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AN OPERATIONAL VIEW OF THE BLM ORGANIC ACT

BY KARL S. LANDSTROM*

Public land law reform, that long-sought goal, has made a big step forward. It is timely at this conference to consider the details of the new Act,¹ for therein rather than in the policy declarations lies its true significance.

When the Honorable Wayne N. Aspinall addressed the 1962 White House Conference on Conservation, he closed with this paragraph:

In summary, what I am saying is that Congress will continue to equate conservation with wise use; will not put out of reach resources that may be required for our national continuance; and that all the resources will be managed for the benefit of the many and not the few.²

These well-chosen words offer a useful standard by which to judge the merits of the new Act. They reflect the essence of "multiple use" management of public lands and resources, a concept in which I have long believed. They suggest the kind of reasonable balance that should be the goal of laws and regulations enacted for the use and disposal of public properties.

A crucial element, however, is missing in the summary of Chairman Aspinall, although I am sure that he has emphasized it at other times and places. I refer to the important question of the timeliness of public land actions.

Congressman Aspinall at one time had thought that general public land law reform, under a "joint effort" agreement with President Kennedy, would soon be operative "in order to meet the demands of the 1960's."³ It now appears that some of the provi-

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¹ 43 U.S.C.A. §§ 1701-1782 (Supp. 1977) (this act is commonly referred to as the BLM Organic Act).

² Address by Congressman Wayne J. Aspinall, White House Conference on Conservation in Washington, D.C. (May 24, 1962), reprinted in HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2D SESS., THE PUBLIC LAND LAW REVIEW COMMISSION, BACKGROUND AND NEED 1, 5 (Comm. Print 1964).

³ Paper by Wayne J. Aspinall, presented at the Conservation Banquet, Utah State University, Logan, Utah (May 3, 1963), reprinted in HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 88TH CONG., 2D SESS., THE PUBLIC LAND LAW REVIEW COMMISSION, BACKGROUND AND NEED 30, 33 (Comm. Print 1964).

sions of the new "organic act" may not be in full operation until the 1980's.

Professor Carver's comprehensive treatment of the new Act⁴—its general features, its congruities and incongruities in relation to other PLLRC recommendations,⁵ and its differences from other kinds of "organic acts"—has opened the way for me to offer a specialized treatment of and reaction to the new Act. Moreover, I believe that the timeliness and untimeliness of the Act offer an appropriate theme.

I. RECENT INSTANCES OF DELAYED ACTIONS

The energy crisis, like the environmental quality movement, is one of a series of events that have focused attention on the procedure, as well as the substance, of natural resource actions taken by the government.

For example, consider the case of the Houston Oil and Mineral Corporation's 1977 attempt to acquire and rely on offshore oil leases. On March 22, 1977, the Houston corporation placed an advertisement in the *Washington Post*,⁶ stating that it had invested \$8.2 million in offshore leases after a federal district court's order barring the lease sale had been overturned by a circuit court of appeals,⁷ and after recourse to the Supreme Court had been denied. The advertisement went on to say that the company had completed plans, committed funds, obtained permits, and entered into contracts to drill, starting May 1, 1977, only to learn that the same district court had, on February 17, 1977, declared the lease sale null and void on account of irregularities in the filing of required environmental impact statements. The company's statement ended with these probing words: "Now we ask you—who's really withholding oil and natural gas from the American consumer? We'd like to know your opinion. Or better still, let your Congressman and Senator know! We are ready when you are."⁸

⁴ See Carver, *The Federal Land Management & Policy Act of 1976: Fruition or Frustration* (this issue).

⁵ PUBLIC LAND LAW REVIEW COMMISSION, *ONE THIRD OF THE NATION'S LAND* (1970) [hereinafter cited as PLLRC REPORT].

⁶ *Washington Post*, Mar. 22, 1977, at 9, col. 1.

⁷ *Id.*

⁸ *Id.*

This is an example of how poorly-integrated federal laws can act to contradict each other. The practical application can be far more cumbersome than the drafters of the legislation ever envisioned.

I hold no brief for Houston Oil, but I think it has a valid point. Moreover, it is not the only form of industry to be hit by such a twist of overlapping laws. A similar illustration may be drawn from the difficulties confronting implementation of the Geothermal Steam Act of 1970.⁹

The need for a geothermal leasing authority was recognized in 1961 when the Office of the Solicitor of the Interior Department held that the Department lacked the statutory authority to issue geothermal leases. The necessary legislation to fill this gap in authority was not enacted until December 24, 1970,¹⁰ however. The Interior Department elected to subject the proposed rule-making for lease authorization to the environmental impact statement procedures. As a result, more than two more years passed before the rules were finally issued in July of 1973,¹¹ and finalized in December of that year.¹² The first sale of such leases was held on January 22, 1974. The first leases were then issued, some thirteen years after the need had first been examined by the Federal Government. Despite the fact that the Geothermal Steam Act expressly granted a "right" to the holders of "grandfather rights" to have leases issued to them by meeting the highest bid at a lease sale, some of these sales have yet to be held. Commercial development of geothermal energy from public lands has not yet begun.

The apparent cause of delay in both of these instances is the environmental impact statement requirement of the National Environmental Policy Act [NEPA].¹³ Perhaps the more accurately stated cause is the application of that requirement by the courts and by the executive branch. And now, a fair question may

⁹ 30 U.S.C. §§ 1001-1025 (1970).

¹⁰ *Id.*

¹¹ 38 Fed. Reg. 19,748-79 (1973). See U.S. DEPARTMENT OF THE INTERIOR, FINAL ENVIRONMENTAL STATEMENT FOR THE GEOTHERMAL LEASING PROGRAM, Report in Four Volumes (1973).

¹² 38 Fed. Reg. 35,029 (1973).

¹³ 42 U.S.C. § 4332(2)(c) (1970).

be to ask how many new causes of delay will be created by the new "organic act."

II. PROVISIONS LIKELY TO CAUSE DELAY

A. *Judicial Review*

A policy declaration in the Act states that public land adjudication decisions should be subjected to judicial review as a matter of policy. The word "adjudication" is not defined. This policy statement, along with others in the Act, has been heaped upon other relevant policy declarations contained in preexisting statutes.

My difficulty with the policy statement is that it might be interpreted as furthering the proposition, urged on the Congress in earlier versions of the legislation, that not only "adjudicative" decisions but also "discretionary" decisions should be subjected to judicial review. Plainly, such a method is not required by current administrative law. Such a review provision would be in derogation of the long line of precedent establishing that agency decisions, when discretionary, are not subject to review by the courts. Moreover, judicial review of discretionary land use decisions would appear to be contrary to the intent of Congress pursuant to section 10 of the Administrative Procedure Act.

It is to be hoped that when Congress implements this policy, it does nothing to restrict the current scope of discretion vested in public agencies. Otherwise, substantial delays may occur in the governmental decisionmaking process, and the authority and independence of executive agencies will be undermined.

B. *Key Definitions*

I have already spoken of the new Act's policy statement which, compared with preceding public land laws, is somewhat redundant and confusing. This is nothing peculiar to the 1976 Act, for public land legislation has often featured confusing and conflicting declarations of policy and definitions of key terms. The objectives of clarity and integration of key terms with others of similar usage have not been achieved in the new Act. Unfortunately, the Act defines only some of its key terms; other words and phrases are left undefined as they pertain to this specific legislation. The obvious problem which is certain to flow from

this deficiency is that such terms will have to be interpreted by agencies and the courts, thus resulting in delays and indecision.

Among the undefined terms likely to cause difficulty are ones such as "land use plan," "management decision," "tract," "equitable distribution," "equitable considerations," "chiefly valuable," "adjoining landowners," "known mineral deposits," "no known mineral values," "proper land use," "the public interest," "national significance," "reasonably necessary," "equitable to the United States and to the holders of grazing leases and permits," "reasonable compensation," "to the extent practical," and "national resource lands."¹⁴ This last term, "national resource lands," presents a particularly interesting history of development and implementation.

The Interior Department originally requested that the term "national resource lands" be applied by statute so as to permit the lands and interests in lands exclusively administered through the BLM to be formally identified. In the interim, usage of the term has been administratively authorized.

There was an earlier time when the term "national land reserve" had been similarly adopted, based on language used by President Kennedy in his 1961 Natural Resource Message to Congress.¹⁵ Use of the term, however, was immediately discontinued, largely because its use, without express statutory authorization, was questioned by a Congressman.¹⁶

The only mention given to "national resource lands" in the new Act occurs in an obscure provision, section 701(g)(6),¹⁷ which

¹⁴ See note 1 *supra*.

¹⁵ Address by President John F. Kennedy, Resources Message to the Congress, Washington, D.C. (Feb. 23, 1961).

¹⁶ Comment of Congressman Wayne J. Aspinall during hearings before the House Committee on Interior and Insular Affairs. The author was a witness appearing before the committee and thereafter instructed Bureau of Land Management offices to discontinue use of the term "national land reserve."

¹⁷ Section 701(g)(6) of P.L. 94-579, which has been condensed into 43 U.S.C.A. § 1701(b) (Supp. 1977), provided that:

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

. . . .
(6) as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political

provides for a limitation on the application of the Act with regard to the functions of state and local governments. This location of the term, not appearing elsewhere, may be viewed as only a drafting error in which the legislators failed to appreciate the existing meaning of the term "national resource lands." I note, however, that Senator Floyd Haskell of Colorado included the term in his senate-floor remarks of March 22, 1977, describing his new bill, S. 1074,¹⁸ to establish a rangelands rehabilitation program.

C. *Land Use Planning*

Professor Carver has stated in his presentation that the land use planning process has replaced the old process of "land classification" as it was formerly prescribed in the Taylor Grazing Act¹⁹ and expanded in the Classification and Multiple Use Act of 1964.²⁰ Multiple use management, both as a concept and as a term of art, came under heavy attack in the PLLRC study, not so much from the public or the land use professions as from the Commission's staff. The Commission opted for use of the term "dominant use,"²¹ illustrating that some resources may have to be devoted to a principal use, and are not susceptible to management for competing and conflicting uses.

The fact that Congress has elected to continue the multiple use management tradition demonstrates the continuing validity and virility of the concept, however, notwithstanding its difficulty of application in some areas. The concept, first formulated by Gifford Pinchot over seventy years ago, is still a workable guide for land use planning.²²

This is not to say that the Act's land use planning provisions will not cause difficulty, however, for there are complex details with which administrative agencies must comply. Moreover, one

subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on *the national resource lands*; or as amending, limiting, or infringing the existing laws providing grants of lands to the States.

¹⁸ CONG. REC. § 4571 (daily ed. Mar. 22, 1977).

¹⁹ 43 U.S.C. §§ 315-316 (1970).

²⁰ 43 U.S.C. §§ 1411-1418 (1964).

²¹ See PLLRC REPORT, *supra* note 5, at 48.

²² Keynote address by McArdle (The Concept of Multiple Use of Forest and Associated Lands—Its Value and Limitations) Proceedings, Fifth World Forestry Congress (1960). *But see* Behan, *The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management*, 7 NAT. RESOURCES J. 473 (1967).

may reasonably expect the agencies' own lawfully promulgated rules and regulations to add to the complexity. Questions arising as to the adequacy of compliance with the statutory procedures or concepts may well form a new cause for litigation similar to the prolific environmental impact statement cases.

D. *Management Decisions*

The language in the new Act prohibits, by implication, the Department of the Interior from making a "management decision" until an authorized land use plan has been developed. Presumably, such a plan must also be formally adopted under the Act's procedures. Therefore, few of these decisions may be expected to be forthcoming for a considerable period of time.

A peculiarity of the management decision provisions, as I read them, is that no decision may be reconsidered, modified, or terminated until the authorizing land use plan is first revised under the full procedures specified in the Act. Omitted from the Act are any provisions for the adjustment of management decisions where, for example, such items as variances may be contemplated by the authorizing land use plans.

This peculiarity may have resulted from a misunderstanding of the usual relationship, in land use planning and zoning practices, between "plans," which are general in scope and detail, and "decisions," which are more specific with respect to specified times, places, and events. This feature of the Act—interlocking plans and decisions into a single-level concept—will likely cause confusion and, therefore, delay.

E. *Congressional Review of Proposed Administrative Actions*

Under the Act, many administrative proposals must wait for ninety days while Congress considers whether to adopt a concurrent (House and Senate) resolution of nonapproval. This does not amount to a congressional veto power, and this is fortunate from my perspective. Such a veto provision was originally passed by the House committee, but the Joint Conference Committee rejected it in favor of the "nonapproval" concept.²³

The congressional-review provision will apply to actions such

²³ 43 U.S.C. §§ 1713(c), 1714(c)(1), (1)(2), 1722(b) (1976).

as: (1) The exclusion of one or more "principal or major uses" for two or more years on a tract of 100,000 acres or larger; (2) a proposed sale of public lands when the tract is larger than 2,500 acres; (3) a proposed termination of a nonstatutory withdrawal; (4) any proposed nonstatutory withdrawal exceeding 5,000 acres; and (5) a proposal not to sell land under the Unintentional Trespass Act.²⁴

My own view of this development is that Congress should have confined itself to taking legislative *actions*, not vetoes, as prescribed by the Constitution. The veto power is constitutionally set forth as an executive power, not a legislative exercise, although it may effectively be exercised through the appropriation power. The "nonapproval" concept, while not amounting to a veto as that power is ordinarily construed, is nonetheless an encroachment on traditional executive functions.

If it were concluded by the Congress that matters of this kind could not be properly considered and decided by the executive branch, then the preferable and more clearly constitutional method of resolving the issue would have been for the Congress to withhold the delegation of such discretion to the executive branch agencies in the first instance. In this regard, I subscribe to the views of Professor Kenneth Culp Davis, who recently wrote:

I have the greatest respect for politicians, who perform the indispensable function of translating democratic desires into statutory law. . . . But I also have respect for professional and scientific people, who have an altogether different kind of skill. Successful government requires both kinds of skills. Those who have one kind must be careful not to encroach improperly on the province of those who have the other kind. . . .

When the factual component of complex rulemaking has been worked over by appropriate professional people within an agency, and when findings have been made on the basis of a record that includes the results of the procedures of notice and written comments, I think it would be *atrocious government* if Congress, on the basis of political pressures, were to change the findings.²⁵

Thus, there remains in the new Act what I believe is an invalid delegation to the Congress of functions that should be, if they are not in fact, reserved to the executive branch.

²⁴ *Id.*

²⁵ Letter from Professor Kenneth Culp Davis to the Honorable Elliott H. Levitas (Nov. 24, 1976), reprinted in CONG. REC. H961-62 (daily ed. Feb. 8, 1977).

F. *Title Restrictions*

The Act authorizes the Department of the Interior to place in instruments of conveyance "such terms, covenants, conditions, and reservations" as the Department "deems necessary to insure proper land use and protection of the public interest."²⁶ This authorization is good and proper. It is a step that I personally have advocated for a long time, although not in the phraseology that has been adopted. However, I believe that confusion and delay will occur because there is no authorization by which adjustments may be made in restrictions as time and conditions change. Some type of a variance procedure needs to be provided. In its absence, the title holders may have to seek private legislation or turn to the courts.

G. *Reserved Minerals*

I was among those, like the late Senator Clinton P. Anderson, who recommended that, when properties are being conveyed to surface right purchasers from the United States, all of the mineral interests should be reserved to the Federal Government. This would be a simple and direct procedure which would avoid the controversial process of evaluating each and every mineral estate under conveyed lands. Moreover, it would assure reservation of valuable mineral interests in the government for the foreseeable future, thus avoiding private speculation or errors in the mineral evaluation process.

The Act has departed from this concept, establishing a new and undefined standard of values.²⁷ I believe that this feature of the Act, necessitating individual attention to mineral rights on land conveyed for other purposes, is ill-advised and will result in confusion and delay in establishing nonmineral usages.

H. *State and Local Government Land Use Restrictions*

The Act provides that sixty days must elapse before a tract may be offered for sale. This period purports to give the appropriate state or local governmental entities the opportunity to be advised of the proposed land use change and enact or amend

²⁶ 43 U.S.C. § 1718 (1976).

²⁷ *Id.*

zoning laws or other regulations "concerning the use of such lands."²⁸

I believe that this provision ignores the elaborate procedures elsewhere in the Act by which state and local governments are to be informed and permitted to participate in the formulation of land use plans. It also seems to rest on a mistaken notion of the relation of state "police power" to the private land-using activities which may be taking place on public lands under rights granted through mining claims, mineral leases, or other forms of tenure.²⁹

The sixty day waiting period is, I believe, unnecessary. Nothing in the Act, or in any other legislation of which this writer is aware, prevents state or local governments from valid exercises of the police power so as to embrace private interests in land although that interest may have been obtained from the Federal Government. It should not be assumed, although I have observed state officials who believe it otherwise, that the exercise of the police power must await complete alienation of title from the United States.

This principle is illustrated by the operation of Oregon's Mined Land Reclamation Act.³⁰ State officials have advised me that the act is being enforced as to unpatented mining claims, except in those areas where the state has surrendered all of its legislative jurisdiction to the United States. Some other aspects of private land use activities on federal base-title properties, to which state authority is being routinely applied, include: (1) Fishing and hunting regulations; (2) conservation of petroleum; and (3) air and water quality standards.³¹

Professor Carver has written that *Kleppe v. New Mexico*³² has had the effect of making federal jurisdiction under the property clause as broad as the legislative jurisdiction clause of the

²⁸ *Id.* § 1720.

²⁹ For a discussion of this problem, see Landstrom, *State and Local Governmental Regulation of Private Land Using Activities on Federal Lands*, 7 NAT. RESOURCES LAW. 77 (1974).

³⁰ OR. REV. STAT. §§ 517.750-517.990 (1975).

³¹ Letter from Stanley L. Ausmus, Oregon Department of Geology and Mineral Industries, to Karl S. Landstrom (March 9, 1976).

³² 426 U.S. 529 (1976).

United States Constitution. It should be remembered, however, that *Kleppe* dealt only with wildlife situated on retained federal lands. The impact of the case should not necessarily extend into matters concerning state regulation of private property uses, although others may disagree.³³ In sum, state and local governments should continually update their land use restrictions to appropriately exercise their authority over private property interests within or on public land tracts.

I. *Duplicative Law Enforcement Procedures*

The Act requires that there be inserted in any use, occupancy, or development permit an authorization for its termination or suspension upon receipt of evidence that the permittee has failed to comply with any applicable air or water quality standard.³⁴ This provision is right in intention, but wrong, I believe, in application.

If the permittee merely has been charged with a violation, but no conclusion has yet been reached on the allegation, then it should be premature to levy a penalty. To revoke a permit without a hearing offends due process. On the other hand, if there has been an evidentiary hearing and the fact of the violation has been established, then, I believe, revocation of the permit represents a second, and duplicative, penalty because the air or water quality law presumably has already been applied.

J. *Rulemaking*

The Act does away with the public property exemption from formal proposed rulemaking insofar as public lands, a form of public property, are concerned. This has been done by way of the Act's self-prescribed route of repeal by implication.³⁵ However, the rulemaking directive to the Interior Department fails to exempt the rulemaking process from the environmental impact

³³ See generally Shapiro, *Energy Development on the Public Domain: Federal/State Cooperation and Conflict Regarding Environmental Land Use Control*, 9 NAT. RESOURCES LAW 397 (1976). See also Western Governors' Regional Energy Policy Office, *Legal Analysis of Authority of the BLM to Promulgate Surface Mining Regulations for Unpatented Mining Claims*, reprinted in CONG. REC. S2202-06 (daily ed. Feb. 3, 1977).

³⁴ 43 U.S.C. § 1732(c) (1976).

³⁵ *Id.* § 1740.

statement procedures of the National Environmental Policy Act.³⁶

The question arises as to how extensive will be the required examination of rules by use of the impact statements. For example, if some or all of the proposed rules promulgated under the Act are subjected to the impact statement analytical procedure, will successive stages of the land use planning procedure each require an impact statement? This, I believe, would be impractical, and the purposes of NEPA would be served by one exposure of the rules to the impact statement procedures.

There was a time when Professor Carver and I advocated extending the rulemaking process so as to include at least a part of the function of exercising administrative discretion in public land actions.³⁷ But under the Act's planning procedures this may not be possible.

K. *Grazing Fees*

The delay of one year in reaching a legislative settlement of the grazing fee question has been understandable, inasmuch as no acceptable solution was available before the Joint Conference Committee. I think, however, that it is regrettable that the Congress has presented the Agriculture and Interior Departments with what seems to be a hastily drafted and ambiguous study directive.

I have suggested to the Grazing Fee Task Force that a determination needs to be made as soon as possible as to the interpretation of the Act's use of the singular in the words "value" and "fee." Is it intended that the studies may recommend only a single-level charge per animal-unit-month throughout the western states, or may the studies also consider multi-level charges that are adjusted to differences in value?³⁸

The task force has advised me that the study is proceeding as though the Act warrants the latter interpretation.³⁹ There is

³⁶ See note 13 *supra*.

³⁷ Carver and Landstrom, *Rule-Making as a Means of Exercising Secretarial Discretion in Public Land Actions*, 8 ARIZ. L. REV. 46 (1966).

³⁸ Letter from the author to the Grazing Fee Task Force, Range Management Staff, U.S. Bureau of Land Management (Mar. 20, 1977).

³⁹ Statement to the author at a grazing fee hearing, Washington, D.C. (Mar. 25, 1977).

reason to believe that the Act contemplated the consideration of multi-level charges, because the study directive requires the two Secretaries to take into account, among other things, "differences in forage values."⁴⁰

The Technical Committee to Review Grazing Fees was mistaken, I believe, in its November 15, 1976 report when it concluded that: "[b]asically, the AUM and hence its general market value are the same from area to area since the grazing requirements of the animals and the yearly production cycle of the ranches are maintained."⁴¹ I have submitted to the Grazing Fee Task Force substantial evidence showing that the market values per AUM of range forage do indeed differ markedly from place to place or from condition to condition in the western states.⁴²

III. PROVISIONS LIKELY TO EXPEDITE ACTIONS

A. *Interim Rules and Regulations*

From an operational viewpoint, perhaps the most constructive action taken by the Congress is its authorization to the Agriculture and Interior Departments to proceed under the pre-existing rules and regulations. The Act mandates that the Departments may use such rules and regulations "to the extent practical" while new administrative decisions are being promulgated pursuant to the new Act.⁴³ This conveniently avoids the impasse which might have resulted had old rules and regulations been repealed by the Act and new rules not yet been proposed.

B. *Repeal of Obsolete Laws*

The timeliness, as well as the quality, of future public land actions will benefit from the Act's repeal of numerous laws that have been considered obsolete or superseded. This has been a goal of at least one federal agency, the Bureau of Land Management, almost from the day of its creation in 1946. Substantial effort was made in the 1960's, based on an understanding between President Kennedy and Congressman Aspinall.⁴⁴ Progress was slowed, however, because of complicated issues presented by pending legisla-

⁴⁰ 43 U.S.C. § 1751(a) (1976).

⁴¹ 42 Fed. Reg. 6,981-88 (1977).

⁴² See note 38 *supra*.

⁴³ 43 U.S.C. § 1740 (1976).

⁴⁴ See note 2 *supra*, at 119-22.

tion, such as the interrelationship of existing legislation with the then pending Wilderness Act.⁴⁵ Indeed, the goal of streamlining the nation's existing public land laws may be said to have been the principal purpose of the PLLRC, its report, and now finally, the 1976 Act.

This is not to say that the new Act has addressed all existing legislation. Some laws, unfortunately in my view, remain essentially unaffected by the 1976 Act. For example, the Bureau of Land Management, in its original "land law reform package," had proposed that the new Act address the Mining Law of 1872.⁴⁶ Similarly, another proposal on the original slate was reform of the "lottery" provision of the Mineral Leasing Act.⁴⁷ The 1976 Act does not affect these laws, nor does it dispose of the Desert Land Act,⁴⁸ a piece of legislation that has been, in my personal experience, most disappointing. If repeal of the Desert Land Act does not appear to be a realistic goal, at least attention needs to be given to an upward adjustment of the notoriously inadequate statutory price per acre of desert land.

C. *Inventories*

The public land inventories should allow for expedited, as well as better informed, land use plans and decisions. Such a benefit may, however, take a long time to arrive.

A peculiarity of the inventory directive is that the Interior and Agriculture Departments are required to give the resulting information to state and local governments only to the extent that it will be used by them in planning and regulating the uses of nonfederal lands in proximity to public lands. This limitation seems to have been based on a mistaken idea of the relationship of state "police power" to private land use activities occurring on federal lands.

Plainly, the state and local governments need up-to-date information regarding the federal lands and their resources, not just

⁴⁵ 16 U.S.C. §§ 1131-1136 (1964).

⁴⁶ Mining Act of 1872, ch. 152, §§ 1-16, 17 Stat. 91 (codified in scattered sections of 30 U.S.C.).

⁴⁷ *Id.* § 181.

⁴⁸ 43 U.S.C. §§ 321-339 (1964).

information regarding nonfederal lands in their vicinity. I hope that the Departments will not construe this directive too strictly.

D. *Land Acquisition*

The new land acquisition authorization should be advantageous. It should aid and expedite the progress of gaining access to remote public lands and generally aid in public land management.

E. *Land Exchanges*

The new Act authorizes monetary payments to be used in equalizing land values.⁴⁹ This should expedite such land exchanges and provide for more equitable results.

F. *Law Enforcement*

Unauthorized land uses can be detected more easily and with greater precision. Moreover, enforcement actions can be taken under express statutory authority,⁵⁰ with federal criminal sanctions imposed, rather than relying on disparate and often imprecise state statutes.

G. *Advisory Councils*

The new public land advisory councils should serve as more effective focal points for general-purpose advice concerning public lands, replacing the hierarchy of boards that had been created by the Taylor Grazing Act. Even though the district advisory board provisions of the Taylor Act⁵¹ were not repealed, there will, of course, be only one grazing advisory board per district or equivalent geographic area. I do not see, therefore, that there is any significant duplication between the general purpose councils and the district boards. A more troublesome point, however, is the omission from the advisory boards of any wildlife representative. Perhaps this omission can be remedied by discretionary administrative action.

H. *Land Retention Policy*

The forthright declaration that it is the policy of the Act that

⁴⁹ *Id.* § 1716(b) (1976).

⁵⁰ *Id.* § 1733.

⁵¹ *Id.* § 315o (1970).

public lands be retained whenever possible or necessary should greatly reduce the time and attention that otherwise might have been devoted to dealing with whether public lands should be disposed of in wholesale blocks. The question had earlier been raised in earnest when the National Livestock Committee on Public Lands was organized in 1946.⁵²

William Voigt, a long-time opponent of the movement, recently observed that "[t]he nation's public land seems safely national."⁵³ Additionally, Professor Carver has stated that the new Act makes it clear that lands should be retained unless specific program interests require their disposition.⁵⁴ Although the intent of the new Act, by implication of its policy statement, seems clear enough, I am not sure that its practical effect is as clear as Mr. Voigt and Professor Carver maintain.

The Congress did not, for example, repeal the "pending its final disposal" provision in section 1 of the Taylor Grazing Act.⁵⁵ Similarly, the Congress has declined to adopt the Bureau of Land Management's request that the term "BLM lands" be given a more specific and descriptive statutory title. I conclude that the Congress does not yet view the "BLM lands" as a necessarily permanent land management system. From my own viewpoint, I am not entirely dissatisfied with this result. There are enough inadequacies in the new Act and in the other related statutes, or at least in their current operation, to cause me, and perhaps others, to look with less disfavor upon the possibility of conveying some of the lands to the states and others to national forests, national parks, and wildlife refuges.

I. *Mining Claim Recordation*

Among the proposals for mining law reform included in the BLM's original 1949 statement was one that would have required recordation of mining claim locations and of annual assessment work in the district land offices.⁵⁶ Now, after twenty-eight years,

⁵² W. VOIGT, *PUBLIC GRAZING LANDS: USE AND MISUSE BY INDUSTRY AND GOVERNMENT* 1 (1976).

⁵³ *Id.* at 325.

⁵⁴ Carver, *Federal Land Policy and Management Act of 1976: A Summary*, 9 ROCKY MTN. MIN. L. NEWSLETTER 2 (1976).

⁵⁵ 43 U.S.C. § 315 (1964).

⁵⁶ *Conference on Revision of United States Mining Laws: Hearings Before a Special Subcomm. of the House Comm. on Public Lands*, 81st Cong., 1st Sess. 1-2 (1949).

the first part of this proposal has become law. In the interim, I have become convinced that a better solution would be to have all filings made in the local office of record. This provision, I believe, will avoid confusion which may arise from the duplicative system of filing in both the local and district offices.

The new provisions, including the penalty imposed for failure to file, will go far toward accomplishing the original objectives of the BLM's proposals. Those goals were: (1) To expedite genuine mining development; (2) to prevent interference with nonmining uses; and (3) to reduce the extent of unauthorized use in the guise of mining locations.

SUMMARY AND CONCLUSIONS

Within the theme of these comments, it is not the policy declarations, but the details affecting operational effectiveness and timeliness of actions, by which the new Act has been examined. For that matter, the policy declarations themselves may turn out to be a source of confusion in that they have been heaped upon existing congressional policies without provision for reconciliation of the new policies with the old.

On the basis of Chairman Aspinall's 1962 standards, the new Act's provisions seem to meet the requirement that conservation be regarded as a wise use. The resources will undoubtedly be managed for the benefit of the many and not for the exclusive or undue advantage of the few. The sound tradition of multiple use will be continued.

The indication to me, however, is that these objectives will be attained only slowly. Public land resources which are currently needed may be slow in being made available.

Oliver Wendell Holmes is quoted as saying: "I find the great thing in this world is not so much where we stand but in what direction we are moving." In the Holmesian sense, we are moving in the right direction, but the rate of progress has been painfully slow. On the basis of practical effectiveness and the necessity of taking timely public land actions, the new Act may prove to be wanting.

There are various ways to implement the Act to help avoid the possibility of confusion and delay. One important step would be to limit the applicability of the environmental impact state-

ment process to a single stage of implementation such as, for example, only after rules and regulations have been promulgated.

Whatever the practical effect of the Act and its application, we need to deal realistically with it, recognizing its limitations and seeking to minimize their impact on the process of land use planning.