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# ADMINISTRATIVE PROCEDURE IN THE BUREAU OF LAND MANAGEMENT

By Robert W. Swenson†

Sweeping demands for reform in the procedure of federal agencies have characterized recent developments in administrative law. In 1955 it was the Hoover Commission and Task Force Reports on Legal Services and Procedures.<sup>1</sup> This was followed by intensive activity in the American Bar Association, culminating in its proposed Administrative Practice Act, administrative code and other bills now before Congress.<sup>2</sup> If these measures become law, federal administrative law will undergo considerable change. The pressure for general reform has tended to obscure the fact that a number of agencies are constantly reviewing their procedural rules in an effort to comply more fully with the letter and spirit of the Administrative Procedure Act of 1946.<sup>3</sup> This may represent a belated recognition of the fact that the APA is, from their point of view, the lesser of two evils. Or, it may represent an honest effort to meet the criticism which various studies have pointed up. At any rate, reform is in the air. No attempt will be made here to evaluate the new proposals. The purpose of this comment is to direct attention to one agency which has revamped its procedure since 1946 with considerable success: the Bureau of Land Management of the Department of Interior. The discussion of Bureau procedure will be limited to mining claims and grazing applications.

The Department of the Interior, established in 1849, has traditionally been the repository of a number of unrelated responsibilities. One of its principal functions is the supervision of the exploitation of most of our natural resources on the vast federally-owned "public domain" which comprises a large part of each of the states in the West and Alaska. One of its most active divisions is the Bureau of Land Management, established in 1946 pursuant to Reorganization Plan No. 3 as a result of the consolidation of the General Land Office

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1. [Hoover] Commission on Organization of the Executive Branch of the Government, Report to Congress on Legal Services and Procedures (1955) and Task Force Report (1955). See generally, Symposium: Hoover Commission and Task Force Reports on Legal Services and Procedure, 30 N.Y.U.L. Rev. 1267-1417 (1955).

2. See Schwartz, Annual Survey of American Law, 1957: Administrative Law, 33 N.Y.U.L. Rev. 154-55 (1958).

3. 60 Stat. 243 (1946), 5 U.S.C. §§ 1001-11 (1952).

and the Grazing Service.<sup>4</sup> Its function is to manage approximately 468 million acres of public domain land. Under its supervision are the re-vested Oregon and California railroad land and other unreserved land. It has control over vast forest land, dividing responsibility in this area with the Forest Service of the Department of Agriculture which has had jurisdiction over the national forest since 1905. It manages range land under the Taylor Grazing Act of 1934. In addition, it handles homestead and mineral entries of various kinds, supervises the surveying and sale of federal lands, and maintains patent records. The magnitude of its operations is described annually in the report of the Secretary of the Interior.

### THE TAYLOR GRAZING ACT

Since the turn of the century, it became increasingly apparent that federal range land in the West was in serious danger of depletion due to overgrazing and other wasteful practices. The free use of grazing land in the public domain was said to be based upon an implied license from the government.<sup>5</sup> Uncontrolled use of range land ended with the enactment in 1934 of the Taylor Grazing Act.<sup>6</sup> Although it was intended primarily as a conservation measure,<sup>7</sup> the act recites that one of its purposes is to stabilize the livestock industry. The Secretary of the Interior was authorized to make temporary withdrawals<sup>8</sup> of unreserved and unappropriated land<sup>9</sup> chiefly valuable for grazing and raising forage crops. He was authorized to establish grazing districts and to issue grazing permits for periods not exceeding ten years, with preferential rights of renewal. In issuing permits, local administrators have the benefit of recommendations from advisory boards made up of local grazers and conservationists. Preference is given to ranchers who own land in the vicinity of the grazing district. Although the statute does not specifically authorize the issuance of temporary or interim licenses, the department soon discovered that it could not issue term permits until it had an opportunity to collect

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4. For a brief description of the history leading to the organization of the Bureau of Land Management, see [Hoover] Commission on Organization of the Executive Branch of the Government, Task Force Report on Real Property Management 113-15, 117-18 (1955).

5. See *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

6. 48 Stat. 1269 (1934), as amended, 43 U.S.C. §§ 315-315r (Supp. 1957).

7. See *Hatahley v. United States*, 351 U.S. 173, 177 (1956); Note, 60 *Yale L.J.* 455, 469 (1951).

8. Occasionally the erroneous impression is given that the withdrawals are permanent. The statute, however, recites that grazing districts may be established "in order to promote the highest use of the public land pending its final disposal. . . ." 48 Stat. 1269 (1934), as amended, 43 U.S.C. § 315 (Supp. 1957).

9. See *Young v. Felornia*, 121 *Utah* 646, 651-52, 244 P.2d 862, 865, cert. denied, 344 U.S. 886 (1952).

the necessary data which would enable it to make permanent plans for administering the federal range. The issuance of interim licenses as well as term permits became common.<sup>10</sup> These are still being issued.<sup>11</sup> The Grazing Service inherited the responsibility of management of the federal range, and in 1946, its functions were transferred to the Bureau of Land Management.<sup>12</sup> At the present time, sixty grazing districts have been organized, and the Bureau manages approximately 170 million acres of federal range land.<sup>13</sup>

The legal status of the grazing license or permit is treated below in some detail because this is an important factor in determining the nature of the administrative procedure. This will be followed by a brief review of the procedure before the Bureau in connection with applications for licenses and permits. Recent developments in the application of the APA to this procedure will then be discussed.

*Legal status of permits and licenses:*

The nature of grazing permits and licenses under the Taylor Grazing Act has come before the lower federal courts on several occasions. The leading case of *Red Canyon Sheep Co. v. Ickes*<sup>14</sup> involved a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from consummating a private exchange of federal land in a grazing district for privately owned land in a national forest. The claimed statutory authorization for the exchange was a series of special statutes enacted between 1929 and 1935 rather than the general provisions of the Taylor Act. It was held that an injunction should issue. The proposed exchange was illegal because the various conditions required by the statutes could not be met. The plaintiff had been issued, under the Taylor Act, interim grazing permits in the federal land sought to be exchanged for the private land. He claimed that if the proposed exchange were consummated, these lands would no longer be available for grazing purposes. In determining whether the plaintiff possessed such an interest in the grazing land as would justify the court in exercising jurisdiction to grant an injunction, the court was faced with the provision in section 3 of the Taylor Act that although grazing privileges "shall be adequately safeguarded," the creation of a grazing district or the issuance of a permit "shall not create any right, title, interest, or estate in or to the land."<sup>15</sup> The defendants contended that this section reaffirmed

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10. See *Brooks v. Dewar*, 313 U.S. 354, 360-61 (1941).

11. See *E. L. Cord*, 64 I.D. 232, 238 (1957).

12. See note 4 *supra*.

13. U.S. Dept. of the Int. Ann. Rep. xxvii (1957). For an excellent evaluation of the program of the Bureau see Note, 60 Yale L.J. 455 (1951).

14. 98 F.2d 308 (D.C. Cir. 1938).

15. 48 Stat. 1270 (1934), as amended, 43 U.S.C. § 315b (Supp. 1957).

decisions prior to the Taylor Act which held that customary grazing on federal lands created no vested rights.<sup>16</sup> The court, however, felt that, for the purpose of this decision, an interim licensee possessed something more substantial than a revocable license:

But we do conclude that if the Secretary determines to set up a grazing district including lands upon which grazing has been going on, then those who have been grazing their livestock upon these lands and who bring themselves within a preferred class set up by the statute and regulations, are *entitled as of right* to permits as against others who do not possess the same facilities for economic and beneficial use of the range. . . . [W]e are of the view that the interim licenses which have been temporarily issued to them *must*, under the Act, ripen into permits, provided that Grazing District No. 4, which has been set up so as to include the lands upon which the appellants have been running their sheep, continues to exist and to include such lands.<sup>17</sup> (Emphasis added.)

Subsequent decisions have generally taken a more restrictive view of the nature of interim licenses and grazing permits. These decisions have involved primarily the question of compensation in eminent domain proceedings and the liability of agents of the government under the Federal Tort Claims Act.<sup>18</sup> In an early case, a term grazing permit issued by the Secretary of Agriculture for forest lands under his jurisdiction was held to be revocable at any time, and since it is neither a "contract" with the government nor a "property" interest, the owner of the permit is not entitled to compensation for its claimed value in condemnation proceedings involving privately-owned land of the permittee.<sup>19</sup> The compensation problem has been encountered more recently where private ranch lands have been condemned by the United States for war purposes. The ranchers usually also owned Taylor grazing permits on adjacent federal land, and it was freely acknowledged that these permits substantially contributed to the value of the private land. In determining the measure of compensation for taking the private land, the courts held that it was proper to consider the "highest and most profitable use" of the fee land, and the fact that it was accessible to permit land was an "appurtenant element of value."<sup>20</sup> The courts, however, refused to allow the permits to be separately valued because they could not be classified as property

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16. See note 5 *supra*.

17. 98 F.2d at 314. In *Garcia v. Sumrall*, 58 Ariz. 526, 121 P.2d 640 (1942), it was held that a permittee whose permit expired was a tenant at will as far as other grazers were concerned, although not as against the government.

18. 60 Stat. 842 (1946), as amended, 28 U.S.C. §§ 2671-80 (1952).

19. *Osborne v. United States*, 145 F.2d 892 (9th Cir. 1944). In this case the permits were first withdrawn by the Secretary of the Interior. Condemnation proceedings were then instituted.

20. *United States v. Jaramillo*, 190 F.2d 300, 302 (10th Cir. 1951).

interests in view of their revocable nature.<sup>21</sup> Where only the grazing land is appropriated, the cancelled permits were thus not compensable under the due process clause. This obvious hardship to permit holders resulted in an amendment to the Taylor Grazing Act requiring the agency appropriating the land for war purposes to pay such compensation out of funds available for its project in an amount deemed by it to be "fair and reasonable."<sup>22</sup> The award by the agency is not likely to be as high as in condemnation proceedings.

The permittee has met with only slightly more success in suits under the Federal Tort Claims Act. In *Chourmos v. United States*,<sup>23</sup> the plaintiff, owner of base lands, claimed that he was entitled as a matter of law under the Taylor Grazing Act to permits on adjacent public land and to crossing permits to move his sheep from one range to another. He alleged that the government officials refused to issue such permits in order to coerce him into surrendering control of his land to the district. It was held that the refusal to issue the permits

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21. *Id.* In this case, the condemnation proceedings did not include the government lands and the permits were not revoked. Hence the existing permits could be regarded as "appurtenant elements" of value to the holder.

A more difficult question was presented in *United v. Cox*, 190 F.2d 293 (10th Cir.), cert. denied, 342 U.S. 867 (1951). Over 427,000 acres of land were appropriated for war purposes under the Second War Powers Act. 56 Stat. 177, 50 U.S.C. § 171a (1952). These ranch lands consisted of fee land, land leased from the state, and public domain land on which the ranchers held grazing permits. Although the grazing permits had not been formally cancelled, the court felt that there was a "cancellation of the permits by a declaration of taking in the condemnation proceedings." It was held to be immaterial that there was no formal cancellation of the permits but simply a declaration by the government that its land was to be included in the project. *United States v. Osborne*, note 19 *supra*, was thought to be controlling, and the existence of the permits could not be considered in determining the value of the fee land. The court drew an analogy to cases dealing with condemnations under the government's power over navigable streams, stating that "preferential privileges" incident to riparian ownership are not compensable. *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) was relied upon. A more recent decision strengthening the court's analogy is *United States v. Twin City Power Co.*, 350 U.S. 222 (1956).

Phillips, J., dissenting in the *Cox* case, regarded the case in this light: "[T]he postulate upon which the majority rests its conclusion . . . is that since the public lands were to be embraced within the project, they would not in the future be available for use in connection with the privately-owned lands under grazing permits and, hence, they should not be considered in arriving at the value of the privately-owned lands." He felt that the error in the approach of the majority is that it represents a retreat from the generally acknowledged rule that value is fixed at the date of taking. 190 F.2d at 298.

22. 48 Stat. 1270 (1934), as amended, 43 U.S.C. § 315q (Supp. 1957). Under this statute the agency may either compensate for the cancellation of the permit or lease back to the government's own permit. *McDonald v. McDonald*, 61 N.M. 458, 302 P.2d 726 (1956).

23. 193 F.2d 321 (10th Cir.), cert. denied, 343 U.S. 977 (1952).

was within the exception from liability under the provisions of the Federal Tort Claims Act<sup>24</sup> relating to the exercise by an agency of its discretionary functions.<sup>25</sup> On the other hand, in *Oman v. United States*,<sup>26</sup> it was alleged that the government officials interfered with the plaintiff's exclusive permit by authorizing others to use the land allotted to the plaintiff and in refusing to cancel the permit of the plaintiff's transferor. This was held to be actionable under the Federal Tort Claims Act because the officials had no discretion to permit such interference and, under the Taylor Act, had no discretion in refusing to cancel the permit which had been issued to the plaintiff's transferor.<sup>27</sup>

The review provisions of the Administrative Procedure Act were involved in one case.<sup>28</sup> The Secretary of the Interior approved a special rule that both land and water in designated proportions were to be recognized as base property under the Taylor Act. The application of this formula to a request for a grazing permit constituted a matter committed to the agency's discretion. The decision of the agency was not, therefore, reviewable under section 10 of the Administrative Procedure Act.

*Procedure for issuance of licenses or permits:*

The Department has adopted detailed rules governing the procedure for the issuance of various types of licenses or permits, hearings on applications, and appeals.<sup>29</sup> An applicant for a grazing license or permit must file his application prior to a designated date set by the range manager of the particular district. The application is considered first by the district advisory board which makes a recommendation to the range manager. If the recommendation is adverse to the applicant, the reasons therefor are required to be stated in a notice to the applicant, and a date is set for filing protests against the recommendation. At the time and place fixed for the protest meeting, "any licensee, permittee or applicant" may make either an oral or written protest. The advisory board reconsiders its recommendation and makes a final recommendation to the range manager. If this is adverse to the applicant, the range manager, if he approves, notifies the applicant, stating the reasons for the decision. This becomes the manager's final decision for appeal purposes. The range manager is

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24. 60 Stat. 842 (1946), as amended, 28 U.S.C. § 2680 (1952).

25. See also *Powell v. United States*, 233 F.2d 851 (10th Cir. 1956).

26. 179 F.2d 738 (10th Cir. 1949).

27. The court felt that its decision came within the the holding of *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308 (D.C. Cir. 1938).

28. *Sellas v. Kirk*, 200 F.2d 217 (9th Cir. 1953).

29. 43 C.F.R. §§ 161.9-.10 (Supp. 1957).

not bound by a favorable recommendation of the advisory board and may issue or refuse to issue a license or permit if he feels the facts or circumstances justify such a decision. The applicant is notified of any variation from a favorable recommendation of the board and advised of his right to appeal to a hearing examiner. Cancellations or reductions of licenses or permits need not go through the advisory board. The procedure is to give the applicant an opportunity to show cause and to appeal to an examiner from an adverse ruling by the range manager.

An appeal, including supporting reasons, may be filed in the range manager's office within 30 days after a decision adverse to the applicant. The manager forwards the appeal to the state supervisor who thereafter represents the Bureau in any further proceedings in connection with the appeal. A motion to dismiss and an answer may be filed. All papers are transmitted to the hearing examiner who makes a ruling on any such motion. If the motion to dismiss is overruled, a date is set for the hearing by the examiner. Other persons who may be directly affected by the decision in the opinion of the range manager may also be notified of the hearing, and they are permitted to appeal as intervenors.

In general the provisions relating to the conduct of the hearing simulate the typical judicial trial proceeding. Thus, there are provisions for issuing subpoenas, taking depositions, administering oaths, calling and questioning witnesses, granting continuances. The parties are required to stipulate so far as possible the material facts and issues involved. The state supervisor or his representative presents his case, followed by a similar presentation of the appellant. At the conclusion of the testimony, an opportunity is given to present proposed findings of fact and conclusions of law. The examiner is required to hand down a written decision. In any case, the director of the Bureau may require the examiner to make only a recommended decision; the initial decision is then made by the director himself.<sup>30</sup>

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30. Zelf S. Calder, 59 I.D. 528 (1947) involved appeal procedure under the old regulations. The opinion held that under existing procedure it was error for the director of the Grazing Service to sign the decision of the hearing examiner to whom an appeal had been taken. The function of the examiner was either to render a decision on the findings made by him or to submit a proposed decision to the Secretary for approval in which case it would become a decision of the Department. The director of the Grazing Service was outside the hierarchy of the appellate process. The opinion referred to the fact that subsequently the regulations had been revised so as to permit the Director of the Bureau of Land Management to require, in the specific cases, that the examiner make only a recommended decision, which was to be submitted together with the record to the director for consideration. The requirement of a recommended decision by the examiner (the one who hears and presides) was said to be patterned after the mandate in § 8(a) of the APA. Under the current regulations apparently the



Appeals from the decision of the examiner to the director and from the director to the Secretary of the Interior are provided for. These are in the main the general rules applicable to all types of proceedings before the Bureau.<sup>31</sup> The effect of an appeal from the examiner is to suspend his decision until determination on appeal. It may, however, be provided at any stage of the appeal that the initial decision shall remain in full force and effect until reversed. The rules expressly provide that the decision becomes reviewable by the courts under section 10 of the APA only if such provision for immediate effectiveness is made. Otherwise, the administrative remedies must first be exhausted.

*Effect of the Administrative Procedure Act:*

Since the passage of the APA in 1946, the Bureau has endeavored to make its procedure in grazing applications conform in a general way to the requirements of the Act.<sup>32</sup> The decision that the APA governs grazing hearings was based on section 9 of the Taylor Grazing Act which provides that 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. . . ."<sup>33</sup> This was construed by the Department as requiring a hearing on appeal in applications for permits or licenses. Section 5 of the APA, which prescribes basic standards to be observed in hearings, applies to "adjudication required by statute to be determined on the record after opportunity for an agency hearing. . . ."<sup>34</sup> This interpretation of the Taylor Act was entirely sound. It led to a revamping of the regulations so as to adopt some of the more desirable features of the APA. Thus, the requirement of a recommended decision by the hearing examiner where the director makes the initial decision was patterned after section 8(a) of the APA.<sup>35</sup> In one departmental decision it was noted that the regulations were more restrictive than would be required by the APA.<sup>36</sup> As might be expected the departmental rules

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examiner may not on his own volition submit a proposed decision to the director of the Bureau.

31. 43 C.F.R. §§ 221.1-37 (Supp. 1957).

32. See Davis, *Government Legal Services, Procedures, and Representation: A Discussion of the Hoover Report and the Administration of the Department of the Interior*, 50 *Nw. U.L. Rev.* 726, 729 (1956).

33. 48 Stat. 1273 (1934), as amended, 43 U.S.C. § 315h (Supp. 1957).

34. 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1952).

35. See note 30 *supra*.

36. In *Frank Halls*, 62 I.D. 344 (1955), it was held that decisions cancelling licenses or permits could not under departmental rules be made effective pending disposition on appeal. It was noted that § 9(b) of the APA was less restrictive since it authorized immediate revocation of licenses in cases of willfulness or where the public health, interest or safety requires such action.

were immediately revised.<sup>37</sup> In another decision, *M. F. Sullivan*,<sup>38</sup> it was suggested that the failure of the range manager to state in the notice of adverse action on an application, all the reasons upon which the action was based may violate section 5(a) of the APA.<sup>39</sup> The opinion reasoned that the very purpose of such a requirement is to give the parties an opportunity to present evidence on the relevant issues affecting their rights. Therefore, disregard of the range regulations and section 5(a) of the APA could not be condoned. The *Sullivan* decision was reexamined and its scope restricted in the *E. L. Cord* opinion, discussed below.<sup>40</sup>

On the question of the right to a hearing on the record, the Department, despite its rather liberal attitude toward the APA, drew a distinction between applications for licenses or permits and protests. Under the general practice regulations, protests include "any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau. . . ." and such action thereon will be taken as is deemed to be "appropriate in the circumstances."<sup>41</sup> The regulations contain no requirement of a hearing on the record in protest cases. A protestant apparently has standing to appeal from a denial of grazing privileges, however, to the director and to the Secretary.<sup>42</sup> On the other hand, an applicant for a grazing permit or license is entitled to appeal to the examiner from an adverse decision and to a hearing on his appeal. This applies also to cancellations of licenses and permits. The distinction between the two types of cases is illustrated by the departmental decision in *Steele v. Kirby*.<sup>43</sup> In that case, Mrs. Kirby filed an application to exchange private land for lands located in a grazing district.<sup>44</sup> Protests were filed by five grazers in the district who had permits which would be affected by the proposed exchange. Private exchanges are covered by section 8(b) of the Taylor Act and may be consummated by

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37. 43 C.F.R. § 161.10 (i) (Supp. 1957).

38. 63 I.D. 269, 276 (1956).

39. Section 5(a) provides: "Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law. . . ." 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1952).

40. See note 48 infra.

41. 43 C.F.R. § 221.52 (Supp. 1957). Under 43 C.F.R. § 160.7 (1954) a protest is required to contain a complete disclosure of all facts upon which it is based. If the protestant desires to lease the land embraced in the application for a permit, the protest should be accompanied by an application for a grazing lease. 43 C.F.R. § 146.8(b) (1954) deals with protests against private exchanges. . .

42. See, e.g., *Steele v. Kirby*, 60 I.D. 389 (1950).

43. *Ibid.*

44. Rules relating to private exchanges are in 43 C.F.R. §§ 146.1-8 (1954).

complying with the conditions laid down by the statute, even though the selected lands are already covered by licenses or permits. The protestants claimed that they were entitled to a formal hearing in order to submit evidence against the proposed exchange. The contention was rejected on the ground that since private exchanges are committed to the discretion of the Secretary (or his designee), no hearing is required by the Taylor Act and, hence, the APA has no application. Moreover, a hearing is not required as a matter of due process since a license or a permit is not a "vested interest." The decision relies upon the court decisions relating to the nature of grazing permits and licenses.<sup>45</sup> Although the opinion does not so indicate, the ruling appears to be based upon the privilege-right analysis which has been utilized by the Supreme Court in other areas. Thus, government employment is sometimes categorized as a privilege rather than a right, and hence may be granted or denied summarily without violating due process. The fallacy in this analysis has often been pointed out: there is no reason why even a privilege should be dealt with unfairly.<sup>46</sup> It may be that a permittee does not have a "vested interest" in the usual sense, but the fact remains that his permit is a matter of considerable value.<sup>47</sup> He should not be deprived of it at least without an opportunity to present evidence showing the undesirability of the exchange. This is not to say, perhaps, that all protests should be accorded a full hearing on the record, but the regulations should be amended to accord a hearing to protestants whose permits will be affected by an exchange. It is difficult to see why a hearing is not as important here as where the permit is directly cancelled.

Apart from the position of the Department in connection with protests, the attitude toward the APA seemed to be one of considerable liberality until the recent decision in *E. L. Cord*.<sup>48</sup> This case involved an appeal by a holder of an interim license from a denial of grazing privileges. It was contended that the notices of the range manager violated section 5 (a) of the APA<sup>49</sup> in that they failed timely to inform the licensee of the facts and law asserted so that he could prepare his defense. In rejecting this contention, it was suggested that it was based upon a misunderstanding of Bureau procedure. Neither the Taylor Act nor the regulations provide for any hearing as a condition precedent to denying or granting a license or a permit. The only

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45. See text supported by notes 14-27 supra.

46. Schwartz, *A Decade of Administrative Law*, 51 Mich. L. Rev. 775, 807-12 (1953); Davis, *Administrative Law* 246-54 (1951).

47. See *Osborne v. United States*, 145 F.2d 892, 895 (9th Cir. 1944).

48. 64 I.D. 232 (1957).

49. See note 39 supra.

hearing provided for in the Taylor Act is on appeal from the decision of the range manager.<sup>50</sup> The notices of the manager were not notices of hearings at all but were simply notices of adjudications made by the range manager which would have become final but for this licensee's protest. This made compliance with section 5(a) unnecessary. This analysis seems to overlook the departmental rules which themselves require such notices to state the reasons for the action.<sup>51</sup> Moreover, while it is true that Bureau procedure is perhaps *sui generis* in the field of administrative law, the notices required of the range manager were certainly intended to perform a dual function. On the one hand, they are designed to inform the licensee of the manager's final action. But, unless they serve also to set the issues for the appeal to the hearing examiner, they are meaningless. How can the licensee possibly formulate any sort of case when he is not aware of the basis for the decision appealed from? While it is correct that in this particular case he might have had actual notice, as the opinion suggests, that will not always be the case.

The opinion goes further and states that the licensee cannot complain of the notices because, when he avails himself of the privilege of appealing, he rather than the Bureau is the moving party and has the burden of proof. How this demonstrates the fairness of the procedure is not readily apparent. It rather serves to magnify the licensee's dilemma. The severity of the decision is ameliorated somewhat by the statement that if the appellant had been the holder of a term permit, the burden would have been on the Bureau to justify the reduction.<sup>52</sup>

The decision also uses the burden of proof analysis as a basis for rejecting the objection that the government's case was based entirely upon hearsay evidence and thus violated section 7(c) of the APA. It is doubtful that the applicability of 7(c) was intended to hinge upon who has the burden of proof.<sup>53</sup>

The burden of proof problem is likely to become one of the most vexatious problems in Bureau procedure. The *Cord* decision is by no means the last word.

### MINING CLAIMS

Space permits only the most cursory review of the manner in which mining claims may be acquired in federal land.<sup>54</sup> The principal method

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50. See note 33 supra.

51. 43 C.F.R. § 161.9 (a-4) (Supp. 1957).

52. See M. F. Sullivan, supra note 12.

53. Compare *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 690 (9th Cir.), cert. denied, 338 U.S. 860 (1949).

54. For a concise summary of current law, see Parriott, *Mining Rights in Public Land*, 34 Texas L. Rev. 892 (1956); Note, 4 Utah L. Rev. 239 (1954).

is by location under the Mining Law of 1872,<sup>55</sup> which opened mineral land in the public domain to free exploitation. Land subject to location is limited to vacant, unappropriated and unreserved land in the public domain. The validity of a mining location depends upon a "discovery" of valuable minerals. To complete a location, state and federal statutes combine to require in a general way the posting of a notice of location, a discovery shaft, the marking off of the boundaries of the claim, and the filing of a certificate of location. The size of the claim depends upon whether it is a lode or placer location. Once completed, the locator may without payment remove all the minerals even though he has not patented his claim, and his claim has the usual characteristics of ownership. A mining claim based on location may be lost by abandonment or forfeited to a relocater through failure to perform the required annual assessment work. Federal statutes authorize, but do not require, the locator to obtain a patent.

Mining rights in public land may also be obtained under the Leasing Act of 1920,<sup>56</sup> as amended, which removes from location and places on a leasing basis certain types of minerals such as coal, oil and gas. Mining rights in "acquired lands," as distinguished from public domain land, may be acquired also by leasing.<sup>57</sup> Another source of mining rights is the now comparatively rare Atomic Energy Commission lease.<sup>58</sup>

*Bureau procedure in mineral applications:*

The Bureau is generally not concerned with the validity of unpatented mining claims. In a rare case, it may contest the validity of a mining location,<sup>59</sup> but normally contests, adverse proceedings or protests either are not or cannot be filed until the locator applies for a government patent. A brief review of these various procedures follows.<sup>60</sup>

The adverse proceeding is statutory in origin and is available to obtain a judicial determination of a private controversy between con-

55. Rev. Stat. §§ 2318-52 (1875), as amended, 30 U.S.C. §§ 21-54 (1952).

56. 41 Stat. 437 (1920), as amended, 30 U.S.C. §§ 181-270 (1952).

57. The Acquired Lands Leasing Act, 61 Stat. 913 (1947), as amended, 30 U.S.C. §§ 351-59 (1952), applies to non-metalliferous minerals.

58. Atomic Energy Acts, 60 Stat. 755 (1946), 42 U.S.C. §§ 1801-19 (1952); 68 Stat. 919 (1954), 42 U.S.C. §§ 2011-2281 (Supp. II 1955).

59. 43 C.F.R. § 221-67 (Supp. 1957) provides, "The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

60. For a description of earlier procedures in the General Land Office, see McClintock, *The Administrative Determination of Public Land Controversies*, 9 Minn. L. Rev. 542, 546-54 (1925); Attorney General's Committee on Administrative Procedure, Department of the Interior, Monograph No. 20, 65-73, 87-114 (1940).

flicting locators where an application for a patent has been filed by one of them.<sup>61</sup> It is commenced by filing an adverse claim with the manager of the local land office where the patent application has been filed.<sup>62</sup> This must be done during the 60-day period required for publishing notice of the patent application. The manager notifies the patent applicant that the adverse claim has been filed and that the adverse claimant will be required to commence an action in a competent court within 30 days from the date of filing. If the claimant fails to commence suit and to prosecute it with reasonable diligence, he may not later assert his claim and will be foreclosed by the issuance of the patent. The suit is generally in the state district court, and the effect of filing an adverse claim is to stay further patent proceedings. The adverse proceeding is thus not pursued through administrative channels. There is a great deal of substantive mining law on what types of claimants must adverse and the effect of their failure to act.<sup>63</sup>

The private contest is an administrative remedy. It is not a method by which a conflicting locator may establish his claim. He must adverse. A private contest may be initiated by one who claims "title to or an interest in land adverse to any other person" claiming a similar interest, for the purpose of invalidating the adverse claim "for any reason not shown by the records" of the Bureau.<sup>64</sup> A typical example is the homesteader who claims that his conflicting entry is valid, as against the mining locator who has applied for a patent, on the ground that the land is nonmineral. The regulations provide for the manner in which such conflicts are to be resolved.<sup>65</sup> Another illustration is the recent departmental decision, *Northern Pac. Ry.*<sup>66</sup> One Ralph L. Bassett filed for a noncompetitive oil and gas lease on an unsurveyed island in the Yellowstone River, Montana. The railroad first filed a protest and later a "contest," claiming title to the island under an 1864 railroad grant.<sup>67</sup> The Department decided that title never passed to the railroad, and its claim was dismissed. In answer to the railroad's contention that the rules of practice required a formal hearing in contests, it was stated that the above regulation applied only where the adverse title was based upon a claim "not shown by

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61. Rev. Stat. § 2326 (1875), as amended, 30 U.S.C. § 30 (1952).

62. 43 C.F.R. §§ 185.78-83 (1954).

63. See Ricketts, *American Mining Law*, c. 17, c. 21 (4th ed. 1943); Morrison, *Mining Rights* 609-40 (16th ed. 1936).

64. 43 C.F.R. § 221.51 (Supp. 1957).

65. 43 C.F.R. §§ 185.88-93 (1954).

66. 62 I.D. 401 (1955).

67. The railroad contended that the island was included in the United States survey of the particular section and therefore passed to it under the grant of "primary land." For a discussion of railroad land grants, see Swenson, *Railroad Land Grants: A Chapter in Public Land Law*, 5 Utah L. Rev. 456 (1957).

the records" of the Bureau. The railroad's claim here was based upon documents all of which were in the Bureau's records. The contestant further claimed that a hearing was required under section 5 of the APA. The Department dismissed this contention on the ground that section 5 applied only to hearings required to be held by statute, and no statutory provision existed for a hearing with respect to a claim that certain public land had been omitted from an original survey.

Protests against mineral patent applications may also be filed by anyone who contends that the applicant has failed to comply with the legal requirements necessary to obtain a patent.<sup>68</sup> The protest may not, however, be made the basis for preserving a claim lost by failure to adverse. The protestant's case is not based upon his own conflicting claim, although if he is successful in his protest, he may be in a position to assert his claim.<sup>69</sup> Normally the protestant has no right to a hearing,<sup>70</sup> and unless he asserts a substantial interest in the land, no right to appeal from the manager's decision.<sup>71</sup>

A protest often results in a government contest of a mining claim. The government may also on its own motion contest the validity of a patent application on the ground that the applicant is not entitled to a patent, e.g., where it is contended that the land is nonmineral or is not open to location.<sup>72</sup>

*Application of the APA to mining claims procedure:*

Section 5 of the APA prescribes basic procedural standards to be observed in connection with formal administrative hearings. Section 5(c) requires that hearing officers appointed pursuant to the act be insulated from the investigative and prosecuting functions of the agency. The requirement of an independent hearing examiner has been one of the great failures of the APA. The "hearing examiner

68. 43 C.F.R. § 185.86 (1954).

69. *Langwith v. Nevada Min. Co.*, 49 I.D. 629 (1923).

70. 43 C.F.R. § 221.52 (Supp. 1957).

71. *Morrison*, op. cit. supra note 63, at 642; *Ricketts* op. cit. supra note 63, at 278. However, 43 C.F.R. § 221.1 (Supp. 1957) may authorize an appeal by any protestant. If the protestant appears in the role of *amicus curiae*, it is doubtful whether he would have standing to appeal as a matter of right. This conclusion is fortified by the fact that a special provision is made for protests and appeals by co-owners of mining locations. 43 C.F.R. § 185.86 (1954). The reason for this special rule is that the Supreme Court held that a co-owner need not adverse a patent application brought by the other co-owner since the former can establish in a judicial proceeding his equitable claim against the patentee. *Turner v. Sawyer*, 150 U.S. 578 (1893). The decision does not necessarily mean that he cannot adverse. If he fails to adverse, he can still protest and has standing to appeal under § 185.86.

72. 43 C.F.R. § 221.67 (Supp. 1957).

fiasco" has been interestingly detailed elsewhere.<sup>73</sup> Section 5 applies only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." Section 7(a), in specifying who may act as hearing examiners in hearings covered by section 5, contains the proviso that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specifically provided for by or designated pursuant to statute."

A number of agencies have asserted exemption under these sections from the provisions of the APA.<sup>74</sup> Section 5 might seem to be restricted to hearings which are required to be held by statute. The Supreme Court in *Wong Yang Sung v. McGrath*<sup>75</sup> indicated, however, that section 5 may apply to a proceeding in which a hearing is required under the due process clause. The principal problem has been to determine what officers are "specifically provided for by or designated pursuant to statute" under section 7(a). At the time of the adoption of the APA, the Attorney General felt that section 7(a) was not intended to provide a loophole for avoiding the examiner system, but was intended merely to exempt from the provisions of the act "special types of statutory hearing officers who contribute some special qualifications." He listed registers of the General Land Office as special types of statutory hearing officers.<sup>76</sup>

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73. Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 Harv. L. Rev. 737 (1950); Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 Yale L.J. 431 (1950).

74. [Hoover] Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures 140, 168-69 (1955). The recommendation is made that § 5 be amended to cover agency proceedings required to be determined after opportunity for an agency hearing under the Constitution or by statute.

75. 339 U.S. 33 (1950). The case dealt with the application of the APA to deportation proceedings. The case was extended to property interests in *Riss & Co. v. United States*, 341 U.S. 907 (1951). See also *Cates v. Haderlein*, 342 U.S. 804 (1951), reversing per curiam 189 F.2d 369 (7th Cir. 1951); *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952).

The Court also held that the immigration inspectors were not hearing officers "specifically provided for by or designated pursuant to statute" under § 7(a). In defining the exception in § 7(a), the Court stated in 339 U.S. at 52 "they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process." This interpretation is criticized in Davis, *Administrative Law* 308 (1951), where it is suggested that the case should have been decided on the ground that the hearing violated § 5(c). For subsequent history as to deportation proceedings, see *Marcello v. Bonds*, 349 U.S. 302, 306-7 (1955).

76. S. Doc. No. 248, 79th Cong., 2d Sess. 227-28 (1946). Compare the quotation from the *Wong Yang Sung* case, note 75 supra.



After the APA, the Department took the position that formal hearings were not required in mineral contests because, unlike the situation with reference to grazing applications, no federal statute required such a hearing. Section 5 of the APA by its terms applied only to hearings required to be held by statute. There was no departmental decision on the precise point, however. The distinction between grazing applications and mining claims on the right to a hearing was anomalous. A mining claim has traditionally been regarded as a property interest, whereas grazing permits are at best unsubstantial interests.

In 1956 the Department abruptly reversed its traditional position in *Keith V. O'Leary*.<sup>77</sup> There the government contested an application to patent a placer claim, contending that minerals had not been found in sufficient quantities to constitute a valid discovery. A hearing was held before the land office manager who sustained the government's charges. On appeal, the Secretary of the Interior held that the APA applied to contest cases involving the validity of mining claims. The decision was based upon the theory that under the *Wong Yang Sung* case,<sup>78</sup> the APA applies whenever the due process clause requires a hearing. An unpatented mining claim is property in the fullest sense,<sup>79</sup> and a hearing is required in any adjudication of its validity. Moreover, the manager of the land office is not an officer authorized by section 7 to preside at hearings.<sup>80</sup>

The *O'Leary* decision resulted in radical revision of contest procedures in mining cases.<sup>81</sup> The regulations now state that if an answer is not filed by the contestee, the allegations of the complaint filed by the contestant will be regarded as admitted and the manager will decide the case without a hearing.<sup>82</sup> If an answer is filed, the case

77. 63 I.D. 341 (1956). In a subsequent appeal to the director in the same case, it was held that an appeal from an interlocutory ruling was premature. *United States v. O'Leary*, Contest No. 5168, August 15, 1957 (unpublished).

78. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

79. *Manuel v. Wulff*, 152 U.S. 505, 510-11 (1894): ". . . mining claims are property, in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and . . . when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession." See also *Cole v. Ralph*, 252 U.S. 286, 295 (1920).

80. It is correct that the manager is not an independent hearing examiner of the type envisaged by § 5(c) of the APA. The opinion overlooks, however, that the manager was regarded as a special statutory hearing officer and thus within the exception in § 7(c) at the time the APA was passed. See note 76 supra.

81. The departmental rules of practice had been revised on May 1, 1956. Major changes were again made after the *O'Leary* decision. See *Sec. Int. Ann. Rep.* 304 (1957).

82. 43 C.F.R. § 221.65 (Supp. 1957).

will be referred to an examiner upon determining that the elements of a contest appear to exist. The details of the procedure before the examiner were also revised along quasi-judicial lines.<sup>83</sup>

The principal change in the regulations after *O'Leary* consists of the utilization of semi-independent hearing examiners, qualified and appointed under the Civil Service Commission's regulations. By the end of the 1957 fiscal year, eight hearing examiners had been appointed. Although they are employed by the Bureau, the agency has, of course, no removal power. This group of examiners hears appeals in grazing applications as well as in contests involving mineral claims. In the Secretary's annual report for 1957, the Bureau reported that there were 240 unclosed cases before the hearing examiners at the end of June, 1957, 12 more than at the beginning of the year. While this is due in part to the fact that the examiners were not appointed until late in the year, the backlog is still great.<sup>84</sup> The 1958 annual report will reveal how efficiently the examiner system is working and whether additional examiners are needed.

There have been some recent limitations on the right to a hearing on the record in mineral applications. The land office manager has some discretion in determining whether a contest exists. Thus, if the contestant's allegations indicate that as a matter of law his claim is void, there is no necessity for a hearing.<sup>85</sup> This is acceptable when viewed in the light of the circumstances of the particular case. In another decision, it was held that the right to a hearing before an examiner (instead of the manager) may not be raised for the first time on appeal to the Secretary.<sup>86</sup>

It should also be noted that hearings are not held in connection with applications for oil and gas leases on federal land under the Leasing Act of 1920. Awarding the lease is discretionary with the Secretary and since the Leasing Act does not require a hearing, the APA has no application.<sup>87</sup>

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83. 43 C.F.R. §§ 221.69-77 (Supp. 1957).

84. Sec. Int. Ann. Rep. 305 (1957).

85. Clear Gravel Enterprises, Inc., 64 I.D. 210 (1957).

86. *United States v. Adams*, 64 I.D. 221 (1957). The failure to observe the requirements of the APA does not necessarily invalidate the proceeding. Timely objection must be made. In this case, the objection was first raised more than three years after the hearing, more than two years after the manager's decision and almost a year after the acting director's decision. Moreover, the appellant was unable to show that the proceeding before the manager was in any way inherently unfair.

87. See *Northern Pac. Ry.*, 62 I.D. 401, 410 (1955). In *Halvor F. Holbeck*, 62 I.D. 411, 414 (1955), it is pointed out ". . . it is well to remember that the issuance of oil and gas leases, even when the public land is available for such leasing, is committed to the discretion of the Secretary and that he may refuse to issue a lease when to do so would not be in the public interest." See also *Earl J. Boehme*, 62 I.D. 9 (1955). Similarly, in *A. Ben Shallit*, 63 I.D. 193 (1956),

The revised regulations now contain detailed rules relating to appeal from the examiner to the director and the Secretary.<sup>88</sup> The director may on his own motion or at the request of either party order a hearing for the reception of evidence on issues of fact before a field commissioner. Granting a hearing is within the discretion of the director, however, and the Department has taken the stand that any such hearing need not conform to the requirements of the APA.<sup>89</sup> As a practical matter such hearings are conducted in much the same manner as those before the examiners.<sup>90</sup> On appeal to the Secretary no hearing is held, but he has discretion to grant oral argument.<sup>91</sup> Judicial review of the Secretary's decision is beyond the scope of this article. It should be noted, however, that the courts are most reluctant to interfere with public land matters committed by Congress to the discretion of the Secretary.<sup>92</sup>

#### CONCLUSION

The Department has also considered the effect of two miscellaneous provisions of the APA. These are section 4 dealing with the rule making function<sup>93</sup> and section 3(a) relating to publication of policy decisions.<sup>94</sup> The important advance in Bureau procedure, however, has been the utilization of semi-independent hearing examiners in mining contests as well as in grazing applications. This long overdue reform appears in the main to be working satisfactorily. The tendency of the regulations has been to judicialize procedure to the point where Bureau practice has become a specialty of a segment of the bar in the West. The regulations abound with words like "complaint," "motion to dismiss," "demurrer" etc. The current notions of burden of proof in grazing cases is fully as complicated as any line of judicial decisions on the subject. In this trend toward conformity with judicial procedure, it might be well to bear in mind Professor Davis' wise admonition:<sup>95</sup>

The successes of informal adjudication are so impressive that excessive formalism in some agencies seems especially unfortunate. Many tasks call for round tables and unbuttoned vests, not for witness chairs and courtroom trappings.

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no hearing was granted under APA for issuance of a right of way over land included in coal lease, because no statute required such hearing.

88. 43 C.F.R. §§ 221.1-37 (Supp. 1957).

89. Report, Minerals Technical Conference, Oct. 11, 1956 (unpublished). This is a summary of a conference with Department personnel to discuss changes in Bureau procedure resulting from the O'Leary decision.

90. See 43 C.F.R. §§ 221.11-20 (Supp. 1957).

91. *Id.* § 221.36.

92. *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306 (1930).

93. *Migratory Bird Treaty Act*, 59 I.D. 431 (1947); *Wade McNeil*, 64 I.D. 423 (1957).

94. *Max Barash*, 63 I.D. 51 (1956).

95. *Davis*, *Administrative Law* 183 (1951).

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