is to uphold a decision of his subordinate office. In any case the objective unbiasedness of the superior office, the Director's Office, is hard to maintain.

Next comes an appeal from the Director's decision to the Secretary's office. This usually requires up to a year, more or less, for a decision. Sometimes, very often, the then decision is not final but is referred back to the original land office for reconsideration and new decision. And so, around and around goes the process again, often for a second time.

Bear in mind that the citizen applicant must exhaust all his administrative procedure appeals, before he can get into court.

Even then, the citizen applicant must, if he wishes to keep in court, must sue the Secretary in a District of Columbia court; this is a financial hardship which is usually unsurmountable.

CONCLUSION

In conclusion, and in my considered judgment, therefore, it is necessary and desirable that the proposed S. 758 bill be enacted into law, and for the following reasons:

- (1) A Board of Public Land Appeals in the Department of the Interior is required to protect the rights of the citizen applicants, and
- (2) Such a board is necessary to insure that the will of Congress, as expressed in existing public lands disposal statutes, be upheld and maintained, and
- (3) To prevent arbitrary policies, procedures and regulations, which may be in whole or in part contrary to statute, from remaining to effect wrongful decisions, and
- (4) To permit hearings on appeals at a convenient location, and
- (5) To insure that the applicant appellant can get into Federal court, and
- (6) To permit applicant appellant to enter the U.S. Court of Appeals for the circuit in which the land involved is situated, rather than in Washington, D.C.

HON. ALAN BIBLE,
Chairman, Public Lands Subcommittee,
Senate Committee on Interior and Insular Affairs,
Washington, D.C.

DEAR SENATOR BIBLE: As president of an organization formed to study homestead problems in Alaska I am very much interested in Senate bill 758.

Since the Alaska Entryman's Rights Association was formed in 1957 we have been constantly in disagreement with the Bureau of Land Management. Most of our problems have stemmed from the lack of correct information furnished us by this Bureau. Homesteaders going to the Anchorage land office of the BLM in quest of information were given answers that later proved to be incorrect. We feel that until 1959 the Alaskan offices were staffed with improperly trained personnel. This condition still exists to a lesser degree here in Alaska and in Washington, D.C.

In the BLM's defense we might add that the homestead law of May 20, 1862, has been amended so many times that it would take a panel of Solomons to correctly interpret it. It is interesting to note that the law of March 8, 1922, came during the era of Albert Bacon Fall which we feel doesn't improve the situation.

Because of the misunderstandings created by the BLM most of the homestead entries in Alaska have hit an administrative snag. Many of these homestead entries have been under appeal and some are still in that state. Under the present administrative procedures it is necessary to appeal a decision, in many cases, back to the official who made the decision in the first place that the homesteader is appealing. This is equivalent to a situation where an individual is arrested for an infraction of law and is forced to go to a court where the arresting officer is acting as judge and jury. S. 758 would correct this situation by affording the entryman the opportunity to take his case before an impartial board. This fits in with our idea of justice for all. Under the present law it would seem that we only have justice for the Bureau of Land Management.

In conclusion, our organization at present represents 112 homestead families, all who have had or are having trouble with the BLM. This is only a small

SEP 29 1963
COHOE, ALASKA,
April 23, 1963.

MANHATTAN, KANSAS

portion of the entrymen on all types of filings who have had or are still having trouble with this Bureau.

Because of the short notice given to us on the April 30 hearing on this legislation our membership has asked me to speak for the organization. We sincerely thank the Members of the U.S. Senate who have recognized the injustice of the present law and who have introduced Senate bill 758 that would correct the current intolerable situation.

Respectfully yours,

EUGENE D. SMITH,
President, Alaska Entryman's Rights Association.

STATEMENT OF VIRGINIA J. GIBBS, SOLDOTNA, ALASKA

One point that should be brought to the committee's attention is the time limit on appeals. Under present law, an entryman is given 30 days to file an appeal and another 30 days to submit the appeal. No extenuating circumstances are considered in this time limit.

On the other hand, the BLM, because of the caseload, takes several years to answer an appeal or make a decision. This would include all the appeals allowed up to the appeal to the Secretary of the Interior. In some cases the poor homesteader is dead and long in his grave before any action is taken, and the congressional delegation must then submit special legislation to give title to his widow.

At the present time the homesteader has been required to meet another unfair ruling of the BLM. It goes something like this. The homesteader assumes that he has met all his obligations and submits final proof. The BLM makes a decision that he has not met his obligations and the homesteader accordingly appeals. Due to administrative delay his papers are tied up in referral to Washington, D.C., until his 5-year prove-up period time has elapsed. The BLM then decides that because he has not gained title within the 5-year period, he no longer has a right to his homestead.

LOS ANGELES, CALIF., April 17, 1963.

HON. ALAN BIBLE,
*Chairman, Public Lands Subcommittee,
Committee on Interior and Insular Affairs,
Senate Office Building, Washington, D.C.*

MY DEAR SENATOR BIBLE: Please refer to my letter dated April 10, 1963, with respect to S. 758 now pending before your committee.

I have just received a decision issued under the authority of the Secretary of the Interior, in a homestead appeal arising from Alaska, which rather graphically illustrates some of the points I made.

Briefly, in that case, a homesteader was required, for technical reasons, to make two separate filings for the lands included in his homestead. The Anchorage Land Office rejected his homestead application because of an alleged conflict with a land withdrawal. The validity and legality of this purported withdrawal is the subject matter of presently pending litigation in the district court for the District of Columbia, where it has been progressing very slowly because of the great distances and expense involved.

In making his appeal to the Director, Bureau of Land Management, in Washington, from the adverse decision of the Anchorage Land Office, the homesteader, a Mr. Martin, was represented by local counsel unfamiliar with the intricacies of procedural technicalities in the Interior Department. Since the adverse decision affecting the two contiguous claims was contained in one document, this attorney accompanied his notice of appeal by a \$5 filing fee, which is the standard amount prescribed by the regulations for each appeal. However, there is an obscure clause which says that there must be a \$5 filing fee for each separate claim, even though they are consolidated in one appeal. Failure to pay this \$5 filing fee for each such claim within the time allowed for filing the notice of appeal and a short grace period thereafter is treated as jurisdictional by the Department.

In the present case the appellant was not notified that he should have paid another \$5 until after the grace period had expired, at which time the Bureau of Land Management arbitrarily dismissed one of the two appeals. At that time

he retained me and I attempted to test the legality and propriety of these proceedings and also to have the appeal reinstated.

The enclosed decision of the Secretary holds that this cannot be done and that where an appeal is thus taken from a land office decision holding two separate or contiguous claims to be invalid and only a single \$5 filing fee is paid for the appeal, it is proper for the Director to dismiss the appeal as to one of the two claims and there is no relief available to the appellant under the regulations.

I believe that this is rather typical of the things which I have described in my letter to you, referred to above, in what some might think was intemperate language. Perhaps this rather striking example of the mechanistic, super-technical and negative attitude of the Department toward persons whose every home is at stake can be better demonstrated by this example than by all the adverbs I can think of. You may wish to include it in the record of your hearings.

Respectfully yours,

EDGAR PAUL BOYKO.

BERNARD R. MARTIN

A-29280—Decided April 12, 1963

RULES OF PRACTICE: APPEALS: DISMISSAL

Where an appeal is taken to the Director, Bureau of Land Management, from a land office decision holding an original homestead claim and an additional homestead claim to be invalid and only a single filing fee is paid for the appeal, it is proper for the Director to dismiss the appeal as to the additional homestead claim.

SURVEYS OF PUBLIC LANDS: GENERALLY—BOUNDARIES—WITHDRAWALS AND RESERVATIONS: GENERALLY

The location of the easterly boundary line of the area withdrawn by Public Land Order 576, which was affirmed by a departmental decision of June 27, 1960, in the case of *Richard L. Oelschlaeger* (A-28299), will not be disturbed in the absence of an adverse ruling by the courts.

HOMESTEADS (ORDINARY): LANDS SUBJECT TO

Land withdrawn from appropriation under the public land laws is not subject to settlement or to the initiation of claim under the homestead laws, and a homestead claim located on such land is invalid.

U.S. DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

Washington, D.C.

A-29280.

BERNARD R. MARTIN

Anchorage 025573, 033242—Original homestead settlement claim held null and void and additional homestead settlement claim appeal dismissed—Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bernard R. Martin has appealed to the Secretary of the Interior from a decision dated September 21, 1961, by which the Division of Appeals of the Bureau of Land Management dismissed his appeal from an Anchorage land office decision holding his additional homestead settlement claim null and void because of his failure to pay the required filing fee for an appeal to the Director and affirmed the land office decision holding his original homestead settlement claim null and void on the ground that the land was withdrawn from all forms of appropriation under the public land laws and reserved for a special purpose.

The record shows that Martin claimed an original homestead settlement on the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and the E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 11, T. 11 S., R. 3 W., Seward Meridian, Alaska, and an additional homestead settlement on the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of the same section. He filed separate notices of settlement, applications to enter, and final proof for both homesteads. The land office held both the original and the

additional claims to be null and void because they were located on withdrawn land.¹ He appealed as to both claims and paid only one \$5 filing fee within the 30-day period allowed for such payment by the applicable departmental regulation, 43 CFR, 1961 Supp. 221.2 (b) and (c). The Division of Appeals noted that a filing fee was required for each separate entry but, also noting that the right to an additional homestead entry could not survive if the right to an original entry should be lost, applied the filing fee that was paid to the appeal on the original entry and dismissed the appeal on the additional entry.

In his appeal to the Secretary, the appellant contends that the Director can dismiss an appeal only if no filing fee is paid but not because of payment of an insufficient filing fee.

There is no support for the appellant's contention in the regulation cited. He concedes that a \$5 filing fee was required for each of his claims but seems to argue that because both claims were rejected in one decision and he included both in a single appeal, the penalty for failure to pay the required fee in each case is modified. Nothing in the regulation supports this conclusion. The fact that the land office did not close one of the cases also could not have the effect, as the appellant argues, of requiring the Director to consider both. The failure to pay the filing fee as to one case was a jurisdictional defect as to that case.

Ordinarily, an appellant who pays the filing fees for appeals of less than the number of claims which he purports to appeal is permitted to choose which are to be dismissed and which are to be considered. But because, in this case, there was no choice, it was not error for the Division of Appeals to dismiss the appeal as to the additional homestead claim, and consider the appeal on the original homestead claim, since the former must fall if the latter falls.

On the merits of the case, the critical question is whether the crucial portions of appellant's original homestead claim (i.e., the portions on which he established residence and which he cultivated) were withdrawn by Public Land Order 576 of March 29, 1949 (14 F.R. 1614), at the time he settled on the land. The question is whether the easterly boundary of the withdrawn area, which runs parallel to and 1 mile distant from the line of mean high tide of Turnagain Arm, has been properly located so as to include in the withdrawal the crucial portions of appellant's homestead claim.

This precise issue was discussed and decided in *Richard L. Oelschlaeger*, A-28299 (June 27, 1960). Counsel for the appellant in that case is counsel for Martin here and he has referred to and urged upon the Secretary the arguments he made in the *Oelschlaeger* case. Nothing he has submitted on this appeal warrants any modification of or departure from the *Oelschlaeger* decision, which is now the subject matter of a suit in the U.S. District Court for the District of Columbia entitled *Oelschlaeger v. Udall*, Civil Action No. 4181-60. Unless and until an adverse court ruling is made, the Department adheres to the position announced in the *Oelschlaeger* case.

Since there is no dispute of fact, only the legal issue of the propriety of the line which forms the easterly boundary of the withdrawn area, the appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Departmental Manual; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor, Land Appeals.

LOS ANGELES, CALIF., April 10, 1963.

HON. ALAN BIBLE,
*Chairman, Public Lands Subcommittee,
Committee on Interior and Insular Affairs,
Senate Office Building,
Washington, D.C.*

MY DEAR SENATOR BIBLE: Senator Ernest Gruening of Alaska was kind enough to suggest that I might want to submit written testimony on S. 758 to establish a Board of Public Lands Appeal in the Department of the Interior, for inclusion in the transcript of hearings soon to be held by your committee.

¹ Both the land office and the Director recognized that the northeastern boundary of the withdrawn area cuts through 2 of the 40-acre tracts included in the land claimed as the original homestead entry, but, asserting that no residence was maintained on the unwritten areas and very little cultivation done there, declared the location null and void in its entirety.

Let me state at the outset that I most emphatically favor this legislation as a much needed and long overdue step in the direction of restoring fairness and equity to the adjudicative processes of the U.S. Department of the Interior.

As a matter of background, in order to enable the committee to evaluate the weight, if any, of my views, allow me to state that I previously served as regional chief counsel of the Bureau of Land Management, U.S. Department of the Interior, in Alaska, that prior thereto I was an attorney in the Minerals Division in the Washington headquarters of the same agency and that for the past 10 years I have represented applicants and appellants before the U.S. Department of the Interior and in the courts, in matters involving the public lands and minerals. I am a member of the bars of the States of California, Alaska, Maryland, and the District of Columbia and of the U.S. Supreme Court. For further details may I respectfully refer you to the biographical section of the forthcoming issue of the Martindale-Hubbell Law Directory and to the current editions of "Who is Who in the West."

For many years past I have been a consistent and, I hope, constructive critic of both the method and philosophy of administrative adjudication as practiced by the U.S. Department of the Interior. The major weaknesses in that area, as I see them, are as follows:

(1) A constant and ever-present intermingling of the quasi-judicial functions with the investigative, administrative, and policymaking functions of the Department and its subsidiary agencies, which result in adjudications largely influenced by administrative expediency, ex post facto evaluations of the facts in the light of desired administrative results, considerations of personality and prestige, and a constant stream of undue influence upon the decisionmakers in the adjudicative process.

(2) A rigid, hypertechnical, and obscure approach to the legal and procedural problems involved in public land matters, with complete and often frankly expressed disregard for equitable considerations, without any weight being given in decisionmaking as to whether the result is just or unjust, fair or unfair, or morally defensible or indefensible. Into this particular category fall the many decisions in which the Department has refused, time and time again, to rectify injustices admittedly done by false, misleading, and prejudicial information or instructions given by employees of the Department to innocent members of the public who relied, in good faith, upon the guidance offered them by public officials. Even a cursory review of departmental decisions will establish that this is indeed a practice and policy which has been followed for many years and is being followed today.

(3) A defensive, negative, and niggardly attitude toward persons seeking to acquire, by lawful means and in accordance with policies established by the Congress, any right, title, or interest in public lands, minerals, or resources. This attitude can be likened to the oldtime supply sergeant who got to the point where he regarded the items which he was supposed to furnish to the men in his unit as his own personal property and every soldier who wanted something issued to him as an intruder upon his personal domain. This attitude must not be confused with enlightened policies of conservation or a legitimate desire to protect the public interest. Rather, it manifests itself in a consistent policy of resolving highly technical legalistic issues against the applicant for public lands; and in the pursuit of administrative policies which will assure the strongest and most persistent hold of bureaucratic controls over the lands and resources by retaining the most strings and the tightest controls for the longest possible period of time, thereby insuring the perpetuation and proliferation of bureaucratic empires.

(4) Last, but not least, a sort of perverted esprit de corps displayed by some of the officials within the various agencies of the Department who deal with the general public, whereby the citizen asserting his claim to public lands is regarded as a sort of enemy with whom the public employee must match wits, and who must be defeated and dislodged at all costs, and whose suffering, dis-appointment, and loss seem to be a matter of no concern to the persons who represent his Government.

The foregoing statements may sound harsh and extreme, but they are borne out by approximately 17 years of experience with the Department and particularly the Bureau of Land Management, both from the inside and the outside of Government. Moreover, I have file upon file to which reference may be made for the documentation of the general statements made above. Obviously, it would be impossible to document each of these points specifically in this brief statement. Senator Gruening has described, on the floor of the Senate, in far

more persuasive and articulate terms than this writer is capable of, the human misery and heartbreak which has resulted in so many cases from the attitudes and policies described above. Perhaps the most pathetic class of victims have been the homesteaders in Alaska, as though their lot of being pitted against an inhospitable climate and a grudging soil were not sufficiently hard without the maze and tangled web of bureaucratic obstructionism, boobytrapped with legal pitfalls, which has characterized several decades of administration of the public domain in Alaska by the U.S. Department of the Interior. It was this colonial arrogance and absentee landlord spirit on the part of many of the Department's representatives which gave such strong emotional impetus to the crusade for Alaskan statehood and, at least to that extent, some good was accomplished. By the same token, since most of the usable land of the State of Alaska is still under Federal ownership or control, these policies continue to hamper the State's economic growth and to injure the welfare of its citizens.

Nothing I have said heretofore should be construed as a wholesale indictment of the men and women who have had a hand in administering these policies. Rather, it is intended as a condemnation of an administrative and adjudicative system and of its guiding policies, made far from the scene, often by persons quite unfamiliar with the problems of the West, all of which have combined to produce the dismal picture described above, from the accuracy of which I would not recede one bit, even conceding the good faith and good will of many of the persons who represent the Department both in Washington and in the Western States.

The reasons why I believe S. 758 would take a great step toward reversing this unfortunate trend are as follows:

(1) It would establish, for the first time, a body of at least semi-independent quasi-judicial officers, who would sit in an appellate capacity and who would thus be able, at least at the later stages of the adjudicative processes, to eliminate the improper influences described above.

(2) It would bring to bear, in a mandatory way, the procedural provisions of the Administrative Procedure Act to important adjudicative processes which heretofore have not been subject to these safeguards. Since the adjudication of cases involving public lands and resources involves in many cases great issues of valuable property rights and important human values, it seems inconceivable that it took so long for someone to insist upon the application of minimum standards of procedural due process in this area.

(3) It would reintroduce, in perhaps a more effective way, the previous policy, abolished inexplicably some years ago, of permitting ameliorative adjudication and administrative adjustment on equitable grounds. This could go a long way in eliminating the harshness and heartlessness which have so often characterized the adjudicative practices of the Department.

(4) The granting of a direct right of appeal to an appellate court of the United States for the circuit in which the land involved is situated is a vast improvement over the present uncertain right of review and its usual restrictions to the U.S. District Court for the District of Columbia, with the incident difficulty of access and the delay and expense involved in obtaining final judicial redress.

(5) Finally, it would provide, particularly through section 8 of the proposed act, a valuable bridge between the adjudicative and rulemaking functions of the Department by making it possible to defer adjudication of a specific case, in which injustice or hardship results from the application of existing regulations, until the same can be rectified. Under present practices, the inequitable and unjust result would needs become final, even if recognized as such, and any changes in the regulation causing the same could only have prospective application. Unfortunately, such corrective changes in regulations eliminating hardship have been all too few and usually the result of irresistible political pressure.

In this connection it should be noted that the Department for many years has been fond of making the assertion—rather hypocritically I submit—to the general public with whom it deals, that the many inequities, harsh results, and injustices which flow from its administrative and adjudicative decisions are forced upon it by the laws made by the Congress and that the Department can only administer these laws as it finds them and as they are given to the Department by the legislative branch of the Government.

Yet, it takes very little sophistication in the science of government to know that the great bulk, if not virtually all, of legislation affecting this Department is either the result of the Department's direct sponsorship or is molded by the

Department's personnel to the highest degree, before it becomes the law of the land. Unfortunately, it has not been an uncommon experience for the Interior Department to tell the public that certain inequitable situations are the unfortunate result of existing poor legislation sponsored by the Congress, which the Department innocently and in good faith was compelled, as though against its will, to execute to the detriment of the public. Yet, as in the case of the mineral rights of homesteaders on the Kenai Peninsula in Alaska, when remedial legislation was introduced in the Congress in reliance upon and as a result of these representations, it was the selfsame Department which strenuously objected—through the same officials—and succeeded in weakening, diluting, minimizing, and in some cases defeating, all or important portions of the proposed legislative improvements. It would not surprise this writer if a similar experience were encountered by this present bill, mild and compromising as it is, undoubtedly in anticipation of this very problem. In this connection it may perhaps not be far amiss to suggest that committees of the Congress might well consider exercising greater independence of judgment and less reliance upon the hardened positions of bureaucrats defending their vested interests.

As I have perhaps inferred above, the bill appears to me to have some weaknesses and could be strengthened. Specifically, I have reference to the continued dependence of the proposed Board of Appeals both in its staffing and in the effective execution of its policies, upon the Secretary of the Interior who, undoubtedly, would again routinely delegate his supervisory functions over many phases of the activities of the board to the same lower echelon career officials whose views and policies have in the past stymied a fair and enlightened administration of the public domain. Also, section 5, as presently drawn, may perhaps be a little bit too narrow in granting the right of appeal and might even be construed as depriving appellants, at least initially, of their right to be represented by counsel. Undoubtedly some of these provisions will be refined and, hopefully, strengthened, in the course of the legislative processes. It is my sincere hope that they will not be weakened or watered down, to placate the resistance of administrative officials hostile to the philosophy embodied in this beneficial legislation.

In conclusion, let me reiterate my enthusiastic support for the substance and spirit of this legislation. I believe that if this bill or something substantially like it had been on the statute books during the past 10 years, a lot of the suffering, injustice, and loss which I have been compelled to observe in my professional capacity might have been avoided.

Your courtesy in giving consideration to the foregoing views is deeply appreciated. I would have liked very much to appear before your subcommittee in person to express these views and perhaps to answer questions raised by them, but at least as of the moment my commitments do not allow me to come back East within the next 60 days or so. Accordingly, allow me to use this means to express my sincerest wishes for the committee's success in its important work.

Respectfully yours,

EDGAR PAUL BOYKO.

CULDESAC, IDAHO, March 23, 1963.

Senator ERNEST GRUENING,
Washington, D.C.

DEAR SENATOR GRUENING: Mrs. Butler and I were disappointed that we were unable to see you when we were in Washington last winter. We realize, however, how busy you folks are in Washington.

We wish to congratulate you on your success of becoming chairman of the Minerals, Materials, and Fuels Subcommittee. We feel this a great importance and aid to the gold mining and mining problems.

I notice from your Newsletter that a hearing will be held on your bill S. 758 to establish a Public Lands Appeals Board on May 1. This is a very important measure and we hope it will receive favorable passage.

Would you kindly send us a copy of your bill S. 758.

We are very appreciative of your continuous efforts to help the mining interests.

Successfully yours,

ERNEST BUTLER.

ROBISON, McCASKEY, & LEWIS,
Anchorage, Alaska, March 25, 1963.

Subject: S. 758.

HON. ALAN BIBLE,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR BIBLE: Senator Ernest Gruening has kindly furnished me with a copy of his bill S. 758 in which he was joined by our other Alaska Senator, Mr. Bartlett, and by yourself and others. At Senator Gruening's suggestion, I am writing you to comment upon my feeling of the need for such legislation at an early date.

On April 25, 1962, I wrote Senator Gruening commenting upon the then pending S. 3107, which had the same objective. A copy of my comments, made at that time, is attached. Nothing has taken place since that time to affect my attitude in the slightest, and I feel even more strongly today that we need a competent appeal procedure to rectify the many examples of bureaucratic bungling which seem to be the rule, rather than the exception, in handling of land cases in the Bureau of Land Management.

I think most of the troubles in the Bureau of Land Management are attributable to the harsh inflexibility of the regulations themselves, and the lack of authority of Bureau of Personnel to apply, where applicable, equitable principles to the facts of a particular case. This is where the appeals procedure can rectify the problem, while we must bear in mind, at the same time, that a thorough overhaul of the Bureau's procedures on land matters is imperative.

One example of a matter we have been handling wherein the Bureau of Land Management has, in our view, committed serious error, is in the interpretation of the provision for oil and gas leasing in areas where protracted surveys, only, are in effect (43 CFR 192.42a (c)). While the leasing of less than full protracted sections now has been provided for, by amendment to the regulation, such amendment does not retroactively authorize the issuance of leases upon offers predating the effective date of the regulation, and thereby a great many applicants in Alaska have been deprived of their right to lease Federal lands for oil and gas where any portion of a protracted section was not available for leasing. This, in our view, constituted an unlawful withdrawal by the Secretary from oil and gas leasing which was never contemplated by the Congress.

In our letter of April 25, 1962, to Senator Gruening, we also reported an example of an Alaska Public Sale Act matter in which our client received most inequitable treatment from the Bureau, which tried to have the lands reclassified right out from under him to bring it within the Recreation and Public Purposes Act (43 U.S.C. 869). Fortunately, in that case on appeal the applicant was given a further extension in which to satisfy the requirements of the Alaska Public Sale Act, and the classification for recreation and public purposes was reversed. Now, however, we represent another client in the same area, a Boy Scout camp, which has received the same treatment from the local land office and have had to appeal that matter to attempt to have the inequity rectified. That appeal is still pending.

Our experience in following the advice of the local land office on handling land matters has been extremely poor. We, as well as our clients, have been instructed to follow certain courses of action on land matters, only to find, after a prolonged delay, a decision negating the rights of our clients. We have virtually developed a reflex action in filing appeals on virtually every matter handled by the local land office. Needless to say these numerous appeals are costly to our clients, and result in much extra administrative work for the Department of the Interior. If others are undergoing the same experience, and I have no reason to feel it could be otherwise, the Department must be expending hundreds of thousands of dollars in handling appeal matters, most of which should be unnecessary.

As an example of how this information furnished by the local land office misfires, one of our clients in a small community on the Kuskokwim River applied for a homesite on a tract of land fronting on the municipal airstrip. The surveyor from the land office told him that he would have to relinquish a portion of his settlement claim, that immediately fronting the airstrip, since the State of Alaska proposed to acquire it under its right of selection. Our client was

amenable to this suggestion and revised his application accordingly. Shortly thereafter another individual filed on the relinquished portion of the homestead tract, and, when our client protested, upon his first visit to Anchorage, thereafter, he was informed that nothing could be done about it inasmuch as a 90-day appeal period to the courts had expired. Legally, we suppose, this information was correct, but our client had never been previously informed that he would have to pursue such a remedy. In another instance, a client of ours filed for a plant site under the Mineral Leasing Act on a 40-acre tract in the public domain. No action was taken on this application, but our client proceeded with construction of facilities since the cost of delay overweighed the possible consequences of a rejection by the land office. More than 6 months later, a homestead application on an adjacent homestead was amended to include this quarter-quarter section and, when the allowance of the homesteader's entry was protested, the land office, after an additional delay of 18 months, ruled that the protest of our client must be rejected, and the homestead entry allowed. While this matter may be somewhat resolved by the allowance of the plant site application prior to final patent to the individual entryman, it still leaves open the possibility that the matter will have to be contested in the courts, whereas, had the land office acted promptly upon the application in the first instance, none of these problems would have ensued.

Apparently, the problems in which we have represented clients are not unique, other attorneys and petroleum landmen in Anchorage having advised me that their experiences have been similar. If the Board of Land Appeals under S. 758 can be provided, presumably the land offices would, to avoid reversals of their decisions, handle land cases with considerably more circumspection than at present. At least that is an end to be earnestly hoped for.

If hearings are to be held in Alaska on the bill, I would appreciate being advised, as it may be desirable to submit additional written statements or testimony. Thank you for this opportunity to comment.

Sincerely yours,

EBEN H. LEWIS.

AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION,
Denver, Colo., May 1, 1963.

HON. ALAN BIBLE,
Chairman, Public Lands Subcommittee, Senate Committee on Interior and Insular Affairs, Washington, D.C.

DEAR SENATOR BIBLE: It is our understanding that hearings are scheduled on May 6 for the Senate Public Lands Subcommittee to consider S. 758, introduced by Senator Gruening, covering the matter of appeals procedures on public lands matters.

Appeals procedures involving the lands administered by the Department of the Interior is a matter which has concerned us for some time. We concur with the principle of impartial appeals procedures and manners in which they might be expedited. However, we do not feel that S. 758 covers this matter broadly enough, although it does recognize that some changes need to be made.

Rather than a single, national appeal or review board, as outlined in S. 758, we think a much more realistic approach might be the establishment in each State of a three-man board to be composed of one man appointed by the Secretary of the Interior, another by the Governor of the State in which the appeal is filed, and the third appointed from the user group affected. This would bring the appeals procedure down to the State level where we feel there would be more opportunity for realistic appraisal made of the problems involved.

Inasmuch as you have expressed willingness to conduct field hearings at the request of the livestock users, we feel this appeals procedure would be a subject that could very well be considered during the field hearing. For this reason, we hope that no formal action will be taken on S. 758 until the entire appeals procedures process might be reviewed. No more golden opportunity could be presented than by the individuals in the field expressing their views.

We respectfully request that you include this letter in the hearing proceedings on S. 758.

Cordially,

C. W. McMILLAN, *Executive Vice President.*

WINNEMUCCA, NEV., May 4, 1963.

Senator ALAN BIBLE,
Senator from Nevada,
Senate Office Building, Washington, D.C.:

Regard S. 758 schedule for hearing before your Public Land Subcommittee.

My thinking on this bill: (1) Should be an appeals board within each Western State; (2) Department should answer appeals within 30 days; (3) Department should render decision within 150 days; (4) the United States should pay cost of appeal if appellate is prevailing party. I request that this bill be one of the subjects of any future field hearings held by your committee.

LESLIE J. STEWART,
Nevada Farm Bureau,
Member, National Public Lands Coordinating Committee.

MINDEN, NEV., May 2, 1963.

Re S. 758, Interior Board of Public Land Appeals.

Hon. ALAN BIBLE,
Chairman, Public Lands Subcommittee, Senate Committee on Interior and Insular Affairs, New Senate Office Building, Washington, D.C.

DEAR SENATOR BIBLE: Notice has been received of the scheduling of S. 758 for hearing by your subcommittee on Monday, May 6, 1963. This letter is written in my capacity as special counsel to the Central Committee of Nevada State Grazing Boards, and as special counsel to the National Public Lands Coordinating Committee.

The Nevada committee, as you know, was created by action of the Nevada Legislature in 1939, pursuant to the Taylor Grazing Act, and is composed of cattlemen and sheepmen chosen from each of the grazing districts in the State to represent the 1,059 livestock operators using the Federal range under Taylor Act license or permit.

Membership of the National Public Lands Coordinating Committee brings together 5 representatives from each of the 11 Western States and Alaska—1 each from the State cattlemen, State woolgrowers, and State farm bureaus, 2 others to be selected from other resource users. The goals and purposes:

(1) To bring to the attention of the public the importance and need for assuring the continued enjoyment and use of Federal lands on the customary multiple-use basis by all citizens.

(2) To encourage livestock operators to participate in and cooperate with other resource user groups at the local, State, and National levels.

(3) To aggressively spearhead a drive to obtain greater security of tenure, to provide stability and customary multiple usages intended and provided by the Taylor Grazing Act.

(4) To coordinate and counsel with livestock, farm and other organizations in advising Congress and governmental agencies on legislation and regulations affecting use of Federal lands.

Hugh Colton of Vernal, Utah, is chairman, Joe Donlin of Casper, Wyo., is vice chairman.

During the past 18 months, the subject of existing appeals procedures in the Department of the Interior has been raised and discussed at meetings of Federal range and other resources users at Albuquerque, Las Vegas, Phoenix, Salt Lake City, Reno, Washington, D.C., and at Elko, Carson City, and Fallon, Nev. In addition, Interior and other Federal agency appeals procedures have been, as you know, a subject of continuing interest on the part of members of the Administrative Law and Mineral, and Natural Resources Law sections of the American Bar Association.

Because of this widespread interest, the consideration of S. 758 by your subcommittee is timely. It is our hope that some action can be taken during the 88th Congress to realine appeals procedures so as to better assure expeditious handling of appeals, to require clear-cut compliance with the Administrative Procedure Act (5 U.S.C. 1001-1011), and to more nearly afford the citizen-appellant the rights and safeguards guaranteed him in judicial proceedings.

On April 28, 1963, representatives of Nevada cattlemen, sheepmen, and the Nevada Farm Bureau, meeting at Elko discussed S. 758, and on April 29, 1963, the Executive Committee of the National Public Lands Coordinating Committee met in Salt Lake City to consider various matters affecting administration of the Federal range, including S. 758.

The consensus of opinion at the Elko meeting was this: That the approach proposed in S. 758 would result in a substantial improvement over present procedures, and that the whole area of Interior Department decision and rulemaking, contests and appeals procedures should be included on the agenda for such Western field hearings as the Senate Public Lands Subcommittee might schedule.

At the Salt Lake meeting, discussion reflected about the same reaction among other Western States represented as that among Nevada spokesmen. There, unaware of the scheduling of this bill for hearing, committee members voted to defer action until the next meeting, to afford opportunity for study in the several Western States, and the submission of recommendations. Members were unanimous in their opinion that changes are needed, that this subject deserves to be a part of any Senate field hearings.

Some of the comments and observations gleaned from the numerous meetings referred to above are these:

(1) That consideration be given to creation of an appeals board within each public land State, with appeals to be taken therefrom to the U.S. district court for the district in which the land involved is situated (see below).

(2) That the Department, on all appeals, should "answer" any appeal, in writing, within the same time permitted an appellant after decision, i.e., 30 days; and that the Department must render a decision on the issues thus framed within 150 days after Department counsel's written brief (copy supplied appellant) is filed:

(3) That the United States be taxed costs, and a reasonable attorney's fee, when appellant is the prevailing party.

(4) That, if a departmental Board of Public Land Appeals is created, cases, on appellant's motion, be submitted for Board consideration wholly in writing, or orally and in writing if requested by appellant or by Board.

(5) That if departmental Board is created, "convenience of the parties" be the measure of whether hearing is held in District of Columbia or in the field.

(6) That, in every case, compliance with the Administrative Procedure Act be required.

As a result of study of this subject during the past year, the Central Committee of Nevada Grazing Boards, representing Nevada stockmen as a creature of Nevada statute, developed a simple amendment designed as a base for congressional consideration. In the form of an amendment to the Taylor Grazing Act, this amendment would delete the second sentence of section 9 (43 U.S.C. 315h), and substitute the following:

"The Secretary of the Interior shall provide, by appropriate rules and regulations, for local hearings on appeals from the decisions of the administrative officer in charge to an examiner, and for the appeal by any party adversely affected by the decision of the examiner to an appeals board, one of which shall be established for each State in which grazing districts or leases have been established. Such boards shall consist of three members, one to be designated by the Secretary of the Interior, one to be designated by the Governor of the State, and one to be designated by the State [grazing] advisory board. The decision of such appeals board shall be final, subject to an appeal to the United States district court in the manner provided by law."

This type of approach would, we believe, adequately protect the interests of the United States, would move "administrative justice" some 1,500 to 2,700 miles nearer to persons affected by Interior decisions in the continental portion of the West, and would unclog the historic bottlenecks in the existing Washington, D.C., appeals channels. We are not wedded, of course, to the suggested method of designating board members, or even to the necessity of such a board in each of the Western States.

Whatever direction is settled upon, please be assured of the support and backing of my associates on the Central Committee of Nevada Grazing Boards, the Nevada Farm Bureau, and on the National Public Lands Coordinating Council.

Again, it is our hope that this important matter can be made the subject of Western field hearings before your committee.

Sincerely yours,

GEORGE W. ABBOTT,
Attorney at Law.

HAILEY, IDAHO, April 22, 1963.

HON. ALAN BIBLE,
Senate Office Building,
Washington 25, D.C.

DEAR SENATOR BIBLE: Thank you for your letter of March 26 enclosing a copy of S. 758. Some of the things which I wished to discuss would be a matter of internal management of the Bureau of Land Management and would not have application to the bill itself except indirectly.

As to the proposed Senate bill 758 which provides for an appeal to the circuit court of appeals, I am wondering if such an appeal would be the exclusive remedy or would a party to the action be entitled to commence proceedings in the District court as now authorized. If the appeal is exclusive of all other remedies, then it would seem to me that the hearings examiner has too much rulemaking power with regard to the facts which may be determined in the hearing before him.

Section 161.10(4) (d) (1) provides, "the examiner will state any other issues on which he may wish to have evidence presented. Issues which appear to the examiner to be unnecessary to a proper disposition of the case will be excluded; but the party asserting such issue may state briefly for the record the substances of the proof which otherwise would have been offered in support of the issue." The fact that an appellant may obtain reversal on appeal because of a limitation on the issues involved by the examiner would not eliminate the expense and time involved in such procedures. I hope that if Senate bill 758 is passed it will not be an exclusive remedy and that a party adversely affected may elect to commence his action in the District court as he now may do. I also wondered whether section 4 of the bill in speaking of the decision to be made by a majority of the board, "on the basis of the entire record," refers to the record made before a hearings examiner or does the bill contemplate a new factual hearing before the board with the decision being made upon the record made at such hearing. Generally speaking, I think the bill would serve a good purpose; but I would hope that in some manner the expense of appeals and the time involved could be lessened; and I am sure that there is room for very much improvement in the internal affairs of the Bureau of Land Management, not only as set forth above but in many other respects.

As to BLM operations, I think it is not fair to require an appellant from a decision of the range manager to carry the burden of proof and to go forward with the evidence in the hearings before an examiner. Something most people do not realize is the fact that the Bureau seems to be able to "browbeat" other State and Federal agencies who otherwise have an interest in similar subject matter so that it is actually impossible for an appellant to obtain any assistance from any of the other agencies particularly as to experts who might have opinions contrary to the opinions of employees of the BLM.

The next reason for believing it unfair to require an appellant to carry the burden of proof is that in many of the decisions made by a range manager the decision grants to one user of the range an advantage he would not previously have over some other range user. When this happens, we always have the user who gains the advantage over the other users joining forces with the Bureau of Land Management to force acceptance of the decision upon the user who sustains a loss by virtue of the decision. In such cases it would appear that the Bureau should only have one interest and that would be to act as a fair arbitrator in the controversy between the two opposing users rather than to be at the same time the judge and the opponent of the person whose rights were adversely affected.

It would always seem to me in these cases where a controversy exists between users of the range, that jurisdiction could be given to local courts in the area to decide the question between the users insofar as the decision does not affect the Federal laws or regulations, or if this is not done, then the Bureau should not take any part in opposing the appellant.

Another matter which seems to be unjustified in Bureau management affairs is the constant shifting of managers and employees from one office to another with the new officers completely failing to recognize any promises or agreements made by the previous incumbents of such offices. At a recent hearing before a hearings examiner, although there were six BLM employees present, only one had been at the local office for as long as 3 years. Agreements as to range usage made with the previous range manager were completely ignored.

Again at this hearing the range manager had made a decision and put it into effect initially under a provision of section 161.10(i) (2) (i). In the par-

ticular case many miles of fence were constructed and the reason given by the district manager for providing initially that the decision should be in force and effect pending decision on appeal was that the funds budgeted would be unavailable if the expenditures were not made promptly and although a decision has not yet been reached on appeal it would appear that all of the expenditures were improvidently made.

It would seem to me that users of the range should not be required to make separate steps on appeal first to the hearings examiner, then to the Director, then to the Secretary. Usually by the time an appellant has completed the administrative remedy under the Administrative Procedure Act, he has expended much more than should be required in any usual type of litigation.

I believe the advisory board has lost its purpose and in many instances has become only an agency to which the range manager can "pass the buck" when he does not want to assume full responsibility for his actions. The value of the advisory board in an advisory capacity, I believe is practically nil. A different method should be provided for representation before the range manager.

I feel this is a very important subject in our States and appreciate the opportunity to express some opinions in connection with it.

Very truly yours,

V. K. JEPPESEN, *Attorney at Law.*

GLASGOW, MONT., *March 20, 1963.*

HON. ALAN BIBLE,
U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: Thank you for the copy of S. 758, and for your request for comments.

In relating the proposed bill to my experiences before the Bureau of Land Management on grazing appeals, the following thoughts occur:

An appellant would still have to appeal his matter to a hearings examiner and reappeal to the Director of the BLM before he would ever get to the Board of Public Land Appeals; my experience indicates that this could easily mean several years' delay before the case ever got on the calendar for the Appeals Board.

Selection of Board members by the Secretary and the establishment of rules and regulations by the Secretary is very similar to the present hearings examiner's system, and my experience before the hearings examiner indicates that an examiner who is an employee of the Department of Interior, appointed by the Secretary, and acting under Department rules, has very little tendency to overrule the Department in any hearing. My experience on the Department's procedure of overrules has not been at all satisfactory either; it has been very common practice for the Department to write letters in memorandum which are placed in the office file and which thereby become admissible evidence in hearings. It is obviously absurd for a rancher to expect that he can write a letter to himself, and that offering the letter in evidence furnishes proof of the truth of the contents of the letter; however, this is exactly what the Bureau manages to do with its files, under hearings procedures prescribed by the Secretary of the Interior. I strongly believe that if any appellant who is arguing with the Bureau is going to have a fair hearing, the rules of evidence must similar to those applicable in Federal court.

And I am very disturbed about the provision that appeals from the Board shall be to the circuit court of appeals. I believe appeals to the Federal district court of the area of dispute would be much fairer to the rancher for two reasons:

Such a provision means that the appeal of an eastern Montana rancher would be heard in San Francisco—approximately 1,500 miles, or halfway across the continent from the place of dispute. I can think of only two cases from all of northeastern Montana that have gone to the San Francisco appeals court in the 12 years I have been in practice (one of which was mine), so it is obvious that the rancher will have difficulty finding an attorney familiar with the facts and the grazing law who is also familiar with appeals procedure; and, of course, if the rancher hires an appeals expert in San Francisco he will have difficulty finding such a man who is also familiar with ranching operations and grazing regulations. It seems likely that the result will be a great deal of expense to the rancher in appealing any case.

And I believe the most serious objection to the proposed bill is that it precludes the rancher from ever having an impartial determination of the facts under proper rules of evidence. Any appeal to the circuit court is made on the record, and the circuit court, of course, will not listen to witnesses, determine

which of two disputing witnesses is more believable, which expert is more qualified to determine carrying capacity of land, etc. Yet if these issues are all determined before an administrative board and the decision of the board is taken before the court of appeals, the rancher may never have had an impartial hearing on these very issues which are the essence of his case. For example, in one case in which I was involved, we had pointed out some pretty glaring inconsistencies in the Government's figures which purported to show that my client was seriously overgrazing his range; the day before a hearing before a hearings examiner, the BLM officials and the Department of the Interior attorney spent several hours preparing a table which changed the amount of available foliage in various Government pastures; changed the amount allowed the appellant for foliage on his own private lands, etc. Such changes were made in order to put the figures in balance, but without any reference to the actual lands involved, or any effort to relate the figures to actual range available. The table was offered at the hearing as an official Government document and part of the file, and no Government witness was available who wished to explain how the figures were arrived at or whether or not they were correct, but the table, nevertheless, was received in evidence, and the hearings examiner accepted it as proof of the Government's position.

Another example: In another dispute over whether or not a rancher's range was overgrazed, the Bureau offered its entire file concerning the rancher into evidence even though this file was approximately 3 inches thick and contained a great number of notes the BLM employees had written to themselves justifying their own actions but without factual basis, letters written to each other, etc., and even though we never received a copy of the exhibit or had opportunity to examine all of the documents in it, it was received in evidence. The Bureau had no witnesses who were able to testify at the hearing from their own personal knowledge concerning the condition of the range, the so-called overgrazing, etc., but the hearings examiner, nevertheless, held that the introduction of the complete file into evidence was sufficient to prove the Bureau's case.

Appeal to the circuit court on cases such as this would be very unjust to the rancher, since the circuit court would likely assume that all questions of evidence (or of fact) had been properly determined in the lower hearing and the only issue in the appeal is whether or not the law has been correctly applied.

My own experience has been that questions of fact and evidence have very seldom been fairly heard and determined at administrative hearings before the Department of the Interior and my own feeling is that the only way a rancher can get a fair and impartial hearing on the facts is by a trial of all of the issues before the Federal district court.

I don't believe the various appeals to a hearings examiner, the Director, to the Secretary or Appeals Board, and finally to the circuit court serve any useful purpose and they put both the rancher and the Government to the unnecessary expense of several rather meaningless appeals before the final determination can be made (and as mentioned in my previous letter, the many years involved surely deprive the rancher of his right to a fair and speedy determination). I believe both the rancher and the Government would be better served if after a single hearing before an Appeals Board such as you propose, the case could then be taken directly to Federal district court for a determination which would be quick and final, unless either of the parties wished to pursue it further to the regular Federal court appeals procedure.

I know of only two grazing cases which have gone through the Department appeals procedure and been appealed to the circuit court of appeals. One is the *Garthoffner* case which I mentioned to you in my previous letter and the other is the *Wade McNeill* case handled by Attorney Leif Erickson, of Helena, Mont. My recollection is that the *Garthoffner* case was appealed first in the year 1957; that approximately a year and a half ago the circuit court of appeals ruled in our favor but made no final disposition of the case, but instead sent it back to the Department of the Interior for corrective action; the case is still pending in the Department and no final determination of Garthoffner's rights is in sight for the foreseeable future. I believe the *McNeill* case dates from about 1956 and I believe in that case also the circuit court of appeals directed the matter back to the Department of the Interior for corrective action, and that McNeill is still involved in appeals with the Department and still has no final decision. Such long-drawn-out proceedings puts the rancher to terrific expense and seriously disrupts his means of livelihood—he can't safely sell out, level additional land, construct reservoirs, etc., when he has no way of knowing what the final

outcome of his fight with the Government will be or when the final decision will be made.

Sincerely yours,

ROBERT HURLY, *Attorney at Law.*

CUT RATE LUMBER SUPPLY,
Olympia, Wash., April 30, 1963.

HON. ALAN BIBLE,
*Chairman, Public Lands Subcommittee,
U.S. Senate, Washington, D.C.*

DEAR SENATOR BIBLE: Thank you for your notice of hearing on S. 758 on May 6 next.

I have read a copy of this bill kindly sent me by Senator Jackson, and wish to express wholehearted endorsement of same.

May I offer a suggestion pertinent thereto? If in your opinion, it is feasible, could a mandatory time limit of a year or less from appeal date for the rendering of a decision by the proposed "Board of Public Lands Appeals" be incorporated in this bill? From my own limited experience, I would say that "time is of the essence" in most cases to be handled by the proposed Board.

To be more specific, may I offer our own experience re time consumption in appeal procedure involving "Contest No. W-4435"—decision rendered in our favor by Director of Bureau of Land Management on September 24, 1962, and presently under appeal by Forestry before Secretary of Interior:

October 1960: Operating personnel ordered off claim by resident forester.

April 5, 1961: Contest formally initiated by Forestry.

July 19, 1961: Hearing by land management examiner (Seattle, Wash.).

March 22, 1962: Examiner's decision rendered from Sacramento, Calif.

September 24, 1962: Decision rendered in Washington, D.C., by Director of Bureau of Land Management re appeal from Sacramento decision.

To date: Decision awaiting action of Secretary of Interior on appeal by Forestry from decision of Director of Bureau of Land Management.

Since we have been informed that a decision from Secretary of Interior requires at least a year from date of initiation of appeal, one can readily see that there is, presently, at least, probability of a time requirement of about 3 years or more before access to a court of law is possible. In our own case, while the lapse of 3 years or more time is decidedly expensive, and the uncertainty involved prohibitive of any comprehensive economic development, it is not disastrous since we have other means of support. But the thing pointed out by this, and that which does genuinely distress us, is the practical effect upon those of decidedly limited experience or financial resource—and of whom there are many. A number of these men have come to us bewildered and angry, to say the least, in the feeling that they cannot cope with what is to them an awe inspiring complexity and time requirement.

The danger that we see in the present situation—that S. 758 should help alleviate—is that an agency such as Forestry can embark upon and pursue an unstated policy that can, to all practical purpose and effect, nullify the intent and law of Congress by the simple tax supported expedient of contesting a claim on any convenient grounds, bona fide or not, through all the sequences of appeal—realizing only too well that the average citizen will give up in despair or through financial inability to legally conduct a series of contests involving a period of over 3 years of uncertainty and harassment. As well, said Agency can do this without any fear of an award of damages, counsel fees, and court costs normally a part of court action.

The authors and initiators of S. 758 are to be complemented for their considered interest in attempting to help rectify a situation which, although not intended to be so, presently works an injustice.

Thanking you for your kind consideration, I am,

Respectfully yours,

KENNETH MCCLARTY.

RENO, NEV., May 7, 1963.

Senator ALAN BIBLE,
*Senate Office Building,
Washington, D.C.*

DEAR SENATOR BIBLE: I have heard or read that you are holding hearings on a proposal by Senator Gruening of Alaska, which would establish an Appeals Board to enable private citizens to fend off the heavy hand of the

Bureau of Land Management. I am in favor of most anything which will protect us from the Bureaucrats. However it appears the cure here is costly: another bureau (Appeals Board) to ride herd on another bureau.

Would it not be better to require the Federal Government to sell at a reasonable price any and all land under the control of the Bureau of Land Management, to any responsible person or group of persons, during the next say, 5 years? After that time, any land still in the hands of the Federal Government would be subject to the local property taxes of the State in which the land is located. Thus the National Government would be able to get out of the real estate business, and State governments would be able to get some control over the areas within their borders.

Sincerely,

F. W. SEARLES.

ANCHORAGE, ALASKA, May 7, 1963.

HON. ALAN BIBLE,

Chairman, Public Lands Subcommittee, Committee on Interior and Insular Affairs, Senate Office Building, Washington, D.C.

DEAR SENATOR BIBLE: As an Alaskan homesteader I wish to take this opportunity to urge your continued support of Senate bill 758 and offer my own personal experience as additional testimony of the necessity of a Board of Public Lands Appeal in the Department of the Interior.

I will try to state my case as briefly and as simply as possible considering the seemingly complexity of the situation and various opinions of the local Bureau of Land Management on the meanings of two different public land orders involved that has come about over a period of many years.

In August 1958, I filed on a homestead outside of Anchorage on unsurveyed land. Being unsurveyed, no notice of allowance was needed or expected by me from the BLM, since appropriation of the land is made by the settlement, occupancy, and use of the land. Several months later, I requested an extension of time to move on the land, since I was in Tulsa, Oklahoma, making plans to resettle my family in Alaska. I also asked for a statement from the BLM as to the status of my filing. The BLM answered my inquiry and request for an extension by informing me that the land was covered by three other prior filings, one of which was the territory of Alaska. The date of the filing made by the territory was dated several weeks after my filing date.

I again wrote the BLM and asked for clarification of the territory's filing since I could not understand how their filing could be considered prior due to the filing dates. I explained such information was of great importance to me since I planned on making Alaska my home upon my return from Oklahoma and was going to build a house on the land as well as the normal development of the homestead. I further explained that I intended to do so immediately upon my arrival in Alaska. The Bureau answered my 2nd letter by simply restating the filings as in their first reply and added "if you feel these filings to be invalid you have the right to contest same." Please note here there is no mention of any preference right of selection and there was no "clarification" of the status of any of the filings. I was sure there was no other valid claim of the other two filings in question since the BLM informed me before I made a filing on the land that they were outdated and invalid since they had failed to move on the land or make any improvements.

In June 1959 I returned to Alaska to make my permanent home. I checked my homestead claim and found the land to be vacant and unimproved. I went in person to the land office to discuss the validity of my filing and to see if I was safe in investing in the land for I was planning on building a home, not just a prove up cabin. I felt that I must be sure of my title in my filing since this was my first experience in building on land or investing into something that I did not yet have title in my name at the time.

The BLM informed me again that if the land was vacant and unimproved that a preference right of entry could only be obtained on unsurveyed land by establishing residency and occupying the land. I was also told since the territory of Alaska's (by this time the State) filing was not filed prior to my filing in date, I had nothing to worry about in regards to this filing—that it was entirely all right with the BLM and safe as far as my investment was concerned to enter the land and develop the homestead without further thought to any conflict on our claim to the land.

Satisfied and content that I had received the most authoritative information and with the full knowledge and consent of the BLM I proceeded to develop my homestead at full speed so as to provide my family with decent housing before the winter had progressed to far along. Within a few weeks I had a road built into the land and by December I had moved up a six-room house up the mountain for a permanent home. I did not build this house—I moved the building there complete for the temporary building there was very unsatisfactory. At present I have invested in an excess of \$16,000 cash in this land and can show receipts for every dime. I found credit to homesteaders for permanent improvements pretty slim due to the fact of title to the land I am sure.

In January 1960, after we were comfortably settled and all of the curtains hung and able to relax from a grueling 7 months hard work getting settled on the homestead—and after 17 months after the date of filing—the BLM rejected my filing in favor of the State's filing. They pointed out later we had no notice of allowance and the State had a preference right of selection. After much investigation and many, many trips to the BLM office here I was able to determine what was going on and what had went on in the past leading up to this situation, which was:

The land had been withdrawn at one time for "highway purposes" for a distance of 1 mile from the "line of mean high tide" along the Turnagain Arm for a distance of approximately 10 miles. This was to be the first in a comedy of errors on the part of the BLM here. It seems there was no provision in the land law for a withdrawal of the kind in the first place and in the second place the Bureau had not actually intended to withdraw the land for any highway purposes anyway, but rather for "scenic" purposes, but having no provision in their laws for a "scenic" withdrawal at the time, had fraudulently labeled the withdrawal for "highway purposes." Next in the comedy was that the wording of the public land order of "from a distance of 1 mile from the line of mean high tide" started creating additional problems for everyone. Since the tides along the Turnagain Arm are the second highest in the world it was discovered during proceedings on the homestead cases of Thomas Mealy and a Mr. Oelschaleger, Sr., whose homesteads virtually join the shoreline, that the line of mean high tide was considerable distance from shore and thereby creating no withdrawal legally at all. Thomas Mealy and Oelschaleger, Sr., were granted patents to their land.

In order to eliminate their mistake and (supposedly) eliminate all conflicts on the other five or six homesteads in the same area (people who had settled in good faith behind the line of the withdrawal)—the BLM issued a second public land order which more clearly defined the withdrawn area by surveyed description (even though the survey was filed or a matter of public record, therefore its legality questionable). This second land order with the exception of (a) the BLM decided not to abide by the precedent set in the *Thomas Mealy Homestead* case, as to where the line of mean high tide was to determine the boundary of the withdrawal, but now elected to now determine same by a "meander line" although the wording in the public land order had not been so changed, and (b) the second land order restored to public domain between the newly determined boundary and the old one, a strip of land. This area is where most of the homesteads in conflict are located or at least of portion of the land included in the homestead claims.

Since a meander line must be determined at the time of survey it goes unexplained to my satisfaction or any other familiar with the cases, how this method could be legal either since the survey had not been filed or valid at the time of the "new decision" of the BLM. At any rate the BLM explained that they did not ever intend to have the wording of the land order read "a distance of 1 mile from the line of mean high tide" but actually intended to use the "meander line." This, of course, is very easy to see, what they "intended" since their definitions are and were so "clearly stated and defined."

Regardless, and with little exception, this second land order would have eliminated most of the conflicts on the homestead filings in the area with the exception of two entire homestead claims and parts of two other in the area. However, with one catch—as if there was not enough problems without adding new ones on the people of the area (which should prove the point they were not interested in trying to help them overcome conflicts with the second land order)—the BLM gave the State (territory) a 90-day preference right of selection on the strip of land restored to public domain by the second land order in determining the new withdrawal. The State exercised this right of selection by filing on this land (undetermined by the courts to date as to what lands the preference right of

selection could include due to the previous conflict). This selection again covered all of the same homesteads that had been in previous conflict with the original "undetermined" boundaries. Please note here that a precedent had been set in two other homestead cases and these two homesteaders have received patent and yet others in the same area, further back from the "meander line" or shoreline, or line of mean high tide, are unable to obtain patents to their land—all under the same questionable public land orders.

It was during the 90-day preference right of selection that I innocently filed on my homestead, not aware of all the previous problems and indecisions of the BLM on the boundaries of the withdrawal or even knowing that any such preference right of selection to the State existed; and I do not believe that the BLM was aware of any such preference right of selection either; or surely they would have informed me on one of the three occasions of opportunity before I ever settled on the land; and they certainly knew full well my intentions. I was later told that the reason they had to wait 17 months before rejecting my filing—was because they were not sure if I was within my rights or not or that they could not determine at any earlier date as to which filing would be valid until after the survey was filed and accepted. In other words their decision was based upon instruments and circumstances which did not even exist at the time I filed in good faith but regardless, I am expected to abide by such a half abased way of doing their business.

The BLM here in Anchorage will support this version of facts I suppose—or at least it is the explanation they gave to me in explaining to me the mess I find my homestead claim to be in.

But I ask any intelligent person to tell me if all this makes any sort of sense or rings of any minute justice. Am I to lose my homestead and improvements that I have worked so hard for and in good faith because of such assassin decisions, erroneous information and "errors" in land order determination, and fraudulent actions? The BLM had three separate opportunities to inform me that a conflict "could possibly" arise or even that a preference right of selection existed on the land.

I would have believed the BLM again in that all wrongs could be righted by an appeal; but time and time again I have had appeals from their decision to reject my homestead filing, decision to request that I remove my improvements and decision to close my case turned down again and again without granting me a hearing. Evidently not once has this BLM informed the Department of Interior of the information they had given us for we cannot make the Department of Interior believe our side of the story without a hearing so we may present witnesses who can support the true facts. My only course of remedy now is through the courts and here again is another catch—only in the District of Columbia—with the expenses of such action almost out of the realm of possibility for me or after exhausting all other remedies—legislation. At any rate all this may take more years of waiting and uncertainty or more expense than I can afford.

There is very little doubt but that a hearing where all the facts may be presented in proper order, would not solve my problem and enable me to get a patent to which I am entitled and I hope and trust you will support this bill and help me by so doing, obtain some relief of my conflict. This is almost my only hope due to expenses of court action which draws nearer each day.

In closing let me add that I have talked to the State and the State does not want the land at the expense of other homesteaders and myself in the area, and yet until the Bureau admits some error or reason that their filing is invalid they cannot relinquish their filing for it could cause other serious problems in relationship to their preference right of selection. The State is not making any attempt to obtain patent because of the conflict.

In addition to my case and the others involved in this area—to which one hearing could solve all the cases—I can name you at least 12 other such cases where the people cannot obtain hearings of their cases—nor can they afford to go to court. The Department of Interior may be right or wrong but the homesteader has no opportunity to try to present his case short of taking action in the courts.

I am enclosing a clipping from our newspaper and would like to comment that I feel Senator Bartlett's testimony was an understatement in that presently the Department of the Interior now acts as both judge and jury, when more in fact, they act as the plaintiff as well, so that virtually any appeal which is contrary to the Bureau of Land Management's original decision is hopeless from the beginning are of no avail to the homesteader, where a hearing is necessary to determine the facts or interpret law. I would like to see just one case

pulled from the Department of Interior files at random where a decision of the BLM has been reversed through an appeal.

I can well understand why Mr. John A. Carver, Jr., does not want the existing system tampered with since it has taken years of bureaucracy to create a system where the plaintiff can judge and decide his own case without even being bothered with hearing the other side.

In the past, every effort by a Senator, or other interested person, in my behalf has resulted in an almost immediate reprisal action by the Department of the Interior which is very evident in the wording of their decision in their answer to my appeals, so I am writing this letter with fear that again I will be creating more trouble for myself. At first I wrote long letters of explanation in the belief that just one person in the Department could understand my actions, concern, and bitterness of my situation was not meant to be against "him" personally, but rather a plea for help from my own Government. I was hoping to find someone pledged to serve in the best interests of "use" both to the true intention of our Government for use of the land. I feel I have been treated like I was trying to "take something away from the Department personally to which I had no right or title to do."

It is my opinion that every appellant is treated on this basis from the first appeal and that the Department of Interior has taken it upon themselves to be the "private guardians of Government property to which they alone are to decide who is "friend or foe and deserving." I wish someone would let them know we are basically on the same team.

In a desire to be of help and at risk of some sort of reprisal, you may use this case in your testimony or any of my appeal records on file with the Department. Both Senators Bartlett and Gruening are familiar with our case also.

Thank you for your efforts, sincerity, and hard work on Senate bill 758, and I hope and pray for its success, and if passed that it does not result in a useless failure of its true purpose.

Sincerely yours,

ROBERT L. MILLER.

ALASKA SOLONS BACK LAND APPEALS BOARD

WASHINGTON.—Alaska Senators endorsed and Interior Department officials opposed today a bill which would set up a Board of Public Lands Appeals.

The bill before a Senate Interior Subcommittee would authorize establishment of a Board in the Interior Department to hear appeals from Interior agency decisions in disputes over Government lands. Disputes involving homesteading, livestock grazing, mining, and other activities on public lands would be heard.

Senators E. L. Bartlett and Ernest Gruening, Alaska Democrats, testified for the bill.

Bartlett said Interior officials now have to act as both judge and jury in land disputes.

There are about 600 appeals pending in the Interior Department, Bartlett said. He added:

"I have cases in my files where the appellants filed over a year ago and their appeals have not yet been reached.

"In the meantime they are left sitting on their homesteads, trade, and manufacturing sites or small tracts without patents, not able to make further investments and not knowing if or when the ax will fall."

John A. Carver, Jr., Assistant Secretary of the Interior, said his Department feels that the bill "would tend to thwart or defeat" public land reforms "rather than aid to supplement them."

Carver said Interior has an adequate appeals system and would "subject administrative judgment to court review promptly and at the field level."

Interior Solicitor Frank J. Barry said the bill would destroy the present system of administration of public lands and actually increase the time required to complete appeals.

About 400 appeals are made annually, Barry said. Hearings required by the bill, he said, would cost about \$200,000 a year.

Senator GRUENING. May I offer this letter for the record from Governor Egan, and a statement of Max Barash, attorney, of Washington, D.C.; a statement of Neil F. Stull, attorney, in Washington, D.C.; a

statement of Mr. Perley M. Lewis, consulting engineer of Phoenix, Ariz.; and then the statement previously alluded to by the Senator from Colorado, from the Rocky Mountain Oil & Gas Association.

Senator BIBLE. They will be made a part of the record, but documents that have already been offered will not be duplicated.

(The documents referred to follow:)

STATE OF ALASKA,
OFFICE OF THE GOVERNOR,
Juneau, May 1, 1963.

HON. ERNEST GRUENING,
U.S. Senator,
New Senate Office Building,
Washington, D.C.

DEAR ERNEST: I am writing in regard to the hearings to be held on May 6 by the Public Lands Subcommittee of the Senate Committee on Interior and Insular Affairs on S. 758 which would establish a Board of Public Land Appeals. I would greatly appreciate it if you, as author of the bill, could find it possible to make this statement a part of the hearing record.

The State of Alaska is strongly in support of the provisions of S. 758 and would urge its early enactment. There are two principal reasons for this position.

At the present time, final decisions on appeal are made by the Solicitor of the Department of the Interior. Yet, in effect, it is the Solicitor who has also made the first decision in a particular case on the district or local level as the result of guidelines which he has established through issuance of official memorandum opinions, rulings, and administrative regulations. Regardless of the number of steps or appeals provided the appellant within the Department's organizational structure, the situation in this regard remains unchanged and it is rarely that an original local land office decision is reversed.

There is no provision at the present time for the correction of administrative errors or omissions on the part of Land Office employees. I do not wish my remarks on this point to be misconstrued as critical of Land Office employees. They are not intended to be so. But mistakes and omissions will occur so long as we have a government of human beings and machinery should be established to correct them.

There have been many instances in which mistakes or omissions have placed an entryman in an untenable position. He may enter upon the land in good faith, spend time and money to perfect his entry, and then find that somewhere along the line a public official failed to make an important entry in the records or inadvertently provided him with misinformation upon which he based a course of action.

Actions dealing with the public lands of the United States now are exempt from the provisions of the Federal Administrative Procedure Act, and there is nowhere along the present line of appeals that these errors or omissions can be corrected.

In its own Land Act, drafted on its experience in dealing with Federal departmental and bureau procedures, the State of Alaska has attempted to avoid such inequities. We have not only made decisions subject to the provisions of the State's Administrative Procedure Act but we have included a specific provision to provide means of correcting past or future inequities. This provision of Alaska law states:

"The Director may grant preference rights for the lease or purchase of Alaska lands in order to correct the past or future errors or omissions of any State or Federal administrative agency where inequitable detriment would otherwise result to a diligent claimant or applicant due to situations over which the claimant or applicant had no control. The exercise of this discretionary power shall operate only to divest Alaska of its title to or interests in lands, and shall be exercised only with the express approval of the Commissioner."

An Appeals Board, as proposed in S. 758, would provide similar machinery on the Federal level for impartial review of all facts and the rendering of an independent decision.

A second major reason for Alaska's support of S. 758 is its provision for Appeals Board hearings and judicial determinations on the local level. All too often the appearance has been given that Interior Department bureaus rule the public rather than being responsive to public needs. This becomes rather easy

when the decisions are made thousands of miles away from the source of the problem.

Nor do I believe that it is appropriate to require that an appellant, seeking correction of an error or omission not of his making, be burdened with the expense involved in pursuing his claim at the Washington level. In many instances—and certainly in the case of an Alaskan—such expense might well exceed by far the value of the land involved.

How much fairer and responsive to public need it would be to provide an Appeals Board hearing at a location convenient to the appellant and to permit appeals from the Board's decision to the U.S. court of appeals for the circuit in which the land involved is situated.

Up to this point my comments have stressed the problem of the individual desiring to make beneficial use of the public domain. The State of Alaska, in its efforts to exercise its rights under the land-grant provisions of Public Law 85-508, has also found itself faced with apparently insuperable obstacles in establishing property rights within the public domain. It is well aware an obvious lack of effective review of actions of the Bureau of Land Management in regard to State land selections.

In closing I would again give the State of Alaska's wholehearted endorsement to the provisions of S. 758 and urge its early enactment by the Congress.

Sincerely,

WILLIAM A. EGAN, *Governor.*

WASHINGTON, D.C., March 28, 1963.

HERBERT W. BEASER, Esq.,

*Legislative Assistant to Senator Ernest Gruening,
New Senate Office Building, Washington, D.C.*

DEAR HERBERT: Here, finally, are my comments and suggestions with regard to S. 758, a bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Land Appeals and for other purposes. In the discussion that follows I shall take up seriatim the various sections of the bill and explain the reason for the changes proposed therein. The proposed changes are incorporated in a draft annexed hereto.

The change in the title is self-explanatory. The purpose of the bill is to streamline the appeal procedure and to provide more adequate review of appeals from decisions of the Bureau of Land Management and Geological Survey. This proposal provides for one decision to be rendered on a Bureau level, in place of two now prescribed in the Department's Rules of Practice;¹ an automatic right of appeal to the Secretary of the Interior² in conformity with and continuing in effect the present practice; and further review by a Board of Public Land Appeals of meritorious cases under a certiorari procedure comparable to the U.S. Supreme Court. The appeal procedure should apply to acquired lands of the United States as well as public lands.

Section 1, 2, and 3 of the present bill are satisfactory.

I have proposed a new section 4 which is intended to abolish the intermediate step of appeal to the Director, Bureau of Land Management, from a decision of the local land office. As you know, at the present time the Bureau of Land Management renders two decisions before an appeal is taken to the Secretary of the Interior. The manager of the local land office renders one decision and the Director renders a second decision. For all intents and purposes the two decisions are one and the same. This is time consuming and a farce and ought to be abolished. Decisions rendered by the local land offices are predicated in large measure on a manual of procedure prepared by the Director's office for the guidance of the local offices. It follows that appeals from decisions of the local land offices are decided in the Director's office by the very same people who dictated through the Bureau manual how the initial land office decision should be written in the first instance. Thus, there is no real impartial and independent review by the Director on appeal. In abolishing the intermediate step of appeal, as proposed in the new section 4, the Director can then determine whether the single Bureau decision should be signed by the manager or by the Director himself. In other words, I visualize that if the intermediate step of appeal is abolished the local land offices would continue to write the initial

¹ See 43 C.F.R. 221.1.

² Decisions on appeal are rendered by the Solicitor or the Assistant Secretary for Public Land Management under a delegation of authority from the Secretary.

decisions but whether they are signed by the manager or by the Director would be for the latter to decide. The right of appeal to the Secretary of the Interior from any decision of the Bureau would continue in force and effect as heretofore. In this connection, it should be noted that even if the Director determines that local land office decisions should be signed by the manager, the Director would still retain the right, on his own motion, to review decisions of the manager which are appealed to the Secretary of the Interior and to return to the local land office for reconsideration any decision found to be in error.

Under present procedure appeals to the Secretary from Bureau decisions are decided by the Solicitor or the Assistant Secretary for Public Land Management under a delegation of authority from the Secretary. This practice would continue undisturbed under the proposed new procedure. The new Board of Public Land Appeals would come into play following disposition of an appeal from a Bureau decision by the Solicitor or the Assistant Secretary for Public Land Management.

The new section 5 does not provide an automatic right of appeal to the board. Instead, the procedure would be akin to the certiorari procedure of the U.S. Supreme Court. In other words, following a final decision by the Solicitor or the Assistant Secretary for Public Land Management an aggrieved applicant or claimant may file with the Board a petition for review of the decision complained of. If, in the judgment of the Board, the grounds set forth in the petition for review are meritorious the petition would be granted and a submission of briefs would follow. Conversely, if the petition for review is not deemed meritorious it would be subject to summary denial. To be sure, it is to be expected that the Board of Public Land Appeals would be liberal in granting a petition for review and authorizing a hearing where it appears that the interests of justice and equity would be served thereby.

The new section 7 substitutes "Board" for "Secretary" but provides that the Board's rules and regulations shall be established with the approval of the Secretary.

The present sections 7 and 8, which would become new sections 8 and 9, are satisfactory although I have some reservations with regard to the present section 8 which will become the new section 9. I am in favor of the Board making appropriate recommendations to the Secretary for changes in the regulations to correct an inequity but whether any change in the regulations should be applied retroactively to afford relief to the petitioner gives me cause for concern. In theory, my answer would be in the affirmative. In practice, there may be difficulties. For example, the principle is well established in the administration of the public land laws that an applicant or claimant for lands which were withdrawn from disposition before the application or claim was filed acquires no rights of any kind to the land sought. If on a petition for review the Board found that the withdrawal was unjustified and its recommendation that the withdrawal be vacated was approved by the Secretary the question would then be presented whether the petitioner can be afforded relief in face of the established principle referred to previously. There are, of course, any number of other circumstances in which relief could obviously be granted without running into problems of this kind. This section should receive careful thought.

The new section 10 has been patterned after the language of section 42 of the Mineral Leasing Act of February 25, 1920, as provided by section 5 of the act of September 2, 1960 (Public Law 86-705). This seems more appropriate and contemplates that suits against the Secretary of the Interior would be filed in U.S. district court in accordance with existing practice.

I am enclosing a copy of my letter of April 3, 1962, to Hon. Jack Brooks, chairman, Government Activities Subcommittee of the Committee on Government Operations pertaining to appeal procedures in the Department of the Interior which may be of interest. Please feel free to call upon me if I can be helpful in connection with the bill.

With best wishes, I am,

Cordially yours,

MAX BARASH, *Attorney at Law.*

PROPOSED CHANGES IN S. 758

Change the title of the bill to read as follows: "A bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Land Appeals, to streamline and provide adequate review procedures, and for other purposes."

Section 1. No change.

Section 2. No change.

Section 3. No change.

Section 4. The intermediate step of appeal to the Director, Bureau of Land Management, from a decision of the local land office, as prescribed in 43 C.F.R. 221.1, is hereby abolished to the end that only one decision shall be rendered by the Bureau. The right of appeal to the Secretary of the Interior from any decision of the Bureau of Land Management, as prescribed in 43 C.F.R. 221.31 shall continue in force and effect as heretofore.

Renumber "SEC. 4" to read SEC. 5" and revise the section as follows:

"SEC. 5. Within thirty days after receipt of a final decision of the Solicitor or the Secretary or the Assistant Secretary for Public Land Management disposing of an appeal from the Bureau of Land Management or the Geological Survey concerning the uses of or claims to public or acquired lands under the jurisdiction of the Department of the Interior, an applicant or claimant adversely affected thereby who is a party to the appeal proceeding may file with the Board a petition for review of the final decision complained of and setting forth specifically the ground or grounds, including such public interest factors as may be present, which form the basis of such petition. No later than thirty days thereafter the Board shall, by written order, grant or deny, in its discretion, the petition for review. If the petition is granted, the petitioner shall file within thirty days thereafter a brief in support thereof and any opposing party shall then have thirty days to submit an answer brief. Pending review by the Board the decision complained of shall be stayed, unless there are extraordinary circumstances which make a stay impracticable in the judgment of the Board, and an opportunity for a hearing if requested and allowed by the Board shall be afforded at a location convenient to the parties. Decisions rendered by the Board shall be by a majority vote."

Renumber "SEC. 5" to read "SEC. 6" and revise the section as follows:

"SEC. 6. A petition for review under this Act may be filed with the Board only by an individual, partnership, corporation, or other entity, including a State or political subdivision thereof, adversely affected by and a party to the decision complained of.

Renumber "SEC. 6" to read "SEC. 7" and revise the section as follows:

"SEC. 7. The Board, with the approval of the Secretary, shall establish rules and regulations governing its procedures and activities, which rules and regulations shall be in accord with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011)."

Renumber "SEC. 7" to read "SEC. 8". No change.

Renumber "SEC. 8" to read "SEC. 9". No change.

Renumber "SEC. 9" to read "SEC. 10" and revise the section as follows:

"SEC. 10. No action contesting a final decision of the Secretary, rendered either by the Board, the Solicitor, or the Assistant Secretary for Public Land Management, shall be maintained unless such action is commenced or taken within ninety days after the date of the final decision. No such action contesting a final decision of the Secretary rendered prior to the enactment of this law shall be maintained unless the same be commenced or taken within ninety days after such enactment."

WASHINGTON, D.C., April 3, 1962.

HON. JACK BROOKS,

Chairman, Government Activities Subcommittee of the Committee on Government Operations, George Washington Inn, Washington, D.C.

DEAR MR. BROOKS: I wish to thank you for your letter of March 14 enclosing a copy of a letter to you dated March 12 from Solicitor Frank J. Barry of the Department of the Interior with regard to the large backlog of pending appeals in the Solicitor's Office. You have requested my views on the actions proposed by Solicitor Barry to reduce the backlog and I am pleased to have this opportunity to submit my comments thereon as an active practitioner who has represented parties in a large number of appeals involving the Mineral Leasing Act and the U.S. mining laws over a period of many years. Moreover, as one who served previously in the Department of the Interior for a period of 15 years in various legal positions I have more than passing knowledge of this subject.

The Solicitor's letter of March 12 makes specific reference to two alternate solutions which have been proposed. One is to abolish the intermediate step of appeal to the Director, Bureau of Land Management, from the decisions of the local land offices. The second is to abolish the right of appeal to the Secretary of the Interior from decisions of the Director and to substitute instead

a procedure for review by the Secretary akin to the certiorari procedure of the U.S. Supreme Court. It appears that the Solicitor has concluded that the certiorari approach is the better of the two solutions and has recommended to the Secretary of the Interior a revision of the Department's rules of practice along these lines.

I wish to express to your subcommittee my vigorous objection to the Solicitor's proposed solution of the problem. There are many reasons why the Solicitor's action is objectionable.

First and foremost, the Solicitor's proposal, if adopted, operates to deprive appellants of due process as contemplated by the Administrative Procedure Act. Appeals to the Director from decisions of the local land offices are handled by the Appeals Branch of the Bureau of Land Management. The local land offices and the Appeals Branch are all part of the Bureau of Land Management. Decisions rendered by the local land offices are predicated in large measure on a manual of procedure prepared by the Director's Office for the guidance of the local offices. It follows that appeals from decisions of the local land offices are decided in the Director's Office by the very same people who dictated through the Bureau manual how the initial land office decision should be written in the first instance. In effect, the land office decision and the Director's decision are one and the same. Thus, there is no real impartial and independent review by the Director on appeal. For the Director's Office to render a decision on appeal which may become a final ruling on the basis of the Solicitor's proposed certiorari procedure hardly constitutes due process of law within the meaning and spirit of the Administrative Procedure Act.

Second, in more than 13 years of practice before the Department of the Interior, I regret to say I have had little confidence in the decisions of the Bureau of Land Management either on a local land office level or on the Director's level. This is said constructively and in a kindly spirit. To some extent this has been due to the large number of appeals and lack of sufficient legal personnel in the Bureau of Land Management. On the other hand, I have always had and still have complete confidence in the caliber of decisions rendered by the Solicitor's Office. This is not to say that I have always agreed with the Solicitor's decisions because the contrary is often true. On the whole, however, the Solicitor's Office has rendered lawyerlike decisions in contrast to those in the Bureau of Land Management. In short it is my firm conviction based upon many years' experience that the only responsible legal decisions rendered in land appeals have been those emanating from the Solicitor's Office. To place in the Bureau of Land Management the final disposition of appeals, except those which would be reviewed under the Solicitor's proposed certiorari procedure, would be a grave mistake and cause irreparable harm to the concept of due process inherent in the Administrative Procedure Act.

Third, I am firmly of the opinion that the elimination of appeals to the Director from land office decisions would best serve the public interest and would tend to expedite substantially the final disposition of such appeals.¹ In other words, this proposal contemplates that appeals be taken directly from decisions of the local land offices to the Secretary of the Interior as a matter or right. To be sure, it may be anticipated that the Solicitor's Office would be handling perhaps twice as many appeals. However, elimination of the intermediate step would save anywhere from 6 months to 1 year's delay in handling appeals in the Bureau. Moreover, the Appeals Section of the Bureau of Land Management should be consolidated with the Branch of Land Appeals of the Solicitor's Office, thus augmenting the legal staff and allowing for more rapid disposition of appeals. In the Solicitor's Office itself the anticipated larger number of appeals could be handled more expeditiously by adopting some simple measures.

In the first place, many appeals, often by the same parties, are merely repetitious of cases previously decided. In appeals of this kind the Solicitor's decision disposing of the appeal should be purely perfunctory and need not be more than one page in length. It should simply make reference to the prior decision whose principles control the subject case on appeal and a copy of that prior decision should be appended thereto and made part thereof. It is my belief that fully 50 percent of the pending appeals probably fall into that category and could be disposed of with a minimum of effort.

¹ Implicit in this proposal is, of course, the continuing right of the Director, on his own motion, to review decisions of the local land offices which are appealed to the Secretary of the Interior and to return to the local land office for reconsideration any decision found to be in error.

In the second place, many appeals to the Secretary could be avoided, particularly in the field of oil and gas leasing, if greater care was exercised in promulgating regulations which carry out the letter and spirit of acts of Congress. It is my humble opinion that over a period of years the Department of the Interior has attempted by regulation to make new law rather than to carry out the mandate of Congress. Examples of this kind of bureaucracy are too numerous to mention here. If called upon to testify before your subcommittee on this subject I shall be glad to furnish specific details. I feel strongly that Secretary Udall and Solicitor Barry can do much to eliminate in the future a large number of appeals which are attributable to the previous administration's failure to promulgate regulations in keeping with congressional direction.

Thank you for the opportunity to make this presentation.

Sincerely yours,

MAX BARASH.

(Later, the following additional communication was received from Mr. Barash:)

MAX BARASH,
ATTORNEY AT LAW,
Washington, D.C., June 5, 1963.

HON. ALAN BIBLE,
*Chairman, Public Land Subcommittee, Interior and Insular Affairs Committee,
U.S. Senate, Washington, D.C.*

DEAR SENATOR: This has reference to my telegram of May 3 as follows:

"It was my intention to testify at the hearing on May 6 supporting in principle S. 758 'A bill to establish in the Office of the Secretary of the Department of the Interior a Board of Public Lands Appeals, and for other purposes.' Circumstances now prevent my being present at the hearing. If it will not cause undue delay in the committee's consideration of the bill, I shall appreciate your keeping the record of the hearing open for a period of 30 days so that I may have an opportunity to submit written representations supplementing my views previously submitted to Senator Gruening. Thank you."

My presentation of March 28, 1963, to Senator Gruening in support of S. 758 suggested a number of changes in the bill which I believe would streamline the appeal procedure and provide more adequate review of appeals from decisions of the Bureau of Land Management. In essence I recommended that one decision be rendered by the Bureau of Land Management¹ in place of two now prescribed in the Department's Rules of Practice; that the automatic right of appeal to the Secretary of Interior provided under present practice be continued in force and effect; and that the proposed Board of Public Lands Appeals to be established under S. 758 be authorized to review decisions of the Secretary under a certiorari procedure comparable to the U.S. Supreme Court.

Eliminating one step in the appeal procedure of the Bureau of Land Management will go a long way in accelerating final disposition of a pending appeal. In this connection, it should be said that in my presentation of March 28, 1963, to Senator Gruening my objections to the present two-step appeal in the Bureau of Land Management were not intended to encompass the functions performed by hearing examiners. They fall in a separate category. My discussion there pertained solely to the decisions of the local land offices and the Director's decisions on appeal which in my judgment are in practical effect one and the same and serve merely to delay final disposition of an appeal. The automatic right of appeal to the Secretary should be continued because decisions by the Solicitor's office, acting for the Secretary, are usually more responsible and more lawyer-like than those emanating from the Bureau of Land Management. Authorizing the Board of Public Lands Appeals to review cases under a certiorari procedure would provide discretion in the Board to entertain meritorious cases only and thus avoid an avalanche of nonmeritorious cases.

At best, revision of the present appeal procedure in public land appeals presents a most difficult task. It may very well be that the real answer is to establish an administrative court rather than a Board of Public Lands Appeals along the lines recommended to the President by the former Chairman of the Federal Communications Commission, Newton N. Minow, as desirable to deal more effectively with the communications industry. An administrative court to

¹ Under existing practice the manager of the local land office renders the initial decision and on appeal the Director renders a second decision.

resolve controversies arising from the administration of public land laws of the United States may be the most effective way to improve the administrative process of the Department of the Interior.

Sincerely yours,

MAX BARASH.

WASHINGTON, D.C., March 28, 1963.

Re S. 758, 88th Congress, 1st session.

HON. ERNEST GRUENING,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR: I have learned that you have introduced S. 758 in the present Congress, seeking to establish a Board of Public Land Appeals in the Department of the Interior.

This bill is, of course, essentially a duplicate of S. 3107, which you introduced at the last session of the 87th Congress.

By my letter of May 28, 1962, I commented somewhat at length on the provisions of S. 3107, pointing out that, in my estimation, public land claimants could not obtain the protection which they deserve against arbitrary and capricious action by the Department of the Interior unless something in the nature of a minerals court or public land court was established outside of the administrative jurisdiction of the Department. I still adhere to the views expressed in my letter, and request that it now be considered in connection with S. 758.

Also, I request that I may be permitted to appear before the Committee on Interior and Insular Affairs and offer my comments relative to the bill.

A copy of my letter of May 28, 1962, is enclosed for your information.

Very respectfully,

NEIL F. STULL, Attorney at Law.

WASHINGTON, D.C., May 28, 1962.

Re S. 3107.

HON. ERNEST GRUENING,
U.S. Senate, Washington, D.C.

MY DEAR SENATOR: I have been requested to furnish you with my views relative to S. 3107 which you have introduced, and which would provide for the creation of a three-member Board of Public Lands Appeals in the Department of the Interior. The primary purpose of the legislation would be to enable a public land claimant to appeal a decision of the Department of the Interior to a board which, I presume, would not be under the jurisdiction of the Secretary of the Interior and would thus be capable of sufficient detachment to enable it to render unbiased opinions and decisions.

I wholly support the purposes of the bill, although, as I will point out, I feel that appeals from final decisions of the Department of the Interior should be submitted to a court rather than to a board.

I was an employee of the Department of the Interior for nearly 20 years and have practiced law before the Department for over 18 years, and I have become increasingly concerned with the arbitrary and sometimes capricious manner in which the claims of public land claimants have been handled by the Department. As a matter of fact, my greatest concern has been with the lack of consistency shown by the Department in deciding appeals, and in the Department's refusal to accept the decisions of the courts if for any reason such decisions do not meet with the approval of some departmental lawyer. In this connection, I need only refer to the reported decision of the Department in the case of *John P. Dever*, decided October 4, 1960, and reported in volume 67, I.D., at page 367.

In that case Mr. Dever raised a question of law which was identical to that raised before the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Barash v. Seaton*, 256 F. 2d 714. The Department has never wanted to abide by the ruling of the court of appeals in the *Barash* case, hence in the *Dever* case it held that it would not accept the ruling in the *Barash* case for the stated reason that the court of appeals apparently "overlooked" the same court's ruling in the case of *Wann v. Ickes*, 92 F. 2d 215 (1937). The amazing part of the Department's decision is that it accused the court of appeals of overlooking one of its own decisions. Not only that, but the *Wann* case was decided in 1937, when the law read differently than it did at the time of the decision in the *Barash* case.

The result of this is that we have two diverse opinions on exactly the same provision of law. So long as a party deals only with the Department, he will be faced with one construction of the law, whereas if he carries the matter to court, he will be faced with a different construction of the law as set out in the *Barash* case.

Inconsistencies in departmental rulings are without number, and as a practicing lawyer dealing almost exclusively with public land and oil and gas matters, I can say without qualification that it is impossible today to advise a client what the law is on any matter which comes before the Department. In one case the Department will be extremely liberal, whereas in another case it will be overly technical in interpreting the same law or regulation. I might add, parenthetically, that this has given rise to a tremendous number of appeals from rulings by subordinate officers of the Department, for which it is impossible for a lawyer experienced in departmental matters to know which way the Department will rule on a given question of law, the only thing that he can tell a client is for him to appeal, for regardless of the question involved there is always a 50-50 chance that the Department will view the appeal in a favorable light.

I could carry on this discussion interminably, but I believe that it is sufficient at this point to say that there should be some tribunal which does not answer directly to the Department but which would be empowered to review departmental decisions and thereby establish a line of rulings which, by reason of the doctrine of *stare decisis*, would enable public land claimants and their lawyers to know what the law is in a given case and to conduct themselves accordingly.

It is true that a person who feels aggrieved by a decision of the Department can normally carry the matter to court, but this is of little benefit to a public land claimant. In the first place, the relief must be sought in the District Court for the District of Columbia in the majority of cases, and, with all due respect to that court, it must be recognized that practically none of the judges has more than a passing knowledge of mineral and public land matters and is therefore in no position to pass on the highly technical questions which arise out of public land cases. Also, the judges as a whole do not like to hear these types of cases, and I have noticed in many cases that there is a tendency to dispose of highly technical but important matters by the simple device of granting the Government's motions to dismiss.

We already have special Federal courts which handle matters of taxes, customs, patents, and claims against the United States. Also, we have a Court of Military Appeals, and until recently we had an emergency court of appeals for the handling of matters arising under the price control acts, the Housing and Rent Act of 1948, and the Defense Production Act of 1950. I submit that matters arising under the public land laws, particularly the mineral laws, are of equal importance with the matters handled by the courts I have enumerated. Furthermore, the conduct of business under the public land laws can only be successfully accomplished if freed from the inconsistencies and capriciousness of departmental decisions. I believe that this can better be accomplished by the creation of a court of public land appeals than it can by the creation of a mere board, for it appears certain that the rulings of a board would be reviewable by the district court the same as departmental opinions are now reviewable by that court, and thus the interposition of a board between the Department and the district court would serve only to delay further the final determination of a claim under the public land laws which became involved in a departmental controversy. Furthermore, I believe that positions on a court would be attractive to more capable persons than would membership on a relatively obscure board.

Certainly matters arising under the public land laws are of sufficient importance to justify the creation of a court. This is particularly true of matters arising under the mineral laws, for, as you know, mining claims and leases of oil and gas and other minerals are often tremendously valuable. Such matters are entitled to as much protection as matters arising under the tax, customs, patent, and other laws which are now handled by special courts.

I wish to express my appreciation to you for permitting me to submit my views in this matter.

Very respectfully,

NEIL F. STULL.

(Subsequently Senator Gruening presented the following communication and resolutions for inclusion in the hearing record:)

McCARTY AND WHEATLEY,
COUNSELORS AT LAW,
Washington, D.C., August 6, 1963.

Hon. ERNEST GRUENING,
U.S. Senate, Washington, D.C.

DEAR SENATOR: In case it has not been brought to your attention, I thought you would be interested to know that the house of delegates of the American Bar Association at its annual meeting last August adopted a resolution endorsing the principle of S. 758. A copy of the resolution is enclosed. The proceedings of this meeting have not yet been published, but further information on this resolution may be obtained from Miss Elizabeth Smith, secretary to the Administrative Law Section, New Post Office Building, room 6515, Washington, D.C.

Respectfully,

CHARLES F. WHEATLEY, Jr.,
Former Chairman, Committee on Natural Resources of the Administrative Law Section, American Bar Association.

"Whereas S. 3107 (87th Cong.) would require the establishment in the Office of the Secretary of the Interior of a three-man Board of Public Land Appeals to hear, on behalf of the Secretary, appeals from final decisions of the Bureau of Land Management or the Geological Survey concerning the uses of or claims to public lands under the jurisdiction of the Department of the Interior, and would require the Board to comply with the provisions of the Administrative Procedure Act (5 U.S.C. 1001-1011), and in particular to give appellants an opportunity for a hearing on the record; Now, therefore, be it

"Resolved, That the American Bar Association approves in principle the enactment of S. 3107 (87th Cong.) or any other similar legislation calling for or requiring the separation of the functions of prosecution and adjudication and authorizing a hearing on the record with respect to appeals from any final decision of the Bureau of Land Management or the Geological Survey of the Department of the Interior concerning the uses of or claims to public lands and acquired lands under the jurisdiction of the Department of the Interior;

"Resolved further, That the Section of Administrative Law be and is hereby authorized to represent the American Bar Association in presenting the association's views on this matter."

JUNE 6, 1963.

RESOLUTION OF THE KENAI, ALASKA, CHAMBER OF COMMERCE

Resolved, That the Kenai Chamber of Commerce go on record as unanimously favoring the passage of Senate bill 758, to establish a Board of Public Land Appeals in the Department of the Interior.

The foregoing resolution was passed by unanimous action of the Kenai Chamber of Commerce (Kenai, Alaska) at its regular Wednesday meeting on June 5, 1963.

CERTIFICATE

I, James E. Fisher, president of the chamber of commerce certify that foregoing action was taken at a regular meeting of the Kenai Chamber of Commerce on June 5, 1963.

JAMES E. FISHER, *President*.

Senator BIBLE. Do we have further statements from any members of the subcommittee?

Senator Allott?

Senator ALLOTT. No.

Senator BIBLE. Senator Jordan?

Senator JORDAN. No.

Senator BIBLE. Senator Simpson?

Senator SIMPSON. No, Mr. Chairman, but I would like to ask the Senator from Alaska the purpose of the section 7, that portion of it, "Hearings may be held before the entire Board or before a single

member thereof, or before an employee of the Board designated by the Chairman to conduct such hearing."

Would the Senator think that provision, with respect to an employee, is a good one?

Senator GRUENING. Well, not necessarily, but sometimes there might be a great volume of appeals and the Board might not have time to hear them all and that would simply introduce flexibility, but I have no pride of authorship at all.

If anyone thinks that is an objectionable provision, I would be happy to have it eliminated.

Senator BIBLE. Thank you.

Senator BIBLE. At this point in the record I would like to have inserted the statement of Senator Howard W. Cannon. Senator Cannon is a cosponsor of S. 758. He has informed me that he has another committee commitment and is unable to be here today.

(The statement is as follows:)

STATEMENT OF HON. HOWARD W. CANNON, A U.S. SENATOR FROM THE STATE OF NEVADA

Mr. Chairman, I am certain that all of the reasons which I shall propose in favor of S. 758 are familiar to you and that you have discussed them at length with constituents or have outlined them in letters to those who have been adversely affected by the appellate process in their attempts to obtain public land.

My own concern arises largely from the firm conviction that the various laws governing the disposition of public lands were enacted for the explicit purpose of putting these lands insofar as possible into private ownership and thus on to the State and county tax rolls. It was intended, I am sure, by those who framed the various acts to facilitate the acquisition in order that interested individuals could obtain a parcel of land for either homesite or agricultural development and thus become landowners in a real sense.

Many of the policies, however, adopted in the form of regulations and administered by the Department of Interior seem to be specifically aimed at vitiating the congressional intent.

A detailed array of technical requirements seems to have been interposed which are largely beyond the comprehension of the average layman who applies for land and ultimately serves to hamstring, if not negate altogether, his efforts to obtain the land under the law.

Following initial refusal of his application, he is then subjected to additional procedural requirements which do little more than keep his hope alive although ultimately resulting in a final refusal to honor the application.

As is true with so many of the appellate processes in administrative agencies, the agency officials are both jury and judge. To obviate this inequity in some measure, I have joined in cosponsoring this bill to establish at least a semi-independent body for the thorough and impartial consideration of appeals. I hope that the committee will act rapidly and that it will be possible by establishing this board to dispell a widely held view that the appellate process is futile.

Thank you, Mr. Chairman.

Senator BIBLE. Our first departmental witness will be the distinguished Assistant Secretary of the Interior, John A. Carver. Mr. Carver, we are always happy to welcome you.

STATEMENT OF HON. JOHN A. CARVER, ASSISTANT SECRETARY OF THE INTERIOR

Mr. CARVER. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, the position of the Department of the Interior with respect to S. 758 is before the committee in its formal report. It is a matter of deep regret that we find

ourselves in opposition to the distinguished array of members who have sponsored the measure, or who have otherwise indicated their support of it.

Notwithstanding our inability to agree on this particular approach to the adjudication of public land issues, I am confident that the members of this committee appreciate that a broad base of agreement exists among us as to the nature and gravity of the problem it treats. Our dissent relates to method and procedure; we simply feel that solutions are to be found through other and different approaches, most of which are attainable through administrative action. The crux of the matter is that enactment of this bill would tend to thwart or defeat such administrative reforms, rather than aid or supplement them.

In taking this position, it will be understood that we are concerned almost exclusively with procedural and organizational matters. S. 758 is confined to these factors; it does not reach to the substance of the public land laws or establish new criteria or standards for their application. If such were the hidden intent of S. 758—to change the law through creating a new forum for its interpretation, separate and apart from the Cabinet official charged with responsibility to administer the same law—then I fear that our differences would be sharper and deeper.

My position here today is not one of defending the status quo or of assuring the committee that all's well in this area of the public business. I would not presume upon your intelligence or test your patience by suggesting that there is no need for drastic reform of the Department's supervisory system as now carried on through appeals. I would not deny that decisions have issued from that supervisory system which fail to accord with the elementary concepts of decency and fair dealing expected of the sovereign in a government of laws.

Senator BIBLE. What is the significance of the additional word "supervisory" system?

Mr. CARVER. As my statement will develop in greater length, Mr. Chairman, I have been concerned with the aspect of the system where, it seems to me, as I will develop, that it really is not an appellate system at all. It is a method by which actions which are discretionary in the Secretary and carried through delegated responsibility at the field level, a method by which these matters are supervised.

If you are dealing with a fundamental discretionary matter of the Secretary, then, as I will develop in this statement, you have got really a supervisory pattern, rather than an appellate pattern.

Neither would I attempt to justify the long delays or make excuses for bureaucratic callousness, superficiality or lack of imagination—all of which make occasional appearance in the record on appeal, at least in the administrative or policy level, BLM and my own office.

I will not intrude upon your time to repeat the content of our formal report. By the same token, I do not propose to engage in minuscule debate with professional administrative lawyers outside the Department, many of whom you have indicated have sent in statements, whose pat formulas may have clear merit, but run to procedural nicety rather than the ills of the system. Rather, my comments are addressed to a few key points which, to my mind, demonstrate that the bill before you deals with symptoms rather than causes, that it will add to delay rather than subtract from it, that it misconceives the

nature of the review procedure and some of the actions which come within its purview.

Let me assure you that my coming here today is no mere formality in being responsive to your request for departmental witnesses. My dissatisfaction with the appellate system is no secret to most of you—and certainly not to the Department. During my confirmation hearing I promised this committee to do something about it. As I will note later, I have done something about it—in regulatory changes already proposed and in others in process of development. While eschewing argument with lawyers—for today—my experience as a practitioner on the other side of the table in a Western State gives me license to do so. It was this experience that prompted me to play my small part in the legislative history of Public Law 87-748, the venue statute initiated in this committee which opened the doors of the U.S. district courts in the West to litigants seeking redress from the Department's actions on land matters.

Senator BIBLE. That certainly was a step in the right direction. You are to be commended for enacting into law this particular statute, and I think it has already proved to be very helpful.

But my focus today must be that of the administrator. My responsibilities involve the exercise of authority delegated by the Secretary of the Interior for review of actions taken at lower levels in public land matters. My contribution to your consideration of this subject can, therefore, be most effective if it is addressed to the impact of the appellate system on the management of the public land resource.

WHY A PUBLIC LAND APPEALS SYSTEM?

Looked at from that point of view, why do we have an appeals system? How does it contribute to public land management in accordance with law and with decent and fair administration?

The basic and most obvious reason, of course, is to assure that decisions are right and just—that the law has been applied properly and that public policy has been observed. All governmental actions require human agency, with its known frailty of judgment, capacity, and even honor. So we have auditors to doublecheck some functions—and appeals systems for others. In the public land field, the applicable laws are myriad and complex—the factual situations infinitely varied. Error is inescapable—we can only strive to reduce its incidence. Some procedure to review actions taken under delegated authority, on the initiative of the aggrieved party, is requisite. Without it, delegation becomes abdication.

A second function served by the appellate process is that of bringing information to the ultimately responsible official. The fact of an appeal will tell the administrator something—if only that the law is being applied in a particular way.

A pattern of appeals on the same point may suggest a defect which should be referred to Congress for correction or clarified by a regulation for uniform application. Whatever the specific result, the system feeds facts to the top—facts adduced impartially by hearing, affidavit, investigation, or otherwise. These become a check and balance against what is reported administratively. They tell the administrator whether problems are developing.

Thirdly, the appellate procedure, properly operated, puts meat on the bones of the statutory skeleton. The blank spaces are filled in through regulations which evolve out of the realistic test of application to real situations. Regulations are tested on the anvil of controversy, just as statutes are. The reported decisions of appealed cases become not only grist for the policy formulation mill, but, like reported cases of the courts, they are the law until Congress, the courts, or some other superior authority dictates otherwise.

Senator BIBLE. Do you have any idea as to how many regulations have been promulgated by the Bureau of Land Management since its inception?

Mr. CARVER. No, sir, but it is a big, thick volume.

Senator BIBLE. I was just wondering.

Mr. CARVER. Let me correct that. Regulations—I assume you are referring to departmental regulations in the field of the responsibility of the Bureau of Land Management.

All regulations are promulgated by the Secretary of the Interior.

Senator BIBLE. This I understand, but I was narrowing it down to the Bureau of Land Management as to the number of regulations. I know we have some difficulty, the people in my office have great difficulty, in following the regulations promulgated by the Bureau of Land Management. There must be a considerable number of them.

Mr. CARVER. There is quite a volume, but I would call the Chairman's attention to the fact that some of these regulations in that area have the genesis, and, indeed, their drafting, in the Office of the Secretary, and particularly the proposed regulations now being considered in the field on land classifications, which I will mention in a moment.

Senator BIBLE. Thank you.

IMPERFECTIONS OF APPELLATE PROCEDURES

Mr. CARVER. Again looking at the matter through the administrator's eyes, however good an appellate system may be, it will always prove imperfect and imprecise as a tool for getting things done. It cannot be relied on as a sole device for acceptable supervision.

For one thing it reveals only half of the situation—it corrects mistakes in only one direction. It will release the homestead entry or mineral patent illegally or unjustifiedly denied—but who appeals the giveaway transaction approved by a land office agent out of ignorance or corruption? What ignites the procedure for recapture of the improvident or fraudulent grant?

If an appellate system becomes rigid—and there is a natural tendency in that direction—then the timely correction of error may become more difficult than if the appellate system didn't exist. Customarily a case on appeal leaves the jurisdiction of the officer who made the decision appealed from. If he, himself, discovers he has made a mistake, he may be without power to correct it, however much he would like to.

As for furnishing information to the Secretary, the same imperfections exist. Not all meritorious cases are appealed; meritorious cases have been known to be dismissed on procedural grounds. The toughest kind of letter I have to sign, as an administrator, is the one which dismisses a valid (if unproved) contention on the ground that an

appeal was filed too late, with the wrong office, with the wrong filing fee, or something similar.

We have made it cheap to file appeals, and dear to win one. For \$5, the poorest case gets a second bite at the apple, so meritorious cases vie for attention with hundreds of frivolous ones, and are sometimes lost in the struggle. An appeal is an appeal, and management must be conscious of the cost of handling an excessive volume of cases on a formal basis. Absent this rigid structure, I suspect there are hundreds of cases where the administrator and the appellant might easily have resolved the points at issue in a matter of minutes of direct communication.

The overriding problem, of course, is delay, delay, delay. Justice delayed is justice denied.

STEPS BEING TAKEN

Most of the imperfections and difficulties outlined above, so far as direct administration of the public land is concerned, involve the review of the appropriateness of the particular exercise of secretarial discretion—a class of cases which involve the function of classification.

It must always be remembered that the officers below the level of the Secretary, when they classify land under section 7 of the Taylor Act, for example, are exercising a function committed by the Congress of the United States to the Secretary. An "appeal" in the juridical sense may properly test the delegation of authority, it may properly test the compliance with the regulations prescribed by the Secretary himself, and it may properly test inter partes contests and claims of preference. But as to the nub of the action, the discretionary act of opening the land to entry, the word "appeal" has more of its lay connotation. In effect, the applicant appeals to the Secretary to recall his delegation as to this particular matter, and exercise his discretion in the other direction.

And this, Mr. Chairman, is the point I alluded to earlier.

We are sometimes accused of running these appeals through some kind of rubberstamp process which ratifies the original action without any real consideration or cerebration. The record will demonstrate that this might be true in terms of results—the rate of reversal. But this does not make it true in fact—and it is not true.

The fact is that there is rarely anything of record upon which to change the decision. Such appeals put the Secretary in a position of utter futility—he is asked to sit in Washington and reverse the onsite technical judgment of a hydrologist or a soils scientist on the strength of the appellant's unsupported allegation that there is, too, an adequate water source or that the soil base is 4 feet instead of 2 inches thick.

Where an appellant is armed with some reasonable evidence of possible technical error, it is wholly appropriate and necessary that we provide some machinery for its reevaluation. But we ought not to misconceive the nature of that process. It is not really appellate, it is supervisory. It is this supervisory aspect to which I have given intensive attention.

The culmination of this attention was the issuance, a month ago, of a proposed major revision of the regulations affecting the classifica-

tion of land under the various statutes giving the Secretary such responsibility in his discretion.

These are statutes that give that.

We have concurrently taken action to accelerate final determinations. This has been done in various ways, some of which involve the countersignature of opinions prepared in the Bureau of Land Management by the Secretary, either through the Solicitor or the Assistant Secretary.

I would like to emphasize, however, that making a BLM decision final does not mean that it has had less secretarial review than it would if it had been issued. Not only is the appellant saved a new \$5 filing fee, but he escapes the aggravation of having his case go to the foot of the new appeals docket—with all the delay that may entail. On a more substantive point, moreover, I want to emphasize that honest secretarial review is performed before countersignature is given. This is performed by a separate staff from that involved in the Bureau action and includes independent checking of contested facts where such is appropriate. It is closely tuned to a review climate not disposed to rule for the Government automatically, but, rather, to assuring that citizens get fair treatment and consideration.

THE PETITION SYSTEM

I sent to each member of this committee an explanation of the proposed changes in the regulations to get at some of these evils. A copy of the regulations as proposed to be changed, and of my explanation, will be supplied for the record with your consent.

Senator BIBLE. Yes, indeed, I think that should be done. I want the record complete on this point.

(The exhibit referred to follows:)

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., April 3, 1963.

DEAR SENATOR: We are proposing to revise the Department's regulations relating to the exercise of the Secretary of the Interior's discretionary authority to classify public lands for disposition. Our proposal will be published in the Federal Register on April 5.

The enclosed information circular indicates what the proposed regulation is designed to accomplish and how the system is intended to operate.

If you have any questions or suggestions we would appreciate hearing from you. We again emphasize that this is proposed rulemaking.

Sincerely yours,

JOHN A. CARVER, *Assistant Secretary.*

Part 296 is revised in its entirety to read as follows:

"PART 296—LAND CLASSIFICATIONS

"Sec.

- "296.1 Statutory authority.
- "296.2 Criteria for classification of land.
- "296.3 Officers who may exercise classification authority.
- "296.4 Procedures for classification.
- "296.5 Administrative review.
- "296.6 Preference right of petitioner-applicants.
- "296.7 Procedures for allowance and entry.

"296.1 *Statutory authority*

"(a) All vacant public lands, except those in Alaska, have been, with certain exceptions, withdrawn from entry, selection, and location under the nonmineral land laws by Executive Order 6910, of November 26, 1934, and Executive Order 6964 of February 5, 1935, and amendments thereto, and by the establishment of grazing districts under section 1 of the act of June 28, 1934 (48 Stat. 1292; 43

U.S.C. 315a). Section 7 of the act of June 28, 1934 (48 Stat. 1272; 43 U.S.C. 315f), as amended, authorizes the Secretary of the Interior in his discretion to examine and classify and open to entry, selection, or location under applicable law any lands withdrawn or reserved by Executive Order 6910 of November 26, 1934, or Executive Order 6964 of February 5, 1935, and amendments thereto, or within a grazing district established under that act, which he finds are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under said act, or proper for acquisition in satisfaction of any outstanding lieu, exchange, or scrip rights or land grant.

"Classification under section 7 is a prerequisite to the approval of all entries, selections, or locations under the following parts of this chapter, except as they apply to Alaska and with certain other exceptions: Original, Additional, Second, and Adjoining Farm Homesteads—Part 166; Enlarged Homesteads—Part 167; Indian Allotments—Part 176; Desert Land Entries—Part 232; Reclamation of Arid Lands in Nevada (Pittman Act)—Part 234; Recreation and Public Purposes Act—Part 254; State Grants for Educational, Institutional, and Park Purposes—Part 270; Scrip Selections—Parts 130, 132, and 133, and Exchanges for the Consolidation or Extension of National Forests, Indian Reservations or Indian Holdings—Parts 148 and 149.

"(b) Section 8(b) of the act of June 28, 1934 (48 Stat. 1272; 43 U.S.C. 315g), as amended, authorizes the Secretary of the Interior, when public interests will be benefited thereby, to accept on behalf of the United States title to any privately owned lands within or without the boundaries of a grazing district established under that act and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than 50 miles within the adjoining State nearest the base lands. The regulations governing such exchanges are contained in part 146 of this chapter.

"(c) Section 14 of the act of June 28, 1934 (48 Stat. 1274; 43 U.S.C. 1171) as amended, authorizes the Secretary of the Interior in his discretion to order into market and sell at public auction isolated or disconnected tracts of public land not exceeding 1,520 acres, and tracts not exceeding 760 acres the greater part of which are mountainous or too rough for cultivation. The regulations governing such sales are contained in part 250 of this chapter.

"(d) The Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a-e), as amended, authorizes the Secretary of the Interior in his discretion to classify certain classes of public lands for lease or sale. The regulations governing leases and sales under this act are contained in part 257 of this chapter.

"(e) The Recreation and Public Purposes Act of June 14, 1926 (44 Stat. 741; 43 U.S.C. 869, 869 1-4), as amended, requires the Secretary of the Interior, in the exercise of his discretion to make a determination that land is to be used for an established or definitely proposed project, and in the case of Alaska authorizes him to classify certain classes of public lands for lease or sale for recreation or other public purposes. The regulations governing lease and sale of land under this act are contained in part 254 of this chapter.

"(f) The Alaska Public Sales Act of August 30, 1949 (63 Stat. 679; 48 U.S.C. 364a-e), authorizes the Secretary of the Interior in his discretion to classify certain classes of public lands in Alaska for public sale for industrial or commercial purposes. The regulations governing sales of land under this act are contained in part 75 of this chapter.

"296.2 *Criteria for classification of land*

"(a) *Policy.*—The statutes cited in section 296.1 of this part authorize the Secretary of the Interior, in his discretion, to classify land or otherwise to take appropriate steps looking to its disposition, subject to requirements of the applicable statutes. It is the policy of the Secretary to specify those criteria which will be considered in the exercise of his discretion.

"(b) *General criteria.*—Factors to be considered in any classification action or other determinations authorized by statutes cited in section 296.1 are as follows:

"(1) The capability, suitability, availability and physical characteristics of the lands for the purposes for which they are sought or for any other purposes for which the public land laws were enacted.

"(2) Potential demand for the land for public purposes which may require its retention in Federal ownership.

"(3) Results of change of land use in terms of benefit or detriment to present or future Federal, State, or local interests. In applying this criterion, comments

and views of officials of the agencies affected, and private citizens, will be sought and considered where practicable.

"(4) Consideration will be given to whether land is subject to mineral permits or leases issued or applied for, or is classified, withdrawn, or reported as valuable for any leasable mineral or lies within the known geologic structure of a producing oil or gas field.

"(c) *Additional criteria applicable to agricultural entry.*—

"(1) In the determination whether land will be classified and opened to entry under the regulations of parts 166, 167, 232, and 234 of this chapter there will be taken into consideration the physical and economic suitability of the land for cultivation, including such factors as soil and water characteristics, topography, climate, location, and accessibility. Consideration may be given to Federal policies affecting the agricultural economy.

"(2) When it is determined that the cultivation of land otherwise suitable for agricultural entry under regulations of parts 166, 167, 232, or 234 of this chapter would endanger the supply of adequate water for existing users or cause the dissipation of water reserves, such land will not be classified and opened to agricultural entry under section 7 of the Taylor Grazing Act.

"(3) Land will be classified for entry under the agricultural land laws (pts. 166, 167, 232, or 234 of this chapter) only if there is available to the land sufficient water for irrigation to permit agricultural development of its cultivable portions.

"(d) *Private exchange criteria.*—In the determination whether an offer to exchange lands of equal value under authority of section 8(b) of the act of June 28, 1934 (48 Stat. 1272; 43 U.S.C. 315g), as amended, meets the statutory requirement that the public interest shall be benefited thereby the following factors will be taken into consideration:

"(1) The effect upon Federal programs of acquisition of the offered land.

"(2) The effect upon Federal programs of disposition of selected lands.

"(3) The anticipated cost to the Federal Government of appraisals to determine equality of values, and the disruption of other programs which this may occasion.

"296.3 *Officers who may exercise classification authority*

"(a) The authority of the Secretary of the Interior to classify lands and make other determinations in accordance with the regulations of this part has been delegated to persons authorized to act in his name; to the Director of the Bureau of Land Management and persons authorized to act in his name; to State directors of the Bureau of Land Management and to any person authorized to act in the name of a State director.

"(b) Classifications and other determinations in accordance with the regulations of this part may be made by the authorized officer without applications or petitions having been filed for the lands.

"296.4 *Procedures for classification*

"(a) When land must be classified or designated pursuant to the authorities cited in section 296.1 of this part before an application for entry may be approved, the application together with a petition for classification on form 4-1677 (hereinafter referred to collectively as a "petition-application") will be filed in the appropriate land office in the State in which the lands are located. For lands in North Dakota or South Dakota filings shall be made in the land office at Billings, Mont.; in Nebraska or Kansas, filings shall be made in the land office at Cheyenne, Wyo.; in Oklahoma, filings shall be made in the land office at Santa Fe, N. Mex. For lands in all other States, filings shall be made with the Bureau of Land Management, Washington 25, D.C. Lists indicating the proper office for filing of application may be obtained from the Director or any other officer of the Bureau of Land Management. Copies of form 4-1677 and the application forms may be obtained from the land offices or from the Bureau of Land Management, Washington 25, D.C.

"(b) Upon the filing of a petition-application, the authorized officer shall make a preliminary determination as to whether it is regular upon its face and, where there is no apparent defect, shall proceed to examine and classify the land for which it has been filed. No further consideration will be given to the merits of an application or the qualifications of an applicant unless or until the land has been classified for the purpose for which the petition-application has been filed.

"(c) The State director shall make and issue a proposed classification decision which shall contain a statement of reasons in support thereof. The proposed

decision shall be served upon each petitioner-applicant for the land and upon any grazing permittee, licensee, or lessee on the land.

"(d) When there are multiple petition-applications for the same land, the proposed decision shall state which petition-application if any will be entitled to preference under applicable law; or, where no petition-application has been filed for the purpose for which the land is proposed to be classified, the proposed decision shall so state.

"(1) When multiple petition-applications have been filed for the same land, the one first filed for the purpose for which it is proposed to classify the land will be entitled to preference under applicable law.

"(2) When two or more petition-applications have been simultaneously filed for the purpose for which it is proposed to classify the land, the petition-application entitled to preference will be the first to be selected by drawing.

"(3) If no petition-application has been filed for the purpose for which it is proposed to classify the land, the proposed decision shall state that the land will be opened to entry after public notice in accordance with applicable regulations for the purpose for which it may be classified.

"(e) For a period of 30 days after the proposed decision on land classification has been served upon the petitioner-applicants and grazing permittees, licensees, or lessees, protest as to the proposed classification may be filed by any interested party with the State director. No particular form of protest is required under this subparagraph, it being the intent of this procedure to afford the State director the opportunity to review the proposed decision in the light of such protests.

"(1) If no protests are filed within the time allowed, the proposed classification action shall be issued as the initial decision of the State director, and shall be served on the petitioner-applicants and upon grazing permittees, licensees, or lessees.

"(2) If protests are timely filed, they shall be reviewed by the State director, who may require statements or affidavits, take testimony, or conduct further field investigations as are deemed necessary to establish the facts. At the conclusion of such review, the State director shall issue an initial decision, either revised or as originally proposed, which shall be served on all interested parties.

"(f) The filing of a petition-application gives no right to occupy or settle upon the land. A person shall be entitled to the possession and use of land only after his entry, selection or location has been allowed, or a lease has been issued. Settlement on the land prior to that time constitutes a trespass.

"296.5 *Administrative review*

"(a) For a period of 60 days after service thereof upon all parties in interest, the initial decision of the State director shall be subject to the exercise of supervisory authority by the Secretary of the Interior for the purpose of administrative review.

"(b) If, 60 days from receipt by parties in interest of the initial decision of the State director, the Secretary has not either on his own motion, on motion of any protestant, petitioner-applicant, or the State director, exercised supervisory authority for review, the initial decision shall become the final order of the Secretary, reviewable in the courts as otherwise provided by law.

"(c) If supervisory authority of the Secretary is exercised, the initial decision of the State director shall be deemed vacated, and the final departmental decision shall be issued by the Secretary of the Interior and served upon all parties in interest.

"(d) No petitioner-applicant or protestant to a proposed decision of a State director to whom the provisions of this section are applicable shall be entitled to any administrative review other than that provided by this section nor to appeal under provisions of part 221 of this chapter.

"296.6 *Preference right of petitioner applicants*

"Where public land is classified for entry under section 7 of the Taylor Grazing Act or under the Small Tract Act pursuant to a petition-application filed under this part, the petitioner-applicant is entitled to a preference right of entry, if qualified. If, however, it should be necessary thereafter for any reason to reject the application of the preference right claimant, the next petitioner-applicant in order of filing shall succeed to the preference right. If there is no other petitioner-applicant the land may be opened to the application for the purpose for which it is classified or the classification may be revoked by the authorized officer.

"296.7 Procedures for allowance and entry"

"After lands are classified and opened for entry pursuant to the regulations of this part, all the laws and regulations governing the particular kind of entry, location, selection, or other dispositions must be complied with in order for title to vest or other interests to pass."

INFORMATION CIRCULAR To ACCOMPANY REVISION OF PART 296, CLASSIFICATIONS

After the Taylor Grazing Act was passed by Congress in 1934, President Roosevelt signed several Executive orders which withdrew virtually all of the public lands from entry under the homestead, desert land entry, and related laws. For these entry laws to be effective since 1934, the withdrawals must be lifted, which in legal effect is accomplished when the land is classified as suitable for the designated purpose. Certain subsequent laws, such as the Small Tract Act, require classification of the land before applications for entry under them can be approved.

There has been confusion between the process of classification and the process of allowance of the entry itself, principally because the application for entry has been the moving document, which initiates the classification procedure. Most departmental decisions denying entry have specified among other reasons the fact that the land has not been classified as suitable for the purpose for which application is made.

The regulations proposed are intended to do several things: First, they specify the principal instances in which the discretionary function of classification must precede allowance of entries under various public land laws; second, they specify the criteria applied by the Secretary of the Interior in exercising the discretionary function of classification; third, they provide an opportunity for the official making the initial classification decision to review the decision himself, encouraging prompt and informal correction of obvious errors; fourth, they transfer review procedures on classification actions from the appellate channels to administrative or line channels, a transfer which is considered highly desirable since the function is discretionary in nature; fifth, they assure prompt judicial review, where such is desired. Under a recent amendment to the Judicial Code, the Secretary's final classification orders are subject to judicial review in the district in which the land is located.

The system we plan under the regulations to be issued is intended to operate as follows:

(1) An individual interested in acquiring public land which must be classified for entry before it may be entered will file, in addition to an application for entry, a petition for classification of the land on which action must be taken before consideration is given to the application for entry.

(2) In accordance with criteria set forth in the regulations, the appropriate State director or the district manager, where authorized to act in the name of the State director, will make a preliminary decision as to the proper classification of the land.

(3) After the proposed decision has been made, each petitioner-applicant for the land and each grazing permittee, licensee, or lessee on the land in question shall be served with a copy of it.

(4) For a period of 30 days after issuance of the proposed decision any individual upon whom it is served or any other individual having an interest in the land may file with the State director an informal protest as to the proposed classification. During this period the State director is required to entertain reasons advanced for changing his proposed decision.

(5) At the close of the 30-day period, the State director shall issue an initial decision, which, in light of any protest filed, shall be either the same as his original decision or changed where persuasive reason is advanced for a change.

(6) The initial decision of the State director shall, for 60 days after it is issued, remain subject to the Secretary's supervisory authority to review. If the Secretary decides to exercise this authority, the decision of the State director will be given a technical review by the staff of the Bureau of Land Management and the Office of the Secretary to determine whether the field decision is proper, in conformance with criteria for classification and in conformance with departmental policy.

(7) If, 60 days after the initial decision, the Secretary has not applied the supervisory review available under his authority, the decision will become the final decision of the Secretary and subject to review in the courts. If the

Secretary undertakes a review of the case, the decision finally issued by him shall become the final decision reviewable in the courts.

It is believed that the adoption of these regulations will insure the public of the highest possible standards of review of requests for land entry. Further, it will expedite consideration of applications for entry so that administrative procedures will be completed quickly and the applicant for land may have his day in court promptly.

Finally, it is our belief these regulations will strengthen administrative control of the Department over the important decisions made at the field level and greatly improve the caliber of our operations at every level of administration.

Mr. CARVER. I would like to summarize briefly here.

I suppose we are talking about maybe a third of the caseload; but I would venture the guess that it would cover more than three-quarters of the cases as to which we get congressional protests.

We would eliminate one level of appeal.

We seek early administrative finality.

We want a better opportunity for correction in the administrative channels, after informal conference with the parties affected.

We want improved administrative supervision. Above all, we think we will get a higher order of administration, as the responsible officials at the field level know that their mistakes will be subject to judicial scrutiny before Federal judges in the very State, and promptly, not in the remote future.

Senator BIBLE. Tell me more about these proposed changes in the regulations. When have these been promulgated formally?

Mr. CARVER. They have not been promulgated. They are still proposed. We issued them in the Federal Register on April 2, 1963. The 30 days has expired, but we are still getting comments, and, so long as people have more things to say, we will hold them open. But in the comparatively near future, these comments and so on will be evaluated, and I think we will at least have a beginning start of cutting down this rather formalized method of handling matters which are, in their essence, discretionary matters of the Secretary of the Interior.

Senator BIBLE. Assuming the adoption of these regulations, then you eliminate which level of appeal? How many do you have now?

Mr. CARVER. Well, there are three levels of appeal now, the officer who rules in the field.

Senator BIBLE. This is in the field?

Mr. CARVER. That is not an appeal. That is the decision. That is the court of first instance, if you will.

Senator BIBLE. Is this the State director?

Mr. CARVER. Generally, it is delegated to the land office manager.

Senator BIBLE. The land office manager.

Mr. CARVER. There is only one at the State level. That is the one there.

Senator BIBLE. That is the one State-level decision?

Mr. CARVER. Yes.

Then there is an appeal.

Senator SIMPSON. May I inquire, Mr. Chairman?

Senator BIBLE. Certainly.

Senator SIMPSON. What about the examiners who hold the hearing? That does not have to be anyone at the State level?

Mr. CARVER. No.

Let me make it indelibly clear that at this point we are talking about only those areas which involve the discretionary function of classi-

fication of the land as open to entry. This does not involve any of the contested matters which come under the Administrative Procedure Act, contests, for example, where the Forest Service is contending concerning a mineral claim or something like that. These involve those cases—

Senator BIBLE. You are talking about classification?

Mr. CARVER. This involves those cases where the Secretary of the Interior, through his delegated agent, is determining—in discretion which is fixed by the Congress in the Secretary—is determined to open the land either for desertland or open it for small tracts or open it for homestead.

These do not necessarily not have an aspect of contest in them, because, obviously, if you open land which is being grazed to small tract entry, why, there is an automatic effect upon the grazing group.

But what we have said is that we will break that process down into two parts, and before we dispose of the application for entry, we will find out, we will finally dispose or completely dispose of the question, the discretionary question, of whether the land is to be opened at all.

Senator BIBLE. This is the way you do it now?

Mr. CARVER. No, sir. The way it is done before—

Senator BIBLE. That is the way you propose?

Mr. CARVER. That is the way we propose. The way it is done now is that the two concepts are intermingled. Specifically, a person makes an application for a desertland entry. This is treated as an application for that land to be opened for entry, because it was withdrawn by the executive orders authorized by the Taylor Act, if you recall.

Now, let us say that the person is disqualified. He is not a citizen, or, except in Nevada, he is not a resident of the State, or he has some other disqualification. Or let us suppose that the land has been already withdrawn or suppose there is some other legal impediment to the granting of it.

We have mixed all these factors up together so that the applicant does not know whether he is getting a turndown on a matter which is within the discretion of the Secretary or whether he is getting a turndown because of his plan of development of the land or the availability of the water or something else which is capable of being proved.

Now, the purpose of these qualification regulations is to break that process into its logical segments, because, by definition, we should not put people to the trouble and expense and time delay of litigating, if you will, their own qualifications for an entry, if the land, itself, is not by a regular process going to be open for entry at all. It is futile; it is frustrating.

That is the way our cases are all mixed in together, and we want to break them out.

Now, if you will confine yourself, then, to the qualification matter, then I can answer the chairman's question by saying that, in a general way, what we propose is that—well, to go back to what happens now, the applicant gets a decision. As I say, the decision will list all the grounds, saying the land has not been opened for entry, your plan of development is not good enough, the area has already been withdrawn—half a dozen, some good, some bad.

Senator BIBLE. These are decisions made by the land office?

Mr. CARVER. Yes.

Senator BIBLE. In the field.

Mr. CARVER. All right. Now, he appeals to the Director of the Bureau of Land Management. That is a moderately formal matter. He must do it within a certain time. He must pay a certain fee. He must send his notice to a certain place, and that matter comes in to a section of Director Landstrom's office, where they are docketed and arranged in order, and the Director then proceeds to go through them pretty much as any appellate system would, to determine whether or not he is going to sustain or reverse the decision. Well, now, let us assume, as is mostly the case, he sustains.

Senator BIBLE. You say "mostly." Is it not about 99 percent of the cases?

Mr. CARVER. Yes, Mr. Chairman, it is, but whatever, he then issues an opinion—we have made some changes recently in this, but, in a general way, a decision is issued, signed by the Director of the Bureau of Land Management, and, in the last paragraph of that, this man will be told that if he cares to, he may appeal again for \$5.

Senator BIBLE. This is the way it is done now?

Mr. CARVER. That is the way it is done now. And if he does, and for \$5 he gets another turn of the wheel. That comes in and is docketed in an appellate section in the Solicitor's Office where it gets a review from that section. If policy questions are involved, that decision, when it is ultimately prepared for signature, will be signed by an Assistant Secretary, Under Secretary, or the Secretary.

If it involves a legal question, it will be signed by the Solicitor. But, at any rate, it is then issued, and this becomes the final administrative determination, and the first time a person can get to court.

Now, let us go back and just talk about the one segment of it on a classification as to the contested matters and so on. We are not making any change, at least for the time being. But, as to the classification aspect of it—and all of you can see that it is perfectly futile to have a person litigate an issue of his own qualification if the land is, in fact, withdrawn, or if, indeed, the Secretary, by valid determination can keep it from being opened up. Then it is just an imposition on him.

The way it would be proposed to be done under these proposed regulations is that the man at the field level in the State would issue what he would call a proposed decision, a proposed decision. He would give that to everybody affected by it.

If it is a small-tract or desertland entry, which goes into a grazing district or under lease, it goes to the man who has the lease and so on, or anybody who has a mineral claim or anything else. For a period of 30 days, under the regulation, this remains open, and the parties are encouraged to get together and hammer it out.

Now, if the State director knows that this involves a policy matter, it involves, let us say an interpretation of a statute or it involves a case which has got lots of money in it, you know, where a big company wants a mineral claim or something like that and they have spent a lot of money and you know it is going to involve the Secretary finally anyway, then our instructions to him will be to send it up so that the first consideration of this discretionary matter will be by the ultimately responsible official, the Secretary.

But, in any event, for a period of 90 days after this decision has become final, after the 30 days and they have not been able to hammer

it out, then the Secretary can be prevailed upon, pretty much by the procedures which are now open, to open that up for his discretionary review.

If he does not, if he says: "I have looked this thing over and I do not see anything to be gained by bringing it up here," then you have got a final administrative determination, which opens the gates to the Federal court right there and then.

If he does open it up and looks at it, whether he may use the BLM staff or his own staff or some other staff or have a hearing, or whatever way he may do it, when he decides, that is the final administrative determination, it is in his name, and again the Federal courts are open.

So that on this matter of classification, which is the point I have directed myself to, we are going to get that matter separated out and promptly determined.

Senator BIBLE. How many of these cases that you have had over the years have hinged on this point where we have run into these delays which you were very frank and candid in admitting exist? How many of them rest on this question of classification?

Mr. CARVER. You see, the volume of cases which vie for attention in the appellate section of the Solicitor's Office, he can give you the data on, but, as a rough guess, I would say, and, as I indicated in my statement, I think about a third of them.

Senator BIBLE. Are classification problems?

Mr. CARVER. This would be a pretty significant third in terms of the pain and suffering this committee goes through.

Senator BIBLE. In other words, what you are saying, that this is the area where we have most of our problems?

Mr. CARVER. Well a lot of cases, Mr. Chairman, oil and gas cases and so on, you have got plenty of big oil company lawyers and everybody who are able to litigate these matters out, and you are not getting complaints from those people so much as you are getting, as Senator Gruening and others have indicated, complaints from those people who want this land to be opened up so they can get on it.

Senator BIBLE. That is a classification problem.

Mr. CARVER. And since all of the land has been withdrawn by these Executive orders, the Secretary of the Interior has to open it up before they can get near it. We have got to be honest and say that is the case, that is a discretionary matter, and we do not think it is appropriate for anybody but the Congress, itself, or the Secretary to exercise that discretion.

Now, if the Congress wants to open up, revisit this matter and say, "We want a whole new set of standards," the Congress has that prerogative, and we will support the Congress in the exercise of that prerogative.

But we do not think that you ought to have an appeals office to open up matters, to open up land which has been closed by Executive order.

Senator BIBLE. The Senator from Wyoming, I believe, had a question at this point.

Senator SIMPSON. Yes.

I just want to be sure. Have you addressed yourself, has the Department addressed itself to the prospect of remedying the situation that

occurs in regard to contested matters, instead of the cumbersome method of appeal, which this bill seeks to correct?

Mr. CARVER. The Department has, but I will defer to my colleague, the Solicitor, for a discussion of that matter. I have tried to confine myself to those matters which are within the supervisory ambit, and, as you will well recognize, the APA sets up its own scheme on that.

Senator SIMPSON. I wanted to interrogate you with respect to this, Mr. Carver.

What is your opposition, the opposition of the Department, in the contest of matters, on an appeal directly from the examiner to the Federal district court in the district in which the land lies, instead of going all the way up to the Secretary, back to the court of appeals, and that sort of stuff?

Mr. CARVER. On the basic question of where a matter ought to be tried, I strongly favor handling it in the district. As a matter of fact, as the chairman mentioned, the venue statute, which originated in this committee and which, I think, had its genesis in a hearing authorized by this committee out in Idaho, looks toward that as a desirable objective.

Now, I would not want to either pin the Department to a position or to comment for the Solicitor on the procedures which are governed by the Administrative Procedures Act, because I just simply have not concerned myself with that aspect of it.

Senator BIBLE. Of course, I do not know—maybe you ought to.

Mr. CARVER. Perhaps I am not being responsive.

Senator BIBLE. I do not think your answer was responsive to the Senator from Wyoming, but it may well be, because you feel the Solicitor, himself, should respond. As I understood Senator Simpson's question, it was simply this:

If you have an adverse decision in the field from the field officer or the State director—what did you say, the land officer? What did you call him?

Mr. CARVER. The land office manager, yes.

Senator BIBLE. The land office manager in the State of Wyoming, for example, and the applicant has an adverse decision from the land officer in Wyoming, why can you not take his decision directly to the courts?

I think this is what the Senator from Wyoming was asking.

Mr. CARVER. That has some of the aspects of what I brought out in my presentation that may be present in such a case; a case which is contested and takes that form may possibly involve discretionary matters which the Secretary ought to—

Senator SIMPSON. Let me put it on this basis: Let us suppose in Wyoming a case is held in which the hearing examiner is taken, say, from your office in Salt Lake City. Now, we conduct weeks and weeks of hearings on matters, contested matters. Then, at the conclusion of that, the examiner decides against you, and you go to the State department, and then you go to the United States, and then you go to the appeals court.

Why the resistance of the Department against direct appeal from the hearing examiner's decision to the Federal district court in which the land is situated?

Mr. CARVER. I think I had better defer on that, if you will permit me, Senator.

I would be out of my depth.

Senator BIBLE. Solicitor Barry is seated in the front row, so he is aware of the question which we will certainly put to him when he testifies.

You may proceed, Mr. Secretary.

THE BOARD OF LAND APPEALS

Mr. CARVER. The pending bill does not go to solve the basic matters outlined above. Where secretarial discretion is the basic issue, as it is in almost all classification cases, I think it governmentally inappropriate to put a board over the Secretary. If the board is under the Secretary, all you have added is another delay in the process.

It may be that what is really at issue is whether the Congress, or some Members, think the Secretary, by writing his own regulations and running his own appellate system, is not departing from the standards for the exercise of his discretion which the Congress intended. If this is the case, then the remedy is not S. 758, it is legislative revisitation of the land laws themselves. Congress can write different standards, and ought to, before using the oblique method of setting up some kind of court, hoping it will do so.

Finally, and here I do trespass a little on the territory of the lawyers, it seems to me that the essence of due process is prompt and efficient access to the courts for review of final administrative actions. Where we extend the administrative process beyond the point where it can produce meaningful results, then I think we do a disservice to the appellant and to our system of law. We propose to close the circuit on the appeals process at the point where further pursuit becomes empty formality. Having thus exhausted the administrative remedy, an aggrieved claimant will be free to test the reasonableness of administrative conduct in timely fashion—not years later after his case is reached on a glutted docket.

Congress took the first step with the venue statute mentioned. While we do not consciously seek to promote litigation, the Department does now propose—at least in the discretionary area of petitions for land classification—to make the statute meaningful and available. We will cut the Gordian knot by subjecting administrative judgment to court review promptly and at the field level, wherever we can.

Senator BIBLE. Thank you very much, Mr. Secretary.

I am going to examine, I have examined with a great deal of interest, your proposed regulations on this area of classification. Would you be in a position—and I suppose it would just be a guess—to state how much time this would shorten up the process in the field of classification?

Mr. CARVER. If it were fully put into effect, why, the average time from the time an action was started at the field level—of course, there might be a good deal of backing and filling before it finally gets to the first determination—from there on it would be a matter of administrative finality, obviously, in 3 or 4 months.

Senator BIBLE. As compared to what time at the present time under your present operation?

Mr. CARVER. I am not very good at statistics, and, if you will permit me to correct the record, but I think it is along in the order of 18 or 19 months, something like that.

Senator BIBLE. This, in itself, then, would be a great saving in time?

Mr. CARVER. As to that classification; yes.

Senator BIBLE. I am just talking about the classification cases to which you have testified and to which you say your proposed regulations will provide some type of a cure. I would like to have you or the Bureau of Land Management supply for the record, the public record, from the annual reports for, I would think, over the period of the last 5 years, and you might make any comments that you want to, but give to the committee the number of appeals that come up, the length of time that is taken on those appeals, and how it could be expedited or how it could be better administered.

Mr. CARVER. The Director of the Bureau of Land Management is here, and he has a great deal of data along that line and is available for questioning on the part of the committee. He has some data to submit for the record, which, I think, will clarify this point.

Senator BIBLE. It could well be supplied for the record. We will examine it after it has been so supplied.

The Senator from Alaska?

Senator GRUENING. I understand from your statement, Mr. Secretary, that you feel the need of reform, and you are eager to get the reform, and you disapprove of this method; is that correct?

Mr. CARVER. I believe that is a fair summary, Senator Gruening.

Senator GRUENING. Do you believe that the regulations which you propose will furnish that reform?

Mr. CARVER. It will not furnish it completely, but it will be a good long step in the right direction.

Senator GRUENING. You know, we have been discussing this informally for some time. Has the Department any idea of submitting legislation to the Congress, proposing legislation which would obviate some of these problems?

Mr. CARVER. I believe, Senator, that the fairest answer to that would be to say that the trouble is within our own house. We do not need legislation. We just need to get at it and make some corrections ourselves, as I think all of the testimony, all of the statements before you today indicate. These are matters, except in the Administrative Procedure Act cases, where the statute governs, but in the others these are matters which the Secretary sets up the system to assure a review and to assure fairness to the applicants, and what he sets up he can change or do away with.

Senator GRUENING. In the report of the Department there are some very interesting comments. On page 1 you say:

For example, no one would seriously contend that the granting of homestead entries rests upon the same considerations as they did 75 years ago.

How are they materially changed in the homesteading procedure in Alaska?

Mr. CARVER. As to Alaska, probably not much.

Senator GRUENING. Well, not at all, have they?

Mr. CARVER. I think—this is a subjective matter, but not much; no. Senator GRUENING. Do you believe that your regulations can change that or make them appropriate to this modern day and age, or do you think it requires legislation?

Mr. CARVER. I think, to have different standards available to homesteads in Alaska as prevail in the other States where the homestead laws are applicable, the western land States, should take legislation. I think that the requirements and cultivation and other requirements of the statute are inappropriate for the kind of homesteading that exists in Alaska.

Senator GRUENING. Later in that same paragraph, I read this:

Within the framework of statutory guidelines prescribed by the Congress, the Secretary recognizes the social and economic factors of our dynamic society.

Just what does that mean?

Mr. CARVER. That means that where you have, as we have in States like Nevada or Arizona or Idaho, public land coming up right to the city boundaries of developing urban areas, as one example, or where you have growing needs for other types of uses and agricultural uses, it seems to me inappropriate to give the priority to the homestead law as opposed to, let us say, grazing or urban use or recreational use, which clearly was the application of the statute right after its enactment. In other words, we were trying to open up and get the West developed in 1862, when the Homestead Act was enacted.

Parts of the land still subject to the Homestead Act are now among the most developed, the most populous parts of the United States.

Senator GRUENING. The Homestead Act was designed to promote agriculture. There are many sections of Alaska where agricultural homesteading is not particularly feasible. It seems to me the Department might propose some changes in the act as it applies to Alaska, even if they do not apply to other States. They may apply to those States, also. Have you given that any consideration?

Mr. CARVER. We have, and I think that is entirely appropriate, Senator, that we find a better method of opening up the land to settlement in Alaska than the rather rigid forms which have come down through both law and court decision of the general public land laws.

Senator GRUENING. Speaking for myself, I think it would be very helpful for the Department to send up a series of recommendations and modifications of the Homestead Act and let the committee consider them and see whether some of them are not practicable and possible of enactment.

Mr. CARVER. I think that our general consideration of this has been presented to committees of the previous Congress. I would like to say in that connection that our opponent in some of these cases, that the real opponent, if you will, is the State; that is, the allowance of entries of one kind or another is in derogation in some instances of selection rights which the State desires to exercise.

Senator GRUENING. I am not conscious of that factor in Alaska, although it may be elsewhere. I would like to ask you this question:

The objections, the difficulties which cause most trouble in Alaska, apart from delay and complexities of law, the cases in which a homesteader has been misinformed, where he has gone to the land office in good faith, presented his papers, asked questions, gone ahead on the say-so of the land office, and then 6 months or a year later, after he

has invested time, toil and trouble to build something, he is told, "That is just too bad. A mistake was made, and you had better take off your cabin or your home and begin somewhere else."

Have you any suggestions as to how that situation could be met? It seems to me to constitute the most basic, flagrant injustice, and, yet, the Bureau of Land Management has taken the stand that that is not its concern; that it is just too bad; it is unfortunate.

Mr. CARVER. Well, if you break that question down into its elements, you will see at the outset that it would be inappropriate for the sovereign, for the U.S. Government, to be bound to a system of administration which did not conform with the law.

In other words, any remedy we seek has to be some remedy other than allowing the applicant to get whatever right he was incorrectly promised, because this would make chaos of administration.

We have got two or three different kinds of approaches to this. The first thing we are trying to do—and I think this is already being done—is to exercise our supervisory responsibilities in such a way that we are not exposed to hearsay charges as to what was or was not said by the particular man, at a particular place, about such and such an entry.

Senator GRUENING. Let us assume for the sake of the argument that the facts are demonstrable; that he was misinformed; that he was misinformed in writing, let us say. Let us deal with the cases, of which there are quite a few, where he was misinformed; he went ahead and spent time, money, and effort, and then is told that he has lost all that.

Let us deal with that.

Mr. CARVER. That kind of question ought to have its remedy, it seems to me, in recompense to the person who was misinformed, not in a twisting or skewing of the public land laws themselves.

In other words, he should not get a right out of the United States in the land on that sort of thing, taking your example to the extreme, where he was misinformed in writing.

Then, there might be personal liability or there might be some sort of Government tort liability, if the Congress should provide, but I think the Congress would be very leery in setting up a system so that a person, by actually misinforming, could, thus, skew the application of the laws and requirements which this Congress has provided.

Senator GRUENING. I have a good many other questions, but I do not want to take the time of the committee, because other members also have questions, but I think that this is a very important matter.

I think it involves modifications of the homestead law, itself, and I hope that we can, in this committee, together with the Department, work out an improvement on the present situation.

It is very obvious that you are fully aware of the abuses, of the shortcomings of the existing situation. But I hope we do not fall on the rock of finding we cannot agree on the remedy. I hold no brief, as has been pointed out by the Senator from Colorado, for this type of reform.

I think, probably, we can do better, but I think it is imperative that we make some improvement on the present administration of the land laws.

Senator BIBLE. I thank the Senator from Alaska. Just so we may have a little guidance as to what the chairman intends to do, there

are a number of us who must attend a luncheon in honor of our colleague on this committee, Senator Moss. It starts just a few minutes after noon. It would be the chairman's intention to proceed for maybe another 10 or 15 minutes, and then to recess the hearing.

I, unfortunately, cannot be in attendance this afternoon because of an executive committee meeting of the Appropriations Committee.

Tomorrow morning we are tied up in the Irrigation and Reclamation Subcommittee hearing before that particular subcommittee of the Interior Committee.

I would propose, when we recess within the next 10 or 15 minutes, to suggest that we go over until 2 o'clock tomorrow afternoon.

I think this has some beneficial aspects. It will give us the opportunity of reading the report of the Secretary of Interior, analyzing it, so that we can study it and ask the appropriate questions.

I would hope that you could be present tomorrow at that time, Mr. Secretary, and we will, of course, have Mr. Barry present at the same time, because we can analyze the statements that have been submitted to us.

I simply announce that as the intention of the chairman, unless there is some objection from some member of the committee.

I am going to continue for another 10 or 15 minutes now. I am not going to cut off questions at this point. This is a complicated and complex problem. It is obvious that we are not going to wrap it up in one session.

The Senator from Colorado?

Senator ALLOTT. Thank you, Mr. Chairman.

I do not have any questions of Mr. Carver at this time. I think that he has given a very good statement here, and he has tried to elucidate certain distinctions, which I think it is probably necessary for us as a committee to understand, although I am not at all sure that this elucidation is going to, of itself, contribute to a solution.

It is one thing we will have to weigh.

I will yield to my colleagues here, Mr. Chairman, because I do not have any particular questions at this time.

Senator BIBLE. The Senator from Idaho, Senator Jordan?

Senator JORDAN. Mr. Secretary, you have directed your attention to the area, the problems arising from land classification, and I think very properly. I commend you for it. Within the last 30 days, I take it you have issued regulations describing quite different procedure for the handling of these problems. Might I inquire what prompted your attention to this matter?

Could it in any way have been the fact that this legislation was introduced in the Congress, Mr. Secretary?

Mr. CARVER. I think not, Senator Jordan.

I would recall again the statement which I made to Senator Bible on the occasion of the hearing on my own confirmation. I think that any examination of the record of this particular regulation in my office would disclose that this matter had been under intensive consideration in my office for many months before the appeals bill ever was introduced in this or any Congress.

Senator JORDAN. I am glad to hear that.

And you have directed your attention to an area that properly needs attention, and I want some more time to study it, and will have questions at a later date, Mr. Chairman.

Mr. CARVER. You will recall, Senator, attending, I think, within a day or two after your swearing into the Senate, a brief session in which I outlined at that time the basic philosophy of this approach.

Senator JORDAN. Yes.

Mr. CARVER. Which took place in this committee room.

Senator JORDAN. I do recall that.

Senator BIBLE. Senator Simpson?

Senator SIMPSON. Mr. Assistant Secretary, I do not want to be guilty of nitpicking with you here, but I notice on page 8 something I want to ask you about.

The fact is that there is rarely anything of record upon which to change the decision—

Talking about contested cases which come before your Department. I just want to call your attention to this. I disagree with that statement, because I think that is where the nub of a lot of the criticism comes from. I have in mind one particular instance where the hearing was held and the appellant was one who was kept out of conferences between the hearing examiner and the Government witnesses, and repeated allusions were made to that in the record by the attorney for the appellant on land zoning.

When that came up for decision, it seems to me that that, in itself, would have been grounds for reversing it and sending it back for further hearing before some impartial examiner. That was one instance. They are not rare instances, but they are common.

Another one is where the Interstate Highway System cut off land which was leased to the landowner, and it cut him off from that land, and the Department arbitrarily then gave it to a person by virtue of the interstate highway department cutting him off.

It seems to me in each of those instances the Department just callously goes ahead and decides in favor of the landowner, and it seems to me it is with just a cursory wave at it and with no allusion to the things that were appealed from which are in the record.

It seems to me the only recourse that the landowner has in these situations is to appeal to the district court.

I cannot agree with you, at least that lawyers rise above principle in order to get a fee. I do not believe that. You are a lawyer and I am a lawyer, and I do not agree with that at all. We do this because we would not take the thing unless we felt, upon appeal, we had an opportunity to get an impartial decision from somebody at the top.

But the feeling is, ordinarily, that we do not. And those are the things we want to remedy. I come back to the question again, which you relegate to someone else in the Department. Would the Department have any objection to appeals being made directly to the Federal court in the district in which the land lies?

Mr. CARVER. I would like to say, Senator, concerning the first point, I do not regard it as knit picking. I know that such cases exist. I could, however, bring to the committee's attention cases where we have, in our process, pulled these things out and reversed time after time after time to get an equity and a fairness in it.

But it is an imprecise system. We do not have any way of being sure that we have done it completely.

Senator SIMPSON. Then, may I ask this: You do not have any objection, do you, to this committee determining a more precise way,

and would you give us your support with respect to that, as you indicated you would do?

Mr. CARVER. More precise way for the determination of?

Senator SIMPSON. For the determination of this thing. That is what this committee is bent upon doing. It is our purpose to get some legislation that is acceptable to the Congress that will remedy these defects that are so patent. Would the Assistant Secretary give us his support with respect to the introduction of such a bill in the Congress?

Mr. CARVER. So long as it is not conceived that I am supporting any particular bill, I think that it is very clear from my statement that we are all working in the same direction here; that we are trying to get a resolution of this kind of problem.

Senator BIBLE. Thank you very much, Mr. Secretary. This has been a very fine opening session. Again, may I say this is a complex and complicated problem on which we are undertaking a study, and these hearings will undoubtedly go on for some little period of time in order to resolve the problem and attempt to be helpful in simplifying appellate procedure. With that, we will stand in recess until 2 o'clock tomorrow afternoon.

(Whereupon, at 11:55 a.m., the committee adjourned, to reconvene at 2 p.m., Tuesday, May 7, 1963.)

PUBLIC LAND REVIEW

TUESDAY, MAY 7, 1963

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2:10 p.m., in room 3112, New Senate Office Building, Senator Alan Bible (chairman of the subcommittee) presiding.

Present: Senators Bible, Gruening, Jordan, and Simpson.

Also present: Stewart French, chief counsel, and Robert E. Wolf, professional staff member.

Senator BIBLE. The subcommittee will come to order. We are having a meeting in the regular hearing room, and I hope you will bear with us in these rather smaller quarters, but I was anxious to complete at least this particular phase of our hearing on Senator Gruening's bill, S. 758.

We had concluded yesterday with the Assistant Secretary of the Interior John Carver. Our next witness is Frank Barry, the Solicitor of the Department, and we are very happy to have you with us, Mr. Barry.

Mr. BARRY. Thank you, Senator.

STATEMENT OF FRANK J. BARRY, SOLICITOR, DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY ERNEST F. HOM, ASSISTANT SOLICITOR, BRANCH OF LAND APPEALS, SOLICITOR'S OFFICE, DEPARTMENT OF THE INTERIOR; AND EDWARD WEINBERG, DEPUTY SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the committee, before I commence, I have some statistical material which I would like to have the members of the committee have during my testimony, and also I will offer it in the record at a point during my statement.

Senator BIBLE. Very well. We can follow it.

Mr. BARRY. My name is Frank J. Barry; I am the Solicitor of the Department of the Interior. The Solicitor is the chief legal officer of the Department. The Secretary of the Interior has delegated to the Solicitor the authority to make legal decisions on behalf of the Department, and included in this authority is the authority to act for him in deciding land appeals cases presenting legal issues.

Article IV, section 3, clause 2, of the Constitution reads as follows:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Pursuant to this provision of the Constitution, Congress early established a Lands Department, now known as the Department of the Interior and now headed by the Secretary of the Interior. Congress has authorized the Secretary, under various land laws, including the Homestead Act, the Mining Laws, the Mineral Leasing Act, the Taylor Grazing Act, and various other statutes, to manage, administer, and determine the propriety of disposition of the public domain.

Needless to say, this responsibility is one which could not be performed by a single individual and consequently it is necessary that the Secretary delegate this responsibility to subordinate officers of the Department which include those who are in the office of the Assistant Secretary for Public Land Management, Bureau of Land Management, the Office of the Solicitor and the Geological Survey.

The concomitant to delegation of authority is the provision which is made by which the Secretary reviews the manner in which his subordinates have carried out the responsibilities entrusted to them. It is based upon the necessity for such review, and not upon any statutory requirement, that an appeals procedure has been established in the Department of the Interior.

This appeals procedure is as much a part of the administration of the public lands as is the action of the officials who make initial decisions with respect to the management and disposition of said lands.

Senator SIMPSON. Mr. Chairman, might I observe that one changes and the other never seems to. We are trying to change it here, aren't we, Mr. Barry?

Mr. BARRY. I beg your pardon? I don't understand, sir.

Senator SIMPSON. You say:

This appeals procedure is as much a part of the administration of the public lands as is the action of the officials who make initial decision with respect to the management.

The trouble is the appeals decision remains the same. What you are trying to do, these others change periodically.

Mr. BARRY. No, I think that we believe that the appeals procedure should be changed.

Senator SIMPSON. I gathered that in reading this.

Mr. BARRY. Yes. We suggest indeed that both should be from time to time changed, and indeed I think the committee is doing a very great service in providing such a change.

S. 758 would destroy this system of administration of the public lands.

Section 4 of the bill provides that "the Board shall hear and determine such appeals on behalf of the Secretary." Section 9 of the bill provides that final decisions of the Board may be appealed to the U.S. court of appeals for the circuit in which the land involved is situated. Thus it appears that the Secretary of the Interior, upon an appeal being lodged to him, loses his authority to make any decision by which he will be given the opportunity to review the actions of the subordinate officials of the Department in carrying out the responsibilities which Congress had delegated to him. In short, the filing of appeals has the effect of stripping the Secretary of his power to administer. This consequence of S. 758 has been more fully detailed by Assistant Secretary Carver in his presentation to this committee.

I shall discuss the effect which S. 758 would have upon the administration of the appeals process in the Department.

It is apparent that the bill would greatly increase the time required to process a case through the appeals system. In this connection, it should be pointed out that the bill is not directed at any proceeding prior to the lodging of an appeal to the Secretary from a decision by the Bureau of Land Management or the Director of the Geological Survey. All proceedings prior to the filing of such appeals presumably would continue to be employed.

Section 4 of the bill provides that the appellant shall have an opportunity for a hearing, and section 6 provides that the Secretary may establish rules and regulations which shall be in accord with the provisions of the Administrative Procedure Act. From these and other provisions it is apparent that what is intended is that a trial type hearing be held. The bill specifically prescribes that the hearing shall be at a location "convenient to the appellant."

At the present time, there are approximately 400 appeals filed each year with the Secretary from the decisions of the Bureau of Land Management and Geological Survey. All of these are presently handled without hearings in the Washington offices of the Department. The requirement that hearings be granted in all such cases at locations "convenient to the appellant" would require not only the additional step of a hearing, but would require all of the time necessary to notice and schedule hearings at various places in the western part of the United States. Since the Board could not carry on this function within its own membership of three, no doubt it would be necessary to take advantage of the provisions of section 7, which authorizes the hearings to be held "before an employee of the Board designated by the Chairman."

Of course, it is impossible to estimate with any degree of accuracy how much additional delay the hearing procedure would entail. It can be said with certainty, however, that it would be very substantial. It must be assumed, since the hearings are to be at locations convenient to the appellants, that the appellants will be accorded an opportunity to present evidence, both oral and documentary, and to call witnesses in support of their appeals. This, of course, would necessitate, in cases where factual issues are raised, an opportunity on behalf of the Department to cross-examine and to call witnesses on its own behalf.

All of the usual delays attendant on trial type hearings will be presented here. Postponements occasioned by illness, inconvenience, and unanticipated interference with hearing schedules, will add to the time consumed in processing an appeal.

Presently, there are about 400 appeals made to the Secretary each year. Assuming that one-half of these appeals will result in requests for hearings—and we sincerely believe that this estimate is most conservative—it is our estimate that the cost of the hearings will be approximately \$200,000 annually, not including the salaries for the members of the Board, nor the additional cost which the Department may incur by reason of being required to present evidence at some or all of the hearings.

In addition to the hearings, the appeals process must include all of the work which is now being done in connection with appeals to the Secretary. This cost is approximately \$111,000 per year.

Notice that the estimates of cost which have been given relate only to appeals from the Director of the Bureau of Land Management or from Geological Survey to the Secretary. There is another level of

appeal in the Bureau of Land Management which I am informed involves a direct annual salary cost of \$215,000.

While the greater number of appeals to the Secretary do not involve factual disputes, but present only questions of law, the provision for a trial de novo would result in the unnecessary rehashing of undisputed facts in order to present to the hearing examiner, and through him to the Board of Appeals, the factual basis for the decisions complained of. Moreover, we believe it reasonable to assume that many whose cases have been lost at the hearing examiner level and have not appealed to the Director, or who have appealed to the Director and lost and have concluded they had a case of insufficient merit to appeal to the Secretary, will now see that they have an opportunity for a new trial by asking for an appeal to the Secretary. We estimate that the result of this will be more appeals to the Secretary than before. Therefore, of those who appeal to the Secretary, we consider the estimate of 50 percent requesting hearings to be low for the reason that the provision for a new hearing will stimulate additional appeals.

An additional disadvantage of the Board of Appeals is that it will decide questions of law independently of the Secretary and the Solicitor. A new legal authority will thereby be set up in the Department. The Solicitor, as prescribed by law, is appointed by the President and confirmed by the Senate and supervises generally all of the legal work in the Department of the Interior. He must advise, through his subordinates, the officials in the Bureau of Land Management and Geological Survey, who make the initial decisions from which the appeals are brought. The Appeals Board, independently of the Solicitor, will presumably make legal decisions which may be different from those which have been made by the Solicitor's Office. This creates two lines of legal authority which cannot but confuse in the administration of the public lands. The evils of divided responsibility and unclear lines of authority that S. 758 would engender on the policy side would be paralleled on the legal side.

The next question to be considered is whether S. 758 affords any greater prospect that the Department will more faithfully or more efficiently carry out its legal responsibility. What reason is there to believe that the Board of Appeals, with its supporting staff, appointed by the Secretary, with the approval of the President, will arrive at wiser or more correct decisions than the Solicitor and the Assistant Secretary for Public Land Management, both of whom are appointed by the President and confirmed by the Senate? Obviously the question answers itself. We do not believe the record will support a conclusion that the appeal system is not producing correct decisions. A good test of the soundness of these decisions is their fate in the courts.

For the 8-year period from January 1, 1955, to January 1, 1963, 57 suits to review departmental decisions have been filed in and decided by the courts. Of these, the Department has been upheld in 50 and reversed in 7. The average of reversal is 12.3 percent. The Department has won its last 37 cases.

Senator BIBLE. At that point, and you may have statistics that bear on it, how many departmental decisions were rendered during this period of January 1, 1955, to January 1, 1963? You may develop that. Mr. Barry. Maybe you develop it in some of your other exhibits. If you do, that is fine.

Mr. BARRY. I have coded that, but let me finish the next paragraph because I think it is at this point.

By way of comparison the percentage of reversals of Federal district courts for the fiscal year ending June 30, 1962, was 23.5 percent. The record of the Department compares favorably with that of the district courts. Certainly there is no reason to enact S. 758 because cases are not being decided in accordance with the law.

Let me first of all refer to my authority for the statement with respect to the district court reversals. That came out just 2 or 3 days ago. The Administrative Office of the U.S. Courts just filed its report a few days ago, and that figure is taken from those reports.

Now that figure is not including only reversals. It says reversals and denials.

We have learned by studying the report that the denials include denials of administrative decisions by administrative agencies that are appealed directly to the circuit court as is contemplated would be done in this bill, if the Appeals Board were set up and appeals were taken directly to the circuit court.

Senator SIMPSON. I don't question the figures. That wasn't the point I was trying to get at.

Mr. BARRY. I see.

Senator SIMPSON. The point I was trying to get at is that undoubtedly you have hundreds and hundreds of departmental decisions which are simply accepted as final.

Mr. BARRY. This is correct.

Senator SIMPSON. By the applicant, because he has neither the money nor the means nor the disposition to go further.

I am just trying to find out how many decisions you actually have made over the same period of time. I wasn't questioning the statistics that you were using. I assume that the facts are correct.

Mr. BARRY. I have some statistical material here in that regard. Of course, we decide approximately 40 cases a month at the present rate.

Senator SIMPSON. You say "we"?

Mr. BARRY. This is the Solicitor's Office.

Senator BIBLE. The Solicitor's Office decides 40 cases a month?

Mr. BARRY. Yes; and this is 480 cases a year, so we are gaining slightly on the backlog.

In a period of 8 years, there have been 84 cases filed in court. Now the figure that I gave of 57 suits are the ones that have been filed and have been finally decided. I did not include 10 which were dismissed.

Appeals were dismissed in the courts for reasons that we could not ascertain from a quick examination of the record. Some of them may have been settled between the parties, and so forth. So we simply omitted those 10.

And a number of them are still pending, and we did not include some cases which we won in the district court, and which are now on appeal in the circuit court of appeals, so that you can see that a very small proportion of the cases are appealed to the courts. The statistical figures that I have presented to you, first I would like to refer—

Senator BIBLE. I did not mean to interrupt your prepared statement, Mr. Barry. You may prefer to develop your whole statement.

Mr. BARRY. Why don't I do that, because the reason I handed these papers out was so that the committee would have an opportunity to examine them.

Senator BIBLE. Yes; we have them before us.

Mr. BARRY. Perhaps our point may be made more clear if we trace a hypothetical case from initial decision to final decision in the Department. It must be realized that the Department does not appeal from its own decisions and that all appeals to the Secretary are appeals by aggrieved parties from outside the Department.

Assume, for example, a case in which the initial decision is adverse to an applicant for a public land entry of some sort. He appeals the decision to the Director of the Bureau of Land Management, and assume that here again the decision is adverse to interests and he files an appeal to the Secretary.

Under the procedure prescribed by S. 758, this appeal will be considered by the Board of Land Appeals. Assume now that the Board renders a decision favorable to the applicant. Under the bill this is the final decision of the Department and amounts to the granting of whatever right the applicant applied for in the first instance. Notice that the decision has been made to part with property of the United States without the approval of the Secretary or the Secretariat and against the specific holdings of the Bureau of Land Management to whom the Secretary has delegated the authority to make the decision in the first instance.

As pointed out earlier in this statement, the appeals procedure is as much a part of the administration of the public lands as is the action of the officials who make the initial decisions with respect to the management and disposition of said lands. The effect of S. 758 is to prevent the Secretary of the Interior from participating at all in the administration of the public lands since the ultimate review of the action of subordinate officials is denied by the independent authority of the Appeals Board. This is the situation which prevails where the decision of the Board reverses decisions adverse to the applicant.

Now consider the situation where the decision of the Board confirms decisions below adverse to the applicant. In this situation the applicant finds himself with a remedy prescribed by the act, that is, he may appeal to the court of appeals for the circuit in which the land lies. Here, an appellant is driven to the courts without the Secretary or the Solicitor having an opportunity to consider his case.

Senator BIBLE. Of course, right on that point, without laboring it too much, I know that the appellant gets much comfort in going to either the Secretary or to your good self. I mean, how many cases do you reverse that come up to you?

Mr. BARRY. We have the accurate figures here.

Senator BIBLE. My experience has been that it is kind of rubber-stamped all the way up the line.

Mr. BARRY. No, as a matter of fact it isn't. On the next to the last page I have got "Analysis of Departmental Decisions."

Senator SIMPSON. Of your statement?

Mr. BARRY. No, of the statistical material.

Senator BIBLE. So that the record may be clear, is this a proper place to insert this statistical information, Mr. Barry?

Mr. BARRY. Yes, I think it would be.

Senator BIBLE. Mr. Reporter, at this time we will insert statistical material furnished by Solicitor Barry, entitled first "Time Lapse in Deciding Appeals," second, "Analysis of Appeals to Secretary," third, "Number of Director's Decisions Appealed to Secretary," fourth, "Ap-

peals to the Secretary," fifth, "Analysis of Departmental Decisions," sixth, "Appeals Decided by Assistant Secretary," and seventh, "Judicial Action or Departmental Decisions."

(The statistical material referred to follows:)

TIME LAPSE IN DECIDING APPEALS

The following tabulation shows the average length of time required to dispose of appeals to the Secretary which were decided in fiscal years 1958 and 1962. The average times shown are those elapsing between decisions of the land office of hearing examiner, decisions of the Director, and decisions of the Secretary.

	Fiscal year 1958	Fiscal year 1962
Time between land office or examiner's decision and Director's decision months.....	17	9
Time between Director's decision and Secretary's decision.....do.....	9	12
Total elapsed time between initial decision and Secretary's decision.....do.....	26	122

¹ The 22-month sum, instead of 21 months, results from the fact that the times given of 9 and 12 months are a little below the actual time elapsing for the respective periods.

ANALYSIS OF APPEALS TO SECRETARY

I. APPEALS PENDING ON JULY 1, 1962		II. APPEALS DECIDED IN FISCAL YEAR 1962	
Type of case:	Number	Type of case:	Number
Homestead.....	80	Homestead.....	35
Desert land.....	114	Desert land.....	26
Public sale.....	88	Public sale.....	23
Small tract.....	104	Small tract.....	30
Exchange.....	29	Exchange.....	7
Selection.....	16	Selection.....	3
Other.....	78	Minerals.....	22
Oil and gas.....	190	Other.....	24
Minerals.....	24	Oil and gas.....	76
Mining.....	40	Mining.....	20
Grazing.....	30	Grazing.....	8
Total.....	793	Total.....	274

NUMBER OF DIRECTOR'S DECISIONS APPEALED TO SECRETARY

	Director's decisions	Appeals to Secretary	Percentage
Fiscal year 1961.....	1,434	532	37.1
Fiscal year 1962.....	1,649	598	36.2
Fiscal year 1963 (1st 6 months).....	520	191	36.7

APPEALS TO THE SECRETARY

	Fiscal year—					
	1958	1959	1960	1961	1962	1963
Appeals pending at beginning of year.....	70	144	213	210	416	792
Appeals received during year.....	224	416	377	478	646	1,331
Appeals disposed of during year.....	150	347	380	272	270	1,420
Appeals pending at end of year.....	144	213	210	416	792	² 703

¹ To Apr. 1, 1963.

² On Apr. 1, 1963.

NOTE.—These figures compiled according to "A" numbers assigned to appeals.

ANALYSIS OF DEPARTMENTAL DECISIONS

The tabulation below shows the actions taken in departmental decisions during fiscal years 1961 and 1962 and the first 9 months of fiscal year 1963 with respect to decisions of the Director of the Bureau of Land Management which were appealed to the Secretary.

Action taken	1961		1962		1963	
	Number	Percent	Number	Percent	Number	Percent
Affirmed.....	181	65.9	159	58.0	273	62.8
Reversed.....	24	8.7	15	5.5	29	6.7
Dismissed.....	32	11.6	52	18.9	86	19.7
Other action ¹	38	13.8	48	17.6	47	10.8
Total.....	275	100.0	274	100.0	435	100.0

¹ This includes affirmances with modification, affirmances in part and reversals in part, remands, etc.

APPEALS DECIDED BY ASSISTANT SECRETARY

	Total appeals received	Decided or to be decided by Assistant Secretary	Percentage
Fiscal year—			
1958.....	224	38	17.0
1959.....	416	95	22.8
1960.....	377	59	15.7
1961.....	478	104	21.8
1962.....	646	261	40.4
1963.....	331	86	26.0
Total.....	2,472	643	26.0

NOTE.—The great majority, but not all, of the cases decided or to be decided by the Assistant Secretary are land classification cases. The remainder involve exercise of discretion in other fields.

JUDICIAL ACTION ON DEPARTMENTAL DECISIONS

Prior to January 1, 1963, 84 actions had been brought against the Secretary arising out of decisions rendered on appeal to the Secretary since January 1, 1955. No decision has yet been rendered in 17 cases. Of the remaining 67 cases, 10 have been dismissed and 57 have gone to a decision on the merits. The Department has lost 7 cases and won 50; 27 of the 50 favorable decisions have become final. Of the remaining 23, 20 are district court decisions which have been appealed, and 3 are circuit court decisions with respect to which petitions for certiorari have been filed. One petition was granted and the case is pending in the Supreme Court.

The Department has won 37 straight victories since its last defeat in November 1961.

Tabulation

Actions filed.....	84
Final decisions in favor of Secretary.....	27
Interim decisions in favor of Secretary.....	23
Final decisions against Secretary.....	50
Cases dismissed.....	7
Pending action.....	10
	17

Senator BIBLE. This I take it, Mr. Solicitor, is your documentation of the appeal procedure numerically.

Mr. BARRY. Yes, after hearing what went on and the questions that were asked yesterday, I thought perhaps this material would be useful.

Senator BIBLE. I think this is most helpful. This is made a part of the record at this point. You were referring to a particular case.

Mr. BARRY. I am referring to analysis of the departmental decisions. This is about fifth or something like that—it is the sixth page.

Senator BIBLE. "Analysis of Departmental Decisions." I have it.

Mr. BARRY. You will notice that this is made up of 3 years, 1961, 1962, and 1963. The cases affirmed 65 percent in 1961, 58 percent in 1962, 62.8 percent in 1963.

Now I think it useful to keep in mind the figure of 25 percent or roughly 25 percent of circuit court reversals of the district court, to see if this is more or less in line, not to say that there is really anything comparable about the figures.

The reverse cases we reversed absolutely, 7.7 in 1961, 5.5 in 1962.

Senator BIBLE. 8.7.

Mr. BARRY. 8.7, excuse me, and in 1962 5.5, in 1963 6.7. Certain cases are dismissed—

Senator SIMPSON. Why don't you put dismissed up with the affirmed, where it belongs?

Mr. BARRY. They are not affirmed. They might be situations where they did not comply with the appeals. However, it is easy enough to put them there if you simply add the figures together. These are cases in which no change is made in the decision below, including affirmed and dismissed.

Senator SIMPSON. But they were appealed.

Mr. BARRY. But they were appealed, yes.

Senator BIBLE. If I am an applicant—at that point in carrying on I am sure the point Senator Simpson is making—if I am an applicant, whether the departmental decision is affirmed or my appeal is dismissed, as the appellant I am in the same position. I have lost, isn't that right?

Mr. BARRY. I am sure. As the matter of fact, it must be more frustrating to have it dismissed because your lawyer did not file it in time or because you didn't pay the necessary fee or for some other technical reason, or for failure, let's say, to file a statement of reasons or complying with the rules.

Senator BIBLE. Very fine. Thank you.

Mr. BARRY. Incidentally, this also includes voluntary dismissals by the applicant. I don't have the breakdown on that.

Now notice though that "Other action" we indicate here "Affirmances with modifications," and "Affirmances in part and reversals in part," and remands where we don't exactly reverse the decision, but send it back for the ascertainment of facts that don't appear in the record.

So actually these figures should be added to the figures of those that are reversed. I mean at least it shows that we are not rubber-stamps.

Departing from my statement for a minute, I think I ought to indicate to you, to assure you for whatever it is worth—and I am sure that you deserve to look further than my assurance, but I do wish to say that we do not act as a rubberstamp. The Department of the Interior is a large Department. There are many, many decisions made every day in which the Solicitor or his immediate staff has no participation at all.

Senator BIBLE. How large a staff do you have, Mr. Solicitor?

Mr. BARRY. About 200 lawyers, 100 in Washington and about 100 lawyers in the field. These are round figures.

Senator SIMPSON. That would be cases per person.

Mr. BARRY. No. They don't all handle these cases. There are lawyers that handle nothing but contract negotiations. There are lawyers that are Indian lawyers, a number are involved in Bureau of Land Management, which probably don't exceed 30 lawyers in the whole Department all over the country.

Senator BIBLE. I think maybe my question was misleading, because what you are saying is that as Solicitor of the Department of the Interior you employ 200 lawyers under you who are assigned to all of the departments within the Department of the Interior.

Mr. BARRY. That is correct.

Senator BIBLE. I think the next proper question, one that I should have followed up with myself, is, How many of these 200 lawyers are assigned to problems involving Bureau of Land Management problems?

Mr. BARRY. Let me submit that figure to the committee, because I know you would want an accurate figure. We have got roughly 12 lawyers in Washington assigned to Bureau of Land Management work. They also do Geological Survey work. And we have, in every region, varying numbers of lawyers. Some lawyers operate in several areas. For example, the field solicitor in Phoenix, Ariz., he handles all the Indian affairs, Bureau of Land Management, Bureau of Reclamation, anything that comes up in that area. He is the only lawyer at that office. So it is rather difficult to break that down.

Senator BIBLE. I would not go to any great amount of time in breaking it down. Here on the Washington level you have how many lawyers assigned to Bureau of Land Management appeals?

Mr. BARRY. The appeals? Seven lawyers.

Senator BIBLE. Out of the total staff of?

Mr. BARRY. Of 200.

Senator BIBLE. No, out of the total staff of how many of the Bureau of Land Management here in Washington? Did you say 12?

Mr. BARRY. No. Perhaps I ought to explain this structure, too, because really it has a part in the situation here.

Senator BIBLE. I just don't have it clearly.

Mr. BARRY. We have what we call an integrated Solicitor's Office. This was accomplished in 1953. All of the lawyers in the Department are now in the Solicitor's Office operating under this larger administrative division of the Department known as the Solicitor's Office.

Previously they had a General Counsel in the Bureau of Reclamation with a large number of lawyers who served only the Bureau of Reclamation throughout the country, Bureau of Land Management had a house counsel as it were, Fish and Wildlife Service, Geological Survey, and so on and so forth. They all would be put into one office.

The Office of the Solicitor in Washington is divided into divisions. Of course, the Solicitor's Office itself has the Deputy Solicitor, a Branch of Land Appeals—now, this is the Solicitor's Land Appeals Branch that processes the appeals that come to the Solicitor—patents and a few others that you are not interested in, so I need not itemize them all.

Then we have the divisions. We have a Land Division which handles Geological Survey and the Bureau of Land Management. Mr. Cavanaugh is the Associate Solicitor in charge of that and there are roughly 12 lawyers that operate in that office.

We have the Bureau of Water and Power Division, Indian Division and so forth. Then in the field we have regional solicitors, and in the larger field offices a breakdown somewhat similar to that in the Washington office. But in the smaller regional offices they have to double in brass occasionally, and serve more than one area.

Senator BIBLE. Thank you.

Mr. BARRY. The lawyers in the Branch of Land Appeals in the Solicitor's Office, who handle these appeals, are not the same lawyers who advise the Bureau of Land Management, and indeed, because it has been suggested that the Solicitor wears two hats, and that in one breath he advises the Bureau and in the next breath he determines an applicant's rights taken by virtue of the advice that was given to the Bureau, the Branch of Land Appeals is isolated from Mr. Cavanaugh's branch, that is the Associate Solicitor for land, for land matters that come up for advice in the Bureau of Land Management.

We have a rule in the office which has been adhered to as long as I have been in the office, where members of the subordinate lawyers in the Department have advised the action which is now on appeal, request an opportunity to file briefs, and we do not permit them to file briefs in the cases, simply for the reason that we say the record is complete and is to be reviewed, and we will determine, on the basis of the record, the correctness of your decision, and we don't want you telling us what we should decide.

Senator SIMPSON. Just one moment, Mr. Barry. By the same token, the Government lawyers have already filed their record on appeal, and their brief prior to that time.

Mr. BARRY. They have made their record for the Bureau of Land Management. The Bureau of Land Management has made its decision, and it is from that decision that the appeal has been made to the Secretary.

Senator SIMPSON. But briefs are filed in support of the appeal?

Mr. BARRY. No, not as a general rule. Just by the appellant. They have a provision whereby they may state their reasons.

Senator SIMPSON. I have tried a number of them, and I have always been confronted with the record on appeal and a brief.

Mr. BARRY. A record; yes.

Senator SIMPSON. We have had reply briefs in addition to the briefs from your Department. Are you sure that your—

Mr. BARRY. As a matter of fact, I have had requests from the Bureau of Land Management to file briefs in the case as Mr. Landstrom will say.

I have a voluminous file by him for answers to the statement of reasons. We have consistently refused to let him file a statement of reasons. Mr. Hom is my assistant, the Assistant Solicitor, and perhaps he can answer. Senator, are you referring to what goes on before the hearing examiner?

Senator SIMPSON. Yes.

Mr. BARRY. This is at a level, of course, that this bill doesn't even address itself to.

Senator SIMPSON. I know it doesn't. I want to go into that with you, however. I think there is room for improvement.

Mr. BARRY. I agree, and I think we have some—

Senator BIBLE. What you are directing your question to is the procedure followed on the Washington level.

Mr. BARRY. That is correct, to point out to the committee that we do not rubberstamp.

Senator BIBLE. You have got lawyers in two different offices separated by a wall.

Mr. BARRY. That is true, and the fact of the matter is this.

Let's consider for a moment what the structure is. Suppose the Secretary of the Interior gives instructions. He has decided.

Let's suppose that instead of delegating, he gives instructions to the Director of the Bureau of Land Management that a certain parcel of land shall be classified for some purpose that is inconsistent with an application for entry. And suppose that the Director classifies it otherwise, or classifies it in a manner which is not as instructed, and it comes up to the Secretary on appeal.

The Secretary, all he does is review to determine whether the Director has done what he was delegated to do. Now in a similar sense this is not really a judicial procedure. As I pointed out, and I think perhaps a little didactically I went into the Constitution to get the position of the Solicitor's Office, and the entire appeals process in the Department of Interior is merely the way by which the senior officers of a department review the manner in which delegated authority has been executed by their subordinates.

If it turns out that I should have advised one of my subordinates to decide a case in a certain way, and he mistook my advice and the matter comes before me, of course, I will reverse it.

But as a matter of fact there are probably hundreds of decisions with legal significance made every day in the Department of Interior, and I could not possibly answer the questions, if I knew the answers and could answer them say 1 minute per question, if they were submitted to me personally.

They are decided below, and this is an opportunity for me—

Senator SIMPSON. Decided below? Do you categorize them?

Mr. BARRY. Some place.

Senator SIMPSON. Take, for example, today. You have mentioned some names. Tell me—I don't know who they are—tell me the names of these gentlemen who are here, and their capacity, what their position is.

Mr. BARRY. Mr. Ernest Hom is the Assistant Solicitor in charge of the Branch of Appeals. He is the man who operates that Branch, and whose staff reviews these cases that come up on appeal, and Mr. Weinberg is the Deputy Solicitor of the Department of Interior. He has delegated authority to sign these appeals.

Senator SIMPSON. To do what?

Mr. BARRY. To sign the appeals. Now let me point this out. It is not in my statement. At this point perhaps a little bit of discussion of what the structure is would be helpful.

You know, in spite of the fact that we have, say, two levels of appeal in ordinary cases, the initial decision of the Land Office, the appeal to the Director and the appeal to the Secretary, in the Director's Office, there must be several levels of his appeal, that is several people who review it.

Eventually it is signed by either him or by the acting director. In our office the decision comes up to Mr. Hom's office. It is assigned to one of the lawyers in the office who works through the file and

writes the decision. Mr. Hom then reviews it, puts his name on it, indicates that it is OK, and forwards it up to either Mr. Weinberg or to me for signature, and we review it.

So actually there are several levels in this thing, and it seems to me that some of the delay has been occasioned by the fact that there are so many levels.

When I came to Washington in January 1961, a very, very diligent Deputy Solicitor, a member of the last administration, was the Deputy Solicitor, and was handling the appeals, signing all the appeals decisions. His office was literally a cluttered junkroom of files, huge files, because these matters had gone through the Department and had accumulated a good deal of paper. He was working through them laboriously.

Senator GRUENING. What was his name?

Mr. BARRY. His name was Fritz, Edmund Fritz.

Now he was taking considerable pains to get these decisions out. But I found out that while occasionally questions came up, that's where he had to change the opinion that was referred to him by Mr. Hom, not very often, and on certain cases it was perfectly obvious that they wouldn't be changed.

Therefore we made some changes which I am going to detail later about delegating to Mr. Hom's office the decision in certain matters which did not have to wait then on the Deputy Solicitor's desk for signature.

Now we are doing more of that all the time, and we feel that this is going to lick the backlog eventually. It has brought us a faster pace with an increased rate of appeals. We are disposing of them, as I say, at 40 a month, and getting them at the rate now of about 35 a month, but I don't think that that is fast enough, and we hope to show you that we intend to dispose of these faster.

Senator SIMPSON. Mr. Chairman, may I ask another question, because I am a bit confused.

When you were talking about this analysis of departmental decisions, that stems from what, Mr. Barry, what type of cases are these?

Mr. BARRY. These cases are the cases where——

Senator SIMPSON. A classification matter?

Mr. BARRY. Well, they could be all types.

Senator SIMPSON. Could they be appeals from an examiner?

Mr. BARRY. No, because the appeals from the examiner go to the Director, and then the Director's decision is the thing that is appealed to us, so that these are decisions, the decisions from which these appeals have been taken were decisions made by the Director of Geological Survey or the Director of the Bureau of Land Management.

Senator SIMPSON. Namely, wouldn't they be classification cases?

Mr. BARRY. No, about 30 percent are classification cases.

Senator SIMPSON. What are the others?

Mr. BARRY. The others are mineral contests, applications for entering on public land for a small tract entry, or something, desert land entry, oil and gas lease cases. They constitute the bulk.

Senator SIMPSON. How much do they constitute, have you got that?

Mr. BARRY. Yes. This analysis of appeals to the Secretary, you see the types of cases.

Senator BIBLE. This is on page 2.

Mr. BARRY. This is the type of cases involved. You will notice that far and away the largest number are oil and gas lease applications, and I am going to guess now, but I think this is right. Mr. Horn can correct me, that a large number of those are appeals on these non-competitive sales, and I might even say that there are a few individuals which simply apply, have their names in for a drawing and who, if they don't prevail, simply appeal, and we just have our record simply glutted.

These matters are matters that present legal questions sometimes as to whether the person who wins in the drawing is actually eligible, and so forth. So these matters are appealed.

Notice also that the homestead entries constitute 80 of the pending cases. Desert land entries of course are in the nature of homestead entries, and they are a substantial number of cases, although they come from areas where water problems intervene. Now in 1962 I have added on this particular table a showing of the number of cases that have been decided in the past year, and how they are broken down.

Senator BIBLE. Is this fairly representative, if you just take 1 year? I mean, if you were to take a 5-year tabulation on this, would it come out about the same way?

Mr. BARRY. I don't know that it has been done.

Senator BIBLE. That is classificationwise?

Mr. BARRY. I think it would be quite easy to do it.

Senator BIBLE. I don't know that it is particularly necessary, but I wondered if this was fairly representative of the type of cases.

Mr. BARRY. Let me put it this way. We are rather rigid as far as priorities of appeals, as they arrive in the office, and they are taken up as they arrive.

Now this is a sampling for a period of a year of the numbers and the proportions of cases that come in. It might be, and sometimes it is significant, and some years the Bureau of Land Management, for some reason or other, has a greater—here we are. Here we have appeals to the Secretary of Interior from decisions rendered by the Director of the Bureau of Land Management from 1958 to 1963.

Senator BIBLE. I think it might be helpful to put that in the record.

Mr. WEINBERG. It is already in the record.

Mr. BARRY. Let me just point out if it is in the record somewhere, let me call your attention to some peculiar things about it.

In 1958 the total mineral cases were 243, but in 1959 it was 926. Now I can't account for that. These are the number of cases that are appealed.

Mr. WOLF. What page are you reading from, Mr. Barry?

Mr. BARRY. Page 13.

Senator BIBLE. I don't think this has been put in the record yet. This is a table I think which Mr. Wolf has shown me which apparently Mr. Landstrom is going to introduce in the record at a later date.

Mr. BARRY. Let me point out what might be a little problem here. The table is marked "Page 13" and entitled "Appeals to the Secretary of the Interior From Decisions Rendered by the Director, Bureau of Land Management."

The fourth item on that table is "small tract." For fiscal year 1958 there were 26 cases appealed to the Secretary from the Director involving small tract entry applications. In the following year, 1959,

there were 117. In 1960 there were 68. In 1961 there were 265. In 1962 there were 348, and in fiscal 1963 there were 77.

Now those figures are so disparate from one year to another that of course you wonder why the change existed. You remember that in 1961 Secretary of the Interior Udall had a public lands moratorium because it developed that there were a number of speculators that started offices out in various cities in the West, and were advertising in the papers that they could get you public land, if you would send them \$1, \$10 or something like that, and they would make these applications and appeal them all and there were a tremendous number of these things that simply glutted the Bureau of Land Management, and also the Appeals Branch, and we are gradually working through that pile of work.

The moratorium is now ended, and the lands are now opened, that is to say they are available now for small tract entry, for classification for small tracts, and you will notice that the figures are coming down to manageable proportions by 1963. But oil and gas ran in 1958, 171,675 in 1955. This might be simply evidence of increasing activity.

Now, you know that the procedure by which noncompetitive leases are given is to have everyone submit a bid, and they are put in a hat as it were, and a drawing is had, and a lot of people simply offer in all cases—and there are some people now who are speculating in this area. They get a lease. They don't intend to develop it, but they know that there were some really sound—I mean people that wanted to develop the land who were anxious to get it, and then they sell their reference that they got by virtue of the drawing.

Of course if they don't get it, they also appeal it. It only costs \$5, so they file an appeal, and tie up the process a little further.

Now of course we are considering these substantive changes that would be required in the law, to prevent this kind of a glutting of the record.

Senator BIBLE. You might proceed with your statement. I apologize for diverting you off to your tables, Mr. Barry. I think you were on page 10.

Mr. BARRY. The bill provides that the Board shall be bound by regulations prescribed by the Secretary. It should be noted that these regulations would, except in cases under the proviso in section 8, have prospective effect only. The result in such cases would be that the regulation would be promulgated after the public's ownership of the lands had been disposed of by the Board, or after all administrative relief had been exhausted. In effect this would be taking great pains to be certain that the barn door was not locked until after the horse had been removed. Moreover, in a case where a decision turns on a question of administrative judgment, the prescription of regulations can provide no remedy for the future. The errors in judgment of the subordinates of the Secretary of the Interior could not be corrected. A regulation, however judiciously drawn, is not a satisfactory substitute for judgment.

In candor, it must be admitted that the system of appeals in the Department of the Interior is not perfect. We have a substantial backlog. The backlog results in long delays from the time an appeal is taken until a decision is finally rendered. This is as much a matter of concern to us as it is to the committee, and we have taken steps

and are taking steps to keep pace with the numbers of cases being filed and at the same time to reduce the backlog to manageable proportions.

In the past year, several steps have been taken which we believe will effectively reduce the backlog of appeals and the time required for acting on a case. These steps include the following:

I think before I start on that, these are in addition to what Mr. Carver described yesterday that he was doing with the classification cases, so you can figure that 25 to 30 percent of the cases, if the regulations that are now proposed by him are adopted, will not come through our offices at all.

(1) The separation of appeals turning on questions of law and appeals turning on questions of policy and discretion with a clear division of work between the Solicitor's Office and the Assistant Secretary's Office on cases in the respective categories. This has saved the time of attorneys who formerly drafted decisions in non-legal cases and eliminated delays inherent in transmitting cases back and forth between two offices.

May I digress a moment to describe what that process was. All appeals originally were lodged with the Secretary, and all authority was lodged with the Solicitor. But obviously a lot of these decisions are not legal decisions at all. They are administrative decisions. Consequently the regulation was amended.

The delegation was transferred as to these discretionary cases to the Assistant Secretary, and he assigned the decision. But the Solicitor's Office continued to do the work.

If an appeal arrived in the Solicitor's Office, it would be referred to the Assistant Secretary for land management. The Assistant Secretary's staff would indicate whether the decision below was to be affirmed or reversed, and since it was a discretionary matter, it was sent back to us, and we would write an opinion carrying out the instructions that were given to us by the Assistant Secretary's Office.

Now notice the extra step that was in there and has been there until these regulations, if they are adopted by Assistant Secretary Carver, become the regulations of the Department. Not only will they not come to our office, but the decisions will finally be made up there in his office, and they will be made on the basis of being automatically made.

Senator SIMPSON. This hasn't been done.

Mr. BARRY. It hasn't been, but remember we mentioned that it had been published in the Federal Register.

Senator SIMPSON. Do you anticipate it will free the time of attorneys under that situation?

Mr. BARRY. Yes. Unfortunately it takes care of appeals lodged after the regulations becomes effective, and it will not take care of backlogs. But we will, of course, tangle with the backlog and do the best we can to get it disposed of as soon as possible, and perhaps devise expedited procedures within the regulations under which those appeals were filed, to dispose of them.

At the present time we have attempted to get to the backlog by sending them up, we send them up to Mr. Carver's office, and his people then write a letter directly to the appellant, if they are going to be affirmed.

Senator SIMPSON. They get one too if they are not affirmed, don't they?

Mr. BARRY. They get one if they are not affirmed. We can't reverse them all, sir.

(2) The adoption of the practice of a more limited review of cases presented on appeal. In past years it was the practice to review an entire case file to determine whether any errors had been committed in the earlier proceedings in the case, even though no such error was assigned by the appellant.

This was the practice when I became Solicitor, and there was considerable resistance to our not searching the record for error.

It was asserted that these people don't have attorneys, but the public business has got to go on, and we were getting a rather formidable backlog, and thought we ought to take drastic steps to cure it.

Now, for most cases, review is limited to a consideration of the points raised by the appellant. Of course, this does not mean that our eyes are closed to patent errors in the decision appealed from merely because the appellant does not call our attention to them. It does mean that a case record is not searched for possible errors which is not apparent.

(3) The adoption of the practice of writing more memorandum-type decisions. This means that in cases which do not present novel questions of law or fact but are governed by well-established precedents, brief summary decisions will be written rather than full expositions which largely repeat what has been said in earlier decisions.

(4) The addition of two attorneys and the probable addition of a third attorney to the staff of the Branch of Land Appeals in the Solicitor's office, which has the responsibility of handling appeals to the Secretary. This will increase the staff of the Branch from five attorneys a year ago to eight. Additional personnel has also been detailed to the staff of the Assistant Secretary to work on appeals.

Let me add there it is one thing to get money from the Appropriations Committee, and we have no complaint. They have given us all the money we could use, but the limitation on our getting money to use is to get able lawyers who are willing to become appeal reviewing lawyers. This is the most routine sort of work, and we have a most interesting department and lots of very, very interesting legal jobs involving offshore oil and reclamation projects, and these young fellows like to get into that sort of thing.

Now the old lawyers have got to have a higher grade than we can afford, and the younger lawyers are interested—who are interested in this kind of work are very, very hard to find. We have had quite a problem with recruiting.

(5) The delegation to the Assistant Solicitor, Branch of Land Appeals, of authority to sign decisions that otherwise would have to be signed by the Solicitor or Deputy Solicitor.

Senator BIBLE. Who is that personally?

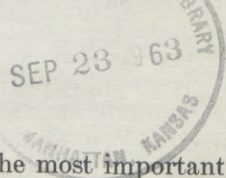
Mr. BARRY. This is Mr. Hom.

Senator BIBLE. This is Mr. Hom?

Mr. BARRY. That is correct.

Senator BIBLE. That is as I understood it.

Mr. BARRY. This authority is not exercised in the most important precedent-making cases but is exercised in those cases which present



routine questions or matters not deemed to be of the highest importance.

Let me give you an example. Sometimes you have a bunch of cases in the office all involving precisely the same point, and that point will be a matter for considerable debate by me, and actually by members of the Secretariat like the Secretary himself and Mr. Carver and others.

Finally, the decision will be arrived at. Now, the decision in a particular case may be signed by me or Mr. Weinberg or even by Mr. Udall, and all the other ones are sort of backed up behind the dam, and they will just flood out.

They are all governed by the same principle, and then in a situation like that, of course, the Assistant Secretary will sign the decisions and that will dispose of it, and that is the Assistant Solicitor.

A major proposal which has been initiated but not yet adopted has been described by Assistant Secretary Carver. I refer to the proposed changes in the department's regulations to eliminate the handling of land classification cases from the appeals system entirely.

I know that there will be some who will deplore any curtailment in the review of cases and in the writing of decisions.

Senator BIBLE. Who would that be?

Mr. BARRY. Well, I will answer it by responding to a question asked by Senator Simpson yesterday, and that was to be asked of me today, as to whether an appeal should be lodged directly from the hearing examiner to the district court in the area. You asked the question.

Now the matter really has never been proposed so far as I know formally, so that the Department has placed a position on it.

I would assume that if we were to adopt regulations that had that effect and published them as rulemaking to give people an opportunity to comment, that the people who do business with us, that is the lawyers and their litigants and the people who apply for oil leases and so forth—well, they would not be involved, but anyway the ones that are involved in this kind of work—would protest that we were taking away from them a discretionary level that they would lose access to.

Now understand if a case goes to the courts from the Department, the appellant has got to have an awfully good case in the law, on the facts.

Senator SIMPSON. That is the point. Our distinguished chairman pointed that out yesterday, this delay. What I am saying is that an appeal to the district court in which the land lies—I don't mean the county court, although I would try that one, but I mean the Federal district court, not necessarily the circuit court of appeals but the Federal district court in which the land lies would be a sensible, logical procedure from a hearing fully blown and fully developed, with the record fully made, and with briefs by both counsel for the Government and counsel for the appellant—I am talking now in a case of defeat, I would not appeal it the other way—and that it should go to the Federal court in the district in which the land lies.

It would expedite this thing so materially and cut out these others. You might have a few protests, but I think the very fact that it would be a few, it would be the exception that proves the rule. I think all of the organizations out west have advocated this thing for a number of years. I have seen resolutions to that effect.

Mr. BARRY. First of all, before we discuss it, I would like to have the record show that I am speaking for myself. This is my only action. We haven't discussed it in the Department.

This would be a major modification. It wasn't included in our preparation on this bill or discussed. But I would like to say in this regard that the discretion that is exercised in the determination by the hearing examiner would not be disturbed by the court. If there is any discretionary authority by the Department when the case gets to court, that is cut off.

The court is not going to substitute its discretionary decision for the decision of the department. And a lot of these litigants still have a discretionary point to make to the Secretary.

Senator SIMPSON. It is too expensive to get them filed.

Mr. BARRY. We are going to get it I hope and—

Senator SIMPSON. I don't want to belabor this thing too much, but I have gone to these hearings and there have been as many as 30 or 35 Government employees there, 2 and 3 weeks of hearings, held waiting to testify, and the Government attorney there and all these other experts, and the landowners put on their testimony, and by the time you get a record from all those witnesses that the Government puts on, and Lord, they would duplicate their evidence as much as we do, and more, and the upshot of it is that the cost of the transcript itself is prohibitive.

Those old cattlemen and farmers and landowners out in that country, out in my country at least, can't go to this expensive constant step up to the director, and then to the Secretary, then to the circuit court. It is a prohibitive thing financially, and I think you must recognize that, too. You have probably had that experience.

Mr. BARRY. I have had a lot of experience with that. The administration of the law can become so expensive.

But I really believe that the advantages of administration over the courts, when your life is in jeopardy or when anything really important is in jeopardy, you want to be sure you can go to a court when you are through with the administrative process.

If there is any possibility of getting it, you can get it cheaper in the administrative than in the courts, without a limit as to the rules on introduction of evidence.

At the time the case is in the Secretary's office, while the director of the Bureau of Land Management can't submit any evidence, our files are open, and if the litigant wants to say "look, this land is suitable for the entry, we ask to have made, because of these facts that we did not present below," we remand the case to ascertain the truth of those facts.

Senator SIMPSON. I think we are talking about two different things. There are two avenues here.

Mr. BARRY. That is right.

Senator SIMPSON. And I think that is what is confusing about it.

Mr. BARRY. Well, I am saying only that the discretionary level would be cut off there. I am only saying I think there would be a lot of objection. I think that that in itself is not enough to condemn it, but some of the objections would be worthwhile.

Senator SIMPSON. The one I am talking about, the hearing examiner makes his decision, and I want that decision appealable, not to the

rubber stamp next door and the one above that, but to the Federal court in the district in which the land lies, and concluded there.

Senator BIBLE. This is the point that the Senator made very forcefully yesterday. I recognize that within the framework of the testimony that is elicited by the introduction of the present bill which I am very proud to be a cosponsor of, that quite possibly the Department does not have a position on that.

But I think about all we are saying here, and I certainly join with my good friend from Wyoming and my friend from Alaska, there must be some way of making this administrative review procedure simpler and faster.

I mean it seems to me that is about all we are saying, that we are trying to drive at. There must be some way to get away from these constant delays at one echelon of the administration procedure to another. Somewhere this can be short-circuited without doing disservice to the concept that you advance.

Mr. BARRY. Let me say this—yesterday in Mr. Carver's statement he said there is one sort of letter that he hates to write and to sign, and he described it as one that deprives a litigant of a possibly meritorious consideration, consideration of what may be a meritorious ground for appeal because he has failed to comply with the rules.

This of course is a bad situation, but it is one that we face in the courts if we missed the boat, and I don't want to be callous about it or anything, but you have to have rules on appeal.

But the kind of letter that I hate to write, and I have written it to each of you I remember very well in which I explained to you that we had not reached Mr. Smith's case, and that we can't estimate when we will reach it, that we have a large backlog of appeals, and it may be several months before we reach it.

This is what I don't like, and I have not liked it since I came to the office, and indeed when it was announced in the papers that I had been nominated by the President to be Solicitor of Interior, I immediately got a large volume of mail from lawyers all over the country, stating that we had to do something about the delays in the appeals process in the Department of the Interior, and I assure you that I have been very interested in that problem, and have been doing what I can to reform it.

All the things I have told you about we have done in the last 2 years. This does not minimize the efforts and the plans that were made by the previous administration. I don't want to suggest that they were not concerned, because they were.

The appeal backlog developed in the last few years in the last administration, and suddenly it became too great for the personnel that we had, and we could not get people to take care of it.

Senator BIBLE. Why don't you finish your statement.

Mr. BARRY. But we must face the fact that funds for handling appeals work are not unlimited. I believe that within the limits of appropriations afforded to us to do the work, we will be able to reduce substantially within a reasonable length of time the backlog of appeals that has accumulated during the past few years. I believe that we can do this with full consideration of the cases presented by appellants and with little sacrifice of quality in the process.

Senator BIBLE. I appreciate your statement a great deal. I recognize, as I said earlier, that possibly you are not prepared to respond

to the question that was asked by the Senator from Wyoming, but I don't think we have an answer in there at the present time as to why it is impossible to take an appeal out in the field after a hearing, from the hearing examiner and the director of land office in that particular State. Why can't you take that directly from that position to the Federal court in the district involved?

Mr. BARRY. Don't let the record show that I said that it was impossible. I think it is possible that that could be prescribed by law.

I am wondering whether if such a law—what our position in the Department would be, and what we would advise. And when I say that, I mean we are here in the Department with the same concern that the committee has to do something about the problem that we have got, with reference to the particular bill that is before the committee, and the problems that it would raise.

If that bill were introduced, it might be that the Department would take the position, and I might on consideration agree with them fully, that such a bill should be enacted.

But it isn't the thing that has been before the Department, and it has been suggested—a lot of suggestions have been made, particularly in response to the material that you put in the record yesterday, Senator, the material from the Rocky Mountains Oil & Gas Co. Now they had a provision there that deserves exploration it seems to me, that when an appeal is lodged, if it isn't decided by a certain time, it may be deemed denied, and the litigant may go to court, which gives the opportunity both for the discretionary review, such as it might be, and it also saves the litigant the dangers of long delay, of a number of years, before the administrative process is exhausted.

Senator BIBLE. Let me just go step by step over a typical land case and do it rather quickly.

I am a land applicant, and we have a hearing before the hearing examiner. This is really more or less the actual trial court. This is the full-blown case. This is where both sides put in their case, and the hearing examiner makes a decision adverse to me as the applicant.

And where do I go today? I go then to the land officer in charge of the district in the State where I am located, is that true?

Mr. BARRY. He would make the decision, the initial decision.

Senator SIMPSON. Now we are talking at cross purposes again. Excuse me, Mr. Chairman, sir.

Senator BIBLE. Interrupt any time.

Senator SIMPSON. I think the chairman is putting a case here that is in line with what I want to see him develop. And then I think you threw him off when you said that the director makes the initial decision.

Are you talking about an examiner's case where the thing was heard before an examiner? That is what I thought that the chairman was talking about.

Mr. BARRY. Quickly let's see the category we will get it into.

Senator BIBLE. Why don't you go step by step.

Mr. BARRY. We have three types of cases really. We have the grazing cases. A decision is made by a fieldman, and an appeal to a hearing examiner. That is the full-blown hearing, I take it, that Senator Simpson referred to.

Senator BIBLE. I think so, the hearing examiner. Where do you go from the hearing examiner?

Mr. BARRY. Now, then, from the hearing examiner you go to the State director.

Senator BIBLE. Correct.

Mr. BARRY. The director of the bureau. Now that is the second appeal.

Senator SIMPSON. Wait a minute, let's get this straight. The director of the bureau in the State in which the land lies, is it not?

Mr. BARRY. No; the Director of the Bureau of Land Management.

Senator SIMPSON. Well, that isn't so. We are not talking about the same case at all. It goes to the State director where a decision is made.

Mr. BARRY. All I know about Bureau of Land Management Mr. Landstrom has told me.

Senator SIMPSON. No; I want to retract that. I am wrong. It is not so. It does go.

Mr. BARRY. It goes to the Director from the hearing examiner. Now that is the second appeal. The first appeal was to the hearing examiner, and it is called an appeal in the statute. The second appeal is to the Director of the Bureau of Land Management. The third appeal is to the Secretary.

Senator SIMPSON. And where is the fourth?

Mr. BARRY. The fourth is to the courts.

Senator BIBLE. This is three steps then to get ready for the court.

Mr. BARRY. That is right.

Senator BIBLE. All right. Now, this is the grazing type of case.

Mr. BARRY. That is the grazing type of case. Now the nongrazing cases fall into two categories.

Senator SIMPSON. May I interrupt you here, because I do want to get some expression here, because this committee is trying to work out something that will obviate the necessity for delay in time and expense.

Here is your decision made with respect to, we will say, a curtailment of the grazing privilege in the district. That has had full consideration by the Department, and it is on the local level.

Then a hearing is held on that before a designated examiner. Now that hearing is a full-blown hearing with exhibits, because all the things are there. They are not here in Washington. They are there on the ground.

Mr. BARRY. That is right.

Senator SIMPSON. As soon as that is over, and it may last 1, 2, 3 weeks—we had one that went for something like 9 months, one hearing, not constantly, but it was postponed for convenience to get everything before it.

Now why not that—why not have that thing appealed from that full-blown hearing from a decision of the examiner to the Federal court in the district in which the land lies, in order to expedite this matter of getting an early decision?

Mr. BARRY. Senator, I can only say that you are very persuasive, the way you put the question, but I don't think I am really authorized to answer that it should be or that any such amendment should be made, because this involves an area that is not mine in the Department.

Senator SIMPSON. Whose would it be?

Mr. BARRY. In the Bureau of Land Management the Assistant Secretary for Land Management, the Secretary of the Interior. The only question that is really a legal question there is—

Senator SIMPSON. You are Solicitor for all of those, aren't you?

Mr. BARRY. That is correct. All I can do is tell them what the legal result is.

Senator SIMPSON. I don't want to antagonize you. I want you on my side. I wish you would get in here and help us with it.

Mr. BARRY. You are not antagonizing me. I certainly don't feel any hostility at all. I mean my reaction is only this—that I feel that the question is really the question that was asked a few minutes ago, and that I can't answer without more discussion in the Department.

Senator SIMPSON. Let me give an example which I think points it up, as I did yesterday perhaps with Mr. Carver.

I would like to have just an expression from you as to what you think would have happened in a similar case had it gone to a court instead of going to the Department, and got the rubberstamp approval that I have seen it get.

Here is a case of one of your landowners who has a Taylor grazing lease. He had it for years. He uses it in connection with his business.

Along comes another Federal agency—namely, the interstate road or highway program—and they cut him off, and as a result of cutting him off, dividing his commensurate land, his parent land from the Taylor grazing land, the Department, the Bureau of Land Management gives the land to another applicant, because he is cut off by this Government agency which condemned that land that made him be cut off, and gave it to another that did not use it in connection with business, but used it in connection with pleasure.

Now, do you think that for one minute a Federal court would have sustained itself from—to make such a decision as that, as compared to the decision that was approved all the way up to the Secretary of the Interior, and from which no appeal could be taken because the landowner was too poor to make it?

Mr. BARRY. I don't know. Of course, on the basis of the complete record, keeping in mind the Secretary's authority under the Taylor Grazing Act, and what the right the cattleman has got to a grazing permit, which is a right that is terminable in the discretion of the Secretary, it seems to me that if it went to court with an exercise by the Secretary of his discretion to terminate that right, that the court would not disturb the decision.

Senator SIMPSON. You circumvent me again. You have gone up to the Secretary, and I want to stay with the hearing examiner.

Mr. BARRY. The hearing examiner's decision is the decision of the Department, certainly.

Now, in the Department has been lodged, and by delegation to the hearing examiner, has been lodged the authority of the Secretary, so it is the decision of the Secretary.

Senator SIMPSON. All right.

Mr. BARRY. Now if you took it on appeal to the courts immediately, and this is a discretionary matter, as a matter of law in my opinion the courts would say "we are not going to disturb the Secretary's exercise of discretion."

Senator SIMPSON. I don't believe that at all. On the record he would have to.

Mr. BARRY. It wasn't appealed, so we can't test it.

Senator SIMPSON. Well—

Senator BIBLE. We are simply probing for an answer to actually be of assistance to you and to your Department, because it does seem to me, in repetition, that this is a cumbersome procedure, and somewhere along the way there must be the mind of man that can conceive a simpler, more direct, and equally effective method of disposing of these problems, Mr. Barry.

I am not prepared right now to say that I know the answer. That is why we are having these hearings.

Mr. BARRY. May I suggest one thing—a suggestion has been made that the committee might be willing to consider—I don't know what the position of the Department would be on it, because it hasn't been fully explored in the Department; but notice that we have three levels of appeal in grazing cases. Now that seems like an awful lot of appeals. We have two levels of appeal in contest cases, in all nongrazing cases. That seems like an awful lot of appeals.

People come to the Director of Bureau of Land Management from Alaska with an appeal, and then after they get their decision, if they want to appeal it further to the Secretary, they come to Washington from Alaska again. Isn't one trip from Alaska enough?

Senator GRUFNING. It is very costly.

Mr. BARRY. Indeed it is, and we have discussed in the Department, and it represents rather serious dislocations, as though one were actually performing an operation on a human body and exchanging a couple of organs from one position to another to change something like this, but one of these levels of appeal might be cut out, and it would be proper it seems to me, because we should discuss this with the people that are interested among the public, and they will come before this committee to consider it.

Senator BIBLE. Mr. Solicitor, I don't want to do disservice to the record, and I think maybe I am guilty of having done that.

You described the levels of appeal in a grazing case, and you were going to tell us about the appellate procedures in two other types of cases, and I don't know that you completed that.

Mr. BARRY. No, I hadn't. In nongrazing cases—incidentally, this is all set out in our report—there are two categories. There are the contest cases for which an Administrative Procedure Act type hearing is required. These are mining contests.

They might be filed by another Government agency like the Forest Service. These are disputes between perhaps two mining claimants over a parcel of land.

These are disputes between two claimants for the same tract of land. Perhaps there is an argument on a preference for a small tract entry.

Contiguity is one of the requirements for preference, and there might be some claim that two people are contiguous to the land that is offered. These cases all get, whether they are contest cases or non-contest cases, they all get the two levels of appeal.

The largest number of nongrazing—are the noncontest cases. These are cases where someone sees a parcel of land and he wants it, and so he makes an application and, as Mr. Carver described it yesterday, the

present theory is that the one application covers both an application for entry and an application for classification of the lands. He proposes to separate those two categories in this new procedure that he has adopted.

On the question of classification, if his resolutions are adopted, that will be the decision of the Department, and it will become automatically the decision of the Department, unless it is reversed within a specified time or said period within the regulations.

The other type of case, that is the nonclassification case, is now appealed to the Director of the Bureau, if it is adverse to the wishes of the applicant. This may turn on a question of law.

After the decision of the Director, assuming that that is a reversal, and of course it isn't always—in 14 percent of the cases they reverse, it isn't always an affirmation of the decision below—in about 14 percent of the cases they reverse the field decision; the case comes up to the Secretary of the Interior on appeal, and is considered in the Office of the Solicitor. It may be a classification case.

Under the present procedure, not the one that Mr. Carver has proposed to adopt, I have already described the process by which it goes to Mr. Carver's office, comes back, we write a decision, and if it is a legal question we decide the legal question. These are of greater or lesser significance, of greater or lesser difficulty.

The ones that are of little difficulty and are well settled by precedence established we propose to have decided without going through the several levels of stages that occur in every appeal, and we have them signed by Mr. Hom himself.

On the ones that require the decision of the Solicitor or the Deputy Solicitor or the Secretary himself, they are brought up and a proposed decision is written.

Now in many of those we don't use the rubber stamp. I think this describes pretty well what all the processes of appeal are in the Department.

Senator BIBLE. Thank you very much, Mr. Barry.

Senator Gruening?

Senator GRUENING. Mr. Barry, of course we don't have the Taylor Grazing Act in Alaska. Our concern is largely with the homesteaders. At least that is where the greatest amount of protests have arisen.

Now in 1963 you reversed 29 cases. Could you say offhand whether any of those were homesteading cases? You may not have this information. What I want to bring out is What were the circumstances which caused you to reverse a typical case?

Mr. BARRY. I don't recall now. May I ask Mr. Hom if he can answer that question?

Mr. Hom. The homestead cases might involve a number of a different variety of cases. You might have a case where the homestead has been contested on the ground that the entryman did not meet the cultivation requirement, or did not establish residence or did not otherwise comply with the homestead law.

If we found on the appeal to the Secretary, we believed that the Bureau's decision was erroneous, then we would reverse it.

Our category of "homestead" would include any kind of a homestead case, and would cover any facet of the homestead law that might be

applicable to that case. We don't have a breakdown as to these specific types of errors upon which we might have reversed the Director.

Senator GRUENING. The largest part of our complaints comes from people who apparently have complied with the law and the regulations as they were informed they were, and then somehow out of the blue comes a decision which cancels all that, and tells them they did it wrong, and they should do it differently. Are you familiar with any of those cases, from your memory?

Mr. HOM. Yes, I am.

Senator GRUENING. Can you give us a little elucidation of how these are decided. Of course, I can't remember them all, but they frequently seem to hold manifest injustices where people have apparently complied, the Bureau has changed its mind, the regulation has been changed, the conditions have been changed, and the people are just out.

Senator SIMPSON. Will the Senator yield for a question?

Senator GRUENING. Yes, indeed.

Senator SIMPSON. Isn't it true we have had cases from your State in which we have had to bring bills for relief for the people who have had some injustice done them as a result?

Senator GRUENING. Precisely, and it is not always easy to get those through. In the case of two or three it has taken us 3 or 4 years to get one injustice rectified.

Senator SIMPSON. I thank the Senator.

Mr. HOM. I think our reasoning in those cases is simply this—we recognize it is an extremely difficult situation as far as the homesteader is concerned. It is always very hard on any citizen who deals with the Government and is given advice which he follows, and then finds out that the advice was erroneous.

However, while the problem in Alaska might have been very pointed in the case of the homesteaders, this question that you raise seems to me to be not restricted to Alaska or to the Department—the Department of Interior. It is a governmentwide question.

What happens when any Federal agency, through an employee, gives erroneous advice to a citizen? Now from the standpoint of the agency, the agency is torn between you might say sympathy for the person who was misled, and at the same time the duty laid upon the agency to administer the law as it conceives it.

Now if the homestead law requires cultivation during the second, third and each succeeding year, if it requires establishment of a residence within 6 months or 1 year, or it requires that the entryman have a habitable house at the time he submits final proof, and there seems to be no basis in the record for finding that he has met those requirements, then our viewpoint has been in the past that we could not possibly dispose of that land in contravention of the statute.

I think that that is a principle that you will find of course in many court decisions. I believe the U.S. Supreme Court many years ago held in a case involving a right-of-way grant by the Department of Interior, *Utah Power and Light Company* case [243 U.S. 389 (1917)], that although some local official in the Department had made an error in advising, I think in actually granting a right-of-way to a utility to either build some transmission lines to maintain a power station, that this action was erroneous, the right-of-way was invalid,

and I believe that in more recent years in connection with some Federal Crop Insurance Corporation case, *Federal Crop Insurance Corp. v. Merrill* [332 U.S. 380 (1947)], held to the same effect.

As I say, I don't think it is a problem confined to Interior. It seems to me it is a governmentwide problem. I could certainly love to have an official of the Internal Revenue tell me I didn't have to pay any income tax. I hardly think that would relieve me of the tax, if his advice proved to be erroneous.

Senator GRUENING. Maybe this is a question that should not be addressed to the Solicitor's Office, but to the officials of BLM: How much room is there for discretionary and compassionate attitude in some of these cases?

The impression widely obtains in Alaska, and this is not only true of the Bureau of Land Management, it is true of almost every Federal agency, that Government officials are enemies of the people. Instead of trying to help them, they are there to impose every possible obstacle, to find flaws in everything they do.

Instead of assisting them, there is a constant struggle. Now is that necessary? It seems to me that if we want to strengthen the faith of the people in our Government which it is certainly desirable to do, we should have a different attitude.

I would extend that to other agencies to take the curse off BLM. It has been felt about other agencies up there, too.

I think maybe that is an administrative matter and it is a question of attitude. But we sometimes feel that Government officials in Alaska take the same position that they are supposed to be taking in a police state. People don't like it, and I can understand they don't, and I don't like it.

Mr. BARRY. Senator, may I comment on that question? You know I am not a career officer of the Government. I came from a State, from the State of Arizona. In my State I have heard the same kind of criticism.

I don't know what way we have in Government or in any other kind of organization of getting people to do the administrative work and never commit an error. Usually an error can be quite drastic.

I know that if the President has withdrawn land for an Indian reservation or for a reclamation purpose or for some other particular purpose of the Government, or perhaps if land has already been disposed of by the Government, but some lazy or perhaps inattentive or perhaps merely overburdened individual in the Government fails to make the necessary entry in the tract book, and a prospective homesteader presents himself, and he is advised that the land is open, he goes to great expense, and then it develops that the land is already taken by somebody else, that it is reserved for a particular purpose and it is not available, that a grievous harm is done.

Now I think in those situations that there is a court of appeal, just like the power of pardon that the President has, by virtue of the Constitution, and that a Governor of a State has. And this appeal is cumbersome too. It takes a little time to get things through Congress, as Senator Gruening has just stated.

I just call attention to the fact that, Senator, you presented a report [No. 125] validating the homestead entry of Leo F. Reeves in which you mention the following language, and I think this is the only answer

that we can give to this very serious problem which is natural in any big organization:

The Department cannot change existing law, but the Congress can. To amend the Homestead Act would involve departures not deemed advisable. Therefore the committee has set out a course based upon reason and equity.

And in a particular case a pardon is sought.

Senator SIMPSON. Will the Senator yield?

Senator GRUENING. Yes.

Senator SIMPSON. Mr. Barry, I am not quite in accord with the thought that there is any lack of ability to remedy some of these situations.

I think the analogy lies between civil responsibility and civil liability. You make a mistake upon which I rely, I can sue you and recover, if you are answerable.

In the Government I think so, too, and I think probably it lies in this too strict adherence to the letter of the law, when I think you have not only the responsibility, but I am sure that you have the elasticity to make proper decisions, and I think that the analogy carried between the civil and the Federal and the people see that in these cases that we pull up to point of these inequities that bring the difficulty to the Department.

I think the departments have not only the responsibility but the elasticity to make decisions, rather than to conform to the letter of the law.

Mr. BARRY. That was not, I don't think, a suggestion, but it was mentioned as a possible solution by Mr. Carver yesterday.

Well, who would respond? If the United States would respond in a tort liability, I rather think you would have difficulty in—

Senator SIMPSON. They don't have to respond, as you know.

Mr. BARRY. Well, a bill might be passed whereby consent was granted by the United States to be sued, just as it is in the Federal Tort Claims Act. Make it a tort. If Congress would do this, why that would be the Government responding.

I think it would be useless really, from what I understand at least of homesteading in Alaska, as I understand it, where it takes about \$25,000 of investment to prove up on a homestead in Alaska.

Senator GRUENING. A lot of money.

Mr. BARRY. Most Government employees that make these kinds of mistakes don't make the kind of money that would—

Senator SIMPSON. The Department could make a directive, publish it in the Federal Register, it becomes the same as the law, and that is something that they want to do.

It may be anathema against the people on whom it is inflicted. Yet they don't take the responsibility of curing an error in the most patent inequitable case like the ones we are talking about in Alaska.

I think that the elasticity is there as well as the responsibility, and it could be done by the departments, and I think it is that narrow adherence to the letter of the law that doesn't give the equity where it belongs, that doesn't place the equitable load upon the person that puts you in disrepute, puts our departments in disrepute with the Government or with the people, and I think it is that type of thing this committee is trying to remedy.

I don't think we are going to do it by insisting upon just a strict adherence to the letter of the law, when you have got the power in the Department with your direction to do what is necessary.

Mr. BARRY. There is elasticity; I am all in favor of exercising it.

Senator GRUENING. Have you ever tried it? I would bet it would go down without a murmur.

Mr. BARRY. Well, now, we can't do it in all cases. Mind you, what if A makes an application for a homestead and B already has prior rights? We can't say that because A was misled that we will take it away from B.

Senator GRUENING. I know that.

Mr. BARRY. And if the land has been set aside for the Indians, we can't simply say because the homesteader came in and was ill-advised in the Bureau office or in the land office somewhere, that the Indians' rights are to be sacrificed.

Sometimes perhaps if the elasticity appears in a particular fact situation, if the discretion, a discretionary act is possible, I assure the Senator we are most anxious to find it and to exercise whatever elasticity there may be.

But it is small comfort to the homesteader who spent \$25,000 to develop a project or a home in Alaska, to find out that it is on an Indian reservation, and that nobody has authority to give it to him. It belongs to the Indians.

We will say, "We are sorry; we can't be elastic in this case," and he says, "Why you never are," and so on. And of course he is right, and we can't give it to him.

Senator BIBLE. Further questions, Senator Gruening?

Senator GRUENING. No.

Senator BIBLE. Senator Simpson?

Senator SIMPSON. No.

Senator BIBLE. I would like to make a part of the record a letter which I have received from John Marvel, a member of the Public Lands Coordinating Committee, making suggestions very similar to the suggestions that were made actually by the National Cattlemen's Association yesterday.

(The letter referred to follows:)

BATTLE MOUNTAIN, NEV., May 2, 1963.

Hon. ALAN BIBLE,
U.S. Senate,
Senate Office Building,
Washington, D.C.

DEAR ALAN: Understanding that immediate action will be taken on S. 758, I shall present the recommendation passed unanimously on this particular bill by the Public Lands Coordinating Committee. We are respectfully requesting that you consider field hearings because of the importance of appeals boards to the many various public land users. Everyone is completely in accord that any improvement upon the present appeals system is definitely a step in the right direction.

I will be gratified if you will examine the merits of establishing an appeals board to function at the local level similar to the proposed amendment D, paragraph 3, of the proposed amendments presented to you by Fred Strosnider: "The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge to an examiner, and for the appeal by any party adversely affected by the decision of the examiner to an appeals board, one of which shall be established for each State in which grazing districts or leases have been established.

Such boards shall consist of three members, one to be designated by the Secretary of the Interior, one to be designated by the Governor of the State, and one to be designated by the State advisory board. The decision of such appeals board shall be final subject to an appeal to the U.S. district court in the manner provided by law."

The other recommendations offered by the National Public Lands Coordinating Committee are being sent to you and I will not bother you with duplicity. However, I would like to make note that all the recommendations of the committee were endorsed unanimously by all the States' representatives in attendance. The committee may have moved cautiously in the way of suggested legislation principally because of the many bills already to be considered which theoretically encompass the principles of tenure. If we are given the opportunity to suggest amendments via field hearings or through your good offices, perhaps the ends may be more understandably accomplished.

With very best regards, I am,

Sincerely yours,

JOHN MARVEL.

Senator BIBLE. I think this has been a very helpful afternoon. I do want to make as part of the record a group of tables supplied to me by Mr. Landstrom, the Director of BLM. I am not prepared to ask any questions on these particular tables at this time, but they will be incorporated and made a part of the record in full at this point. They are as follows:

INDEX TO TABLES

Appeals to the Director, by type, for each fiscal year 1958-62.

Appeals to the Director for fiscal years 1958-63 (cumulative).

Adjudication operations, summary by land office, for each fiscal year 1958-62.

Decisions of subordinate officers reversed, modified, or vacated by Director (January 1, 1961-April 30, 1963).

Appeals to the Secretary, by type, in terms of cases, for fiscal years 1958-63.

Appeals to the Secretary, in terms of decisions, for fiscal years 1958-63.

Decisions of Director reversed, modified, or remanded by the Secretary (January 1, 1961-March 31, 1963).

Age analysis of appeals pending before the Director as of April 1, 1963.

TABLE 57.—*Appeals to the Director from decisions by subordinate officers of the Bureau, fiscal year 1958*

Type of case	Awaiting action, July 1, 1957	Received during fiscal year 1958	Total	Cases acted on during period ¹		Awaiting action, June 30, 1958
				Decisions	Appeals	
Homestead.....	130	103	233	84	88	145
Desert land.....	102	390	492	89	317	175
Public sale.....	121	112	233	80	88	145
Small tract.....	580	449	1,029	149	452	577
Exchanges.....	27	55	82	34	48	34
Selections.....	18	48	66	12	51	15
Other.....	85	124	209	56	79	130
Total land cases.....	1,063	1,281	2,344	504	1,123	1,221
Oil and gas.....	563	1,034	1,597	370	820	777
Mineral and mining.....	151	175	326	88	137	189
Contests.....	71	19	90	24	35	55
Total mineral cases.....	785	1,228	2,013	482	992	1,021
Grazing cases.....	30	26	56	25	26	30
Grand total.....	1,878	2,535	4,413	1,011	2,141	2,272

¹ 1 decision rendered may have covered more than 1 appeal case.

TABLE 53.—*Appeals to the Director, 1959*

Type of case	Awaiting action July 1, 1959	Received during 1959	Total	Cases acted on during period ¹		Awaiting action June 30, 1959
				Decisions	Appeals	
Lands cases:						
Homestead.....	145	214	359	130	192	167
Desertland.....	175	1,747	1,922	176	1,292	630
Public sale.....	145	149	294	178	214	80
Small tract.....	577	325	902	191	591	311
Exchanges.....	34	50	84	41	58	26
Selections.....	15	27	42	12	32	10
Other.....	130	111	241	113	154	87
Total land cases.....	1,221	2,623	3,844	841	2,533	1,311
Minerals cases:						
Oil and gas.....	777	1,866	2,643	525	1,665	978
Mineral and mining.....	189	178	367	121	224	143
Contests.....	55	100	155	77	129	26
Total mineral cases.....	1,021	2,144	3,165	723	2,018	1,147
Grazing cases.....	30	52	82	44	49	33
Grand total.....	2,272	4,819	7,091	1,608	4,600	2,491

¹ 1 decision rendered may have covered more than 1 appeal case.

NOTE.—2,590 miscellaneous letters and memorandums prepared during period.

TABLE 53.—*Appeals to the Director, 1960*

Type of case	Awaiting action July 1, 1960	Received during 1960	Total	Cases acted on during period ¹		Awaiting action June 30, 1960
				Decisions	Appeals	
Lands cases:						
Homestead.....	167	141	308	77	93	215
Desertland.....	630	882	1,512	178	1,078	434
Public sale.....	80	129	209	100	111	98
Small tract.....	311	1,040	1,351	138	645	706
Exchanges.....	26	54	80	22	30	50
Selections.....	10	75	85	4	33	52
Land contests.....	9	2	11	7	9	2
Other.....	87	277	364	131	256	108
Total land cases.....	1,320	2,600	3,920	657	2,255	1,665
Mineral cases:						
Oil and gas.....	978	824	1,802	522	951	851
Other leasable minerals.....	89	83	172	53	122	50
Mining contests.....	17	70	87	35	45	42
Mining noncontests.....	54	63	117	45	78	39
Total mineral cases.....	1,138	1,040	2,178	655	1,196	982
Grazing cases.....	33	37	70	39	44	26
Grand total.....	2,491	3,677	6,168	1,351	3,495	2,673

¹ 1 decision rendered may have covered more than 1 appeal case.

TABLE 54.—*Appeals to the Director, 1961*

Type of case	Cases pending July 1, 1960	New cases received during 1961	Total	Cases disposed of during 1961 ¹		Cases pending June 30, 1961
				Decisions	Appeals	
Land cases:						
Homestead.....	156	484	640	111	229	411
Desertland.....	440	419	859	170	648	211
Public sale.....	81	215	296	151	265	31
Small tract.....	576	1,036	1,612	193	1,072	540
Exchanges.....	92	91	183	65	113	70
Selections.....	65	19	84	13	49	35
Land contests.....	8	14	22	16	16	6
Other.....	123	171	294	120	225	69
Total land cases.....	1,541	2,449	3,990	839	2,617	1,373
Mineral cases:						
Oil and gas.....	576	695	1,271	344	1,003	268
Other leasable minerals.....	59	81	140	48	122	18
Mining contests.....	69	90	159	88	144	15
Mining noncontests.....	37	77	114	78	107	7
Total mineral cases.....	741	943	1,684	558	1,376	308
Grazing cases.....	26	36	62	34	39	23
Grand total.....	2,308	3,428	5,736	1,431	4,032	1,704

¹ 1 decision rendered may have covered more than 1 appeal case.TABLE 54.—*Appeals to the Director, 1962*

Type of case	Cases pending July 1, 1960	New cases received during 1962	Total	Cases disposed of during 1962 ¹		Cases pending June 30, 1962
				Decisions	Appeals	
Land cases:						
Homestead.....	411	374	785	247	760	25
Desertland.....	211	447	658	179	592	66
Public sale.....	31	328	359	233	326	33
Small tract.....	540	706	1,246	278	1,201	45
Exchanges.....	70	19	89	33	84	5
Selections.....	35	31	66	13	45	21
Land contests.....	6	12	18	13	8	10
Other.....	69	161	230	143	200	30
Total land cases.....	1,373	2,078	3,451	1,139	3,216	235
Mineral cases:						
Oil and gas.....	268	599	867	368	671	196
Other leasable minerals.....	18	93	111	24	70	41
Mining contests.....	15	73	88	36	62	26
Mining noncontests.....	7	192	199	46	124	75
Total mineral cases.....	308	957	1,265	474	927	338
Grazing cases.....	23	70	93	36	85	8
Grand total.....	1,704	3,105	4,809	1,649	4,228	581

¹ 1 decision rendered may have covered more than 1 appeal case.

Appeals to the Director from decisions by subordinate officers of the Bureau

	Cases pending beginning of period	New appeals to Director received during period	Total	Decisions rendered ¹		Cases pending end of period
				Number of decisions	Number of appeal cases	
Fiscal year 1958.....	1,878	2,535	4,413	1,011	2,141	2,272
Fiscal year 1959.....	2,272	4,819	7,091	1,608	4,600	2,491
Fiscal year 1960.....	2,491	3,677	6,168	1,351	3,495	2,673
Fiscal year 1961.....	² 2,308	3,428	5,736	1,431	4,032	1,704
Fiscal year 1962.....	1,704	3,105	4,809	1,649	4,228	581
July 1, 1962, through Apr. 30, 1963.....	² 545	1,818	2,363	897	1,668	695
Total.....		19,382		7,947	20,164	

¹ 1 decision rendered may have covered more than 1 appeal case.² Figures adjusted to agree with physical inventory of cases.TABLE 51.—*Adjudication operations, fiscal year 1958* ¹

Area	Land office	Unclosed cases July 1, 1957	New cases during year	Reactivated cases during year	Cases closed during year	Unclosed cases June 30, 1958
1.....	Spokane.....	798	360	271	617	812
	Portland.....	842	849	787	1,399	1,079
	Sacramento.....	3,097	1,879	1,185	2,879	3,282
	Los Angeles.....	24,565	7,277	10,134	13,695	28,281
	Total area 1.....	29,302	10,365	12,377	18,590	33,454
2.....	Boise.....	1,601	1,137	731	1,912	1,557
	Salt Lake City.....	3,732	4,657	15,734	18,809	5,314
	Reno.....	11,861	2,872	7,936	11,397	11,272
	Phoenix.....	3,503	2,662	2,687	5,149	3,703
	Total area 2.....	20,697	11,328	27,088	37,267	21,846
3.....	Billings ²	2,532	4,655	5,070	9,823	2,434
	Cheyenne ³	4,914	13,289	15,086	29,992	3,297
	Denver.....	1,494	4,776	8,714	13,171	1,813
	Santa Fe ⁴	6,878	11,492	9,054	19,499	7,925
	Total area 3.....	15,818	34,212	37,924	72,485	15,469
4.....	Fairbanks.....	1,059	5,323	1,133	4,052	3,463
	Anchorage.....	3,596	9,067	8,746	13,319	8,090
	Juneau.....		322	693	557	458
	Total area 4.....	4,655	14,712	10,572	17,928	12,011
	Eastern States Land Office ⁵	2,544	2,185	1,545	3,659	2,6
	Branch of Field Services.....	507	1,999	113	2,382	215
	Lands Staff Office.....	620	189		421	337
	Outer Continental Shelf Office.....	8	3	87	92	88
	Grand total.....	74,151	74,993	89,706	152,824	86,026

¹ For unclosed cases pending June 30, 1958, by type of case, see table 56. For operations, by type of case, see tables 52-55.² Includes North Dakota and South Dakota.³ Includes Kansas and Nebraska.⁴ Includes Oklahoma and Texas.⁵ All public-land States east of the Mississippi River and Arkansas, Iowa, Louisiana, Minnesota, and Missouri.

TABLE 47.—Adjudication operations, 1959 (summary by land office)

Area	Land office	Unclosed cases July 1, 1958	New cases during year	Reacti- vated cases during year	Cases closed during year	Unclosed cases June 30, 1959
		<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>
1	Spokane	986	2,506	158	910	2,740
	Portland	1,307	2,500	2,885	2,618	4,074
	Sacramento	8,252	5,363	829	5,800	8,584
	Los Angeles	28,561	6,096	7,596	15,940	26,313
	Total area 1	39,106	16,465	11,468	25,328	41,711
2	Boise	3,847	3,901	1,174	4,594	4,328
	Salt Lake City	6,499	14,876	4,289	21,405	4,259
	Reno	11,274	5,618	6,160	11,189	11,863
	Phoenix	4,570	4,758	1,692	5,444	5,576
	Total area 2	26,190	29,153	13,315	42,632	26,026
3	Billings ¹	3,144	5,730	2,433	8,227	3,080
	Cheyenne ²	3,297	26,503	8,657	30,030	8,427
	Denver	3,187	11,751	5,981	17,989	2,930
	Santa Fe ³	8,243	21,166	2,406	22,687	9,128
	Total area 3	17,871	65,150	19,477	78,933	23,565
4	Anchorage	8,291	9,625	4,779	15,494	7,201
	Fairbanks	3,463	4,187	825	6,707	1,768
	Juneau	481	635	338	720	734
	Total area 4	12,235	14,447	5,942	22,921	9,703
	Eastern States Land Office ⁴	2,615	2,920	1,234	4,375	2,394
	Branch of Field Service	237	1,749	146	1,785	347
	Land Staff Office	388	288		295	381
	Outer Continental Shelf Office	7	94	35	111	25
	Grand total	⁵ 98,649	130,266	51,617	176,380	104,152

¹ Includes North Dakota and South Dakota.² Includes Kansas and Nebraska.³ Includes Oklahoma and Texas.⁴ All public land States east of the Mississippi River and Arkansas, Iowa, Louisiana, Minnesota, and Missouri.⁵ 12,623 cases added by inventory adjustment.

TABLE 47.—Adjudication operations, 1960 (summary by land office)

Area	Land office	Unclosed cases July 1, 1959	New cases during year	Reactivated cases during year	Cases closed during year	Unclosed cases June 30, 1960
		<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>
1	Spokane.....	2,740	7,494	460	6,928	3,766
	Portland.....	4,074	1,721	785	2,661	3,919
	Sacramento.....	8,584	5,573	1,181	7,895	7,443
	Los Angeles.....	26,313	3,602	3,640	15,256	18,299
	Total area 1.....	41,711	18,390	6,066	32,740	33,427
2	Boise.....	4,328	1,517	980	3,321	3,504
	Salt Lake City.....	4,259	24,215	5,991	29,359	5,106
	Reno.....	11,863	3,744	4,824	11,842	8,589
	Phoenix.....	5,576	8,789	1,956	7,671	8,650
	Total area 2.....	26,026	38,265	13,751	52,193	25,849
3	Billings ¹	3,080	7,303	3,564	11,264	2,683
	Cheyenne ²	8,427	37,181	9,342	43,795	11,155
	Denver.....	2,930	18,430	6,521	24,742	3,139
	Santa Fe ³	9,128	55,945	4,286	54,240	15,119
	Total area 3.....	23,565	118,859	23,713	134,041	32,096
4	Anchorage.....	7,201	5,044	13,153	19,949	5,449
	Fairbanks.....	1,768	8,000	720	7,651	2,837
	Juneau.....	734	2,522	288	769	2,775
	Total area 4.....	9,703	15,566	14,161	28,369	11,061
	Eastern States Land Office ⁴	2,394	3,323	1,299	4,590	2,426
	Branch of Field Service.....	347	1,911	215	2,098	375
	Outer Continental Shelf Office.....	25	273	210	505	12
	Grand total.....	103,771	196,587	59,424	254,536	105,246

¹ Includes North Dakota and South Dakota.² Includes Kansas and Nebraska.³ Includes Oklahoma and Texas.⁴ All public land States east of the Mississippi River and Arkansas, Iowa, Louisiana, Minnesota, and Missouri.

TABLE 48.—*Adjudication operations, 1961 (summary by State)*

State	Unclosed cases July 1, 1960	New cases received during year	Cases reactivated during year	Cases closed during year	Unclosed cases June 30, 1961
Western States:					
Alaska:	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>
Anchorage.....	5,449	6,353	6,763	13,159	5,406
Fairbanks.....	2,837	6,161	5,032	10,321	3,700
Juneau.....	2,775	541	523	3,122	717
Arizona.....	8,650	9,728	1,342	8,943	10,777
California:					
Los Angeles.....	18,299	4,033	2,794	13,543	11,583
Sacramento.....	7,443	5,234	1,358	7,615	6,410
Colorado.....	3,130	28,904	7,387	34,879	4,551
Idaho.....	3,504	1,088	2,461	4,528	2,525
Kansas.....	22	48	61	103	28
Montana.....	2,210	6,373	3,090	8,814	2,859
Nebraska.....	72	166	67	98	207
Nevada.....	8,589	2,501	3,415	8,747	5,818
New Mexico.....	13,225	83,672	3,117	83,570	16,444
North Dakota.....	211	1,025	579	1,506	309
Oklahoma.....	1,486	1,968	232	2,273	1,413
Oregon.....	3,919	2,743	884	3,959	3,587
South Dakota.....	262	545	351	717	441
Texas.....	408	76	86	110	410
Utah.....	5,106	31,085	7,265	37,958	5,498
Washington.....	3,766	2,350	812	5,213	1,715
Wyoming.....	11,061	52,754	10,059	67,919	5,955
Total Western States.....	102,433	247,396	57,619	317,095	90,353
Division of Field Services.....	2,801	8,900	1,791	9,596	3,896
Outer Continental Shelf Office.....	12	91	208	308	3
Grand total.....	105,246	256,389	59,618	327,001	94,252

TABLE 48.—*Adjudication operations, 1962 (summary by State)*

State	Unclosed cases July 1, 1960	New cases received during year	Cases reactivated during year	Cases closed during year	Unclosed cases June 30, 1961
Alaska:	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>	<i>Number</i>
Anchorage.....	6,123	5,971	5,590	12,669	5,015
Fairbanks.....	3,700	4,587	2,827	8,495	2,619
Arizona.....	10,777	6,385	1,962	15,202	3,922
California:					
Riverside.....	11,583	3,474	1,986	13,359	3,684
Sacramento.....	6,410	5,785	1,249	8,844	4,600
Colorado.....	4,551	20,117	8,885	37,020	2,533
Idaho.....	2,525	728	3,752	5,608	1,397
Kansas.....	28	58	30	98	18
Montana.....	2,859	9,422	3,187	13,187	2,231
Nebraska.....	207	168	31	367	39
Nevada.....	5,818	2,511	1,970	7,219	3,080
New Mexico.....	16,444	109,047	5,086	118,900	11,668
North Dakota.....	309	1,328	722	2,050	309
Oklahoma.....	1,413	1,878	311	3,048	554
Oregon.....	3,587	2,183	688	4,140	2,318
South Dakota.....	441	702	378	1,022	499
Texas.....	410	156	19	344	241
Utah.....	5,498	33,987	9,919	45,924	3,480
Washington.....	1,715	939	121	1,364	1,411
Wyoming.....	5,955	70,017	13,210	83,877	5,305
Other States.....	3,896	8,456	1,541	11,108	2,785
Total States.....	94,249	293,899	63,414	393,854	57,708
Outer Continental Shelf Office ¹		524	25	495	57
Grand total.....	94,252	294,423	63,439	394,349	57,765

¹ Includes 6 cases on Pacific coast.

NOTE.—Juneau consolidated with Anchorage.

Decisions of the land office, district office, and hearing examiner reversed, modified, or vacated by Director, Bureau of Land Management

Month	Number of decisions rendered	Number of cases involved	Reversed	Modified	Vacated
1961—January.....	123	471	7	10	3
February.....	101	442	4	10	3
March.....	179	577	13	19	7
April.....	140	601	4	12	10
May.....	107	274	1	6	5
June.....	119	224	8	9	7
July.....	112	274	2	4	2
August.....	107	264	1	5	4
September.....	176	657	6	3	2
October.....	108	389	3	2	9
November.....	57	322	4	0	2
December.....	213	466	1	6	11
1962—January.....	105	277	2	2	11
February.....	189	429	3	6	24
March.....	160	253	6	7	21
April.....	149	231	3	3	26
May.....	133	360	2	10	13
June.....	140	231	4	6	10
July.....	109	190	3	6	14
August.....	93	117	4	3	6
September.....	86	360	2	5	10
October.....	99	171	5	1	7
November.....	74	96	3	3	5
December.....	59	91	2	2	6
1963—January.....	127	183	1	3	3
February.....	70	127	3	1	5
March.....	118	178	3	5	4
April.....	62	155	2	0	6
Total.....	3, 253	8, 410	100	149	230
Percentage of decisions rendered by Director.....			3	4	7

Appeals to the Secretary of the Interior from decisions rendered by the Director, Bureau of Land Management

Type of case	Fiscal year 1958	Fiscal year 1959	Fiscal year 1960	Fiscal year 1961	Fiscal year 1962	Fiscal year 1963 ¹	Total
Homestead.....	25	42	25	69	153	71	385
Desert land.....	47	142	168	188	329	70	944
Public sale.....	23	41	36	82	157	65	404
Small tract.....	26	117	68	265	348	77	901
Exchanges.....	10	16	12	36	19	6	99
Selections.....	2	15	0	23	21	31	92
Land contests.....	0	0	3	4	6	7	20
Others.....	11	20	41	30	87	50	239
Total land cases.....	144	393	353	697	1, 120	377	3, 084
Oil and gas.....	171	675	320	340	286	133	1, 925
Other leasable minerals.....	62	95	30	53	76	15	331
Mining contests.....	10	156	42	78	55	45	386
Mining noncontests.....	0	0	10	32	27	22	91
Total mineral cases.....	243	926	402	503	444	215	2, 733
Grazing hearings.....	6	14	16	13	21	3	73
Grazing nonhearings.....	0	0	0	1	9	8	18
Grand total.....	393	1, 333	771	1, 214	1, 594	603	5, 908

¹ 1st 10 months (through Apr. 30, 1963).

Appeals to the Secretary

	Fiscal year—					
	1958	1959	1960	1961	1962	1963 ¹
Appeals pending at beginning of year.....	70	144	213	210	416	792
Appeals received during year.....	224	416	377	478	646	² 331
Appeals disposed of during year.....	150	347	380	272	270	² 420
Appeals pending at end of year.....	144	213	210	416	792	³ 703

¹ 9 months.² To Apr. 1, 1963.³ On Apr. 1, 1963.

Note.—These figures compiled according to "A" numbers assigned to appeals.

Decisions of the Director, Bureau of Land Management reversed, modified, or remanded by Department of the Interior

Month	Number of decisions rendered	Number of BLM decisions involved	Reversed	Modified	Remanded
1961—January.....	32	97	3	1	3
February.....	25	66	5	0	1
March.....	21	75	4	1	0
April.....	5	154	1	0	0
May.....	4	167	3	0	0
June.....	5	153	1	0	0
July.....	39	103	2	2	1
August.....	24	74	1	2	2
September.....	22	154	1	1	1
October.....	13	100	2	1	2
November.....	17	108	1	2	1
December.....	3	100	1	0	0
1962—January.....	14	134	2	0	1
February.....	24	135	1	1	1
March.....	29	119	2	0	2
April.....	20	106	2	0	4
May.....	27	69	1	0	13
June.....	28	99	1	0	2
July.....	48	123	4	1	2
August.....	67	101	2	2	0
September.....	93	179	3	3	5
October.....	45	140	3	3	1
November.....	32	107	3	0	0
December.....	40	119	7	1	4
1963—January.....	35	112	1	1	0
February.....	24	107	2	0	3
March.....	41	176	4	3	3
Total.....	777	3,177	63	25	52
Percentage of decisions rendered.....			8	3	7

Age analysis of appeals pending before the Division of Appeals as of Apr. 1, 1963

	Lands	Minerals	Grazing	Total
Less than 3 months.....	278	126	7	411
3 to 6 months.....	34	79	0	113
6 months to 1 year.....	12	98	0	110
1 to 2 years.....	7	28	0	35
Over 2 years.....	5	11	2	18
Total.....	336	342	9	687

(At the chairman's direction, the following examples of decisions by the Bureau of Land Management are included in the record at this point:)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
6.05c
Utah 025826

March 12, 1963

DECISION

Roland Willard Newbold

:
:
:

Special Land Use Permit
Second Homestead Application

Decision Vacated

Richard Willard Newbold has appealed from a decision dated November 15, 1962, requiring him to arrange for a pumping test of a well drilled under the authority of a special land use permit. The permit was issued for the purpose of exploring for sufficient water to irrigate a 160 acre second homestead entry. The decision further required that the well be equipped to produce 450 GPM for a 24 hour period. Failure to comply would result in rejection of his second homestead application.

The special land use permit was issued in order to give the appellant an opportunity to demonstrate that an adequate supply of water exists to allow him to comply with the cultivation requirements of the homestead law. Since Mr. Newbold does not wish to demonstrate the productivity of his well by conducting a test in the presence of Bureau of Land Management personnel, the Bureau should proceed with consideration of his case without the benefit of such evidence.

Accordingly, the decision appealed from is vacated and the case is remanded to the State Director for Utah for appropriate action to determine whether the lands can be classified as suitable for homestead entry and for appropriate action on Mr. Newbold's application consistent with that determination.

Karl S. Lundstrom
Director

DISTRIBUTION:

Hon. Frank E. Moss, United States Senate, Washington 25, D. C.
Hon. Wallace F. Bennett, United States Senate, Washington 25, D. C.
Roland Willard Newbold (Regular Mail)
Division of Lands and Recreation
SD (Utah) With case record Utah 025826
LO (Salt Lake City)
Case File
Appeals Reading File
Permanent File
Attorneys' Reading File
CLH

In reply refer to:
6.05c
Utah 094712

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 8, 1963

DECISION

D. R. Walton

:

Potassium

Reconsideration

Mr. D. R. Walton has appealed to the Secretary from Bureau decision of January 22, 1963, which affirmed the decision of the Salt Lake City Land Office, requiring the applicant, in connection with his potassium prospecting permit application Utah 094712, to furnish a \$1,000 bond. The Bureau decision was predicated on information in the record indicating that the applied-for lands were available for permit and the issuance of a permit was subject only to the furnishing of the required bond.

In his appeal to the Secretary, the appellant states that part of the lands applied for, namely, the SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 35, T. 29 $\frac{1}{2}$ S., R. 20 E., S.L.M., Utah, is embraced in a prior-filed application for potassium permit and that he should not be required to post a bond until a determination is made as to the availability of these lands to him as he may not want a permit under his application unless it covers all of the applied-for lands.

Information received subsequent to the Bureau decision discloses that the above-described SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 35 is embraced in a pending, prior-filed potassium prospecting permit application as asserted by the appellant. Therefore, Utah 094712 is a junior application as to this land and no action was necessary on the application to this extent pending a determination as to whether the prior applicant is entitled to a permit for the lands. Cf. John E. Miles, 62 I.D. 135 (1955). Bureau decision of January 22, 1963, is therefore modified to so hold. However, the decision is correct as to the bond requirement with respect to the remaining lands applied for, approximately 2509.78 acres, since the record shows these lands are available for prospecting permit and the issuance of a permit thereon is subject to the furnishing of the required bond. Accordingly, Mr. Walton is allowed thirty days from receipt hereof in which to submit the required bond, failing in which the application will be finally rejected as to all lands applied for except the above-described SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 35, T. 29 $\frac{1}{2}$ S., R. 20 E., S.L.M., Utah.

In view of the foregoing it is appropriate to recommend that the appeal to the Secretary be dismissed. Approval hereof by the Department will constitute dismissal of the appeal.

Karl L. Landstrom

Director

Approved: April 22, 1963

J. A. Conrad

Assistant Secretary of the Interior

DISTRIBUTION

Mr. D. R. Walton (Regular Mail)
Division of Minerals (5)
Geological Survey, Conservation Division (3)
SD (Utah)
LO (Salt Lake City)
Case File
Permanent File
Appeals Reading File
Attorneys' Reading File
WJ

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
Los Angeles 0167645

April 18, 1963

Certified Mail
Return Receipt Requested

DECISION

Harold T. Halbert and
Min M. Halbert

Oil and Gas

Decision Affirmed in Part
and Reversed in Part

Harold T. and Min M. Halbert have appealed from a decision of the Chief, Mineral Adjudication Unit, Riverside Land Office, California, dated October 17, 1962, which rejected their above-noted noncompetitive acquired lands oil and gas lease offer, which described lots 230A and 239, T. 3 S., R. 7 W., S.B.M., Riverside County, California. The decision was based on a report of the U.S. Army Corps of Engineers, Los Angeles, California, which stated that the lands embraced in the lease offer were privately owned and that the United States had no interest in them except for a flowage easement.

The appellants state that in fact the United States has a reservation of mineral rights in the land involved. In connection therewith the appellants have submitted a certified copy of a quitclaim deed describing lot 239, and transferring it from the United States to private ownership, with a reservation of mineral interests therein.

A supplemental report of the Corps of Engineers has confirmed lot 230A to be in private ownership, the United States having no mineral interest in it.

Accordingly, that part of the decision appealed from which rejected the offer as to lot 230A is affirmed.

However, the supplemental report reveals that with respect to lot 239, the appellants' contention, substantiated by the quitclaim deed facsimile, is correct.

Accordingly, the decision appealed from is reversed as to that part which found the United States to have no leasable mineral interest in lot 239 and which rejected the offer as to that lot. The case record will be remanded through the Bureau's State Director, for issuance of lease upon lot 239, all else being regular.

The appellants are allowed the right of appeal to the Secretary of the Interior, in accordance with the regulations in 43 CFR Part 221, as amended, of that part of this decision that affirmed the land office rejection of the lease offer as to lot 230A. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be \$5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Frances A. Patton

Chief, Branch of Mineral
Leasing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

Mr. and Mrs. Harold T. Halbert (Certified Mail)
SD (California)
LO (Riverside)
Division of Minerals (5)
Conservation Division, Geological Survey (3)
Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
DWG

In reply refer to:

UNITED STATES	Nevada 048847
DEPARTMENT OF THE INTERIOR	047704
Bureau of Land Management	054874
Washington 25, D. C.	055732
	6.05c

August 29, 1961

Certified Mail
Return Receipt Requested

DECISION

North American Aviation, Inc.,	:	
Exchange Applicant - Appellee	:	
	:	
Malcolm McGuire	:	
Homestead Applicant - Appellant	:	
	:	Land Exchange
W. Dalton La Rue, Sr., and	:	
Juanita S. La Rue	:	
Depauli Bros.	:	
Don Cooper	:	
Forrest L. Parmenter,	:	
Protestants - Appellants	:	
	:	

Manager's Decisions Affirmed, as Modified
Appeals Dismissed in Nevada 054874 and 047704

Reference is made to the several appeals concerning the dismissal by the land office of protests against consummation of the above-noted proposed land exchange and the rejection by the land office of homestead application Nevada 047704 for a portion of the selected lands in the proposed exchange.

In substance the appeals are directed (a) to the correctness of the determination that the proposed exchange is in the public interest and (b) to the propriety of effecting the exchange in view of (1) the economic detriment which would be occasioned certain present users 1/

1/ A protest filed by William M. Stead in his own behalf and for James E. and Marian M. Stead on July 28, 1959, was withdrawn on January 11, 1961, for the stated reason that the protestants considered the exchange to be in the public interest, the lands in question having only a marginal economic value for livestock grazing in the area.

of some of the selected lands for grazing purposes, (2) the alleged loss to the United States in failing to reserve oil and gas deposits in all of the selected lands in the exchange and particularly with respect to those selected lands which are included in outstanding oil and gas leases, and (3) the alleged higher values of the selected lands over the lands offered the Government in the proposed exchange. In addition, W. Dalton La Rue, Sr., and Juanita S. La Rue question whether the selected lands may be made available to the exchange proponents for the industrial and defense purposes to which they assert these lands will be devoted, through the vehicle of a land exchange, when such procedure will deprive the La Rues of all Federal grazing privileges they have enjoyed over many years in connection with their established ranch operation, without compensation for the loss and without a hearing in the matter. The Depaoli Bros. also have requested a hearing in the matter, with respect particularly to their grazing privileges in some of the selected lands:

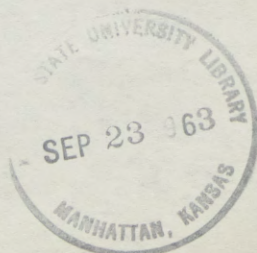
The record shows the exchange application involves 20,763.48 acres of offered lands in Ts. 29 and 30 N., R. 31 E., M.D.M., Pershing County, Nevada, within the boundaries of Winnemucca Grazing District No. 2, having an appraised value of \$90,100 for 10,807.41 acres of selected lands in Ts. 22 and 23 N., Rs. 21 and 22 E., Washoe County, within the Carson City Grazing District No. 3, with an appraised value of \$86,400. By letter of February 2, 1961, the land office notified the exchange proponent that, in accordance with 43 CFR 161.15(g), it would be required, prior to issuance of patent, to reimburse Mr. W. Dalton La Rue, Sr., as owner of the following authorized range improvements constructed on the selected lands: 120, 121, 122, 123, 124, 126, 133, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, and 148, as well as one unnumbered development in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 2, T. 22 N., R. 21 E., M.D.M., Nevada. The record shows these improvements had at that time a value of \$4,100.

The land office pointed out in the decisions appealed from that the public interests would be benefited by acquisition of the offered lands in an area where consolidation of the land pattern is needed from a grazing land-use management standpoint and by disposal of the selected lands in an area where grazing management is becoming less important

(continuation of Footnote 1)

A protest filed on August 24, 1959, by the Fish and Game Department of the State of Nevada, which was assigned serial number MRN-001309 by the land office, was withdrawn March 3, 1961, the Department of Fish and Game stating it had reached a suitable agreement with the exchange proponent as to management of the wildlife resources within the boundaries of their area.

In a reply brief filed with the record on June 5, 1961, the Depaoli Bros. have indicated they are presently in negotiation with the exchange proponent.



and impracticable due in part to the acquisition by the exchange proponent of most of the private lands in this area for purposes other than grazing. The land office held further that consummation of the exchange would benefit the public interest also through the proposed use of the selected lands by the exchange proponent in furtherance of space and missile programs of the Government in the interest of the national defense. Based on the fact that the exchange proponent was not reserving minerals in the offered lands, reports from the Geological Survey that the selected lands were not considered prospectively valuable for oil and gas or other minerals, and upon information assembled as a result of field examinations by qualified personnel of this Bureau disclosing that the lands approved for exchange are not valuable for minerals, the land office determined that the selected lands may be exchanged without mineral reservation but subject to all rights and privileges of the oil and gas lessees pursuant to outstanding oil and gas leases involving some of the selected lands.

A careful review has been made of the case record in light of the several appeals as well as the principles enunciated in the land conservation program of the Secretary of the Interior, announced February 14, 1961, which supersedes the former anti-speculation policy referred to in some of the decisions appealed from.

I

First, it is necessary to dismiss the appeal of Mr. Don Cooper because of his failure to serve a copy of his notice of appeal (filed in the land office on February 24, 1961) upon North American Aviation, Inc., within 15 days from February 24, 1961. 43 CFR 221.4, 221.95 and 221.98. The record shows the appellant's statement of reasons with a second notice of appeal, filed March 4, 1961, was served on the exchange applicant on March 7, 1961. An appellant is required to serve each document in an appeal case upon the adverse party. However, even if it were possible to ignore this omission of the appellant, and to consider the service on the adverse party of the second notice of appeal and statement of reasons as adequate notice of the appeal, it would be necessary to dismiss the appeal summarily because this notice of appeal was filed in the land office more than 30 days after service of the land office decision upon Mr. Cooper on January 31, 1961. Cf. Waldo E. Coyle et al., A-28439, May 4, 1960; Morriam T. George, A-27852, January 29, 1959.

The appeal of Mr. Malcolm McGuire is also subject to summary dismissal for failure of the appellant to serve the adverse party with the notice of appeal within 15 days from the date of filing such notice in the land office. 43 CFR 221.4, 221.95 and 221.98. It would appear from the record that the exchange proponent had notice of the appeal on

December 29, 1960, but no evidence has been presented by the appellant to establish that the notice of appeal was served upon the adverse party on or before December 17, 1960, the 15th day after the filing of the document in the land office. The statement of the appellant that she served the adverse party by registered mail is insufficient to constitute proof of service in compliance with the rules of practice. E. O. Bishop et al., 64 I.D. 25, January 28, 1957. Nor can the appellant's receipt for mailing a registered letter to North American Aviation, Inc., on December 2, 1960, serve as the required proof of service within the 15-day period allowed therefor.

In the circumstances these appeals are dismissed.

II

Section 8 of the Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., sec. 315g), authorizes the Secretary of the Interior to approve land exchanges "when public interests will be benefited thereby" and the values of the selected lands do not exceed the values of the offered lands.

The record amply demonstrates that acquisition of the offered lands is beneficial to the proper and effective management of the grazing resources in the Bureau's land-management program in the area. It is evident that the exchange of the selected lands will affect the livestock operations of the grazing users of these lands, the effect to the La Rues' operations being substantial and that upon the Depaoli Bros. of a lesser degree. These factors have been considered. Nevertheless, the benefits accruing to the public interest in facilitating the administration of the Winnemucca Grazing District No. 2 by improving the land-ownership pattern therein and by permitting more proper land-use management, and in disposing of the selected lands within the Carson City Grazing District No. 3, where grazing management is becoming less important and impracticable, are considered to outweigh the disruption of private livestock operations created by the loss of the use of the public lands to be exchanged. Harold Stewart and Cecil Fisher, A-26557, April 8, 1958; Cf. Willis N. Farlow et al., 62 I.D. 206, May 27, 1955.

It is to be noted, however, that the Manager erred in his decisions to the extent he implied or ruled that the proposed use of the selected lands by the exchange proponent, in furtherance of space and missile programs of the Government, is a persuasive factor in determining whether the proposed exchange is in the public interest and in accord with provisions of the Taylor Grazing Act, as amended, supra. Considerations of the public interest in a land exchange under the Taylor Grazing Act involve matters related to conservation of Federal resources, i.e., whether the exchange will facilitate the administration of the public

lands, e.g. promote the interests of conservation or range management. The decisions appealed from are therefore modified to eliminate any reference to any so-called national defense justification for the exchange, this being extraneous to the issue of the public interest in the exchange.

The appraisal information of record has been reviewed, and the reports appear adequate and they support the conclusions that the offered lands exceed the selected lands in value, as noted above. Appraisal data on the lands were made available for examination by attorneys for some of the appellants, pursuant to request therefor. No substantial or positive evidence has been presented by the appellants to show that the appraisal of the lands is incorrect or that any change therein is warranted.

The land office correctly held that Mr. W. Dalton La Rue, Sr., as owner of authorized range improvements upon the selected lands, is entitled to reimbursement for them. 43 CFR 161.15(g). There is no entitlement, however, to the grazing users for compensation as a result of their loss of grazing use of the selected lands or the effect of such loss upon their livestock operations in this case. The granting of the permits for grazing privileges in the selected lands did not create any rights in these lands in the permittees for which they could be compensated upon consummation of this exchange. Compare in this connection provisions of the Taylor Grazing Act, as amended, in 43 U.S.C., 1958 ed., secs. 315(b) and 315(q). Contrary to the assertions of the La Rues, the transfer of the selected lands does not constitute a taking for defense projects as contemplated by the latter mentioned provision of the Taylor Grazing Act, as amended.

The procedures followed by the land office in processing the exchange application and in considering the protests were correct. The record shows the exchange proponent has complied with all requirements stipulated by the land office. The processing of applications for private exchanges or of protests against them is not subject to the provisions of the Administrative Procedure Act relating to adjudications. J. D. Critchlow et al., A-27907, August 4, 1959.

A protestant against a private exchange is not entitled as a matter of legal right to a hearing on matters relating to the allowance of the application. Glenora Sheehan Hunter et al., A-27267, February 29, 1956. The controlling issue in this matter is the public interest in effecting the exchange. The record which has been assembled in the matter is extensive and complete, and it does not appear that any additional relevant facts could be brought out in a hearing. It does not appear that a public interest would be served by a hearing in the matter. The interest so represented would appear to be the private interest of the

grazing users of the selected lands only. Accordingly, the requests for hearing are denied.

Concerning the requests of the La Rues for permission to inspect the record pertaining to the exchange proposal, the record shows the public portion of the file was made available for their inspection by the land office and that by letter dated April 3, 1961, the Associate Director of the Bureau responded to their request for permission to inspect the non-public portion of the file. The La Rues were notified that the Bureau would consider further requests for the inspection of any specific documents in the exchange record, provided the request disclosed the manner in which these documents would be relevant to the interest of the La Rues. Since no further communication was received in the matter subsequent to this correspondence, this matter has been considered closed. Cf. Marian M. Nicoll et al., A-28243, September 13, 1960.

III

The ruling of the land office concerning the mineral estate in the lands is consonant with the law, the regulations and departmental position. Where, as in the instant case, the lands are considered to be without value for minerals, metalliferous or nonmetalliferous, and the exchange proponent makes no mineral reservations in the offered lands, no reservation of mineral rights is made in the selected lands. The granting of the lands to the exchange proponent with the mineral rights, but subject to the outstanding oil and gas leases, will not alter the rights which the lessees have in these leases. The leases will remain in effect and the lessees will have the right to renew for an additional five years in the same manner as if title to the land remained in public ownership.

CONCLUSION

After careful consideration of the record and the arguments advanced by the protestants, it is concluded that the protestants have not established by positive and substantial evidence that the proposed exchange is not in the public interest, or that the protests should be sustained. Therefore, the decisions of the land office are affirmed, with the modification as noted above.

The appellants are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be \$5.00. In taking an appeal there must be strict compliance with the regulations.

If an appeal is taken, the adverse party to be served is:

North American Aviation, Inc.
C/o Messrs. Woodburn, Forman, Wedge,
Blakey and Thompson
Attorneys at Law
First National Bank Building
206 North Virginia Street
Reno, Nevada

R. H. Hockmuth

Associate Director

Enclosure

DISTRIBUTION:

North American Aviation, Inc. (Certified Mail)

Attorneys for Appellee: Messrs. Woodburn, Forman, Wedge,
Blakey and Thompson
Mr. Charles Pickett
Miss Judith T. Younger
Mr. Warren E. Baker

W. Dalton La Rue, Sr., and Juanita S. La Rue (Certified Mail)

Attorneys for Appellants: Messrs. Richard H. Levin and
Alan L. Reinstein
Messrs. D'Ancona, Pflaum, Wyatt and
Riskind
Mr. David Ginsburg

Malcolm McGuire (Certified Mail)

Depaoli Bros. (Certified Mail)

Attorney for Appellants: Mr. Edward C. Reed

Don Cooper (Certified Mail)

Forrest L. Parmenter (Certified Mail)

Attorney for Appellant: Mr. Eugene J. Wait, Jr.

Frank W. Groves, Director, Fish and Game Department, State of Nevada
(Regular Mail)

William M. Stead (Regular Mail)

James E. Stead (Regular Mail)

Marian M. Stead (Regular Mail)

Attorneys: Messrs. John Chrislaw and Peter Echeverria

Hon. Alan Bible, United States Senate

Hon. Howard W. Cannon, United States Senate

Hon. Walter S. Baring, House of Representatives

Hon. John E. Moss, House of Representatives

Hon. Grant Sawyer, Governor of the State of Nevada

SD (Nevada)

LO (Reno)

DO (Carson City, Nevada)

Division of Lands & Recreation

Division of Minerals

Case Files

Permanent File

Attorneys' Reading File

Appeals Reading File

FAP

- PUBLIC LANDS * 1 Generally
* 10 Appraisal

The established appraised value of land for industrial sites applied for by the City of Miles City, Montana, under the Act of June 16, 1950, will not be disturbed, where the appraised value is based on the market value of similar type lands in the vicinity and appellant has failed to furnish substantive or convincing evidence that such appraisal is excessive or unreasonable.

City of Miles City, Montana, Montana 029858 (March 18, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

Montana 029858
5.04g

March 18, 1960

Certified Mail
Return Receipt Requested

DECISION

City of Miles City, Montana :
 :
 :
 :
 :

Application to Purchase under
the Act of June 16, 1950

Decision Affirmed

The City of Miles City, Montana, has appealed from a decision of the Chief, Land Adjudication Section, Montana Land Office, dated November 27, 1959, requesting the purchase price based on the valuation of \$500.00 per acre for 14.72 acres of public land, which it applied for pursuant to the act of June 16, 1950 (64 Stat. 233). 1/

The appellant contends in substance that the appraised price of the land as established by the Bureau of Land Management at \$500.00 per acre is too high, based on information it has obtained from various sources. The appellant asserts in substance that the tract being purchased is isolated, because it is at the end of a presently barricaded road; that it would be expensive to develop; and, that industrial or commercial values placed on land purchased recently in the vicinity thereof should receive only minor consideration as Miles City is not in a commercial area. The appellant further contends that taking into consideration the fact that there is little or no value or demand for the land in its isolated location as a commercial or industrial site, and the fact that the applicant is merely a community service to the livestock industry, an over-all appraisal price of \$100 per acre would be fair. The appellant concludes that it needs one acre of the land for which the price of \$500 per acre would be reasonable. As to the remainder of the tract, the appellant values four acres of irrigable land at \$200 per acre and 9.72 acres of dry land pasture at \$25.00 per acre. The appellant has submitted a considerable amount of data as to sales of land in the area and statements of other persons concerning the appraisal of the land in question in support of its contentions that the appraised value of the land as established by the Bureau of Land Management is too high.

1/ The Act of June 16, 1950 (64 Stat. 233), as amended by the Act of July 29, 1955 (69 Stat. 395) provides for the purchase of certain public lands by the City of Miles City, Montana, for industrial and commercial purposes.

The report of field examination made in connection with the sale of the tract, shows it to be located approximately $3/4$ miles from Miles City on a dead-end County road. U. S. Highway No. 10 is approximately $1/4$ mile away by road. The Miles City Salesyard Company, which plans to purchase the tract in question is located on land which joins the tract on the east and lies between this tract and U. S. Highway No. 10. Access to the Northern Pacific and Milwaukee Railroads is provided by a lane to the Miles City Salesyard location and the tract in question. The tract is presently being used by the Fort Keogh Range Livestock Experiment Station as a holding pasture. The tract in question is not isolated as contended by the appellant, although the County road leading to it may be temporarily barricaded at the present time.

In arriving at the appraised value of the land of \$500 per acre, a comprehensive study was made by employees of the Bureau of Land Management, as to recent sales of comparable land for industrial and commercial sites. Information obtained by the Bureau of Land Management employees, and based upon recent sales of comparable lands shows a range of values from \$460 to \$1000 per acre, the larger portions of the sales ranging over \$500 and up. Rental information shows that small, better located and more desirable industrial or commercial sites have a value of from \$700 to \$1860 per acre based on a capitalization rate of 7%. From these values, this Bureau established the fair market value of \$500 per acre or a total of \$7360.00, less the amount of \$618.90 allowed for fencing, leaving a total \$6741.10, to be paid as the purchase price of the land.

In order that a fair and just appraised value of the land might be established, a report was requested to be made by personnel of the Bureau of Reclamation. The appraised value of the land as established by the Bureau of Reclamation was somewhat lower than that of this Bureau, the total value being placed at \$4500 for the 14.72 acres or an average price of approximately \$300 per acre. This appraisal was based on recent sales in the area, and took into consideration inaccessibility of the tract in question, limited market, and the limitations placed upon the land by the provisions of the act under which it was applied for and by the Miles City Planning Board itself.

All of the information gathered as to the appraisal of the land by both Bureaus was finally reviewed by personnel from this Bureau's Area Office at Denver, Colorado, and the Bureau's Montana State Office Appraisal Review Board. All available data was carefully checked, and the final determination was made that the \$500 per acre appraised value established by personnel of this Bureau is justified and sound.

It is noteworthy that the appellant in arriving at what it believes to be a fair market value for the land, has considered the largest portion as agricultural land rather than as an industrial or commercial site. The

appellant has listed some 15 recent sales of land in the vicinity of Miles City. Some of the lands involved are somewhat comparable to the land in question in that uses more intensive than economically feasible agricultural production are evident. Some of the lands are too far from the city to have value for anything but agricultural use. Based on the data furnished by the City, of the sales listed and numbered 2, 3, 4, 5, 11, and 15, the sales prices range from \$103 to \$400 per acre. Sales 2, 3, 4, and 5 are strictly in an agricultural area, more or less suitable for suburban residential use, and are located approximately 3 miles from the City center. Sale No. 11 was for land a comparable distance away and out of the Yellowstone Valley. Sale No. 15 was for land strictly agricultural in character, approximately 2 miles from the City center, and on the opposite side from railroad facilities.

The prices in sales numbered 7, 8, 10, 13, and a resale in number 10, ranged from \$400 to \$600 per acre. These lands are closer to the City than those previously discussed. They compare more favorably with the land in question because of their location.

The data as to the sales numbered 1, 9, 12, and 14, furnished by the City shows that the lands involved are the more choice properties than the land in question because of their better quality and location. Prices for the lands in sales numbered 1, 9, 12, and 14 ranged from \$800 to \$1000.

The information furnished by the appellant as well as the Bureau appraisers as to the values of land sold, serve as a good basis upon which to make a thorough analysis of the values of commercial and industrial type land adjacent to or in the vicinity of Miles City. However, the appellant has not furnished an objective analysis by a qualified impartial appraiser, upon which to base its conclusion that the market value of the land applied for should only be \$100 per acre. The land has been applied for as an industrial site as provided for by the Act of June 16, 1950, and agricultural lands, as such, cannot be purchased under the act. Even though the land may be used as a holding pasture, an agricultural use, the contemplated use appears to be in connection with the Miles City Salesyard, which is a commercial enterprise. The land must be considered as a commercial or industrial site as contemplated by the act under which it has been applied for, and must be sold at its fair market value and the Bureau may not sell it for less.

After a careful consideration of all of the factors in the instant case, including the market values of similar type lands in the vicinity as based on an analysis of all of the sales information at hand, we conclude that the price of \$500 per acre does not exceed the fair market value of the land in question. The appellant has not submitted any substantive or convincing data or other showing that the appraisal is excessive or unreasonable. Cf. Melvin K. Dalton, Colorado 09150 (August 7, 1957).

Accordingly, the decision appealed from is affirmed, subject to reconsideration of the appraisal at the time the case is returned to the Manager for the consummation of the sale, to take into account any possible appreciation of values since the original appraisal.

The City of Miles City, Montana, is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations contained in 43 CFR Part 221, as amended. See enclosed Form 4-1365. The appellant, being a municipal corporation, is not required to remit a filing fee in the event an appeal is taken. In taking an appeal there must be strict compliance with the regulations.

Paul F. Thomas
Acting Director

Enclosure

DISTRIBUTION:

City of Miles City, Montana (Certified Mail)
Lands Staff Officer
Appeals List No. 1
RBO

In reply refer to:

Arizona 019675, etc.
6.05cUNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

September 20, 1961

DECISION

Frank G. Lizarraga et al.:
:
:

Homestead Applications

Decisions Affirmed

Frank G. Lizarraga and others listed in the attached appendices have appealed from decisions rejecting their respective homestead applications for lands in the Rainbow Valley - Waterman Wash - Vekol Valley area of Arizona. Each of the applications was rejected because the current water requirements for the irrigation of lands already under cultivation exceeds the annual rate of recharge to the underground water supply, and because the costs of developing the lands prohibits the permanent reclamation of the lands as economic, self-sustaining farm units.

The Secretary of the Interior has determined that it is in the public interest to conduct the Department's land-management programs in a manner providing for the conservation of groundwater supplies.

In each of the cases under consideration, it has been clearly demonstrated by Bureau of Land Management investigations, by U. S. Geological Survey findings, and by water consultants employed by some of the applicants, that the groundwater supply in the Rainbow Valley - Vekol Valley - Waterman Wash area is now being mined by present agricultural operations, and that allowance of each or any of the subject homestead applications would only serve to increase the rate of groundwater depletion in this area, endangering existing operations, endangering future use of the existing water for more essential and productive needs and uses, and precluding other use or disposition of the public lands which would be more in the public interest.

In view of this, it would be contrary to the Secretary's program to allow any of the agricultural entries in the Rainbow Valley - Vekol Valley - Waterman Wash area.

Consequently, it is affirmed, in view of these considerations, that none of the tracts of public lands involved is "more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants" (48 Stat. 1269 as amended; 43 U.S.C. 315f) and hence a classification of any of these lands as proper for entry under the homestead laws, as sought by each of the appellants, may not validly be made under the provisions of the act cited. Accordingly, in view of the discretionary authority the above-cited statute vests in the Secretary of the Interior, the applications are finally rejected.

The applications listed in Appendix B are in this office as a result of appeals from decisions requiring the applicants to submit additional information to support their applications. However, since these applications embrace lands in the area covered by this decision, they are hereby rejected for the reasons listed in the above paragraphs.

The appeals filed by the applicants listed in Appendix C are not only subject to rejection on the classification grounds stated above, but are also subject to summary dismissal for the reason that the applicants have failed to comply with the procedural requirements for appealing to the Director. See 43 CFR Part 221, as amended. Many of the appeals were not supported by statements of reasons, or the statement of reasons was not filed within the period allowed by the regulations, and in some instances, there is no proof that the appellants served the adverse party named in the decision appealed from with a copy of their notice of appeal and statement of reasons.

We have noted that in many cases the signatures on notices of appeal and statements of reason were obviously not affixed by the same person who has signed the applications themselves. The appellants' attention is directed to the regulations in 43 CFR Part 1 which outline the qualifications of those who may practice before the Department on behalf of applicants. Since, however, all of the applications must be rejected for the reasons listed above, the Bureau has concluded that it would serve no useful purpose to pursue this matter further at the present time.

Many of the appellants have demanded that hearings be held. Hearings are not held, however, where the sole issue is the question of the proper classification of lands. Cf. Ferris F. Boothe, 66 I.D. 395 (1959). Hence, their demands are denied.

W.K. Hochmuth

Associate Director

Approved: September 20, 1961

John A. Cannon, Jr.

Assistant Secretary of the Interior

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Hon. Carl Hayden, U. S. Senate
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Hon. John J. Rhodes, House of Representatives
Hon. D. S. Saund, House of Representatives
Roe & Petsch, Attorneys at Law (Regular Mail)
A. Y. Moore, Attorney at Law (Regular Mail)
Edward E. Williams, Attorney at Law (Regular Mail)
W. Francis Wilson, Attorney at Law (Regular Mail)
Bayham and Huffsteter, Attorneys at Law (Regular Mail)
Each Appellant (Regular Mail)
Chief, Div. of Lands & Recreation
SD (Arizona)
LO (Phoenix)
Case File
Permanent File
Attorneys' Reading File
Appeals Reading File
LLM

APPENDIX "A"

<u>Serial Number</u>	<u>Name</u>
Arizona	
019675	Frank G. Lizarraga
020286	Henry D. Pelham
020295	Robert L. Koch
020528	John T. Bales
020969	Roderick U. Grandy
020979	Carl E. Babcock
021490	John L. Vogt
021160	Delwin L. McMinn
021161	Helen F. McMinn
021182	Charles R. Ford
021188	Hoillis Webb
021191	Amelia J. Babcock
021192	Roger L. Eastman
021347	James O. Mainord
021353	Joseph E. McKee
021354	George B. Koch
021560	Carl A. Hegi
021638	Joseph F. Flood
021659	Phillip F. Falkenstein
021660	William J. Falkenstein
021662	Dured V. Houck
021786	Sumner N. Howard
021834	Woodrow Baker
021923	Silas E. Abbott
021924	Paul Abbott
022062	Joe Lambert
022073	Norman Nichols
022074	Mabel Nichols
022099	Harold L. Rice
022207	George Harold Crose
022208	Maude M. Lambert
023352	Fred W. Underwood
022357	Thelma E. Shepard
023516	Lawrence H. Watkins
023517	William J. Smith
023518	John J. Friedman
023521	Earl V. Heckman
023539	James F. Russell
023563	Orman C. Emery
023564	John C. Wright
023565	Paul F. McCune
023570	Herbert R. Kampert
023571	Harve O. McInish, Jr.
023573	Dean W. Allen

Arizona

023659	Charles R. Dotson
023661	Bill R. Sonner
023668	Russ Scholtz
023956	Robert M. Gillen
023958	Robert A. Thompson
023959	Carl D. Thompson
023960	Belton E. Hodges
023961	Clarence E. Hodges
023963	James D. Thompson
023964	Dorice L. Martin
023966	Raymond H. Coffelt
023967	Joanna H. Lieler
023968	Melvin R. Martin
023970	Donald L. Martin
024010	William O. Hintze
024029	George Ladra
024030	Heartsill A. Johnson
024031	Hayden E. Ladra
024032	Lawrence D. Ladra
024056	Charles E. Roseberry
024061	Fred D. Cathey
024216	Leonard Dankowski
024255	Teddy F. Warner
024256	Carl N. Smith
024257	Jonathan H. Michael
024261	Fernando Carrera, Jr.
024262	Mardell L. Young
024270	Walter W. Crabtree
024271	John R. Richards
024272	William L. Scovel
024273	Loraine F. Herget
024276	Walter L. Hall
024290	George J. Konnoff
024291	Rodney K. Kayes
024293	Olice C. Dillard
024312	J. F. Shumaker
024390	Archie E. Davis
024391	Jay Smalley
024461	Gilbert S. Boers, Jr.
024479	Harold C. Olson
024521	Leonard J. Bietz
024709	Willis L. Peterson
024722	Wayne O. Earley
024743	Donald M. Thrift
024744	Charles Kalil
024745	Chris Anderson

Arizona

024846	Alvin E. Alvey
024857	Russell W. Desman
024858	E. Lee Fitzhugh
024859	Roberts B. McCoy
024864	William B. Schmickel
024871	Allen R. Wagner
024872	William B. Fahey
024874	Truman E. Prentice
024933	Creve C. Maples
024958	Philip E. Prentice
024992	George D. Hough
025014	George F. McGrath
025021	Edward H. Broad
025022	Ralph Harmon
025082	William V. Allen
025190	Donald L. Puente
025192	Herman A. Schmidt
025193	Oliver B. Buskirk
025197	George F. Baroch
025272	Leland E. Kirkpatrick
025278	Dorsey W. Chisum
025295	Henry E. Suneson
025296	Mollie A. Crouch
025297	James H. Crouch
025301	Pat N. York
025302	Burton E. Crocker
025304	Robert E. Clark
025305	Wanda J. White
025306	John V. Brothers
025307	Keith Turner
025308	Raymond V. Stearns
025309	Omer A. Frost
025311	James D. Wagoner
025314	Harold S. Parks
025315	Clarence A. Johnson
025316	Bee A. Brothers
025317	Theodore J. Bethel
025318	Elizabeth Martinez
025319	Avo B. Bethel
025323	Everett W. Hatchett
025325	Lamon T. Bell
025331	Otis N. Bradley
025332	Leland R. Wigley
025348	Doyle M. Whitlow
025353	Frank G. Johnson
025357	Iver S. Orcutt

Arizona

025359	Bert W. Orcutt
025378	Larry B. Birch
025379	Milo P. Birch
025384	George R. Howard
025386	Keith D. Taylor, Jr.
025389	Emerson G. Huff
025391	Ethel D. Ashley
025393	Murrel P. Herman
025398	Worthy Adams
025432	James R. Edwards
025434	Bertha M. Henderson
025438	Carl P. Engelbrecht
025444	Carl D. Remmler
025448	Edward C. Lopez
025458	Marshall G. Eichenauer
025459	A. L. King
025460	John C. Eichenauer III
025469	Boyd L. Gaines
025480	Kenneth R. Eichenauer
025481	Charles Bayham
025482	Alan P. Bayham
025483	Ruth W. Adam
025484	Sam M. Jiacalone
025485	Wilbur C. Bayham
025486	Raymond Huffsteter
025487	Michael Pascal
025488	Carl L. Dyer
025490	Bert P. Lough
025492	Edward Kuykendall
025493	Lillian Kuykendall
025494	Wayne R. Dimmit
025596	Anna H. Edwall
025587	Dave Williams
025589	Eugene J. Sykes
025594	Glenn W. Shaw
025595	Ray E. Shaw
025598	Henry C. Shaw
025605	John W. Ridley, Jr.
025606	Vincent D. Collins
025608	Alvin Collins
025616	Thomas Q. Beatty
025619	James S. Beasley
025620	Luther J. Harper, Sr.
025621	Johnny H. Price
025623	John W. Welkos
025661	F. Lee Wilson

Arizona

025662	Frederick Z. Board, II
025677	Thomas N. McCoy
025678	Rev. Perry V. Davis, I
025680	Carl W. Divebiss
025682	Wilbur Edward Buckley
025685	Donald Mlacker
025726	Hummum Anderson
025730	Lawrence Callahan
025731	Louis H. Coor
025732	Alonzon Chappell
025733	Porter Callahan
025734	City Scott
025735	McKinley Hill
025736	Ben Roberts
025737	Gilbert Gray, Sr.
025738	Willie L. Gray
025739	Melvin E. Gray
025740	Herbert Gray
025741	Clarence J. Gray
025742	Lonnie Q. Gray
025753	Gilbert Gray, Jr.
025756	Vincent J. Zepp
025769	A. Loretta Kozel
025770	Kenneth E. Johnson
025771	Christine E. Tefft
025781	Shirley McMahon
025798	Helen L. LeCuyer
025819	Thelma C. Evans
025821	Claude Barber
025825	Vernon Cherry
025829	Glenn C. Morris
025830	Obed L. Woods
025831	Karl O. Oksanen
025834	H. B. Daniels
025846	Floyd D. Greenlee
025851	Robert W. Barton
025861	Harry Holden
025863	T. A. Gundy
025866	Donald L. Sherrill, Sr.
025870	Harry S. Cochran
025871	Chester Callahan
025876	Nancy E. Witt
025877	Richard C. Witt
025938	Cressworth C. Lander
025994	Richard R. Crance

Arizona

026001	Donald E. Lander
026067	Ray E. Cagle
026058	Forrest L. Cagle
026069	Frederick M. Aspey
026353	Willie Nell Payne
026391	Ann Oberlies
026448	Gary G. Zesiger
026520	Jacqueline Shelly
026521	John H. Lindauer
026533	Louise H. Lindauer
026537	Curtis J. Swanson
026543	Joseph A. Sarwin
026545	P. O. Springer
026560	Ruth D. Henderson
026562	J. D. Bailey
026576	John W. Fanning
026580	Howard E. Miller
026587	Artell E. Johnson
026588	Richard H. Bell
026617	Robert L. Drake
026626	Arthur R. Watson
026633	Rosolino Lo Curto

A P P E N D I X "B"

025341	Capt. Robert A. White
029855	Jerome A. Mussman

A P P E N D I X "C"

020974	Louis F. Joslin
021687	Eugene M. Ybarra
021925	John M. Ybarra
021926	Rito M. Ybarra
021927	Julian M. Ybarra
022343	Charles W. Garling
022358	Mike G. Aguilar
023965	Hubert L. Raper
024428	Cedric E. Fite
024877	Louis P. Rudin
024953	James E. Rutherford
024966	Melvin L. Rhinehart
025081	Donald A. Godman
025083	Cecil N. Perkins
025201	Billy D. Hayes, Jr.
025290	Quentin D. DeMuth
025399	Donald L. Bankowski

Arizona

025471
025489
025638
025743
025778
025779
025780
025791
025852
025874
026071
026379
026449
026549
026608
026612
026613
026615
026627
026640
026611

Richard L. Cutsinger
Mary Alice Pigg
Noel B. Fisher
Boyce Q. St. Clair
Gertrude Nixon
Gus Grant
Lloyd Sutton
Donald J. Rideau
Leo Pendergast
John W. Ridley
Isiah Gipson
Olliver Kissling
Denton E. Zesiger
Donald M. Skog
Leslie Droë
Wilber L. Jenkins
Virginia L. Spear
Ina Drake
Ross S. Ramos
Pauline A. Shanks
William K. Helms

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:

6.05c

Misc. No. 47-86995 (Idaho)

November 13, 1962

DECISION

R C Wake et al

:
:
:
:
:

Protest against the proposed
agricultural classification
of public land in the Raft
River drainage basin

Manager's Decision Affirmed

On October 4, 1957, R. C. Wake and others, through their attorney, appealed to the Director of the Bureau of Land Management from a decision issued by the Manager of the Boise, Idaho, Land Office. That decision, dated September 5, 1957, dismissed the protest filed by the appellants against the proposed agricultural classification of certain public lands located in the Raft River drainage basin. The classification was conditional as to each tract applied for; each applicant for the lands being required to prove the existence of an adequate underground water supply prior to the allowance of his homestead or desert land application.

In his decision, the Manager held that the Bureau of Land Management is in no position to deny persons the right to apply for entry under the homestead and desert land laws regardless of economic conditions, and that the lands he proposed to conditionally classify for agricultural entry had been carefully examined and found suitable for the production of agricultural crops through the application of irrigation water. The Manager stated that the only unknown factor was the availability of water for the irrigation of the lands, and pointed out that a showing of adequate irrigation water would be required of each homestead and desert land applicant before his application would be allowed. In this connection he stated that each applicant would be permitted to enter 5 acres of the land for which he had applied for the purpose of drilling a test well to prove the existence of an adequate underground water supply. The Manager also held that the Bureau of Land Management is in no position to question the source of capital to be used to develop the lands so long as the development is accomplished in accordance with the applicable laws and regulations.

The protestants alleged that the Manager erred in fact in determining that all of the lands included in the proposed classification notice are suitable for agricultural purposes, and in assuming that sufficient underground water is available for the irrigation of all the lands he proposed to classify. They also argued that the Manager erred in law in stating that the Government is not interested in who finances the development of the individual entries as the purpose of the homestead law is to permit individuals to acquire property rather than one person or combine to acquire, through mesne conveyances, large tracts of land from the Government.

Shortly after the appeal was filed, the protestants requested that a hearing be held in order to determine the proper answers to the allegations made in their appeal brief. A hearing was subsequently ordered for the purpose of receiving testimony and evidence concerning 14 designated issues of fact relating to the proper classification of the lands described in the proposed classification order. This hearing was held August 1, 2, and 3, and October 3, 1961.

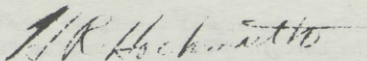
The protestants' contention that the Manager erred as a matter of law in stating that the Government is not interested in who finances the development of the proposed homestead and desert land entries is not correct. The laws and regulations do not impose any restrictions on the sources from which an entryman may obtain the funds needed to develop his entry. It is only with the sale, assignment, or mortgage of the entry before the submission of final proof with which the laws and regulations are concerned. See 43 CFR 166.10 and 232.15 et seq. Moreover, the protestants have submitted no evidence tending to show that the homestead and desert land applicants are not proceeding in good faith.

Hence, the only question remaining is whether the appellants have shown that the Manager erred in fact in finding that all of the lands included in the proposed classification notice are suitable for agricultural purposes, and in assuming that sufficient underground water is available for the irrigation of all the lands. In this connection, it has been uniformly and repeatedly held that one who challenges the Bureau's classification of land must show, through the submission of substantial, affirmative proof, that the classification is erroneous. Cf. Ramon Q. Ortega, A-28661 (February 8, 1962).

An evaluation of the evidence submitted by the appellants reveals that they have not carried the burden they assumed when challenging the classification. With respect to the suitability of the lands for agricultural purposes, the appellants have not shown that there is not sufficient irrigable soil in each proposed entry. As to the sufficiency of the underground water supply, they have not shown that sufficient underground water is not available for the irrigation of the approximately 9,000 acres of irrigable land embraced in the proposed entries.

Moreover, the protestants' allegation that the Manager erred in assuming that there is sufficient underground water available for the irrigation of the lands is based on an erroneous interpretation of the facts. The Manager did not assume that sufficient water is available. He specifically stated in his opinion that the availability of adequate irrigation water was an unknown factor, pointing out that each applicant would be required to drill a test well to prove the existence of ample water before his entry would be allowed.

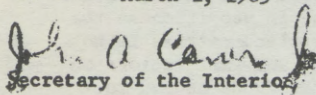
Accordingly, the dismissal of the protest is affirmed.



Acting Director

Enclosure

Approved: March 1, 1963


Secretary of the Interior

DISTRIBUTION

Hon. Len B. Jordan, United States Senate
Hon. Frank Church, United States Senate
Hon. Ralph R. Harding, House of Representatives
Mr. Herman E. Bedke, Attorney for the Protestants (Regular Mail)
Messrs. S. T. Lowe and Kales E. Lowe, Attorneys at Law (Regular Mail)
Mr. Lawrence H. Duffin, Attorney at Law (Regular Mail)
Each applicant listed in attached appendix (Regular Mail)
SD (Idaho)
LO (Boise)
Office of Hearing Examiners, Salt Lake City, Utah (Regular Mail)
Hearings Administrative Officer
Geological Survey
Division of Lands and Recreation
Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
LLM

APPENDIX

Homestead Applications

Delbert R. Woolsey
Idaho 05351

Jay E. Bowen
Idaho 05362

Desert Land Applications

Edward A. Boyd
Idaho 04476

Arthur V. Daley
Idaho 04501

Marion J. Callister
Idaho 04611

Elam J. Sanders
Idaho 04924

Ida Sanders
Idaho 04926

Dennis D. Biggers
Idaho 05069

Phebe F. Biggers
Idaho 05070

Donald W. Black
Idaho 05073

Charles E. Utt
Idaho 05159

Evan L. Black
Idaho 05210

Elisee J. Ollivier
Idaho 05321

Joseph E. Lee
Idaho 05339

Fred W. Trautwein
Idaho 05343

Treva May Trautwein
Idaho 05344

Glenn L. Jones
Idaho 05695

John A. Glenn
Idaho 06098

Marjorie P. Newcomb
Idaho 06400

Earl L. Somsen
Idaho 06870

Olive E. Stoor
Idaho 06889

Don A. Greenwell
Idaho 06928

Lillian Thompson
Idaho 06993

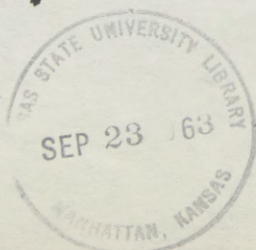
Clark W. Ward
Idaho 06997

Vardis June Ward
Idaho 06999

Charles A. Montgomery
Idaho 07000

Eva Montgomery
Idaho 07001

Lester Thompson
Idaho 07004



Bud M. Stoor
Idaho 07131

Kasper E. Backman
Idaho 07249

Marjorie Humphrey
Idaho 07392

Everett T. Johnson
Idaho 07394

Lois Smith
Idaho 07396

Viola Gertrude Temple
Idaho 07424

Wells Hepworth
Idaho 07289

Wayman Yarbrough
Idaho 07212

Rawlins J. Harper
Idaho 07271

Nolan B. Humphrey
Idaho 07393

Della Mae Johnson
Idaho 07395

Theodore Tuttle
Idaho 07397

Orvil E. Beecher
Idaho 07476

In reply refer to:
6.05c
Fairbanks 028764

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 22, 1963

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Calvin C. Carroll : Homesite Notice of Location
:
:
:
:
Decision Affirmed

Calvin C. Carroll has appealed from a decision, dated November 21, 1962, notifying him that the Geological Survey had reported that the land embraced in his above-noted notice of location of settlement under the Homesite law was prospectively valuable for oil and gas, and therefore, the land was subject to the act of March 8, 1922 (48 U.S.C. 376-377), as amended, and the regulations 43 CFR Part 66 1/. The decision allowed him 30 days from the receipt thereof within which to file a petition supported by technical evidence, for reclassification of the land as nonmineral in character, failing in which, any certificate or patent issued for the land would be impressed with a reservation of the oil and gas to the United States in accordance with the provisions of the act of March 8, 1922, supra.

The appellant asserts in substance that since no oil and gas leases have been issued on lands in Fort Yukon, where his homesite claim lies, he believes a mistake has been made in identifying his claim and declaring it valuable for oil and gas.

The record shows that the land involved was correctly identified by the metes and bounds description of the land which was based upon the sketch map submitted by the claimant with the notice of location of his homesite.

The regulations (43 CFR 102.22) provide:

"(a) Where the Geological Survey reports that land embraced in a nonmineral entry or claim on which final proof has not been submitted or which has not been perfected in an area in which valuable deposits of oil and gas may occur because of the absence of reliable evidence that the land is affected by geological structure unfavorable to oil and gas accumulation, the entryman or claimant will be notified thereof and allowed a reasonable time to apply for reclassification of the land as nonmineral, submitting a showing therewith, and to apply for

1/ The act of March 8, 1922 governs agricultural entries on coal-oil and gas lands and 43 CFR 66.2 provides that the general instructions in 43 CFR Part 102 will be followed in matters of practice and procedure in such cases.

a hearing in event reclassification is denied, or to appeal. He must be advised that, if a hearing is ordered, the burden of proof will be upon him, and also that if he shall fail to take one of the actions indicated, his entry or claim and any patent issued pursuant thereto will be impressed with a reservation of oil and gas to the United States." Underscoring added.

The record in the instant case shows that the Geological Survey reported on October 25, 1962 that the land involved is valuable prospectively for oil and gas. Therefore, the appellant's homsite location is subject to the act of March 8, 1922, supra, and any patent issued pursuant thereto must be impressed with a reservation of the oil and gas deposits to the United States, unless, upon application by the appellant, the land is finally reclassified as nonmineral. Accordingly, the decision appealed from is affirmed.

The appellant is allowed 30 days from the receipt of this decision within which to either make application to the Director, Bureau of Land Management, Washington 25, D.C. for reclassification of the land as nonmineral, or appeal to the Secretary of the Interior. Should the appellant elect to apply for reclassification of the land as nonmineral, he must submit a showing therewith. The appellant may also request a hearing in the event the reclassification is denied, however, the burden of proof will be upon him. If an appeal is taken to the Secretary of the Interior it must be filed with the Director, Bureau of Land Management, Washington 25, D.C., and the amount of the filing fee will be \$5. In taking an appeal there must be strict compliance with the regulations. See enclosed Form 4-1365.

Upon failure of the appellant to take one of the actions specified above within the time allowed the case will be returned to the Manager of the Fairbanks Land Office, for further appropriate action.

Richard M. Connelley
Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

Calvin C. Carroll (Certified Mail)

SD (Alaska)

Division of Lands and Recreation

LO (Fairbanks; Case File; Perm. File; Appeals Reading File; Attorneys' Reading File

In reply refer to:
6.05c
New Mexico 0338731

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 23, 1963

Certified Mail
Return Receipt Requested

DECISION

Wallace L. Hilgenberg

:

Public Sale Application

Decision Affirmed

Wallace L. Hilgenberg has appealed from a decision, dated January 15, 1963, rejecting his public sale application filed on December 10, 1962. The stated reason for the rejection is that the applied-for lands were classified on October 26, 1962, as suitable for disposal for recreation and public purposes and are therefore not available for public sale.

The appellant alleges that the applied-for land is suitable for grazing; is not suitable for recreation use; and he does not believe the land will be used in conjunction with the proposed Rio Grande Park.

Information in the case record shows that the applied-for lands are part of a large tract which was the subject of an action taken by the Twenty-fourth New Mexico Legislature by Chapter 37 laws 1959 establishing Rio Grande State Park.

It is the policy of the Department to make public land, valuable for recreation purposes, available to the general public, rather than allow disposition for private uses. Roscoe T. Schafer, A-28131 (August 27, 1959). Therefore, it is proper to reject applications for land that have been classified as suitable for recreation uses. Cf. Randall Storey, A-27573 (September 22, 1958); Lafayette M. Hughes, A-27213 (December 28, 1955).

Accordingly, the decision is affirmed.

Wallace L. Hilgenberg is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be \$5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed, the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J. McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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Wallace L. Hilgenberg (Certified Mail)
SD (New Mexico)
LO (Santa Fe)
Division of Lands and Recreation
Case File
Perm. File
Appeals Reading File
Attorney's Reading File
MHS

In reply refer to:
6.05c
Timber Sale Contract
14-11-0001(14)-930 (Oregon)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 23, 1963

Certified Mail
Return Receipt Requested

DECISION

Chester C. Gibby

Timber Sale Contract

Decision Affirmed

Chester C. Gibby has appealed from a letter-decision, dated February 12, 1963, terminating his right to purchase certain described O & C timber and retaining his bid deposit of \$1,300. The decision states that the required contract and bond forms, together with the required payment for the purchase of the timber, were not received from the appellant within the required time.

The record shows that a 90-day timber sale notice, dated October 19, 1962, was issued, inviting written bids for not less than the advertised appraised price of \$12,830.50. Two bids for the advertised timber were received, on printed Bureau forms; (1) a sealed bid in the sum of \$12,830.50 and (2) the appellant's oral bid of \$14,029.75. The appellant's bid form, dated November 26, 1962, was signed by him and it states that the required bid deposit is \$1,300. The form also contains the following printed statement on its face:

"IT IS AGREED that the bid deposit shall be retained by the United States as liquidated damages if the bid is accepted and the undersigned fails to execute the sale contract and furnish a satisfactory performance bond within 30 days after the bid is accepted. . . ."

The Bureau accepted Mr. Gibby's bid by letter of December 3, 1962, and he was requested therein to execute the attached contract and performance bond forms and return them to the Bureau's office in Salem, Oregon, within 30 days after the receipt of the letter. Section 32 of the contract provides in part that:

A performance bond shall be filed by the Purchaser on or before the date this contract is signed by the Authorized Officer in the sum of Four Thousand and no/100 Dollars . . .

The December 3 letter also states that the contract requires a payment of the first installment of \$2,000. The bid deposit was applied against the first installment and, therefore, a check for the sum of \$700 was to have accompanied the executed contract and bond forms.

On December 26, 1962, the Acting District Manager of the Salem, Oregon office sent Mr. Gibby a letter by certified mail reminding him that 22 days had elapsed since his high bid was accepted and that unless the signed contract, bond forms, and a payment of \$700 were received by January 5, 1963, or unless he presented a satisfactory written request showing why he required additional time, his bid deposit would be retained as liquidated damages.

Mr. Gibby requested an extension of time until February 5, 1963, to complete his contract, which request was granted. On February 6, 1963, Gibby made another request for an additional 10-day extension of time to complete his contract; but this was denied and the decision of February 12 was thereupon issued:

The appellant alleges that:

1. Had appellant been given one more week's time he could have secured the necessary bond.
2. The decision to not extend the time under the circumstances was capricious, arbitrary, and an abuse of discretion.
3. The contract was awarded to the second highest bidder for \$13,998.75. Therefore, the actual damages sustained by the Government amounted to \$31. Under such circumstances, the "Forfeiture of \$1,300 is a penalty and cannot be considered liquidated damages when there is no reasonable relationship between the damages sustained by the United States and the sum forfeited."

On the basis of the foregoing allegations, the appellant demands the refund of the net sum of \$1,269 from the Government.

The signed deposit agreement submitted by Mr. Gibby contains the following language:

"... In submitting or confirming this bid, the undersigned agrees to the ... applicable regulations ..."

The applicable regulations read as follows:

"Within 30 days after receipt of the contract the successful bidder shall sign and return the contract, together with any required performance bond: Provided, that the authorized officer may, in his discretion, extend such period an additional 30 days If the successful bidder fails to comply within the stipulated time, his bid deposit shall be forfeited as liquidated damages." (43 CFR 115.25(b)).

A minimum performance bond of not less than 20 percent of the total contract price will be required for all contracts of \$2,500 or more. . . . The performance bond may be:

- (1) Bond of a corporate surety . . . ; or
 - (2) Personal surety bond . . . ;
 - (3) Cash bond; or
 - (4) Negotiable securities of the United States.
- (43 CFR 115.27)

The appellant expressly and unqualifiedly agreed that his bid deposit of \$1,300 shall be retained as liquidated damages if he failed to furnish a satisfactory performance bond within 30 days after the acceptance of his bid. The appellant admits that he did not comply with the plain language of his bid. However, he contends that he could have secured the necessary bond if he had been given "one more week's time". The record shows Mr. Gibby was allowed an additional 30 days extension of time and still failed to furnish the bond. The regulation, supra, makes no provision for any extension of time beyond the one additional 30 day period that was granted to Mr. Gibby.

The Bureau personnel are not authorized to grant any extensions of time beyond the one 30-day period allowed by the departmental regulations. Therefore, there is no merit to the appellant's allegations that the Bureau's determination was arbitrary and an abuse of discretion.

The term "liquidated damages" is used, in reference to a breach of contract, to express a fixed sum which is agreed upon between the parties as the ascertained damage which the one is to receive and the other to pay because of the default. U.S. v. U.S. Fidelity and Guaranty Co. 151 F. 534, 536. The amount of recovery is limited by the contract even though the actual damages may be in excess of or less than the stipulated amount. 25 Corpus Juris Secundum, Damages, sec. 116. The absence of actual damages is not fatal and does not convert a liquidated damages provision into a penalty. No proof of damages is necessary. Appeal of Refer Construction Company, 68 I.D. 140, 143 (1961). Generally, the distinction

between a "penalty" and a provision for "liquidated damages" is that a penalty is, in effect, a security for performance, while "liquidated damages" are a sum to be paid in lieu of performance. Foster v. Montgomery Ward and Company 24 Wash. 2d 248; 163P(2) 834, 844, 845; See also 25 Corpus Juris Secundum, Damages, sec. 101C.

Although the actual damage in this case may have been only \$31 it is not material to the issue in this case, because the Government would have no recourse to any additional damages if the actual damages in this case had been the amount of the full bid price. The test for determining whether an agreed sum is to be construed as "liquidated damages" or a "penalty", is not the relationship between the actual damages sustained and the sum forfeited, as it is alleged by the appellant, but whether the uncertain amount likely to be lost is greatly disproportionate to the amount involved. The withholding of 15% of the contract price as "liquidated damages" in the event of a breach has been held enforceable. Russ Mitchell Inc. v. Houston Pipe Line Co., Tex. Civ. App. 219 S.W. 2d 109. In another instance, an agreement that \$2,500 earnest money be retained in a \$60,000 hotel purchase in event of default was held enforceable. Grimsley v. Life Insurance Co. of Virginia, Tex. Civ. App. 154 S.W. 2d 196.

The determination in the decision appealed from complies with the departmental regulations and it is consistent with the legal principles established by the courts.

Accordingly, the decision is affirmed.

Chester C. Gibby is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D. C., and the amount of the filing fee will be \$5. In taking an appeal there must be strict compliance with the regulations. If an appeal is filed the appellant will have the burden of proving, by presenting positive and substantial evidence, wherein the decision appealed from is in error.

Richard J. McComick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

DISTRIBUTION

Hayter & Shetterly (Certified Mail)
Chester L. Gibby
SD (Oregon)
DM (Salem)
Division of Forest Management (50)
Case File
Perm. File
Attorney's Reading File
Appeals Reading File
MHS

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
BLM 048583
(Mississippi)

March 26, 1963

DECISION

Board of Supervisors	:	
Jackson County, Mississippi	:	
Applicant	:	Recreation and Public
	:	Purposes Application
E. P. Wilkes	:	
Protestant-Appellant	:	

Decision Affirmed

E. P. Wilkes has appealed from a decision dated October 15, 1962, dismissing his protest against the proposed disposal of certain lands, comprising what is commonly known as Round Island, to Jackson County, Mississippi, pursuant to its above-identified recreation and public purposes application.^{1/}

The appellant in his appeal contends, in substance, that he is opposed to the proposed disposal of the lands to Jackson County, especially when the "deed" will contain a clause permitting change of purpose for which the lands are to be used through consent of the Department. The appellant further asserts that once the lands are sold to Jackson County there is the possibility of it being disposed of to private individuals at some future date, with the consent of the Department, else there would be no provision put in the "contract" providing that the use for which the lands were disposed of could be changed with the consent of the Department.

The records show that the lands have been carefully examined, and it has been determined that their highest and best use is for disposal to Jackson County for use in connection with its plan of development of the area for recreation. The county has agreed, in writing, by stipulation, and by its plan of development, that the lands will not be used for any other use than for public recreation and park purposes.

^{1/} Protests were filed by some 27 persons in connection with the proposed transfer of the land in question to Jackson County upon publication of the notice in a local newspaper of the proposed disposal. Mr. Wilkes, however, is the only person to appeal from the decision dismissing the protests.

The conditions and limitations attaching to patents issued pursuant to the Recreation and Public Purposes Act are specified in detail by the statute itself (act of June 14, 1926, 44 Stat. 741, as amended; 43 U.S.C. Supp. II, 869-2). Under its terms, a grantee may not convey the lands involved except to one qualified under the act (a State or political subdivision or a non-profit organization), nor may the use of the land be changed except to a use which would also qualify under the act (recreation or public purpose). Even these limited changes in ownership or use may be effected only with the consent of the Secretary of the Interior. Any attempt to convey or change land use in contravention of the statute causes title to revert to the United States. Prior to 1959, these limitations were restricted to a period of 25 years, but an amendment in that year struck out the time limit so that they are now effective in perpetuity.

The public policy of the United States to govern in such cases is thus clearly provided in statute law. By formal regulation issued pursuant to law (43 CFR 254.10), it is required that the restrictions and limitations be repeated in the patent. It is difficult to conceive how any more complete safeguards could be provided against the contingencies foreseen by the appellant.

Accordingly, it is concluded that his objections are outweighed by the public interest in providing recreation facilities and the decision appealed from is affirmed.

This decision constitutes a final administrative determination by the Department in this matter. 43 CFR 1963 ed., 221.31.

L. J. Hoffman
Assistant Director

Approved: April 22, 1963

J. W. Cannon
Assistant Secretary of the Interior

DISTRIBUTION

Mr. E. P. Wilkes
Board of Supervisors, Jackson County
Division of Lands and Recreation
Division of Field Services
FSLO
Case File
Permanent File
Appeals Reading File
Attorneys' Reading File
REO

In reply refer to:

6.05c

California Contest No.

10-747

April 24, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

DECISION

United States,	:	Involving the Ukiah, Covelo, Humbolt,
Contestant-Appellee;	:	White, Tannery, Tannery #2, Jackson,
	:	Cademartori, Furnell, Last Chance,
v.	:	Lewis, Enough and Faurrell placer
	:	mining claims. Situated in Secs.
Humbolt Placer Mining Company,	:	5, 6, and 7, T. 34 N., R. 8 W.;
a Corporation, and Del de Rosier	:	Secs. 1, 2 and 3, T. 34 N., R. 9 W.;
Contestees-Appellant	:	Sec. 35, T. 35 N., R. 9 W.; all
	:	M.D.M., Trinity County, California.
	:	

Decision Affirmed

The above-named contestees have appealed from a decision of the Manager of the Bureau's Sacramento Land Office, dated February 7, 1963, rejecting their answer to an amended contest complaint and dismissing their motion to dismiss the complaint. The Manager held that the answer and motion to dismiss, filed January 29, 1963, are not responsive to any action pending before the Department of the Interior because the case to which they were directed was finally closed on October 11, 1960, after all proper actions had been taken.

The record shows that the amended contest complaint to which the appellants' answer was directed was served on Anthony J. Kennedy, as "attorney-in-fact and law and agent for Humbolt Placer Mining Company," on March 18, 1960; and on Del de Rosier and the Humbolt Placer Mining Company, c/o E. W. Phipps, President, on March 21, 1960. The complaint charged that certain of the placer claims were null and void for want of a discovery, that the land embraced by the claims is non-mineral in character, and that one of the claims embraced noncontiguous tracts of land. It charged that portions of certain other placer claims were nonmineral in character and should be excluded from the claims. The contestees were allowed 30 days within which to file answer to the amended contest complaint; however, they filed instead, in the District Court of the United States, a "Complaint for Injunction" in which they requested that the Bureau of Land Management be permanently enjoined and restrained from proceeding further in this matter. This complaint for injunction was filed on April 18, 1960, and on that same day the Court issued a restraining order pendente lite, ordering, in effect, the Bureau of Land Management to withhold further action in connection with the amended contest complaint and to show cause why they should not be permanently enjoined from attacking the contestees' title to the claims.

In essence, the contestees' complaint for injunction charged that as the United States had initiated condemnation proceedings to obtain possession of the disputed claims in the District Court, the Bureau of Land Management had no jurisdiction to determine the validity of the claims in contest proceedings.

After a hearing on the contestees' complaint for injunction, the District Court found that, assuming that it had the power to enjoin further proceedings in the contest, there was no good reason for the exercise of such power, and that the United States could, through the means of condemnation proceedings, obtain immediate possession of the disputed claims and, at the same time, permit the Bureau of Land Management to initiate contest proceedings to challenge the validity of the claims. The District Court dissolved the temporary restraining order and dismissed the complaint for injunction. It issued no order which would keep the restraining order standing while the contestees perfected an appeal to the Court of Appeals. Humbolt Placer Mining Company and Del de Rosier v. Raymond R. Best etc., 185 F. Supp. 290 (1960).

On August 18, 1961, the Court of Appeals, 9th Circuit, vacated the ruling of the District Court and remanded the case for further proceedings. Humbolt Placer Mining Company v. Best, 293 F. 2d 553 (1961). Subsequently, the Supreme Court of the United States granted certiorari (368 U.S. 983 (1962)), and in a decision of January 14, 1963, it reversed the Circuit Court, sustaining the action taken by the District Court. Best et al., v. Humbolt Placer Mining Company et al., 371 U.S. 334 (1963).

Meanwhile, after the District Court had dissolved the restraining order and before the Circuit Court's decision, the Bureau of Land Management issued an order extending the time within which the contestees were to file an answer to the contest complaint. This order, dated July 14, 1960, stated that, as the period of time allowed to file an answer to the amended contest complaint had almost expired at the time the contestees filed their complaint for injunction and obtained a temporary restraining order, the contestees would be allowed 15 days from the date of receipt of the order within which to file an answer. The order was served on Del de Rosier on July 16, 1963, and on Claud E. Phipps and Charles L. Gilmore, attorney for the Humbolt Company, on July 18, 1963.

As the contestees did not file an answer to the amended contest complaint, the Manager issued a decision, dated August 3, 1960, declaring null and void, either in whole or in part, the claims identified in the complaint. This decision advised the contestees of the usual right of appeal to the Director, Bureau of Land Management. It was served on Mrs. C. L. Phipps

on or before August 29, 1960, and on Charles L. Gilmore and Del de Rošier on August 4, 1960. No appeals were filed, however, and the Manager closed the case on October 11, 1960.

In their appeal from the Manager's February 7, 1963 decision, the contestees contend, in essence, that the Bureau of Land Management had no jurisdiction to do anything regarding the amended contest complaint from April 18, 1960, when the temporary restraining order was issued, until January 14, 1963, when the Supreme Court issued its decision.

The contestees argument overlooks Rule 62(c) of the Federal Rules of Civil Procedure and the fact that the prosecution of an appeal cannot operate as an injunction when none has been granted, as in the case of an appeal from a decree dismissing a bill for an injunction when no injunction has been granted, or from an order denying a preliminary injunction. Virginian Railway Company v. United States et al., 272 U.S. 658 (1926). An appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect, and injunctive orders prior thereto are not set aside, kept standing or restored without a special order. Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U.S. 212 (1922); Hovey v. McDonald, 109 U.S. 150 (1883).

Accordingly, as there is nothing in the record to show that the Courts in which this matter was prosecuted directed the Bureau of Land Management to suspend action on the amended contest complaint after the decree dissolving the temporary restraining order and dismissing the complaint for injunction had been issued, the contestees' argument is without merit.

In their appeal, the contestees state that the placer mining claims involved in this case are some of the 38 mining claims included in a single application for patent, Sacramento 049136, which was filed on November 19, 1954. They contend that they are being harassed because all of the claims included in the patent application have not been considered at one time, and that many contests involving two or more claims have been, or are being, prosecuted in a manner designed to discourage them from defending their claims.

The contestees have submitted nothing to show that all of the mining claims described in their patent application could, or should, have been examined and processed at one time so that a single contest could have determined the validity of all of the claims the United States wished to challenge. Nor are we prepared to find that this ought to have been done. That the 38 claims cover an area of some 5,645 acres, more or less, and that each of the 38 claims must be judged on its own merits, suggest that a single hearing would not be administratively feasible. Nor does the record show that the Bureau of Land Management arbitrarily delayed contesting any of the claims.

Accordingly, the decision appealed from is affirmed.

The contestees are allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C.. The amount of the filing fee will be \$5 for each mining claim for which favorable action is sought. If all 13 mining claims affected by this decision are included in an appeal, the filing fee will be \$65. In taking an appeal, there must be strict compliance with the regulations. If an appeal is filed the appellants will have the burden of showing that this decision is erroneous.

John B. Tricolo
Chief, Branch of Mining
and Grazing Appeals
Division of Appeals

Enclosure

DISTRIBUTION:

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Hearings Administrative Assistant
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Case File
Perm. File
Appeals Reading File
Attorneys' Reading File
LIM

In reply refer to:

6.05c

Oregon 013189

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

April 5, 1963

DECISION

Kronenberg Logging Company, Inc. : Application to Purchase
: under Act of October 23, 1962
:

Application Denied

On February 23, 1963, the Kronenberg Logging Company, Inc., filed the above-noted application under the Act of October 23, 1962 (76 Stat. 1127). The application was for patent to an area of five acres, (not described) surrounding the improvements situated on the Durtonia No. 1 Placer Mining Claim, in the ~~E1NE1SW1~~^{E1NE1SW1} of Sec. 12, T. 32 S., R. 14 W., W.M., Oregon. The application shows that the claim was located on September 11, 1956, by the applicant's predecessor in interest, J.F. Kronenberg. The application indicates that buildings have been constructed on the claim, regular annual assessment work performed and residence maintained to the present time.

The record shows that the claim was declared null and void by decision of the Hearing Examiner dated June 12, 1962.

Under the Act of October 23, 1962, *Supra*, and the regulations a "qualified applicant" is one who is: A residential occupant-owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors were in possession of for not less than seven years prior to July 23, 1962. 43 CFR 260.2(a)(1).

Since the claim was not located until September 11, 1956, the applicant has not demonstrated that he and his predecessors in interest were in possession of the unpatented mining claim for not less than seven years prior to July 23, 1962, as required by the act and the regulations. Consequently, the applicant is not a qualified applicant. It is unnecessary, in view thereof, to discuss other deficiencies in the application.

Accordingly, the application is hereby rejected.

This decision constitutes a final administrative determination in the matter. 43 CFR 221.31.

Karl S. Landstrom
Director

Approved: April 18, 1963

John O. Camer
Assistant Secretary of the Interior

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Pierce M. Rice, agent for appellant (Regular Mail)
Division of Lands and Recreation
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Appeals Reading File
Attorneys' Reading File
CLH

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
Colorado 0101313

April 8, 1963

DECISION

Louis and Lena M. Weber

Public Sale Application

Decision Affirmed

Louis and Lena M. Weber have appealed from a decision dated January 21, 1963, rejecting in part their above-identified public sale application, filed on January 8, 1963 as to the lands described therein as Lots 28 and 30 sec. 13, and E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 14, T. 44 N., R. 8 W., New Mexico Principal Meridian, Colorado, for the reason that these lands had been classified for small tract purposes by Small Tract Classification Order No. 39, published in the Federal Register of April 5, 1962, and were, therefore, segregated from all appropriation under other public land disposed laws.

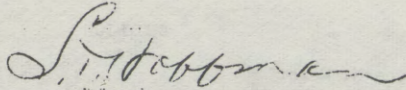
In their appeal, the appellants state that they wish to withdraw their application as to Lots 28 and 30 sec. 13. However, they strenuously object to the classification of the E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 14 for small tract purposes for a number of reasons as stated in their appeal. The appellants suggest as a solution of the problem, in the event their protest against the classification of the E $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 14 is denied, that an exchange be effected whereby the Bureau would exchange this tract of land for the W $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 13 owned by them.

As stated in the decision appealed from, the subject lands are classified for small tract purposes and are segregated from all appropriation under other public land disposal laws. The classification order No. 39, published in the Federal Register of April 5, 1962 (27 F.R. 3261), specifically provides that classification of the lands segregates them from all appropriations, including locations under the mining laws, except as to applications under the mineral leasing laws. Such segregation is in conformity with the applicable regulation, 43 CFR 257.3(b). This would preclude disposing of the lands in question either under a public sale application or through an exchange. In the circumstances, it was proper to reject the appellants' application for the lands classified for small tract purposes. Cf. Francis E. Mullen, A-28612 (July 14, 1961). See also Paul B. and Ruth M. Butler, A-27634 (August 26, 1958).

As to disposing of the remainder of the lands applied for by the appellants, not included in the small tract classification order, it is noted that the United States Geological Survey, in a report dated February 19, 1963, has indicated that the lands may be valuable for tungsten, maganese, gold, lead, copper, zinc and uranium. Consequently, further field examination will be necessary before a decision can be made concerning the remaining lands in the subject application. However, if such examination discloses that the lands are in fact valuable for such minerals, the lands may not be disposed of under the public sale law. See 43 CFR 250.8.

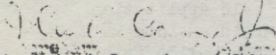
Accordingly, the decision appealed from is affirmed.

This decision constitutes a final administrative determination of the Department in this matter. 43 CFR 1963 ed., 221.31.



Assistant Director

Approved: April 23, 1963



Assistant Secretary of the Interior

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Mr. Theodore L. Brooks, Attorney for Appellants (Regular Mail)

Mr. and Mrs. Louis Weber (Regular Mail)

Division of Lands and Recreation

SD (Colorado)

LO (Denver) Hon. Gordon Allott, U.S. Senate

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Wyoming Misc.
W5-F-62-1

April 29, 1963

DECISION

Jack Schwabacher
A. E. Schwabacher

:
:

Fire Trespass

Case Remanded

By a letter dated January 15, 1963, the Wyoming State Director demanded from the above-named parties \$7,079.78 as damages suffered and costs incurred or to be incurred by the United States as a result of a fire or fires allegedly caused by the Schwabachers or their agents. The Schwabachers were allowed 30 days within which to effect a settlement for the trespass damages or to show they were not responsible. An appeal to the Director, Bureau of Land Management, was provided in the event the Schwabachers did not wish to comply with the terms of the letter.

However, it was improper for the State Director to include in his letter a provision allowing the Schwabachers a right of appeal to the Director. This is not the procedure in trespass cases of this nature.

Accordingly, the decision is vacated and the record is remanded to the Bureau's State Director for further processing.

As the State Director's action was improper, the \$5 appeal filing fee paid by the Schwabachers' attorney will be refunded to him in due course by check from the Treasury Department.

Richard J. McCormick

Chief, Branch of Land Appeals
Division of Appeals

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LLM

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Sacramento 055830

February 28, 1962

DECISION

David L. Williams

Color of Title Application

Decision Vacated
Case Remanded

This is an appeal from a decision dated November 27, 1961 rejecting the above-noted Color of Title Application because the lands lie in both Tehama and Mendocino Counties and the latter county has never assessed any portion of the land but carried it on its rolls as United States land. The decision also stated that the Tehama County tax title transfer includes only portions of the land described in the application and that it would not be good administrative practice to allow title to that portion for which taxes have been paid as partial allowance would require a metes and bounds survey to determine the acreage and legal description of the allowable portion. In addition, the decision stated that the lands provide ingress and egress to National Forest land.

On appeal, the appellant states that he is willing to restrict his application to that part of the land which has been taxed and is located in Tehama County, that he is willing to give the Forest Service such right-of-way as it might need and, that if a survey will result in the granting of his application, he will have it made.

In view of the statements contained in appellant's statement of reasons, the case is remanded to the Sacramento Land Office through the Bureau's State Director for further consideration as may be appropriate.

Richard J. McCormick

Legal Assistant
Division of Appeals

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JBJ

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In reply refer to:
6.05c
Nevada 053310

January 3, 1963

Certified Mail
Return Receipt Requested

DECISION

Elmer Edward Wobig

:
:
:

Desert Land Application

Decision Affirmed

Elmer Edward Wobig has appealed from a decision of the Chief, Lands Adjudication Section, dated August 21, 1962, rejecting the above-identified application for the reason that the land is not agricultural in character and therefore not proper for disposal under the agricultural land laws. The decision was based on a classification of the subject land which stated that the lands are alkaline and have a high pH (above 8.0), a clay pan and a high water table. The classification further states that four to six foot hummocks cover over one-half of the lands under application. The report indicates that the highest and best use of the lands is for grazing, and that no other use exists.

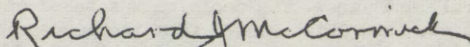
Appellant contends that a surveying company employed by him to survey the land has reported to him that it does not agree with the rejection of appellant's application for the reason that the hummocks on the lands are not uncommon and can be easily removed by earth-moving equipment. Appellant further states, in answer to the report that the soils are highly alkaline and are underlain by hard clay pan, that he has been informed that most of the surrounding land has similar characteristics and has proven to be extremely successful for agricultural use.

The record contains a report of field examination made by Bureau employees, which refutes the appellant's contention that most of the surrounding land has the same characteristics and has proved to be extremely successful for agricultural use. The field examination showed that there are no surrounding lands being farmed that exhibit similar physical characteristics of the subject lands. The closest farmed lands are one mile away from the subject lands. These lands have soils that are deep, medium textured, and moderately permeable; and such cultivated lands are not characteristic of lands having a high water table as the subject lands. The record further indicates that the subject lands have a high water table that limits reclamation, and are heavy textured and relatively impermeable.

Appellant's contentions, which consist merely of contradictory statements, without additional supporting evidence, are not sufficient. It has been held that an application for desert land is properly rejected upon a determination that the land is marginal for agricultural purposes due to poor soil conditions, and where the appellant has not submitted positive and substantial evidence showing that the classification of the lands is erroneous. Dorothy Gussie Meyers, A-28559 (September 13, 1961), Dorothy J. Phillips, A-27874 (May 19, 1959).

Accordingly, the decision appealed from is affirmed.

Elmer Edward Wobig is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken, the amount of the filing fee will be \$5. In taking an appeal, there must be strict compliance with the regulations.


Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

In Reply Refer to:
6.05c
Sacramento 062964
061438

November 23, 1962

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Southern Pacific Railroad : Railroad Selection
Company 1/ :

Decisions Affirmed

The above-named company has appealed from the decisions dated April 16 and June 8, 1962, rejecting its applications for patent under sub-section (b), Sec. 321 Part II, Title III of the Transportation Act of 1940, as amended (54 Stat. 954; 49 U.S.C., 1958 ed., 65) on behalf of the successors in-interest to the original purchasers 2/. The applications were rejected because the lands are mineral in character.

A careful review of the entire record, Sacramento 062964, reveals that the subject tract of land is covered by placer mining claims. One of the claims is presently being worked and annual assessment work is being performed. Sufficient presumptive evidence is shown to indicate that the lands are mineral in character and to warrant such a classification.

A review of case record, Sacramento 061438, reveals that approximately 12 patented mining claims lie adjacent to the lands under application. These claims were patented between 1887 and late 1922. This is prima facie evidence that the subject lands are mineral in character.

The Department has held that "discovery of the mineral character of the land at any time before the issuance of the patent will defeat the grant." Southern Pacific Railroad, 41 LD 264 (1912); and, furthermore, the Department has held that "to except lands from a railroad grant as mineral in character, it is not necessary that a discovery of mineral be shown such as would serve as a basis for mineral patent; but it is sufficient if the land be shown to have a prima facie mineral character." Central Pacific Railroad Company, 45 LD 25 (1916).

Due consideration has been given to the contentions of the appellant. However, it is concluded that they have not shown by sufficient and overwhelming evidence that the land was not mineral in character at the time of the Railroad grant. Accordingly, the decisions appealed from are hereby affirmed.

1/Successor in-interest to the Central Pacific Railroad Company, the original grantee.

2/The real parties in interest in Sacramento 061438 are Frank V. and Gertrude L. Amaral successors in-interest to the Washington Mining Company and in Sacramento 062964 the real party in interest is Arthur E. Connick successor in-interest to John Armstrong.

As to the appellant's request for a hearing in the matter, the Department has held that a hearing will not be held on the issue when there is little likelihood that a hearing would develop facts decisive of the issue and no showing is made by the applicant that he will be able to present evidence controverting the facts of record. Margaret A. Andrews et al., 64 I D 9 (1957). Therefore the appellant's request for a hearing is denied.

The Southern Pacific Railroad Company is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken the amount of the filing fee will be \$5.00 for each case appealed. In taking an appeal there must be strict compliance with the regulations.

Richard A. McCormick

Chief, Branch of Land Appeals
Division of Appeals

Enclosure

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In reply refer to:
6.05c
C-6-1

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

March 26, 1963

DECISION

Donald L. Sawyer, and : Section 15 Grazing Lease
Lilas L. Sawyer : (Temporary Closure)
:

Decision Affirmed

Donald L. and Lilas L. Sawyer have appealed from a decision of the District Manager, dated January 18, 1963, temporarily closing to all grazing the area included in their section 15 grazing lease because of the depletion of the range and to prevent further damage to the federal range by continued grazing during the extended drought period now being experienced.

The appellants allege in their appeal that the District Manager does not have the authority under the provisions of 43 CFR 160.13 (b) to close leased areas to grazing. They contend that even if such action were taken by a duly authorized Bureau official, the Bureau should be estopped from closing the area because it was cognizant of the appellants' intent to graze in the area and permitted them to go to great expense in purchasing cattle to stock the area.

A careful review has been made of the records and the statement of reasons submitted by the appellants. The sole issue to be decided on this appeal is whether the Federal range included in the appellants' section 15 grazing lease is so depleted that it is in the best interest of the public to close the area temporarily to further grazing.

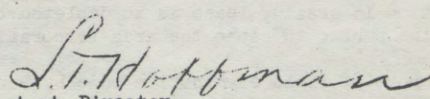
A report of field examination made by Bureau personnel on February 4, 1963, in company of the appellants, shows that the dominant plants in the area were mainly Black Brush, Burro Brush, Bladder Pod, Yucca, Cactus, (no live grass was found, but considerable evidence of dead perennial grass was observed) which are considered practically worthless for forage plants. Appellants' cattle were extremely thin and weak, apparently emaciated from lack of feed. A number of carcasses of dead cattle were found in the leased area. The report concluded that the rainfall is far below average (1.62 inches from July 27, 1962, through February 1, 1963, which is the least recorded in this area for several years) and the drought condition actually exists. The condition of the range is extremely poor. The carrying

capacity, as recorded on what the appellants term their "best" ranges, averages 77A/AUM. With the aforementioned carrying capacity considering the total of 232,277 acres under lease to the appellants a maximum total of 3,017 AUMS can be grazed on the leased land. This averages out to a maximum of 241 animal units for the entire leased range. (Area now stocked with 900 head of cattle.).

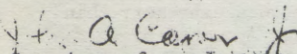
Appellants do not attempt to rebut or dispute these findings, but as noted above, they question the District Manager's authority to close the range and allege that the Bureau should be estopped from taking any action to protect and conserve the Federal range. These arguments are without merit; therefore, it is sufficient to say that where an emergency exists, as in this case, the District Manager, who is primarily responsible for the range within his district, may take such action within his discretion to alleviate a serious condition by decision or otherwise until such time as the State Director or the Director has had an opportunity to investigate. Either of these officials may confirm the action taken, modify it or supplement it with additional requirements. The pertinent regulation (43 CFR, 1963 ed., 160.13 (b)) provides in material part that: "(b) The authorized officer may close temporarily to grazing portions of the leased lands" (Emphasis supplied)

Accordingly, the decision appealed from is affirmed. In addition thereto, it is hereby ordered that the decision appealed from shall be in full force and effect immediately and will remain in effect until such time as it is determined that the subject range is replenished sufficiently to warrant future grazing without causing damage or deterioration to the range.

This decision constitutes a final administrative determination in the matter. 43 CFR, 1963 edition, 221.31.


Assistant Director

Approved: April 1, 1963


Assistant Secretary of the Interior

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Mr. & Mrs. Donald L. Sawyer (Regular Mail)
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Division of Range Management
JJS

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

In reply refer to:
6.05c
Arizona 024027 etc.

March 12, 1963

DECISION

George L. Verity et al.*

Oil and Gas

Cases Remanded

The above-named parties have appealed from a decision of the Manager, Phoenix Land Office, dated January 22, 1960, rejecting their above-noted noncompetitive oil and gas lease offers filed in December 1959 pursuant to the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226), as to those lands applied for situated within the northern division of the Kaibab National Forest and within the area established as the Grand Canyon National Game Preserve by proclamations dated November 28, 1906, and June 23, 1908. The offers were rejected on the basis of objection by the Regional Forester, Southwestern Region, Forest Service, United States Department of Agriculture, that the proposed oil and gas development would be incompatible with the purposes for which the lands were set aside.

Subsequent to the submission of these appeals it has been determined that leasing of the lands involved for oil and gas purposes may be permitted with suitable stipulations providing rigid safeguards for wildlife and scenic resources. The stipulations spell out the precautions that will be needed if development work is undertaken and they provide for protection of other resources in the forest.

Objections and protests by sportmen's groups and others to proposals to lease the forest lands for oil and gas exploration have been met by the stipulations, which cover all aspects of exploration and development. The objections and protests were directed generally to the leasing of the lands in the northern division of the Kaibab National Forest. They were not identified specifically to these cases on appeal, or to any other cases of record. Nevertheless, it is appropriate to state herein that the objections and protests were carefully considered and it is determined that leasing may be permitted with the stipulations mentioned. The objections and protests to leasing directed generally to the offers involved in this appeal and to all other offers pending in the land office are therefore dismissed. This action, upon approval by the Secretary of the Interior, constitutes the final administrative determination in this matter.

* The names of the appellants and the serial numbers of their lease offers are listed in the attached Appendix.

Accordingly, the cases are remanded for further processing.

Karl L. Lundstrom
Director

Approved: APR - 5 1963

Assistant

John A. Cam...
Secretary of the Interior

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Mr. J. Felix Hickman (Regular Mail)
Mr. Robert L. Maddox, Jr. (Regular Mail)
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Mr. John P. Warfield, Attorney at Law (Regular Mail)
Whiteford, Hart, Carmody & Wilson (Regular Mail)
Mr. Hugh J. Mitchell (Regular Mail)
Mr. Rodney P. Calvin (Regular Mail)
Mr. Floyd H. Schroeder (Regular Mail)
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U.S. Geological Survey, Conservation Division (40)
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DWG

APPENDIX

<u>Offeror</u>	<u>Oil and Gas Lease Offers</u> <u>(Arizona)</u>		
George L. Verity	024027	024074	024077
	024072	024075	024082
	024073	024076	
Hugh J. Mitchell	024033	024043	024046
	024038	024043	
	024039	024044	
	024040	024045	
Rodney P. Calvin	024034	024037	
	024035	024041	
	024036	024051	
Floyd H. Schroeder	024027	024048	
	024049	024050	
Robert L. Maddox, Jr.	024078	024080	
	024079	024081	
J. Felix Hickman	024083	024087	
	024084	024088	
	024085	024089	
	024086		
James E. Rogers	024090	024091	

(At the chairman's direction, the following examples of decisions by the courts relating to the Bureau of Land Management are included in the record at this point:)

Public Lands: Desert Land Act, 43 U.S.C. 321; Conclusiveness of Decision by Secretary of Interior Affirming Decision of Manager Denying Application for Entry. *Noren v. Beck* (S.D. Calif., March 8, 1963.) This action was brought to review a decision by the Bureau of Land Management denying plaintiffs' applications for entry upon certain lands pursuant to the Desert Land Act. From a decision of the Director of the Bureau of Land Management which affirmed the decision of the manager of the Sacramento land office which rejected plaintiffs' applications, plaintiffs appealed to the Secretary of the Interior. The cases were remanded by the Secretary to the Bureau of Land Management with instructions to allow plaintiffs an opportunity to submit evidence to disprove a classification of the lands as being unsuitable for agricultural development and to reconsider the classification in the light of such evidence.

The Secretary's decision at that time remanding the cases was based upon a showing made that two other applicants in the same vicinity were successful in reclaiming the lands they had entered. After remand, plaintiffs' applications were again rejected on the ground that the lands were not suitable for agricultural purposes. That decision was affirmed by the Director, Bureau of Land Management, and affirmed by the Secretary of the Interior.

Administrative remedies having been exhausted, the present suit was instituted and the court, in a previous interlocutory decision, November 21, 1961 (199 F. Supp. 708), held that the case should be submitted upon the administrative record and not tried de novo.

After review of the administrative record, the court concluded that the Secretary's decision affirming the manager's decision was fully supported by the evidence and is conclusive in the absence of fraud or imposition. The court stated that it could not substitute its judgment for that of the Department of the Interior, citing *Ickes v. Underwood* (141 F.2d 546).

Staff: Assistant U.S. Attorney Melvin C. Blum (S.D. Cal.), and Herbert Pittle (Lands Division).

Mining Claims: Necessity for Discovery of Presently Marketable Mineral Deposit. *G. C. (Tom) Mulkern v. Harold C. Hemmitt* (District of Nevada, February 25, 1963). Plaintiff brought an action to enjoin the manager of the Nevada land office of the Bureau of Land Management from canceling plaintiff's unpatented placer mining claims said to be founded upon discovery of silica sand and gypsum. The lands within plaintiff's claims are situated within the Lake Mead Recreational Area but plaintiff contended that his claims had been established before the lands were withdrawn and placed within the recreational area. Since the decision by the manager to cancel plaintiff's claims for lack of an adequate discovery of mineral had been affirmed by the Acting Director of the Bureau of Land Management and by the Deputy Solicitor of the Department of the Interior as the delegate of the Secretary of the Interior on appeals taken by plaintiff, plaintiff also sought a declaratory judgment that their decisions were invalid and without force or effect.

The administrative officials had held that the minerals discovered within the claims were insufficient in quantity, quality, and marketability to constitute an adequate basis to support plaintiff's claims.

In ordering the entry of judgment for defendant, the court wrote a brief opinion in which it is said:

"Plaintiff contends that the Secretary did not apply the proper standard of marketability in determining whether his claims constituted a valuable mineral deposit. Plaintiff asserts that the Secretary based his decision upon the ground that there was no present market value for the gypsum in question, whereas the proper test is 'would a person of ordinary prudence be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine?'

"A similar contention was made in *Foster v. Seaton* (271 F.2d 836 (D.C. 1959)), and the court quoted therein the above test which plaintiff asserts to be the correct one. However, the Court went on to note that with respect to widespread nonmetallic minerals such as sand and gravel the Department of the Interior has stressed the additional requirement of *present marketability* in order to prevent

the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining."

Staff: U.S. Attorney John W. Bonner (district of Nevada).

Senator BIBLE. I think this hearing has been most helpful in probing some of the difficulties and problems that we have. As I indicated yesterday, I am certainly not going to adjourn this hearing. I am going to recess it.

I have some misgivings about the present bill which we are considering. I doubt if this does the job that we are trying to do.

I would like to have you, Mr. Barry, and you can convey it directly to the Secretary of the Interior, if that is indicated as necessary, give some thought within the next 30 days to the proposals suggested or the suggestion made, however you want to word it, by the Senator from Wyoming, Senator Simpson, about the possibilities of working out an appeal directly from the results of the final decision in the State of Wyoming and in the State of Nevada into the Federal court right immediately, without the necessity of coming through these two levels, through the Bureau of Land Management in grazing cases and then the Secretary back in Washington.

I know that you are an able lawyer. I am very well aware of the fact that you are not a career man, and not a so-called bureaucrat at this time, and you have had much experience in these land problems. I think that you can put your mind to this with a great deal of success, which will be helpful to this committee.

If you could attempt to come up and talk it over down in your shop as to ways that we could effect this cumbersome procedure, I know it would be helpful to the committee. I am wedded to no particular version, in attempting to work this out, and I am sure from my talks with Senator Gruening that he isn't.

Senator GRUENING. No, this is just a method of calling attention to a situation.

Senator BIBLE. With a hope that we can find some relief or remedy for it.

Senator SIMPSON. Mr. Chairman, may I just say a word?

Senator BIBLE. Certainly.

Senator SIMPSON. I am impressed with the fairness of you gentlemen, and you have some problems of your own, but I do want to concur in what our chairman has said.

I would welcome some assistance from the Department. I think I have come closer to getting it from other departments which I have been closer together with politically, and I would appreciate it if the Solicitor really put his efforts toward a solution. That one phase in itself would raise the image.

It would raise the prestige, let me put it that way, of the Department, if we would eliminate some of the underbrush in these cases where the record is complete downstairs.

I certainly concur in what our chairman has said. We would like to have you put your noggin to that, and work it off the top of your head and see what we come up with.

Senator BIBLE. Let's put that noggin against a 30-day deadline.

Mr. BARRY. Senator, we will try to get a report to you. May I ask one thing for the record—you asked a question to which I said I would submit the answer. Mr. Hom has found the answer. During the 8-year period during which these 84 cases were filed, 57 were decided,

50 were affirmed and 7 reversed. There were 2,164 decisions rendered in the Office of the Solicitor in the Department of the Interior.

Senator BIBLE. So with the exception of the 84 appealed, the remainder of the 2,164 were not appealed.

Mr. BARRY. That is correct.

Senator BIBLE. I do appreciate that.

Senator Gruening?

Senator GRUENING. Mr. Barry, would there be any value in perhaps having one of your top-level or fairly high-leveled people stationed on the ground, rather than this process of sending it to Washington?

There seems to be something in geographic distance and space and time that militates against perhaps the finest kind of a result. If you had a man there who could actually go out and see the physical circumstances on which the appeal is based, might that not help the situation very considerably?

Mr. BARRY. Yes. The trouble is, Senator, that the ground is so much, and to get high-level people on all the ground would present a real problem.

You know Alaska itself would keep a man hopping to get around to the ground, if it was just one man. We have got many, many Western States and lots of land to oversee.

I know Senator Simpson and Senator Bible who have had experience as lawyers never went to the scene of a crime or an automobile accident, or in fact a scene where a mortgage was signed, without learning something that helped in presentation of a case. You know more about your case if you go to the ground.

Senator GRUENING. That is right, and the human factor seems to disappear in the transmission over the distance of several thousand miles, and the passage of time.

In other words, if there could be someone there who would ultimately make a decision who could be on the ground, it would make a big difference, and the human aspects would get a little more emphasis.

I think that is a very important consideration in all of these matters, because these cases are really sometimes very personal calamities, and they are handled in a routine manner. It doesn't mean that justice is necessarily denied, but it is more apt to be.

Senator SIMPSON. There is precedent I might add, Mr. Chairman, for a quicker procedure. Take the Park Service, for instance.

In condemning land for the public interest, the judge immediately signs an order which turns the property over to the Park Service, but it is appealable on one phase of it, unless there is bad faith where it is appealable on both. So I am not talking through my hat with respect to a quicker procedure in some of the departments of Government, and I think it is indicated.

Senator BIBLE. Senator Jordan, I realize that you have come in rather late to this meeting. We have had a very helpful afternoon. We have left this rather in a state of recess.

Solicitor Barry has indicated some of the legal problems they have down in their shop. He is also going to give us some real solutions to this within the next 30 days. I don't know whether you have any particular question or not.

Senator JORDAN. No, Mr. Chairman. I apologize for not being here. There are just too many places to be at the same time.

I will look with interest at the record. I am tremendously interested in this.

Senator BIBLE. We are going to keep this alive, because I am sure by doing so, and by probing around, we can come up with some improvement of the present plan of operation.

If there is nothing further, we stand in recess.

(Subsequently the following communication was submitted:)

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., July 5, 1963.

HON. ALAN BIBLE,

Chairman, Subcommittee on Public Lands, Committee on Interior and Insular Affairs, U.S. Senate, Washington, D.C.

DEAR SENATOR BIBLE: I am happy to state the Department's views on the question of finality of hearing examiners' decisions raised with Solicitor Barry in the course of his May 7 testimony on S. 758. As we understand the question, it inquires as to the views of the Department with respect to a procedure whereby dissatisfied parties, without further administrative action, could seek judicial review of hearing examiners' decisions in grazing cases by Federal district courts. We are also responding in the light of your observations on the Senate floor on May 27 in which you indicated that "the Department should come back to the committee with its thoughts on improvements that could be effected in the appeals procedure" (Congressional Record, May 27, 1963, p. 8879).

Preliminary to dismissing the question of the finality of examiners' decisions, it is helpful perhaps to set out the classes of land cases in which hearings before hearing examiners are held in accordance with the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1001 et seq.). In addition to hearings on appeals in grazing cases, these cases involve contests, both private and Government, against mining claims and homesteads and desert land entries. In grazing cases the statutory hearing before an examiner ordinarily takes place on appeal after the initial adjudication by local officers of the Bureau of Land Management. In contest cases, on the other hand, the hearing precedes the initial decision in the case. However, in those grazing cases where there appear to be repeated or willful violations by a licensee or permittee, notice is served on the alleged violator and a hearing is held before a decision is made on the alleged violations.

Viewing the question as limited to examiners' decisions in grazing cases, we are unable to perceive a logical distinction for drawing the line. If the suggestion is that examiners' decisions in all cases should be made final, a number of problems arise.

First, where "due process" requires a hearing, and in our view that is true of the classes of cases we are here concerned with (*United States v. O'Leary et al.*, 63 I.D. 341 (1956); *E. L. Cord, dba El Jiggs Ranch*, 64 I.D. 232 (1957); see *Johnnie E. Whitted et al.*, 61 I.D. 172 (1953)), the hearings must be and are held in accordance with the provisions of sections 7 and 8 of the Administrative Procedure Act. So far as here material, these sections grant parties broad rights of administrative review. The procedure suggested by the question would eliminate those rights. It is therefore similar to S. 1734 introduced by Senator Carroll in the 87th Congress. The primary purpose of S. 1734 was to require agencies to delegate final authority to hearing examiners in order to make their decisions the final agency decisions subject only to limited review by the agencies. Although this Department had no objection to S. 1734, our report of August 1, 1961, noted that Bureau of the Budget had advised that the administration did not favor limiting the discretion of agency heads to review decisions of subordinates as the bill proposed.

S. 1734 was the subject of extensive and coordinated study by agencies of the executive branch under the leadership of the Bureau of the Budget and the Department of Justice. It appeared to be the consensus of executive branch opinion that unlimited delegation of final decisional authority to hearing examiners was not desirable. The question of finality for examiners in land cases cannot,

in our view, be distinguished from the issue as it arises for agency action generally under the Administrative Procedure Act.

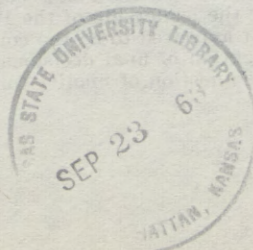
We do not believe, therefore, that it would be desirable or appropriate to provide separate rules for cases arising from this Department.

Aside from the issue of uniformity above discussed, there are other aspects which lead us to question the desirability of finality for examiners' decisions in land cases. The same types of cases are, of course, handled by a number of hearing examiners. Decisions in the cases often involve mixed questions of fact, law, and policy. Individual examiners may differ in their interpretation of each or all of these elements. A principal objective of the Department's present appeals system (or indeed of any system of administrative appeals) is the achievement of uniformity through top level rulings which can serve as a guide for similar cases. If each examiner's decision is made final, the decision appealed from may not even be one that would have survived administrative review. Thus, the burden of administrative supervision for which they are at best ill equipped is thrown upon the courts. The result could be, we fear, that the time of applicants, the courts, and the Government, not to speak of the expense involved, would be wasted in litigation over matters that could be resolved more expeditiously and inexpensively in administrative proceedings.

Then too, finality of hearing examiners' decisions could work to the disadvantage of an aggrieved party. The scope of judicial proceedings to review final agency decisions is limited. The courts ordinarily limit their review to a determination whether the decision complained of is arbitrary, capricious, or unreasonable. Agency determinations of fact or conclusions of policy or law will usually not be overturned if found to be reasonable even though the courts might have reached a different conclusion if they had decided the case *de novo*. (*Work v. Rives*, 267 U.S. 175, 183 (1925); *McLaren v. Fleischer*, 256 U.S. 477 (1921); *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), *cert. den.* 371 U.S. 901.) In an administrative proceeding, however, the reviewing officer is not so limited. Even though the decision appealed from could withstand judicial attack, it may nevertheless be reversed in an administrative proceeding if from the standpoint of factual determination, policy, or interpretation of law, a contrary decision is more desirable. Thus, because of different standards or limitations in the scope of review, a party aggrieved by an examiner's decision may suffer a distinct disadvantage if his only recourse after the examiner's decision is limited review in the courts.

The foregoing serves, I believe, to point out that a procedure for direct judicial review of an examiner's decision may not only have undesirable administrative consequences; it may also not be an unmixed blessing to the private party. We do not wish to suggest that the problems noted are insurmountable. We believe, however, that the problems are such that other possible solutions must be studied and in the context of their Government-wide implications.

Turning to the request for suggestions by the Department for improving the Department's appeals procedure generally in land cases, both Assistant Secretary Carver and Solicitor Barry discussed in the course of their testimony on S. 758 the concrete steps which have already been taken or are being adopted or considered. Data submitted at the hearings show that some of the steps taken have already reduced the backlog of appeals pending and increased the output of decisions. While other steps, such as the division of responsibility between the Assistant Secretary's office and the Solicitor's office for handling cases turning upon nonlegal issues, have been in effect for but a relatively short time, the evidence to date is that the appeals backlog will be substantially cut down and, correlatively, the disposition of cases will be speeded. In the first 10 months of fiscal year 1963 (July 1, 1962, to April 30, 1963), the backlogs of cases was reduced from 793 to 684 cases, a reduction of 109 cases. Perhaps the most important measure for reducing appeals is the proposal discussed by Assistant Secretary Carver for removing land classification cases from the appeals procedure. The proposal was adopted by regulations published in the Federal Register on June 14, 1963.



I believe that the steps which have already been taken and those which are about to be taken should be afforded a reasonable opportunity to prove their worth. For that reason, further proposals for changes in the appeals procedure are not being advanced at this time by the Department. This is not to say that other measures are not being considered but not further concrete proposals are being adopted or recommended for the time being. We believe that a shakedown period is desirable before any further course is charted. We would like, however, to have opportunity to report on the working of the appeals procedure and perhaps also to review the subject further with the subcommittee as the current session of the Congress progresses.

Sincerely yours,

STEWART UDALL,
Secretary of the Interior.

(Whereupon, at 3:45 p.m., the committee was in recess, to reconvene subject to the call of the Chair.)



