THE "PUBLIC" IN PUBLIC LAND APPEALS: A CASE STUDY IN "REFORMED" ADMINISTRATIVE LAW AND PROPOSAL FOR ORDERLY PARTICIPATION

Marla E. Mansfield*

I. INTRODUCTION

The term "public lands" has a specific legal meaning but nevertheless evokes a picture of unfenced acreage subject to the claims of the general populace. This picture is not completely fanciful. Although the "public lands" are technically federally-owned lands and interests therein managed by the United States Department of Interior Bureau of Land Management ("BLM"), they serve many public uses, fulfilling demands for recreation, minerals, forage, timber, and other resources and activities.¹ Decisions of the BLM made while administering the lands operate as allocations of resources, and impact divergent values. Individuals concerned with particular attributes of the affected area naturally desire to influence these choices.² This article will examine certain procedural rules of the BLM, as interpreted by the Interior Board of Land Appeals ("IBLA," or "the Board"),³ to ascertain how and why the public participates in public land management.

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* Private practitioner, Denver, Co.; J.D. 1978, University of Wyoming; B.A. 1974, Yale University.


3. The IBLA is the Board within the BLM designated to hear appeals dealing with public lands, minerals, and certain aspects of acquired land administration. 35 Fed. Reg. 12,081 (1970); see also infra notes 49–50 and accompanying text.
There are four components to this examination. The first describes the position the IBLA developed regarding public access to agency decisions when it is not compelled by Congress to adopt specific procedures. The second component analyzes where in conventional administrative law theory this response could be categorized. The third component attempts to see why the position was adopted. Finally, the feasibility of improving the process is explored. The analysis reveals that the agency developed procedures in response to the substantive statutes administered and that its solution might not be optimal.

In order to assess agency action, the IBLA’s treatment of informal adjudication by the BLM is examined. The procedures considered govern what is known as the “informal adjudicative decision.” Such decisions are informal because neither a statute nor the Constitution mandates the use of any specific procedure. This species of agency activity is not governed by specific congressional directive nor by the mandates of the Administrative Procedures Act (“APA”). Therefore, the informal decision represents agencies’ own conceptions of fairness and administrative necessity. However, such decisions are adjudicative in that they determine the application of statutes and standards to a particular factual situation.

This article attempts to address the recent lack of focus on the administrative procedures of the BLM and the Department of Interior (“DOI” or “the Department”). However, because these

4. This definition accords with the typology of Professor Verkuil, who states that such action is “a residual category of procedural entitlement that grows or diminishes in ‘formality’ more by judicial and administrative notions of fairness than by legislative plan or design.” Verkuil, A Study of Informal Adjudicative Procedures, 43 U. Chi. L. Rev. 739, 739 n.1 (1976); see also Shapiro, Administrative Discretion: The Next Stage, 92 Yale L.J. 1487, 1488 (1983).


6. The PLLRC, in describing BLM procedures, contrasted “adjudication” with “rulemaking”:

[R]ulemaking [is] the development and promulgation of substantive and procedural regulations designed to announce the standards under which a statute will be administered; and ... adjudication [is] the application of statutes and regulations to particular fact situations on a case-by-case basis to determine whether applicants are entitled to the various rights or privileges provided for by law.

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procedures were subjected to extensive commentary, criticism, and reform during the previous two decades, Section II provides a historical overview that identifies the mission of the Department and prior attempts at adjudicatory fairness.

With the historical context thus outlined, Section III analyzes the role of the IBLA in administering the public lands through the appellate process, focusing on access to the Board and the effect of its jurisdiction. Since its creation in 1970, the IBLA has interpreted both the BLM's regulations and its own in a broad fashion that emphasizes and facilitates public participation. The IBLA has translated vague regulatory provisions into a structured system assuring public access to both the BLM and to the Board as a reviewing body. Despite broad authority to substitute its judgment for that of the BLM, the IBLA rarely employed this power. More often, it merely forced the BLM to consider additional arguments. This mode of administrative action closely approximates the "interest representation" model in which agencies provide forums to fine tune legislative actions rather than merely implementing predetermined statutory goals or being themselves uniquely qualified to protect the public interest. The term "interest representation" is derived from Professor Stewart's 1975 article, *The Reformation of American Administrative Law*, in which he recognized that the role of many agencies had been changed to resemble mini-legislatures. Therefore the term "reformed administrative law" is meaningful in the sense that the IBLA has internalized the interest representation model.

The impetus for the IBLA's actions, which were taken on its own and in the context of informal adjudication, is examined in Section IV. The analysis concludes that the nature of the statutes administered determines the procedural choices. Procedure follows substance, or in this case, the lack of substance. Although its decisions impact many divergent values, the BLM was given the authority to allocate the resources of the public lands without firm congressional guidance.

The BLM has received amorphous, conflicting, or even non-existent policy direction from Congress. The BLM's decisions

8. Id. at 1760-62; see also Rabin, *Legitimacy, Discretion, and the Concept of Rights*, 92 Yale L.J. 1174 (1983).
often irretrievably affect intertwined resource uses. In view of the nature of the statutes, the BLM must make these polycentric decisions without concrete standards.⁹ Faced with such a dilemma, the IBLA has internalized the “interest representation model” of administrative law, possibly in an attempt to approach decision-making in a mode of “comprehensive rationality.”¹⁰ There are two distinct decisionmaking paradigms. “Interest representation,” which views administrative action as a substitute for legislative policy-setting, simply requires that all affected concerns be addressed. “Comprehensive rationality,” however, implies that an agency should reasonably sift through all possible responses to a problem in order to achieve an optimal method of reaching a specified goal. Procedures that foster the development of alternative views are crucial to both decisionmaking paradigms.

Open access to the decisionmaking process provides many benefits, including an increase in information and range of viewpoints represented. However, as employed by the IBLA, open access can frustrate orderly administration of the public lands. Section V reveals the difficulties inherent in the choice of interest representation as a mode of action. It encumbers the administrative process with increased costs and delays. Furthermore, the policy might actually decrease careful deliberation. Therefore, in Section VI this article concludes that a middle ground could be achievable if the IBLA treated intervention in the administrative proceeding, rather than standing to appeal the BLM decision, as the relevant issue.

Intervention, most simply expressed, is the procedure whereby a person not initially a party to a case enters the process in order to assert and protect an interest in the subject matter.¹¹ The APA does not address intervention by that name but embraces the concept when it states that “an interested person may appear before an agency . . . in an agency proceeding . . . or in connection with an agency function.”¹² The differences between the concepts

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¹⁰. Terminology drawn from Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393 (1981); Stewart, supra note 7, at 1669. For more detailed definitions of these terms, see infra note 119.

¹¹. BLACK’S LAW DICTIONARY 736 (5th ed. 1979).

of “standing to appeal” and “ability to intervene” provide the mechanism for flexible responses that would ameliorate the problems of efficient resource allocation.

Procedures could change without sacrificing the benefits of input because the IBLA actually provides a second level of agency participation by allowing appeals to it from BLM decisions. In certain instances these appeals provide automatic stays of activity and can take over three years to resolve. However, the BLM also provides a forum through which members of the public can present evidence and arguments in favor of their positions. The process could be improved by retaining unlimited entry to the BLM, but limiting access to the second level by using the balancing test applied to intervention rather than mechanically applying tests designed to ascertain standing to appeal a decision.

II. HISTORICAL PERSPECTIVE

Because the BLM is subordinate to the Secretary of Interior, and is therefore part of the Executive Branch, the proper embarkment point in tracing its administrative functions is the Constitution. In expansive terms, the Constitution empowers Congress to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ”13 Beginning in 1849, general statutes designated the Secretary of the Interior as the executive officer in charge of such matters when public lands were involved.14

The courts found these statutes to be proper delegations of authority, conferring upon the Secretary and his subordinates the right to hear and determine claims to the public lands.15 However,

if a subordinate acted, the Secretary reserved the power to review and, if necessary, to reverse all proceedings that alienated or allowed the use of any portion of these lands. Construing the Mining Law of 1872, the Supreme Court affirmed not only the general responsibility of the Secretary to see that "valid claims be recognized, invalid claims be eliminated, and the rights of the public preserved," but also acknowledged that procedural fairness must be maintained:

Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the land title remains in the Government, it does have the power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if found invalid, to declare it null and void.

The Department, in recognition of these duties, began to develop rules for hearings and other appeals as early as the 1800’s. Obviously, these rules evolved over time. By the 1950’s, and until a major revision in 1970, the basic provisions for review of a BLM field decision detailed a two-level process. First, an appeal to the Director of the BLM could be

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lodged through the deciding official. This appeal would involve only briefs and written submittals unless the Director determined that the case contained a substantial question of disputed fact and ordered a hearing. If the private party was disappointed with the Director's ultimate decision, he or she could appeal to the Secretary of Interior. In practice, however, the Solicitor of the DOI or his delegate normally wrote and decided these latter appeals.

As many commentators have observed, the system bred numerous flaws. First, and perhaps foremost, the process diverged from the spirit of the APA. While the APA does not apply directly to most BLM decisions, it is recognized as a conceptual paradigm for administrative decisionmaking. Precedents embodied in internal manuals and prior adjudications were not uniformly promulgated and often were contradictory. Sometimes, the appellant

22. See, e.g., 43 C.F.R. § 1842.4 (1969) (establishing a 30-day limit in which a party can file an appeal); id. § 1842.5-1 (requiring a Statement of Reasons for appeal).
23. Id. § 1843.5. Because this article examines only informal adjudication, the decisions discussed herein are those considered in the absence of statutory or constitutional mandates for hearings or other special procedures. Prior to the establishment of the IBLA in 1969, hearings as of right were limited. Id. §§ 1851–1853, 3513, 3530; see also Strauss, Mining Claims on Public Lands: A Study of Interior Department Procedures, 1974 UTAR L. REV. 185, 213–15; Sturges, Administrative and Judicial Review of Interior Department Decision, ROCKY MTN. MIN. L. INST., July 1985, at 1, 24; Landstrom, supra note 2, at 387; Comment, supra note 21, at 1204–06; Edelstein, Administrative Procedure and the Mining and Mineral Laws, 11 ROCKY MTN. MIN. L. INST. 421, 432 (1966); C. McFarland, supra note 21, at 168; Robertson v. Udall, 349 F.2d 195 (D.C. Cir. 1965).
24. 43 C.F.R. §§ 1844.1, 1844.9 (1969) (Secretary's decision is final).
26. In addition to the defects discussed below, which were directly caused by the administrative review process, many thought that sporadic and deferential judicial review exacerbated the problems of administrative review. See, e.g., Peck, Judicial Review of Administrative Actions of Bureau of Land Management and Secretary of the Interior, 9 ROCKY MTN. MIN. L. INST. 225, 235–42 (1964); Parriott, The Administrative Procedures Act and the Department of Interior, 4 ROCKY MTN. MIN. L. INST. 436, 455–60 (1958); Comment, supra note 21, at 1220–53; C. McFarland, supra note 21, at 183–86; Clyde, Administrative Aspects of the PLLRC Report, 6 LAND & WATER L. REV. 265 (1970); McFarland, supra note 13, at 48–52.
27. See generally Parriott, supra note 26; Wheatley, supra note 21; see also ONE THIRD, supra note 6, at 253:

We find procedural problems in existing adjudicative procedures in two broad areas: (A) informal and formal procedures for developing the factual record for decision; and (B) the appellate decisionmaking structure as it bears on (1) separation of the adjudicatory function from other investigatory, advisory or program responsibilities, and (2) delays in rendering “final” decisions.

28. Parriott notes the general unavailability of digests and previous decisions, al-
did not know what constituted the "record" before the decision-maker, partially because *ex parte* communications were rampant.\(^2\)

Additionally, because each level of review had original jurisdiction and plenary authority, the rationale for the ultimate decision might not have been argued.\(^3\) Moreover, although the BLM officials who decided appeals and the Solicitor were nominally insulated in their adjudicatory functions, they were not divorced from the daily concerns of the agency, and either advised or directed lower officers.\(^4\)

Fundamental elements of due process—namely the opportunity to know and meet the opposition's case—often received short shrift in these informal adjudications.\(^5\) Furthermore, the procedure applied to most public land-use decisions, because few of the statutes administered by the BLM were interpreted to require the hearing apparatus of the APA (partially due to the early vintage of the statutes).\(^6\) Although the number of decisions con-

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\(^2\) For example, Parriott noted that confidential "jackets" placed on BLM files to prevent outside perusal, limited access to decisionmakers alone. Parriott, *supra* note 26, at 438; see also Wheatley, *supra* note 21, at 173–74; Landstrom, *supra* note 2, at 375; C. McFARLAND, *supra* note 21, at 263–64.


\(^5\) See Morgan v. United States, 304 U.S. 1, 16, reh'g denied, 304 U.S. 590 (1938) (the right to respond is a fundamental element of due process).

fronting the BLM each year would overwhelm any attempt to provide initial evidentiary hearings in all instances, this cursory analysis demonstrates that reform was necessary.

Critics seeking procedural reforms embraced two disparate ideals. Some, including the Public Land Law Review Commission ("PLLRC"), admitted that adjudicative practices could be improved, but emphasized a need to substitute rulemaking with public participation for the then prevalent reliance on adjudicatory decisions to interpret statutes.\textsuperscript{35} Although the BLM had published numerous regulations, very few went beyond repeating statutory language and thus provided little interpretive insight.\textsuperscript{36} One illustration of the problem often employed by critics was the difficulty a prospector would have defining what constituted a "discovery" of a "valuable mineral," a predicate to a valid mining claim. Purportedly, such a definition could require resort to voluminous decisional material.\textsuperscript{37} In addition to clarity, the participatory nature of rulemaking could eliminate the problems of \textit{ex parte} communications and allow all interested persons to have standing to contribute.\textsuperscript{38}

Other voices cautioned that because it is impossible to anticipate all possible scenarios, too great a reliance on rulemaking could ossify decisionmaking and hinder necessary policy

\textsuperscript{35} The PLLRC advised as follows:

Recommendation 108: Congress should require public land management agencies to utilize rulemaking to the fullest extent possible in interpreting statutes and in exercising delegated discretion, and should provide legislative restrictions to insure compliance with this goal.

Recommendation 109: Congress should direct the public land agencies to restructure their adjudication organization and procedures in order to assure: (1) procedural due process; (2) greater third party participation; (3) objective administrative review of initial decisions; and (4) more expeditious decisionmaking.

\textsuperscript{36} For example, Carver argued that a lack of standards creates due process problems. Carver, \textit{supra} note 34, at 116; see also McFarland, \textit{supra} note 21, at 40–41; C. McFarland, \textit{supra} note 21, at 237–40.

\textsuperscript{37} See Carver, \textit{supra} note 30, at 15; see also C. McFarland, \textit{supra} note 21, at 54, 308–09.

\textsuperscript{38} Carver & Landstrom, \textit{supra} note 35, at 59.
changes. Rulemongers were reminded that a "rule of law," desired for predictability and fairness, did not necessarily require specific regulations—improved appellate procedures could achieve the same ends. To do so, the process must force the BLM to review all relevant precedents raised by adversaries with competing interests. Flexibility to respond to changing conditions would remain.

In one respect, almost all critics concurred: more public participation was necessary. In regard to rulemaking, all believed the Department of Interior should modify its position that the APA’s notice and comment provisions did not apply to BLM regulations under the Act’s "public property" exception. In the adjudicatory arena, although the existent procedures did make provision for third parties to enter into the process, in the words of high departmental officials, "the privilege [was] not widely known or understood." The PLLRC called for third party notification of pending actions and liberal intervention rights.

39. Bloomenthal argues that the attempts to define "valuable mineral" by regulation were misguided. Bloomenthal, supra note 30, at 244–46. Strauss posits that the evolution of this term reflected necessary policy changes. Strauss, supra note 23, at 256–58. Earlier in his article, Strauss cautioned:

[The miners'] most frequent complaint, that the Department "makes policy" rather than "applies the law," is somewhat misplaced. What the miners disapprove is that the Department no longer acts as if it were 1872 in applying this 1872 statute. But it is no longer 1872, and the Department cannot tenably be required to ignore the striking changes in its general mandate, even if this particular statute has been more durable than most.

Id. at 187 (emphasis in original). This evolutionary phenomenon is typical of the incremental mode of policymaking by adjudication. See, e.g., Diver, supra note 10, at 404–06 (asserting that the foci of adjudicative decisionmaking are sequential and remedial and therefore the model is dynamic, not static).

40. See Bloomenthal, supra note 30, at 251.

41. C. MCFARLAND, supra note 21, at 296; ONE THIRD, supra note 6, at 253–54; C. REICH, BUREAUCRACY AND THE FORESTS 13 (1962); McCarty, supra note 21, at 170–71; Comment, supra note 21, at 1213–14. However, Landstrom argues that actual public participation was greater than acknowledged, partially because in 1958 the BLM voluntarily submitted its rulemaking to notice and comment. Landstrom, supra note 2, at 378–83; see also Loesch, Multiple Use of Public Lands—Accommodation or Choosing Between Conflicting Uses, 16 ROCY MTN. MIN. L. INST. 1, 19–20 (1971).

42. Carver & Landstrom, supra note 35, at 59 n.60 (discussing 43 C.F.R. §§ 1842–1844, 1852.1-2 (1965)).

43. ONE THIRD, supra note 6, at 253–54. The PLLRC also desired to limit standing for judicial review strictly to those who had participated in administrative appeals. Noting the impossibility of ever providing adequate notice to all interested parties, one commentator found this aspect of the report backward-looking. Bloomenthal, supra note 30, at 262.
Thus, the PLLRC expressed the need not only for greater mandatory rulemaking, but also for detailed procedures to improve adjudication of appeals, which included, as a central component, provisions for public input.44 After receipt of the PLLRC report, Congress attempted to provide a coherent statutory framework for the BLM. It repealed many scattered laws and granted new, more centralized authority through the Federal Land Policy and Management Act of 1976, commonly referred to as the FLPMA or the BLM Organic Act.45 It implemented some—but not all—of the recommendations of the PLLRC.46 Although the FLPMA frequently mandates public participation in specific activities for general administrative procedures,47 Congress primarily referred to the recommendations in hortatory policy statements. These statements indicate preferences for judicial review, public participation in rulemaking, and improved adjudicatory practices.48

Possibly, Congress felt that it need not act on appellate procedures because the Department of Interior substantially modified its practices in 1970. The Office of Hearings and Appeals ("OHA") emerged to place review of initial agency decisions directly under the Secretary, rather than under the control of the head of the BLM or the Solicitor, whose subordinates also advised, investi-

44. See supra note 35.
45. 43 U.S.C. §§ 1701-1784 (1982 & Supp. IV 1986). Prior to passage of this Act and its repeal of numerous dispersed statutes, it was "absolute dogma" when discussing the BLM to mention that it administered more than 5,000 statutes. Parriott, supra note 26, at 436. Perhaps the most significant aspect of the FLPMA was its adoption of the position that the public lands generally should be retained in federal ownership. Prior statutes envisioned more disposals. See generally P. Gates, History of Public Land Law Development (1968); M. Clawson, The Federal Lands Revisited (1983).
48. The policy section of the FLPMA, which is not self-implementing, reflects general congressional desires for "adequate third-party participation, objective administrative review, and expedition in decisionmaking . . . ." 43 U.S.C. § 1701(a)(5)-(6) (1982). For specific instructions in limited situations, see id. § 1740 (to implement the FLPMA, the Secretary should promulgate regulations under the APA without reference to the "public property" exception); id. §§ 1732(c), 1776 (establishing hearing requirements for easement or land authorization revocations); see also generally Frishberg, Hickey & Kleiler, supra note 20, at 541-44.
gated, and prosecuted matters for the agency. The IBLA was established as the Board within this office designated to hear appeals dealing with the public lands, minerals, and certain aspects of acquired land administration. This structural change naturally led to a revision of the regulations controlling appeals. These regulations, as subsequently modified and interpreted by the IBLA, will be reviewed extensively in the following section. The discussion will emphasize the availability and possible effects of public input. For simplicity's sake, the "public" may be defined as those persons not directly related to the activity being considered; that is, anyone other than the seeker of authorization to use the public lands.

III. INFORMAL ADJUDICATION IN ACTION

Although the FLPMA did not provide direct guidance on how to implement third party participation in informal adjudicatory proceedings, the IBLA has transformed open-ended regulations into a regimented system for such input. These regulations apply to decisionmaking in general, and do not implement specific sta-

49. See 35 Fed. Reg. 12,081 (1970) (creating the IBLA and outlining its organizational structure and delegations of authority). Department of Interior officials had previously urged such changes. See, e.g., McCarty, Proposition for Changes in Appeals Procedures at the Department of Interior, 13 ADMIN. L. Rev. 159 (1960). However, the revision was at least partially a response to outside stimuli. Although unsuccessful, a bill had been introduced in Congress to reform the Department's procedures by creating a board of appeals. S. 758, 88th Cong. 1st Sess (1964), discussed in Frishberg, Hickey & Kleiler, supra note 20, at 547-49; see also Oil Shale Corp. v. Morton, 370 F. Supp. 108, 127-29 (D. Colo. 1973) (holding that the unrevised procedures violated due process).


51. Compare this to the definition of "public" in planning regulations, which includes affected or interested individuals or groups. 43 C.F.R. § 1601.0-5(b) (1987).

tutory directives. To understand fully what the IBLA has wrought, its position within the DOI must be clarified.

A. The Nature of the IBLA’s Authority

As part of the OHA, the IBLA is the representative of the Secretary of Interior with authority to determine matters in its jurisdiction fully and finally. Except for employee and contractual disputes, most BLM appeals are within the IBLA’s realm. In addition to the IBLA and three other appeal panels, the OHA contains a Hearings Division, which is comprised of administrative law judges authorized to conduct “on the record” hearings pursuant to the APA. Attorneys employed by the DOI’s Office of the Solicitor represent the government before both the IBLA and the Hearings Division. Although the three-judge panels that decide most appeals taken to the IBLA might resemble a familiar part of the traditional adversary system, four crucial elements of the Board’s authority demonstrate how it functions as a surrogate for the Secretary of the Interior.

First, the IBLA has the full power of the Secretary to review decisions of subordinates. The Board will not be bound by prior determinations of fact or applications of law by BLM employees. The IBLA will not even deem as authoritative instruction memoranda that are signed by the Director of the BLM and intended to

53. For instance, planning decisions are not appealed to the IBLA. Instead, any person who participated in the planning process may protest to the Director of the BLM, whose decision is final. 43 C.F.R. § 1610.5-2 (1987). Compare this with the general “protest” regulation. See infra note 77 and accompanying text; see also generally Sturges, supra note 23 (a general overview of procedures, including instances where an intermediate review by a BLM official is available before resort to the IBLA).

54. 43 C.F.R. § 4.1(b)(3) (1987). In addition to appeals concerning public lands, their resources, and minerals in acquired lands, the IBLA also considers appeals dealing with off-shore oil and gas leases, native land selections in Alaska, and environmental aspects of coal mining. Id. The IBLA’s jurisdiction, however, does not extend to awards of damages for breach of contract on common law theories, even if the contract involved is a federal oil and gas lease. See Exxon Corp., 95 I.B.L.A. 374 (Feb. 18, 1987).

55. 43 C.F.R. § 4.1(a), (b)(1), (b)(2), (b)(4) (1987). The other boards are the Board of Indian Appeals, the Board of Contract Appeals, and the Ad Hoc Board of Appeals.

56. 43 C.F.R. § 4.3(b) (1987).

guide administration of the law. Moreover, it may *sua sponte* require the development of additional facts or legal arguments it believes necessary. When a dispositive issue exists, it may also rule on such grounds even if not argued by the parties.

Second, the IBLA serves as the final arbiter of appeals taken from the BLM (absent unusual circumstances), much in the same way that the Secretary has the final word in the Department of the Interior. The IBLA binds the BLM, and the latter is bound by the former’s rulings. The BLM never can appeal an IBLA decision to the courts, although it may request that the Board itself reconsider. The BLM does, however, have recourse to political channels, either through direct secretarial action or by amendment of regulations that the BLM feels have been wrongly interpreted by the IBLA.

The political maneuvers available to the BLM underscore the third aspect of the IBLA’s power: because the IBLA is a surrogate, or a wielder of delegated power, it cannot contradict the source of its authority. If the Secretary of Interior or any of the Assistant or Undersecretaries have signed or approved a decision, the IBLA will not have review jurisdiction. The IBLA also may not second-guess policy choices or legal conclusions in a decision of the BLM that responds to a secretarial directive; it can only review the BLM decision to ascertain whether that decision conforms with the directive. Similarly, duly promulgated regulations bind the IBLA and therefore it may not declare them invalid.

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63. Any party may seek reconsideration, which will not stay the effectiveness of the decision (unless so ordered by the Director or by IBLA) or its finality for judicial review. 43 C.F.R. §§ 4.21(c), 4.403 (1987). The BLM also may appeal to the IBLA from the decision of an administrative law judge in certain situations. Id. §§ 4.452-9, 4.476.
64. See infra notes 66, 67.
67. Chugach Alaska Corp., 94 I.B.L.A. 24 (Sept. 25, 1986); Garland Coal & Mining Co., 88 Interior Dec. 24, 52 I.B.L.A. 60 (1980) (IBLA can invalidate a rule if that rule has not been duly promulgated, is contrary to statute, and has been consistently ignored).
The final important corollary of the delegated nature of the IBLA’s authority is the simple truism, “he who gives may also take.” The Secretary may review the decision of or assume jurisdiction over any matter before any subordinate, including the IBLA, at any time. Express notification of all parties, however, must precede the taking of jurisdiction over an appeal pending before the IBLA. Therefore, the Secretary of Interior has the regulatory authority to maintain ultimate supervision of the Department, although this power is invoked infrequently. The Department has considered, and rejected, providing for appeals to the Secretary in all instances.

This structure enables the IBLA to make significant policy determinations without secretarial oversight when it adjudicates appeals. The impact of a decision may not be communicated to the Secretary nor even fully appreciated at the time. Therefore, appellate practice comprises an important opportunity to influence the direction of public land management.

**B. Access to the IBLA**

Relatively few regulations govern review of informal actions. The threshold requirement for access to the IBLA states that “any

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69. The notice requirement was added after a particularly frustrating example of confusion engendered when the IBLA misconstrued an action as secretarial approval of a decision under review. In one instance, the IBLA cited a letter to the Governor of Wyoming from the Acting Undersecretary as depriving the Board of jurisdiction and dismissed the appeal. After the letter was determined to not have been so intended, the IBLA overturned the BLM action upon remand from District Court. However, this latter action occurred after the original decision had been defended in court for eighteen months. When the IBLA decision was subsequently appealed, the U.S. Attorney found himself at counsel table with his prior opponents. *See* Sierra Club, 80 I.B.L.A. 251 (May 2, 1984) (on judicial remand); Getty Oil Co. v. Clark, 614 F. Supp. 904 (D. Wyo. 1985), *aff’d sub. nom.*, Texaco Producing, Inc. v. Hodel, 840 F.2d 776 (10th Cir. 1988).
70. Frishberg, Hickey & Kleiler, *supra* note 20, at 554–55. When the regulation detailing the Secretary’s power to assume jurisdiction was amended, the Department stated that it did not intend to change the practice of rare use. 43 Fed. Reg. 37,689 (1978) (codified at 43 C.F.R. § 4.5).
72. For information regarding the mechanics of appeal, see 43 C.F.R. §§ 4.411–4.415.
party to a case adversely affected by a decision of an officer of the Bureau of Land Management or an administrative law judge shall have the right to appeal" to the IBLA. The regulation lists only limited exceptions to this privilege. If a decision is not within one of these express exceptions, the BLM cannot circumvent an appeal. Therefore, in questionable situations, the IBLA itself has the jurisdiction to consider the scope of its own jurisdiction regarding the parties seeking review before it—the BLM cannot, on its own authority, foreclose access to the IBLA. As long as the person or organization attempting to appeal is both "a party to the case" and "adversely affected," almost all day-to-day decisions of the BLM can reach the IBLA. This dual-sided criterion needs further explication.

The first requirement for a potential appellant, that of being "a party to the case," can often be determined without difficulty. The applicant whose request to use public lands or to develop their resources is rejected or granted on objectionable terms is obviously a party to the case and the BLM will inform this party, by decision, of its disposition of the request. Similarly, a person served with an order to perform or a notice of a violation of a

(1987). The appeal is decided upon the file and briefs unless a particular statute or regulation entitles an adversely affected party to a hearing or unless the Board in its discretion orders a hearing to resolve a material issue of fact. Id. § 4.415; see also Norman G. Lavery, 96 I.B.L.A. 294 (Mar. 3, 1987). Actions currently requiring hearings include: (1) the invalidation of mining claims or other entries for matters of fact not revealed in BLM records, 43 C.F.R. §§ 450–452 (1987); (2) the termination or suspension of certain land-use authorizations, id. § 2920.9-3, or right-of-way grants, id. §§ 2803.4, 2883.6; (3) the cancellation of geothermal leases, id. § 3244.3; (4) the rejection of preference right leases, id. §§ 3430.5-2, 3513.4, 3523.4, 3533.4, 3543.4, 3553.4, 3563.4; (5) the imposition of penalties under the Federal Oil and Gas Royalty Management Act or for coal trespass, id. §§ 3163.4-1, 9239.5-3(f)(3); (6) the resolution of any appeal involving grazing, id. § 4160; and (7) the resolution of issues raised by the filing of verified petitions by mining claimants under certain laws, id. §§ 3700, 3740. See also generally Sturges, supra note 23.

73. 43 C.F.R. § 410(a) (1987).

74. Id. The only decisions excepted are those made under certain listed regulations that are required to be taken to an administrative law judge or approved by the Secretary. A regulation not listed, but which states that the Director of the BLM has final review authority of decisions adopting resource plans, also forecloses IBLA jurisdiction. Wilderness Soc'y, 90 I.B.L.A. 221 (Jan. 30, 1986) (construing 43 C.F.R. § 1610.5-2(b)); cf. Minchumina Homeowners' Ass'n, 93 I.B.L.A. 169 (Aug. 15, 1986) (construing 43 C.F.R. § 4.410(b)) (recounting the more limited appeal rights available under the Alaska Native Claims Settlement Act); United States Fish and Wildlife Serv., 97 I.B.L.A. 367 (May 27, 1987); see also Koniag, Inc. v. Andrus, 580 F.2d 601, 614 (D.C. Cir. 1978), cert. denied, 439 U.S. 1052 (1979) (Bazelon, J., concurring) (predecessor of regulation); 43 C.F.R. § 4160.4 (1986); id. § 23.12 (1987) (rights to appeal are accorded to any "person whose interest is adversely affected" by a grazing decision or by certain mining decisions).

relevant regulation, lease, permit, or contract term must be a "party" to that enforcement action.

Other individuals and groups less directly tied to an action may also obtain this status through one of two means—the "contest" or the "protest." A third party who can demonstrate an adverse claim of title or interest in the particular land being considered may initiate a "contest" against another party's assertion of rights to use that land.76 On the other hand, a member of the public without such a right or interest can still enter the decision-making process through an alternative mechanism, the "protest":

Where the elements of a contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.77

The right to protest is open-ended. No relationship between the protestant78 and the proposed action is necessary; nor is there any limitation on the types of action that may be protested or the reasons that may be raised.79

The regulation, however, is also singularly uninformative as to what consequences will flow from the protest. In the face of its indeterminate directive to do "what is appropriate," the IBLA has delineated strict procedures. The BLM must consider the points raised in the protest and, if the BLM does not cancel or modify the action in response, it must issue a decision to the protestant dismissing the protest and indicating that an appeal is available.80

This decision is part of the record of the case and not a mere ad

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76. 43 C.F.R. § 4.450-1 (1987). The rationale for the "contest" must be factual and not shown on the BLM records. A hearing will be granted in contest actions, but not in protest actions.
77. 43 C.F.R. § 4.450-2 (1987) (emphasis added). If the pending action is the patenting of a mining claim or a grazing decision, specialized regulations apply. Id. §§ 3872.1, 4160.2; see also Lee Brothers Dredging Co., 79 I.B.L.A. 330, 333–34 (Mar. 30, 1984) (persons who "protest" act as amicus curiae).
78. "Protestant" is the term used by the IBLA.
79. But see infra note 92 and accompanying text (failure to act cannot be the subject of a protest).
hoc rationale for the action. More importantly, the dismissal transforms the protestant into a “party to the case.” The IBLA, not the BLM, will then ascertain whether the second requirement of the test for an appellant, that of being “adversely affected by the decision,” has been met.

Because the “protest” is the primary route for the public into the process, its attributes should be delineated in detail. Unfortunately, no clear guidance on what constitutes a protest exists under the regulations. The IBLA has stated that not all comments directed towards a public notice of an action must be treated as a protest, although it has intimated that clear “objections” would qualify.

The lack of formality involved is underscored by instances in which the IBLA almost waived the requirement that a protest be filed prior to the consummation of the objectionable action. For example, in the Utah Wilderness Association decision, the IBLA granted party status to the Utah Wilderness Association when the Association, allegedly due to lack of notice, had not objected to a particular decision to allow the drilling of an oil well. The Association had, however, requested notice of such proposed actions and its members did use the affected lands. The Association also had participated in other management decisions concerning the area. This decision can best be reconciled with other holdings that a pre-action protest is a firm prerequisite for an appeal by assuming that the IBLA accepted the general position of the environmental group and its avowed desire to protest all such activities as an informal protest for purposes of determining party status.

83. By contrast, a “protest” of a resource management planning decision must contain specific details. 43 C.F.R. § 1610.5-2 (1987). In the grazing arena, a protest may be either oral or written and is triggered by a specific action of the BLM, namely a proposed decision. Id. § 4160.2; see also International Paper, 98 I.B.L.A. 52 (June 5, 1987) (construing 43 C.F.R. § 5003.3) (establishing a time limit for timber sale protests).
86. Id. at 128–29; see also California Ass’n of Four Wheel Drive Clubs, 30 I.B.L.A. 383 (June 10, 1977) (a group may appeal without formal protest on behalf of members who use lands when that group participated in formulation of plan effectively amended by decision).
87. For example, in Sierra Club, 84 I.B.L.A. 311 (Jan. 7, 1985), the IBLA held that an environmental group could not use “surprise” as an excuse for its lack of a protest
However, in addition to equating the group's past activities with a protest, the *Utah Wilderness* case should also be viewed in light of the BLM's recognition of the Association as "interested" in the Applications for Permission to Drill ("APDs") and thus entitled to direct, personal notice. Without such notice, the protest requirement dims in importance. Because the IBLA dismissed the Association's appeal as moot, the chastisement of the BLM for the failure to notify the group might have been the main purpose of the decision.

The notice rationale could explain the convoluted reasoning of the IBLA in *Arnell Oil Co.* In that case, the BLM had authorized an oil and gas pipeline company to cross over lands leased to another for oil and gas exploration. Although the pipeline right-of-way could not be issued if it interfered with the lease operations, the leasing company claimed they had received no notice of the right-of-way prior to issuance. The lessee requested that the BLM reconsider the decision. While the request for reconsideration was too late to be considered a protest, the IBLA suggested that the lessee could appeal the denial of the request to reconsider.

In other situations, the IBLA has strictly required that a protest precede BLM activity. The IBLA has narrowly construed the scope of access in one additional aspect: the BLM must be considering an action in order for a protest to be allowed. A failure to act cannot be the subject of a protest. The protest mechanism cannot initiate enforcement or other BLM activity. The basic scheme remains that any person may raise objections by way of a protest only while an action is pending. After a decision is rendered, only a "party to the case adversely affected" may appeal.

before a mineral lease was issued because lease applications are noted on master plans and other public documents in BLM offices. In *Utah Wilderness*, the BLM had provided greater opportunities for public awareness of the drilling proposals. *Utah Wilderness*, 91 I.B.L.A. at 128; see also *id.* at 126–27. Notices of the "Requests to Stake" drillsites had been published in the local newspapers, although notices of the actual Applications for Permission to Drill had not been. The former actions are generally precursors of the latter.

88. *Utah Wilderness*, 91 I.B.L.A. at 128–29 (citing 43 C.F.R. § 3162.3-1(f): The BLM "will consult with . . . appropriate interested parties.").
89. 95 I.B.L.A. 311 (Jan. 13, 1987).
90. Id. at 319; see also Peter Paul Groth, 99 I.B.L.A. 104 (Sept. 22, 1987); cf. Roy Jones, 10 I.B.L.A. 112 (Mar. 9, 1973) (a mining claimant who had been notified of his claim's invalidity by publication and certified letter sent to last known address may not transform "final" decision into appealable one by "appealing" letter giving information on the original decision).
91. See, e.g., Sierra Club, 84 I.B.L.A. 311, 318 (Nov. 12, 1985).
Therefore, it is necessary to ascertain when the BLM is no longer merely contemplating an "action proposed to be taken."93

In a manner similar to the IBLA’s treatment of the necessity of a protest in the absence of notice, concern for effective public input has created another blurred and administratively troublesome concept: the distinction between a final and pending action. Generally, an action is pending until the BLM has actually issued or denied a use authorization such as a lease, right-of-way, drilling permit, or timber contract. In accord with this view, the IBLA found that preliminary indications of proposed actions, including public notices, were not appealable, but only subject to protest.94 Similarly, an environmental document prepared as a prerequisite for a decision in compliance with the National Environmental Policy Act of 1969 ("NEPA")95 should not be subject to review independent of a decision to act, but should enable those who oppose the action to submit protests prior to the BLM implementation of the proposal.96

The IBLA disagreed in Animal Protection Institute of America,97 holding that where an environmental assessment of an area-wide decision is made, appeal of the assessment is not premature.98 Nevertheless, the IBLA’s reasoning would not authorize direct appeals of environmental documents in all instances. The Board observed that normally the action contemplated, not a conclusion in an environmental assessment, has the potential to “adversely

94. Cascade Holistic Economic Consultants, 58 I.B.L.A. 332 (Oct. 12, 1982); see also Utah Wilderness Ass’n, 65 I.B.L.A. 219 (July 9, 1982); International Paper Co., 98 I.B.L.A. 52 (June 5, 1987); Kenneth W. Bosley, 99 I.B.L.A. 327, 332-34 (Oct. 29, 1987). Other decisions are labelled interlocutory or final on minor differences. See, e.g., Franklin Bell Real Estate Co., 93 I.B.L.A. 272 (Aug. 29, 1986). Because it is an absolute necessity to appeal in a timely manner from an adverse, non-interlocutory decision, the linguistic distinctions could be crucial. Cf. Inexco Oil Co., 93 I.B.L.A. 351, 353-54 (Sept. 15, 1986) (an appeal must be made of a fact deemed erroneous even if the remainder of the decision is favorable).
96. NEPA requires that a “detailed statement” (commonly referred to as an Environmental Impact Statement or "EIS") accompany any "major federal action that significantly affects the human environment." 42 U.S.C. § 4332(2)(C) (1982). In various such documents, the BLM told the public that a protest may be raised thirty days after the filing of the EIS. See, e.g., BUREAU OF LAND MANAGEMENT, HICKLEY MOUNTAIN-TABLE MOUNTAIN OIL AND GAS FIELD DEVELOPMENT RECORD OF DECISION AND FINAL EIS (May, 1987).
98. Id. at 103-04.
affect” a party. Therefore, it would be adequate to raise the insufficiency of the NEPA compliance in an appeal of the actual action.\textsuperscript{99} However, more effective review was needed when the BLM proposed to allow up to sixteen gas wells to be drilled over three years in a wilderness study area also designated as a wild horse range. The IBLA held that it would be impractical to require appeals of each individual well approval, especially since the cumulative impact of drilling most disturbed the environmental groups.\textsuperscript{100} Therefore, the IBLA concluded that an “area-wide decision” to allow a program of drilling had been made without preparing an environmental impact statement. The basis for this decision, namely the BLM’s environmental assessment, should be subject to immediate appeal to enable review to have any meaning and to avoid drilling before its review.\textsuperscript{101} The IBLA noted that nothing limited its authority to the review of only “final” decisions of the BLM; it could thus intercede at any stage where there has been “adverse affect.”\textsuperscript{102} No APD could be granted before the adequacy of the NEPA compliance was decided.\textsuperscript{103} This stance protects public input.

Another aspect of the process’ promotion of citizen input involves not the timing of appeals, but the second prong of the regulatory test for standing, which requires that a party be “adversely affected by the decision.” Although the IBLA acknowledged that standing for an administrative appeal need not be equated with the judicial concept, it did follow the courts; it expanded the realm of “legally recognizable interests” to include the “aesthetic, conservational and recreational.”\textsuperscript{104} However, the IBLA does inquire into whether or not an “injury in fact” has occurred to such an interest. Usually, it is sufficient that the protestant organization or a member thereof allege its use of the public

\textsuperscript{99} Id. at 101–02.
\textsuperscript{100} Id. at 101.
\textsuperscript{101} Id. at 102–04. The IBLA recognized that approval of an APD was, at that date, a “full force and effect” decision. See infra note 109. Therefore, wells could be completed before the IBLA could act. See Utah Wilderness Ass’n, 91 I.B.L.A. 124, 130 (Mar. 19, 1986). Reviewing the environmental document as a separate decision would avoid this, because no APDs could be granted until NEPA is fulfilled. The same effect would occur by holding that the dismissal of a protest and appeal thereof forbids further action on the underlying decision. See infra notes 110–15 and accompanying text.
\textsuperscript{102} Animal Protection, 79 I.B.L.A. at 102–04.
\textsuperscript{103} Id. at 100.
\textsuperscript{104} Donald Pay, 85 I.B.L.A. 283 (Mar. 13, 1985) (citing Sierra Club v. Morton, 405 U.S. 729 (1972)).
lands involved. The IBLA has also never employed corollaries of the injury test such as a requirement that the injury be within the “zone of interest” protected by the relevant statute.

C. The Effect of an Appeal

Increased access to the appeal process without an immediate impact on land management would not be an appreciable gain for the public. However, appeals do affect the BLM's ability to continue as it had determined to act. The BLM loses jurisdiction of the matter appealed and cannot act, even to modify the decision in a manner desired by the appellant, unless the IBLA approves or remands the case. More importantly, an appeal will stay the effectiveness of the BLM decision in most instances:

Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal.

Unless a regulation states otherwise, the mere filing of a paper entitled “notice of appeal” is equivalent to a preliminary injunction without proof of irreparable harm or likely success on the merits. However, many activities frequently challenged by environmen-

105. See, e.g., National Wildlife Fed'n, 82 I.B.L.A. 303 (Sept. 5, 1984); California State Lands Comm'n, 58 I.B.L.A. 213 (Sept. 29, 1981) (“colorable” allegations of injury suffice); see also United States v. SCRAP, 412 U.S. 669, 686–87 (1973); Bryant v. Yellen, 447 U.S. 352 (1980); Stewart, supra note 7, at 1762. But see infra note 268 (potential pitfalls in the standing doctrine). For recent cases denying standing in addition to Donald Pay, in which there was no allegation of use of the lands, see James W. Smith, 85 I.B.L.A. 237 (Mar. 4, 1985); Save Our Ecosystems, Inc., 85 I.B.L.A. 300 (Mar. 15, 1985); In re Thompson Creek Timber Sale, 81 I.B.L.A. 242 (June 7, 1984); Blaine County Bd. of Comm’rs, 93 I.B.L.A. 155 (July 31, 1986); James M. Wright, 95 I.B.L.A. 387 (Feb. 24, 1987). In most of these cases, the IBLA simply decided that no rational explanation of injury was articulated or existed.


108. 43 C.F.R. § 4.21(a) (1987). When public interest dictates, the IBLA or Director of OHA may place a decision in force immediately. Id.; see also id. § 4.477(b). Conversely, on proper showings they, or the Secretary, may suspend certain full force and effect decisions. See, e.g., id. §§ 2804.1(b), 2884.1, 3165.4(c). The IBLA does not limit itself to judicial tests for preliminary injunctions in these cases. Mark S. Altman, 93 I.B.L.A. 265, 265 n.1 (Aug. 28, 1986).
talists were or are accorded "full force and effect" status during the pendency of an appeal.\textsuperscript{109}

In some cases, however, the IBLA hinted that these "full force and effect" exceptions to the normal stay could be undercut by third party participants.\textsuperscript{110} It has stated that if a third party protest is filed, the BLM cannot implement its proposed action during the thirty days following a dismissal of the protest or during the pendency of any appeal that might be filed.\textsuperscript{111} However, the cases in which these "hints" appeared, as well as the cases cited in support thereof, all dealt with decisions that would not have been accorded full force and effect during an appeal.\textsuperscript{112}

With these types of actions, if the BLM had rendered decisions concurrently dismissing the protest and granting the requested authorization, an appeal of the protest dismissal would effectively be an appeal of the actual implementing decision to grant the authorization, which would properly be tolled by the appeal. If the BLM separated the decisions, no practical change would occur in the activity's status—it would have been stayed in any case. However, parties would be able to appeal the implementing decision later, creating inefficiencies as causes of action multiplied. If, however, the BLM must separate its decisions when the implementing decision is one that would not be stayed by an appeal, the tolling of its ability to act during adjudication of the protest dismissal would not only be inefficient, but would also profoundly change the system.

To allow a protestant to block otherwise operative decisions undermines the regulatory scheme. Part of the reason to place a decision in full force and effect is to enable a person objecting to it to proceed directly to court.\textsuperscript{113} If the Secretary decided on such a procedure in a regulation, the IBLA should not countermand it _sub rosa_.\textsuperscript{114} It should only act through a direct ruling on a motion

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\textsuperscript{109} Decisions regarding the following are currently not automatically stayed and therefore are in full force and effect during the pendency of an appeal: Oil and gas operations, 43 C.F.R. \S 3165.4(c) (1987); rights-of-way including those for oil and gas pipelines, \textit{id.} \S 2804.1; mining claim plans of operation, but only if appealed by someone other than the operator, \textit{id.} \S 3809.4; forest management, \textit{id.} \S 5003.1 (1986); and certain recreational permits, \textit{id.} \S 8372.6(b).

\textsuperscript{110} Sierra Club, Or. Chapter, 87 I.B.L.A. \textit{I} (May 17, 1985); Sierra Club, 84 I.B.L.A. 311 (Jan. 7, 1985).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} See 5 U.S.C. \S 704 (1982); 43 C.F.R. \S 4.21(b) (1987).

\textsuperscript{114} Such an action by the IBLA parallels the holding of Animal Protection Institute
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that the decision either be stayed or implemented pending appeal. In essence, by attempting to foreclose BLM actions, even in full force and effect situations, the stay provisions do what the IBLA says the provisions cannot do: force the BLM to provide affirmatie relief. In fact, however, the IBLA has allowed the continuance of an activity that would not generally be stayed by an appeal while adjudicating a protestant's case. Nothing expressly reconciles this treatment with the positions espoused in the cases.

In many situations, the IBLA does circumscribe BLM behavior to facilitate public input. This is obvious in the definition of standing employed as well as the flexible approach to defining protests and decisions. However, as will be discussed below, the IBLA has not otherwise been a direct activist in reviewing BLM decisions. Even this tendency toward inactivism, however, is consistent with adoption of the interest representation model of administrative law.

IV. AN ANALYTICAL FRAMEWORK OF INTEREST REPRESENTATION WITHIN THE BLM PROCESS

Although adjudicators rarely articulate the theories influencing their behavior, commentators often attempt to do so. Often, a compulsion to rename concepts accompanies these efforts. This article will refer to two now-familiar models of decisionmaking;
namely, interest representation and comprehensive rationality. Moreover, no attempt will be made to generalize broadly about "Administrative Law" in the upper case; the law examined is that which has evolved to control appeals of informal BLM decisions. Nevertheless, one working hypothesis emerges: similar procedures would be natural for agencies that administer similar statutes. Procedure and substance frequently intertwine. Therefore, the first step in this analysis is to isolate the relevant characteristics of the statutes administered by the BLM in these informal proceedings. The crucial characteristic is that they tend to endow the

119. Professor Stewart posed the "interest representation model" of administrative law as "the provision of a surrogate political process to insure the fair representation of a wide range of affected interests in the process of administrative decision." Stewart, supra note 7, at 1670. Professor Diver summarizes the four steps of the "comprehensive rationality" paradigm:

First, the decisionmaker must specify the goal he seeks to attain. Second, he must identify all possible methods of reaching his objective. Third, he must evaluate how effective each method will be in achieving the goal. Finally, he must select the alternative that will make the greatest progress towards the desired outcome.

Diver, supra note 10, at 396. He cautions that while increased participation may be present in this mode of decisionmaking, it and the interest representation model are not necessarily compatible. Id. at 422–28. Other commentators have noted these two modes of administrative activity, albeit under different labels. See, e.g., Shapiro, supra note 4, at 1495–1500; Reich, Public Administration and Public Deliberation: An Interpretive Essay, 94 YALE L.J. 1617 (1985).

120. Cf. Elliot, supra note 118, at 1528; Rabin, Administrative Law in Transition: A Discipline in Search of an Organizing Principle, 72 NW. U.L. REV. 120 (1977) (querying whether a uniform field of administrative law exists or simply law for each agency); Stewart, supra note 7, at 1670 n.5.

121. Gellhorn & Robinson, Perspectives on Administrative Law, 75 COLUM. L. REV. 771, 786 (1975) (administrative law must follow substantive law); see also Rabin, supra note 120, at 143–44 (suggesting that the BLM and the Forest Service might have different procedures than the National Park Service, which faces fewer conflicting goals); cf. Rabin, Some Thoughts on the Dynamics of Continuing Relations in the Administrative Process, 1985 WIS. L. REV. 1, 44–46 (asserting that the Forest Service in the pre-1970’s did not act in traditional APA mode, but employed a managerial model and that further research on current tendencies is needed). A preliminary examination does reveal a similarity between the Forest Service and the BLM. The Forest Service administers statutes that, like those of the BLM, present problems of polycentricity and multiple criteria. See generally Coggins & Ward, The Law of Wildlife Management on the Federal Public Lands, 60 OR. L. REV. 59, 143–55 (1981); Coggins & Evans, Multiple Use, Sustained Yield Planning on the Public Lands, 53 U. COLO. L. REV. 411 (1982). The Forest Service has a structured review process with public participation allowed. 36 C.F.R. § 211.18(a) (1987). The Forest Service decisions are publicized. Id. § 211.18(a). Environmentalists avail themselves of these provisions. See, e.g., Sierra Club, 80 I.B.L.A. 251, 234–35 (May 2, 1984) (recounting of history). For a further testing of the hypothesis that procedure reflects substance, see infra notes 185, 214.
agency with discretion to choose among conflicting societal values without concrete congressional direction.122

A. The Nature of Discretion Available under the FLPMA and the Mineral Leasing Act

Most of the decisions subject to informal adjudication involve rights and authorizations pursuant to the FLPMA and the Mineral Leasing Act.123 For the leasing system, issues relating to oil and gas will be used as a microcosm of the problems dealt with by the Act.124 Both of these acts delegate policymaking discretion to the BLM.125 Despite recommendations to the contrary, the FLPMA did not dictate concrete decisionmaking criteria. Similarly, the basic discretion inherent in the Mineral Leasing Act, summarized by the phrase "to lease or not to lease," includes the authority to consider conflicting uses. Both the FLPMA and the Mineral Leas-

122. Such statutes have been referred to as "thematic," Shapiro, supra note 4, at 1505-07 (listing "considerations" but providing no weighing factors), and "aspirational," Henderson & Pearson, Implementing Federal Environmental Policies: The Limits of Aspirational Commands, 78 COLUM. L. REV. 1429, 1430 (1978). Stewart delineated two sources of discretion: Congress could freely "endow an agency with plenary responsibilities" and allow the agency full discretion, or it could "issue directives that are intended to control the agency's choice among alternatives but that, because of their generality, ambiguity, or vagueness, do not clearly determine choices in particular cases." Stewart, supra note 7, at 1676 n.25. The latter example describes most of the congressional guidance given the BLM.


125. Professor Koch defines five types of discretion. See Koch, Judicial Review of Administrative Discretion, 54 GEO. WASH. L. REV. 469 (1986). "Policymaking discretion" exists when an agency may choose alternative actions in furthering societal goals. Id. at 483-87. The BLM's discretion might also be "numinous" in Koch's typology. Such discretion exists when there is no "right" or "wrong" answer to a problem. Koch's example is whether the criterion for "peanut butter" should be that a product be 87% or 90% peanuts. Id. at 502-06. Some might differ and maintain that there could be a "right" answer to the BLM's task of ascertaining whether a particular tract of land is better suited to backpackers or oil rig roughnecks, but this would be determined by a value choice, not by scientific verity.
The Mineral Leasing Act provides, as to oil and gas, that the Secretary of Interior "may" lease lands for oil and gas exploration.\textsuperscript{126} The permissive language grants the Secretary the right to refrain from leasing; environmental concerns could justify the refusal. The passage of NEPA in 1969 enlivened the consideration of environmental values.\textsuperscript{127} However, even before NEPA, the Secretary could decide to devote certain lands to uses that would preclude oil and gas development.\textsuperscript{128} Moreover, the BLM has the authority and obligation to consider all impacted resources and, if necessary, to employ environmental safeguards if it issues a lease.\textsuperscript{129}

The BLM may take measures to mitigate impacts because the power to grant or not grant an authorization or suspension includes the power to reasonably condition the grant.\textsuperscript{130} In fact, the BLM may issue an oil and gas lease that expressly reserves a right to veto all possible future development if it finds specified thresholds have been crossed.\textsuperscript{131} More importantly, even if the BLM issues a

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\item \textsuperscript{126} More importantly, even if the BLM issues a
\item \textsuperscript{127} See \textit{42 U.S.C. § 4331(b) (1982); Gulf Oil Corp. v. Morton, 493 F.2d 141, 145–46 (9th Cir. 1973).}
\item \textsuperscript{128} See \textit{Learned v. Watt, 528 F. Supp. 980, 981–82 (D. Wyo. 1981) (secretarial memorandum foreclosing oil and gas leasing in an area of scenic beauty held to be valid); Udall v. Tallman, 380 U.S. 1 (1965) (discretion to lease or not lease exercisable by regulation); Boesche v. Udall, 373 U.S. 472 (1963).}
\item \textsuperscript{129} See \textit{Morton, 493 F.2d at 145–46.}
\item \textsuperscript{130} Getty Oil Co. v. Clark, 614 F. Supp. 904, 915–16 (D. Wyo. 1985); see also \textit{generally Pring, "Power to Spare": Conditioning Federal Resource Leases to Protect Social, Economic, and Environmental Values, 14 NAT. RESOURCES LAW. 305 (1981).}
\item \textsuperscript{131} Rocky Mountain Oil and Gas Ass’n v. Watt, 696 F.2d 734 (10th Cir. 1982) (non-impairment-of-wilderness stipulation can foreclose development); Sierra Club v. Peterson, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (presumes validity of general “no surface occupancy” stipulation that prevents drilling if later environmental analysis reveals unacceptable im-
\end{itemize}
standard lease without reserving veto power, the BLM retains the 
right to examine and condition proposed activities before surface 
disturbance begins. In such cases, the BLM may not destroy the 
granted right and must have a reasonable basis for its require-
ments. One technique to assure such control is that the devel-
oper submit an application for permission to drill for approval
before proceeding. The BLM then sets appropriate terms.

Policy choices abound in leasing actions, both in decisions on 
the propriety of leasing at all and in decisions about stipulations 
or permit conditions. Each may increase the cost or difficulty of 
mineral recovery. Proponents of various values have the choice of 
congressional directives. Mineral lessees and potential lessees cite 
the Mining and Minerals Policy Act of 1970, a hortatory act that 
embraces a policy of fostering energy and strategic mineral inde-
pendence. Persons asserting other interests rely on additional 
distinct policies in the BLM’s organic act, the FLPMA.

This later Act did not embrace the philosophy of the PLLRC 
in giving and demanding delineation of policy. The PLLRC rec-
commended that comprehensive planning be undertaken, with Con-
gress providing a clear set of goals. The public lands would be 
managed for the maximum net public benefit. Certain lands would 
be devoted to primary uses. In case of conflicts, the BLM would 
follow value determinants specified by Congress. These rec-
ommendations were in accord with then current administrative 
law philosophy. A disenchantment had set in with the New Deal

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132. Sierra Club, 717 F.2d at 1414; Conner, 836 F.2d at 1520.
(ability to regulate for “conservation” in statute includes protection of all natural resources, 
not simply oil and gas); 43 C.F.R. §§ 3162.3-1, 3162.3-3 (1987); see also generally Laitos 
& Westfall, Government Interference with Private Interests in Public Resources, 11 HARV. 
135. See infra notes 141–42 (delineating various policy goals contained in the 
FLPMA).
136. ONE THIRD, supra note 6, at 45–48. The PLLRC provided Congress with a 
non-exhaustive list of diverse value preferences. Congress could have directed the BLM 
to favor regional economic growth or values that do not have a market price. Another 
suggested guideline was to require the BLM to adopt the option that was least harmful to 
the environment. 137. See Stewart, supra note 7, at 1693–1702 (general history).
concept of broadly entrusting the "public interest" to agency determination, often through adjudication, and with the conviction that agency expertise could function as a cure-all for social ills. Not only were critics urging agencies to employ rulemaking, but they called upon Congress to provide better guidance to agencies.

Nevertheless, Congress infused the FLPMA with contradiction. The Act's policy section articulates the mutually exclusive goals of environmental protection on the one hand, and the enhancement of the production of resources on the other. Nat-
urally, these goals cannot both be met on each parcel of land.143 Other sections of the FLPMA, such as those dealing with dispositions, similarly contain laundry lists of potentially contradictory considerations.144

Moreover, the FLPMA expresses the policy that "management [of public lands] be on the basis of multiple use and sustained yield unless otherwise specified by law."145 To some extent, this mirrors prior statutes that required "multiple use management," a criterion that many felt was meaningless.146 However, in addition to exhortations to employ these concepts, the planning procedure of the FLPMA requires that the BLM "consider" both present and future uses of the lands as well as relative scarcity of the valuable attributes of the lands. The Act also requires "a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences," "giv[ing] priority to the designation and protection of areas of critical environmental concern," and "provid[ing] for compliance with applicable pollution control laws."147 These mandatory provisions, according to

fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 . . . ." Id. § 1701(a)(12).


144. See 43 U.S.C. § 1713(a) (1986) (sales); id. § 1716(a) (exchanges), discussed in Anderson, Public Land Exchanges, Sales, and Purchases under the Federal Land Policy and Management Act of 1976, 1979 UTAH L. REV. 657; see also 43 U.S.C. § 1719(b) (Supp. IV 1986) (governing the conveyance of reserved mineral interests when "the reservation of mineral rights by the United States is interfering with or precluding appropriate nonmineral development of the land and such development is a more beneficial use of the land than mineral development." (emphasis added)).

145. 43 U.S.C. § 1701(a)(7) (1982). The Act further states that "in the development and revision of land use plans, the Secretary shall . . . use and observe the principles of multiple use and sustained yield set forth in this and other applicable law." Id. § 1712(c); see also id. § 1702(c) ("multiple use" defined); id. § 1702(h) ("sustained yield" defined).

146. Prior acts using such terms included the Classification and Multiple Use Act of 1960, 43 U.S.C. §§ 1411-1418 (1964) (expired in 1970 pursuant to 43 U.S.C. § 1418) (BLM), and the Multiple Use and Sustained Yield Act, 16 U.S.C. §§ 528-531 (1982) (Forest Service). For views that either or both statutes were not effective, see One Third, supra note 6, at 43, 45; Behan, The Succotash Syndrome, or Multiple Use: A Heartfelt Approach to Forest Land Management, 7 NAT. RESOURCES J. 473 (1967); Reich, The Public and the Nation's Forests, 50 CALIF. L. REV. 381, 386 (1962); Comment, Managing Federal Lands: Replacing the Multiple Use System, 82 YALE L.J. 787, 788 (1973); McCloskey, Natural Resources—National Forests—The Multiple Use-Sustained Yield Act of 1960, 41 OR. L. REV. 49 (1961); Strand, Statutory Authority Governing Management of National Forest System—Time for a Change, 7 NAT. RESOURCES LAW. 479, 495-97 (1974). But see Coggins, Of Succotash Syndrome and Vacuous Platitude: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management, 53 U. COLO. L. REV. 229, 243-50 (1981) (past cases have usually been deferential to agencies, although there are some hints that due consideration and rationality are required); P. Culhane, supra note 2, at 326-27 (the term "multiple use" is not vague to professional land managers).

one commentator, contain judicially enforceable "law to apply" and hence add "bite" to the Act. However, although these terms may influence BLM activity, they are primarily procedural checks, not substantive determinants. The BLM may decide as it desires so long as it follows the proper decisionmaking paths, with only the arbitrary and capricious standard to curb directly its substantive choice. Nevertheless, the requirement of specific procedures and the forced consideration of diverse criteria can indirectly moderate BLM activity, because process controls can be potent.

Congress thus gave the BLM broad management authority with little but process requirements to guide it. Despite the tendency of courts to assume jurisdiction under the Administrative Procedures Act by refusing to find decisions "committed to agency discretion," effective substantive review may elude the courts. Congress did attempt to retain some control over various major allocative actions; it provided for house vetoes of certain decisions on withdrawals, sales, and land management.

148. See Coggins, Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate, 14 ENVTL. L.—NW. SCH. L., LEWIS & CLARK 1, 48-65 (1983) (although there is some latitude granted to the agency, the heavier emphasis in the FLPMA is on preservation); see also Coggins & Evans, supra note 121 (citing as "law to apply" the statutory command to "take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c) (1982)). Unfortunately, the terms "unnecessary" and "undue," just like the concept of "impairing" an area's suitability for wilderness, are subject to wide interpretation. See 43 C.F.R. §§ 3802.05(l), 3809.05(k) (1987); State of Utah v. Andrus, 486 F. Supp. 995, 1003-09 (D. Utah 1979); Norman G. Lavery, 96 I.B.L.A. 294 (Mar. 31, 1987); Southwest Resource Council, 94 Interior Dec. 56, 96 I.B.L.A. 105 (Mar. 10, 1987).


152. See 43 U.S.C. § 1713(c) (1982) (prospective sales of tracts exceeding 2,500 acres); id. § 1714(e)(1) (withdrawals of 5,000 acres or more); id. § 1712(e)(2) (management decisions affecting 100,000 or more acres and precluding one or more primary uses for two
Unfortunately, these provisions are probably unconstitutional under recent precedent. In a search for alternative sources of restraint, some commentators have urged applying the theories of communal ownership or the public trust doctrine, but it is doubtful that such ambiguous standards could meaningfully or substantively abridge the BLM’s discretion except in the most egregious situations.

Discretion, however, need not be scorned as a concept in and of itself. Arguably, the legal system could not exist without it. There are a number of compelling reasons for granting administrative agencies significant discretion. First, agency personnel can provide crucial professional knowledge and initiative. Second, Congress often lacks the expertise to define national policy completely and cannot devote sufficient time to respond to or supervise either the regulated populace or the agencies.

Further, Congress often cannot politically balance the diverse demands of society. It delegates broadly or with conflicting language in order to avoid stalemates and respond in some manner to a perceived necessity for legislation. In essence, Congress...
passes the dilemma to an agency. This is not a perfect solution. Agencies left foundering are subject to usurpation both by those regulated and by the courts. However, in the absence of a consensus that will force agency action in one direction, there may be no rational alternative. Methods must therefore be created to channel the exercise of discretion.

IND. L.J. 606, 608 (1972) (broad delegations arise from urgency); Freedman, Crisis and Legitimacy in the Administrative Process, 27 STAN. L. REV. 1041 (1975); Ackerman & Hassler, supra note 138, at 1509–13 (the 1970 amendments of the Clean Air Act abdicated Congress’ function to reconsider basic policy premises, partially because of scarce time and its staff’s accessibility to divergent competing interest groups); see also Stewart, supra note 7, at 1693–97.

Yet when Congress has failed to adopt a set of social preferences for resolving such fundamental and complex issues as typically lie behind broad delegations of power, an administrative agency, itself now exposed to the conflicting political forces that led Congress to shirk from a decisive response in the first instance, can hardly be expected to do better.

Freedman, supra note 158, at 1054; see also Gellhorn & Robinson, supra note 121, at 778–79.

Usurpation by the regulated is referred to as “capture” and has been explained in various ways. See, e.g., Reich, supra note 156, at 1238–39 (reflects a desire to yield toward the status quo); Boyer, Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111, 122–25, 141–45 (1972) (“insider perspective” links agencies to Congress and constituencies for support). But see infra note 218 and accompanying text (discussing the value of cooperation between agencies and their constituents). For an empirical view of the phenomenon in the BLM, see P. CULHANE, supra note 2, at 186–204, 218–29; Jaffe, supra note 140, at 1109–10.

See generally Miller, Statutory Language and the Purposive Use of Ambiguity, 42 VA. L. REV. 23, 35 (1956). For more particular examples, see generally Diver, supra note 10, especially at 413–15 (Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), was a judicial resolution of seemingly irreconcilable conflicts by providing the necessary value judgment to enable synoptic analysis); Murphy, The National Environmental Policy Act and the Licensing Process: Environmental Magna Carta or Agency Coup de Grace?, 72 COLUM. L. REV. 963, 985–90 (1972).

Fuchs, supra note 158, at 608; Saunders, Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Participation, 1986 DUKE L.J. 346, 360–62 (an ambiguous statute carries with it an implicit delegation of rulemaking authority). To contrast with the “thematic” or broadly delegatory statute, Ackerman and Hassler posit the agency-forcing statute, which directs policy in a certain direction but requires the agency to use its expertise in a careful policy appraisal before the congressional initiative becomes a regulation and thus law. Ackerman & Hassler, supra note 138, at 1556–65. The FLPMA is generally not agency-forcing in regard to land management, except for some agenda-forcing provisions with time frames for some activities, such as withdrawal and wilderness reviews. 43 U.S.C. §§ 1714(c)(2), 1782(a) (1982). Compare the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §§ 1201–1238 (1982 & Supp. V 1987) (especially §§ 1238, 1260, 1265) with 43 U.S.C. § 1701 (1982) (FLPMA’s policy section) and id. § 1782(c) (FLPMA’s admonition to “prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.”)

The control of discretion has been described as the current “major theme” of administrative law. See Shapiro, APA: Past, Present, and Future, 72 VA. L. REV. 447,
B. The Nature of Disputes Arising Under the FLPMA and the Mineral Leasing Act

For any given area of a public land, there is a large pool of potential users. A lumber company may desire to log; a mining company may desire to develop a mining claim; an oil and gas company may desire a new lease, well, or pipeline; a developer may desire to build a road for access to its project. Such an area, of course, may also support deer, elk or grizzly bears, contain unspoiled vistas or opportunities for primitive recreation, provide watershed protection, or in other ways serve environmental, recreational, or commercial needs in its undeveloped state. Clashes are inevitable because all the demands are dependent on the same resource and are, to greater or lesser extents, mutually incompatible.

The resultant conflicts are not merely between development and recreation, but often pit recreationists against other recreationists and commercial interests against other commercial interests. Backpackers and preservationists deplore recreational off-road vehicles. Professional hunting guides and other tourist-related business owners as well as ranchers who graze cattle on lands slated for development object to plans that would interfere with their uses. Therefore, even if an absolute value priority such as economic development or recreational enjoyment was available to the BLM, the answer would not be clear.

The problems confronting the BLM are those of allocating a scarce resource. Any allocation it may make will create reverberations for numerous other potential claimants to the resource. For example, an oil and gas rig could displace wildlife and disturb hikers. If the BLM limits drilling to certain seasons to mitigate

488-92 (1986); see also Stewart, supra note 7, at 1676-88 (historical treatment of discretion); K. Davis, Administrative Law Treatise §§ 9, 10 (2d ed. 1979).

164. See supra notes 126, 133 and accompanying text (discussions of leasing authority and regulation of drilling activities respectively); 30 U.S.C. § 226 (1982 & Supp. III 1985) (leasing authority); id. § 185 (authority for oil and gas pipelines).


166. See, e.g., American Motorcycle Ass'n v. Watt, 714 F.2d 962 (9th Cir. 1983).

167. See, e.g., Park County Resources Council v. Department of Agric., 613 F. Supp. 1182 (D. Wyo. 1985), aff'd, 817 F.2d 609 (10th Cir. 1987) (a named plaintiff and primary witness against drilling was a hunting guide).

168. Protestants against BLM actions also include direct competitors of the applicant. See, e.g., Western Gas Supply Co., 86 I.B.L.A. 258 (May 8, 1985).
these impacts, the economic feasibility of drilling would be altered. A company might forego drilling and thus, unbeknownst to all, a major field might remain undiscovered. The scenario could therefore be stretched out to include impacts to other regions that now must be drilled or to the effects of higher petroleum prices. Conversely, unrestrained impacts to wildlife could not only detract from the enjoyment and livelihoods of many, but could affect the survival of a species that would have provided insight to a researcher on a fundamental problem. Each proposal for resource use or non-use creates externalities. Because the rivals do not desire the same end result, such as efficient recovery of oil and gas, the problems are less tractable than when a community of interest may be invoked.\textsuperscript{169}

The nature of the decision is hence polycentric: it is "a situation of interacting points."\textsuperscript{170} A polycentric task is one in which the disposition of a part has implications for the proper disposition of every other part.\textsuperscript{171} Most environmental disputes have polycentric characteristics. Of necessity, the allocation of scarce resources requires economic and other tradeoffs. Numerous relevant variables must be considered, often with the necessity of predicting impacts from possible courses of action amidst uncertainty.\textsuperscript{172}

Another aspect of the BLM's difficulties related to polycentricity, conceptually distinct though often found in the same problems, is the dilemma posed by multiple criteria being available to the decisionmaker.\textsuperscript{173} In essence, each allocation encompasses a planning decision, but no value has been identified by Congress as being authoritative in ordering the result.\textsuperscript{174} Resolving tasks that are polycentric or that contain multiple criteria creates special problems.

\textsuperscript{169} Fuller, \textit{supra} note 9, at 381 (adjudication works best when community of purpose is present); Dorfman, \textit{The Technical Basis for Decision-Making}, in \textit{The Governance of Common Property Resources} 383, 387 (E. Haefle ed. 1974) (it is harder to resolve common problems in "asymmetric" situations where externalities differ for each user).

\textsuperscript{170} Fuller, \textit{supra} note 9, at 394–95.

\textsuperscript{171} Id.; \textit{see also} Fletcher, \textit{The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy}, 91 \textit{Yale L.J.} 635, 645 (1982) ("Polycentricity is the property of a complex problem with a number of subsidiary problem 'centers,' each of which is related to the others, such as the solution to each depends on the solution to all others.").

\textsuperscript{172} Boyer, \textit{supra} note 160, at 117–19.

\textsuperscript{173} See Eisenberg, \textit{supra} note 9, at 424.

\textsuperscript{174} See Reich, \textit{supra} note 156, at 1234–35. (administrative law, by using phrase "public interest," creates the myth that allocation and planning decisions are objective; value choices permeate decisions); \textit{see also} Landstrom, \textit{supra} note 2, at 375–76 (describing the nature of BLM's problem without use of terminology).
C. Administrative Difficulties Resulting from the Adjudicator Problems

The polycentric and multiple criteria decisions before the BLM in informal adjudication cannot be resolved by viewing agencies as implementors of powers narrowly delegated by Congress—an early characterization of agencies often analogized to a transmission belt. However, the analogy cannot work when Congress refuses to define policies. Similarly, because values collide, many commentators cannot accept that the BLM has any peculiar "agency expertise" to balance the issues with scientific efficiency, as New Dealers viewed the role of agencies. A different model of agency action and its complementary procedures is necessary.

This need is heightened by the nature of the decisions confronting the BLM, and thus the IBLA on appeal, which, in the words of the late Professor Fuller, strain "the limits of adjudication." The rationale behind this view is the identification of a particular type of participation as the hallmark of adjudication. The ability to present proofs and reasoned arguments on behalf of one's desired outcome typifies adjudication. A BLM informal adjudicatory decision could impact vacationers, biological researchers, mineral developers, archaeologists, and numerous others. Obviously, it is impossible to identify all the potential parties affected by a proposed resource allocation, much less to afford each of them the necessary participation rights.

Fuller's view, however, is not unanimously accepted. Professor Fiss counters that Fuller inappropriately concentrates on the individuals affected by adjudication, rather than emphasizing the

175. Stewart, supra note 7, at 1684.
176. Id.; see also J. Mashaw, Due Process in the Administrative State 15-22 (1985); Bradley & Ingram, supra note 47, at 509-13 (professionalism alone will not solve the BLM's problems).
177. Fuller, supra note 9, at 400-04; see also Boyer, supra note 160 (trial-type hearings unsuited to similar problems); Verkuil, The Ombudsman and the Limits of the Adversary System, 75 Colum. L. Rev. 845, 853 (1975) (trials not suited to advance substantive and distributive justice).
178. Fuller, supra note 9, at 364.
179. For decisions that openly involve planning, namely developing Resource Management Plans, a different system for appeals exists than for an informal adjudicatory decision. Protests are made to the Director of the BLM rather than to the "independent" IBLA. 43 C.F.R. § 1610.52 (1987). Additionally, Congress explicitly mandated public participation in this situation. 43 U.S.C. § 1712(f) (1982); see also supra note 52.
pinnacle—the judge.¹⁸⁰ From Fiss's perspective, adjudication becomes the social process by which judges give meaning to society's public values. Representative spokespeople would therefore be sufficient to enable the adjudicator to approach a polycentric task, so long as the full range of interests is represented.¹⁸¹ Therefore, an internalization of the interest representation model by the IBLA is understandable. The decisions before it require a balancing of societal goals and one way to do so is to broaden the agency's information base.

The balancing process is perhaps more akin to the traditional concept of legislative action than to the judicial stereotype. Rulemaking would be the APA equivalent for agencies.¹⁸² Most rulemaking requires public participation at the very least by notice and comment procedures to ensure that affected parties can inform the agency of their views.¹⁸³ This requirement is sufficient to provide "due process" in the legislative realm.¹⁸⁴ However, it would be awkward to apply notice and comment procedures each time someone desired to use the public lands. On the other hand, it might be impossible for the BLM to develop through rulemaking

¹⁸¹ Id.; see also Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1297 (1976) (new model of litigation for structural reform of judicial institutions). But see Eisenberg, supra note 9 (Chayes' model is not adjudication, but a consultative process); Eisenberg & Yeasell, The Ordinary and the Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980) (institutional lawsuits differ from traditional litigation mostly in substance, not in procedure or remedy). For views that agencies and courts must confront such problems, see K. Davis, supra note 163, § 10:3; Fletcher, supra note 171.
¹⁸² The APA defines rulemaking as the process of making or amending a "rule," which in turn is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1982).
¹⁸³ Section 553 of the APA requires notice and opportunity for comment on a regulation if the organic statute does not require such regulations to be promulgated after a hearing on the record, in which case even more detailed procedures must be followed. Id. § 553. At least in the past, an argument could be made that the BLM need not comply with these requirements. See supra notes 41, 48 and accompanying text. Additionally, "interpretive" rules are not subject to notice and comment procedures. See Saunders, supra note 162, at 358 (difficulties delineating binding "legislative" rules from non-binding "interpretative" rules).
¹⁸⁴ Legislative "due process" does not require strict control of the information directed to legislators. They may base their decisions on any available information so long as some rational basis for the legislation exists. Hahn, Procedural Adequacy in Administrative Decision Making, Pt. 1, 30 Admin. L. Rev. 467, 477–82 (1978) [hereinafter Hahn pt. 1]; Hahn, Procedural Adequacy in Administrative Decision Making, Pt. 2, 31 Admin. L. Rev. 31 (1979); see also Eisenberg, supra note 9, at 615.
concrete policy "rules" in advance that could be applicable for all specific allocations of its lands. Furthermore, because the decisions subject to informal adjudication generally involve one party's request to gain permission to use public lands, it is hard to deny that the procedure involves "licensing," which the APA characterizes as a form of adjudication. Naturally, the APA's rigid dichotomy between rulemaking and adjudication can inappropriately label procedures. If one views procedures functionally, they are simply mechanisms to acquire, exchange, and manage the information that contributes to the decision.

In this light, the IBLA's interpretation of the Department of Interior's regulations can easily be explained as a recognition that the "public interest" in "public lands" is diffuse and that procedures must facilitate access to information from these myriad interest groups. The IBLA's actions should now be reexamined to ascertain where they may may be categorized in administrative law theory.

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185. In limited situations, land designations will provide more concrete management criteria for the affected lands. See, e.g., 43 U.S.C. § 1782(a) (1982 & Supp. IV 1986) (recommendations for including areas in the wilderness system); id. § 1702(a) (1982) (delineations of "Areas of Critical Environmental Concern"). After a Resource Management Plan is adopted, its terms will guide the BLM. The Endangered Species Act also provides specific guidance: no action "likely to jeopardize the continued existence" of a listed species may proceed without special disposition. 16 U.S.C. § 1536(a)-(f) (1982 & Supp. IV 1986).

The BLM's lack of congressional direction may be contrasted with another agency of the Department of Interior—the National Park Service. The Service has some ambivalence in its mandate, because tension can arise in its statutory directive that national parks should be managed "to conserve the scenery . . . and wild life therein and to provide for the enjoyment of the same . . . ." 16 U.S.C. § 1 (1982) (emphasis added). For the most part, however, the Park Service need not cope with the demands of mineral developers, loggers, graziers, and other users. Nevertheless, the individual statutes creating various units of the park system can specifically authorize such uses. See generally Coggins, supra note 148, at 76–77; Sax & Keiter, Glacier Park and Its Neighbors: A Study of Federal Interagency Relations, 14 Ecology L.Q. 208 (1987).


187. See Hahn pt. 1, supra note 184, at 469–96 (differences in activities do not justify such a stringent dichotomy, because agency action often combines aspects of both); see also Gellhorn & Robinson, supra note 121, at 790–91.

188. See Hahn, supra note 184, at 469.
D. Identification of the Model of Administrative Law Embraced by the IBLA

As stated previously, two models of administrative activity provide a theoretical basis for analysis. According to the "interest representation" model of administrative law, it is the responsibility of agencies to balance divergent interests. A hallmark of the model is therefore a simple demand that these interests be considered in decisionmaking. "Comprehensive rationality," on the other hand, requires a careful sifting of all alternatives to achieve an optimal approach towards a specified goal. Unlike the interest representation model, comprehensive rationality first requires that the decisionmaker specify what goal is sought. Although the models share some attributes, the IBLA's approach most closely approximates an internalization of the interest representation model.

Three of the elements that contributed to the development of this model are present in the IBLA's internalization. The first two elements that were crucial to the model's judicial evolution both involve entry into new decisionmaking. Courts enlarged the types of interests allowed to participate in the administrative process not only at the judicial review stage, but also at the time the initial agency decisions are made. First, in interpreting the regulations governing appeals, the IBLA has allowed a decision's "adverse affect" to be premised on injury to a diverse set of interests, thus mirroring the broadened theories of standing that govern access to the courts. Second, the IBLA has also in-

189. See supra note 119 and accompanying text.
190. For a listing of the four components needed for the creation of the model, see Stewart, supra note 7, at 1716. The first three are discussed infra notes 191-202 and accompanying text. The fourth element identified by Professor Stewart, namely the increase in the types of interests entitled under the due process clause to a pre-infringement administrative hearing, is not as obvious. However, the IBLA does require the BLM to develop facts. Norman G. Lavery, 96 I.B.L.A. 294 (Mar. 31, 1987).
191. Stewart, supra note 7, at 1716, 1723–56. For other discussions of the liberalization of standing, see K. Davis, supra note 163, § 24 (Supp. 1983) (criticizing unprincipled decisions) and articles cited therein. For other discussions of the liberalization of the requirements for intervention, see id. § 14:16 (Supp. 1980); Cranton, The Why, Where, and How of Broadened Public Participation in the Administrative Process, 60 GEO. L.J. 525 (1972); Gellhorn, Public Participation in Administrative Proceedings, 81 YALE L.J. 359 (1972).
192. 43 C.F.R § 4.410 (1987); see also supra notes 105–06 and accompanying text.
creased the diversity of interests that may be represented in the BLM’s initial consideration.

The IBLA has accomplished the second element of the participation mandate by strictly protecting the right of “any person” to protest. The BLM must respond formally to a protest with a decision and, at least sporadically, the IBLA has professed that all activity on the issue must cease until the ultimate resolution of the protest. To further enhance the opportunity to participate, the IBLA will enforce obligations to provide notice or interpret a protest as an appeal if necessary. Hence, the protest is a powerful tool for public input. The only limit the IBLA has grafted onto the protest is that it may not be used to initiate agency action. However, the participation granted would be almost meaningless if the BLM did not have to respond rationally to a protestant and consider public input.

The third important element of the model is that there must be an effective means to require adequate consideration of the views of newly enfranchised participants. The courts primarily rely on remanding a decision when an agency fails to consider evidence or alternatives suggested by the affected interest. However, enforcement of this duty most often imposes only a procedural obligation on the agency. The IBLA reflects this procedural emphasis in its espoused standard of review. Although in theory

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193. 43 C.F.R. § 4.450-2 (1987); see also supra note 77 and accompanying text. As indicated above, the IBLA sometimes seeks to usurp jurisdiction from the BLM in order to preserve public input. See supra note 117 and accompanying text.

194. See supra notes 110–16 and accompanying text.

195. See supra notes 86–90 and accompanying text.

196. See supra notes 88–90 and accompanying text.


198. Stewart, supra note 7, at 1716, 1756–60.


200. Scenic Hudson Preservation Conference v. Federal Power Comm’n, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) [hereinafter Scenic Hudson II] (after remand of Scenic Hudson I, the court held that the Commission adequately considered alternatives and refused to set aside the agency’s decision); see also Scalia, Responsibilities of Regulatory Agencies under Environmental Laws, 24 Hous. L. Rev. 97, 98 (1987) (noting that actions are overturned not on the substance of the decisions, but on how the decisions are reached).
the IBLA could substitute its judgement for that of the BLM, it repeatedly states that so long as the BLM's decision is based on the relevant factors, the decision will be affirmed.

This technique of enhancing participation by forcing an agency to confront alternatives predates passage of NEPA, but because NEPA provisions bolster the need to study reasonable alternatives, its treatment is informative. In most instances where it has reversed a decision of the BLM for failure to comply with NEPA, the IBLA has based its reversal on the BLM's failure to consider alternatives. More importantly, NEPA itself is predominantly a procedural control on agency action: the Supreme Court declared that NEPA does not mandate that the agency decide in any specific substantive manner, but merely that it follow the procedural dictates of the statute. Nevertheless, an agency forced to consider the effects of its decisions on diverse parties will tend to accommodate these interests to the fullest extent possible. Both NEPA and the generalized standard of review can influence BLM decisions when enforced by the IBLA.

201. United States Fish and Wildlife Serv., 72 I.B.L.A. 218 (Apr. 25, 1983) (the IBLA need not affirm if the decision is supported by "substantial evidence," but it may review as fully as is permitted by the Secretary); see also supra text accompanying notes 57-64 (delineating powers of the IBLA).

202. See, e.g., Wilderness Soc'y, 90 I.B.L.A. 221, 232 (Jan. 30, 1986) (if all relevant factors have been considered and are supported in the record, BLM discretion will be affirmed); Richard J. Leaumont, 88 Interior Dec. 490, 54 I.B.L.A. 242 (Apr. 27, 1981) (compelling evidence is needed to overturn discretionary action); In re Trailhead Timber Sale, 97 I.B.L.A. 8 (Apr. 20, 1987) (mere difference of opinion is insufficient for reversal); see also Southwest Resource Council, 96 I.B.L.A. 105 (Mar. 10, 1987) (standard for review of a finding of no need to prepare an EIS, emphasizing identification and consideration of issues).

203. NEPA requires all proposed actions which would significantly affect the environment to be accompanied by a statement detailing not only the environmental impact but also the alternatives. 42 U.S.C. § 4332(2)(C)(iii) (1982).

204. See, e.g., National Wildlife Fed'n, 82 I.B.L.A. 303 (Sept. 5, 1984); Sierra Club, 80 I.B.L.A. 251 (May 2, 1984) (on judicial remand); State of Wyoming Game and Fish Comm'n, 91 I.B.L.A. 364, 367 (Apr. 24, 1986) ("Precisely because the NEPA mandate is primarily procedural, it is absolutely incumbent upon agencies considering activities which may impact on the environment to assiduously fulfill obligations imposed by NEPA."). However, IBLA has reversed BLM decisions for NEPA flaws other than a failure to consider alternatives. See, e.g., Glacier-Two Medicine Alliance, 88 I.B.L.A. 133, 151-52 (Aug. 9, 1985) (failure to address fully the environmental impact of a proposed oil drilling project); In re Humpy Mountain Timber Sale, 88 I.B.L.A. 7, 8-10 (June 28, 1985) (environmental impact statement filed for a timber project failed to consider site-specific impacts); In re Upper Flores Timber Sale, 86 I.B.L.A. 296, 298-99 (May 13, 1985) (failure to revise EIS for clearcutting when large acreage is added to the initial proposal after the EIS is prepared).


206. This accommodation often results in compromise. If opposing interests are before
Many of these same changes in administrative activity are relevant to another model of decisionmaking, the synoptic or "comprehensive rationality" paradigm.\textsuperscript{207} Although most commonly applied to rulemaking, the synoptic model also affects judicial review of adjudication, especially when NEPA is involved.\textsuperscript{208} This model involves identifying alternative methods of achieving a clearly articulated goal, and comparing these in order to select the optimal approach. Obviously, the relaxation of standing and intervention requirements aids in the crucial identification process.

However, vigorous support of interest representation could hamper true rationality. Undue emphasis will inure to the alternatives proposed by those concerned enough to be insistently vocal. Moreover, comprehensive rationality might be inappropriate for the BLM's resource allocation decisions. Unless either the agency or Congress actually identifies the values to be implemented by the decision, the first step in the paradigm is unattainable: no clear objective would exist against which alternatives may be arrayed to ascertain an optimal choice.\textsuperscript{209}

Comprehensive rationality also has other drawbacks for settling the BLM's polycentric and multiple criteria problems. By creating an illusion of scientific precision, the "maximizing" approach of the model could hide the political activity of value choice.\textsuperscript{210} Once one "right" answer is achieved, the process may appear to be completed, and the agency would be less responsive to changed circumstances.\textsuperscript{211} Additionally, "soft values" such as environmental concerns often receive short shrift in these kind of economic efficiency calculations.\textsuperscript{212}


\textsuperscript{207} See Diver, \textit{supra} note 10, at 409–16.
\textsuperscript{208} Id.
\textsuperscript{209} Id. at 396.
\textsuperscript{210} Id. at 429.
\textsuperscript{211} See Shapiro, \textit{supra} note 4, at 1520; Shapiro, \textit{supra} note 163, at 454–56.
\textsuperscript{212} See Teegarden, \textit{Benefit-Cost Analysis in National Forest System Planning: Policy, Uses, and Limitations}, 17 Envtl. L. 393, 411–16, 426–27 (1987); cf. Farber, \textit{From Plastic Trees to Arrow's Theorem}, 1986 U. Ill. L. Rev. 337 (rather than attempting to justify environmental values, we should accept that they are emotional and part of human nature).
Nevertheless, the insistence on openness in decisionmaking might be the IBLA's attempt to give at least a veneer of comprehensiveness, if not rationality, to the process. However, in light of the IBLA's standard of review, it is more accurate to view the IBLA's activities as an adoption of the interest representation model. Moreover, this model is appropriate. In these decisions where environmental concerns and elements of planning predominate, the issues are not those of traditional administrative law, which emphasized vindication of private rights. Instead, a species of public law is present in which differing interests must be harmonized. 213

Since divergent values clash, a core of irreconcilable differences permeates many of the BLM's tasks. The agency perhaps can only defend its decisions by having at least addressed the multiple interests. Hence, the IBLA's interpretations of agency procedures to broaden public access are an understandable response to the BLM's challenge to reconcile the irreconcilable. 214 Nevertheless, as demonstrated below, the adoption of the interest representation model in its current manifestation is not without drawbacks.

213. See Reich, supra note 156, at 1234–35.

214. This hypothesis is bolstered by looking at three additional Department of Interior agencies that have land management duties, but, due to their more explicit congressional guidance, are less schizophrenic than the BLM: the Bureau of Reclamation, the National Park Service, and the Fish and Wildlife Service. See supra note 185. Although SMCRA was identified as an agency-forcing statute, see supra note 162, the procedures under it would not be a valid comparison to those governing the BLM because the IBLA also reviews decisions under SMCRA. 43 C.F.R. § 4.1(G) (1987). Moreover, the statute extensively mandates public participation. See, e.g., 30 U.S.C. §§ 1254(c), 1257(c), 1263, 1269(f), 1270, 1275, 1281(c) (1982).


These three agencies are subject to the Department of Interior's generic appeals provision, which allows review by the Director of the Office of Hearings and Appeals in limited circumstances. 43 C.F.R. § 4.700 (1987). It is only applicable if the particular agency's regulations permit appeals to the Secretary of the Interior. Id. The three agencies rarely so provide. For the only examples of the applicability of the appeal provisions, see 43 C.F.R. § 21.8, 230.116 (1987). Therefore this appeal provision is not a general opportunity for public participation and would not foster the use of the public interest model.
V. DISADVANTAGES OF THE INTEREST REPRESENTATION MODEL

The IBLA's use of the interest representation model of decisionmaking creates two main drawbacks for good administration of the public lands. First, it does not necessarily assure effective input by all concerned members of the public. Second, especially as employed in the BLM process, it can provide excessive power to third party participants by giving them the ability to delay decisions inordinately. Appreciation of these limitations is necessary in order to structure an effective appellate process.

One limitation is that the mere implementation of the interest representation model may not result in effective input by all affected interests—there is self-selection. Only those with enough concern, knowledge, and resources to participate will do so. As a result, representation will always be incomplete and interests overlooked. The clamor to respond to those present could trammel the interests of those absent.

In addition, officials of the BLM react in their decisionmaking roles not as automatons, but as humans. To please others is a natural human desire, and agencies, being comprised of people, do reflect this aspect of human nature. A hierarchy of players


[The plaintiff group] evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened . . . .

Id.; see also Burch, Who Participates—A Sociological Interpretation of Natural Resource Decisions, 16 Nat. Resources J. 40, 48, 53 (1976) (conservationists are middle-class and from within the system, and the technical complexity and pattern of ownership of energy systems limits direct input by those most affected). "Public interest" groups, such as the Sierra Club and Mountain States Legal Foundation, readily admit that they do not attempt to present all views. See generally Stewart, supra note 7, at 1762-70; Getches, Preface: On Natural Resources as an Area of the Law, 53 U. Colo. L. Rev. 195, 198-200 (1982); Hassler & O'Conner, Woodsy Witchdoctors vs. Judicial Guerrillas: The Role and Impact of Competing Interest Groups in Environmental Litigation, 13 B.C. Envtl. Aff. L. Rev. 487 (1986).

216. As Professor Cramton noted: "Critics that saddle [our democracy] with charges of unresponsiveness are in error, for our governmental institutions are highly responsive. But to what? The answer is obvious. They are responsive to the inputs they receive, including the feedback that greets their action." Cramton, supra note 191, at 528-29; see also Rabin, supra note 120, at 127-45 (arguing for a study of external influences on decisionmaking not apparent in judicial opinions).
can shape and channel this impulse to please. First, no one wants to offend unduly those who could directly affect one's personal livelihood or to whom a political obligation is owed.\textsuperscript{217} Additionally, if a continuing relationship exists with a party, conflict resolution and accommodation becomes more imperative than if the other party will not be present in the future.\textsuperscript{218} This relational status often applies not only for the regulated industry, but for organized interest groups as well.\textsuperscript{219} Finally, even a vociferous, one-time participant can command some of this urge to please. Within the constraints of the hierarchy, an agency tends to acknowledge the "public interest" in a way that really best accommodates the desires of those the agency must please.\textsuperscript{220} Participation may thus be crucial lest unrepresented values be compromised.\textsuperscript{221}

Financial resources, however, potentially limit participation. Although the Equal Access to Justice Act allows the award of attorneys’ fees in some litigation and administrative proceedings when the government’s position is not “substantially justified,”\textsuperscript{222} it does not apply to non-hearing proceedings before the IBLA.\textsuperscript{223}

\textsuperscript{217} See Boyer, supra note 160, at 122–25, 141–42; Wichelman, supra note 185, at 271.


\textsuperscript{219} See Rodgers, supra note 218, at 202; see also id. at 198 (“It does not appear rash to suggest that relationships with people you know or deal with over time tend to be less strident and formal, less exploitative, more sympathetic and tolerant, and more attentive to future relations.”); O’Riordan, Policy Making and Environmental Management: Some Thoughts on Process and Research Issues, 16 Nat. Resources J. 55, 61–62 (1976) (pressure groups resemble organizations they fight; they need structure, informational command, and leadership responsiveness of lobbies).


\textsuperscript{221} See Culhane & Friesema, Land Use Planning for the Public Lands, 19 Nat. Resources J. 43, 51–52 (1979) (public participation undercuts “rational” decisionmaking based on purportedly scientific “inventories” and provides the chief mechanisms for environmentalists to enter the process); Komesar, Lawyering versus Continuing Relations in the Administrative Setting, 1985 Wis. L. Rev. 751 (litigation, while imperfect, is necessary for unrepresented interests).


Other suggested procedures for increasing participation, such as agency advocates and workshops, have not been implemented by the BLM in the informal adjudicatory setting. Because the effective presentation of arguments in this forum requires expensive expert advice—both technical and legal—the high price of "knowledge" may prevent certain interests from being adequately represented.

Nevertheless, although expert advice might be costly for the public to obtain, there is actually no cost barrier on access to the IBLA. The threshold costs of appealing are minimal (literally the price of two pages of paper and two stamps). The sole requirements for appeal are a notice and a statement of reasons, which may be included with the notice of appeal or sent separately. These submittals must be copied and sent to the appropriate office of the Solicitor. Therefore, liberalized standing theoretically could overwhelm the IBLA appellate process. The typical response to this fear—namely that increased rights of intervention and appeal would not open floodgates because cost is an effective filter—does not apply to the initial entry into the process. The only constant barrier to triggering the procedural effects of an appeal is "concern," i.e., the desire to object to a proposed BLM action. Knowledge, in the sense of awareness of a BLM activity, may sometimes inhibit participation. However, very often the subject matter of an informal adjudication has been publicized by being included in the planning process or by public hearings required by NEPA.

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224. In other venues, the BLM employs formal and informal alternatives to obtain public input. See, e.g., supra note 52. For descriptions of these informal methods, see P. Culhane, supra note 2, at 232–62; M. Clawson, supra note 45, at 247–60. For discussions of alternative procedures, see W. Boyer, supra note 138, at 68–71; Rothstein, Presentation of the Consumer Viewpoint in Federal Administrative Proceedings—What is the Best Alternative?, 41 U. Pitt. L. Rev. 565 (1980); Stewart, supra note 7, at 1791–1808; Opinion of the Comptroller General, No. B-139703 (Dec. 3, 1976); Lazarus & Onek, The Regulators and the People, 57 Va. L. Rev. 1069, 1096–1106 (1971).


There is a second drawback to the use of the interest representation model in its current form. Because an appeal can be initiated with little cost, its availability can lead to inordinate power when combined with the regulatory automatic stay provisions and the potential for the IBLA to restrain BLM action during the protest/appeal process. The ease of blocking action can lead to delays without improved decisionmaking because an appellant has no need to prove even a questionable argument. A mere avowal of displeasure with the decision without any indication of legal or technical error by the BLM can trigger delay in the action the BLM approved. Such a delay could be lengthy, with substantial impacts for proponents of the activity.

Currently, the average substantive appeal requiring individual analysis takes the IBLA a minimum of eighteen months, and often two years, to complete. Naturally, an appeal raises the cost of a project, not only for the applicant seeking to use public lands, but also for the agency, because it must expend resources to respond. Even if a decision is not stayed by an appeal, the party authorized to use the public lands may be hesitant to proceed if its authorization could be overturned. Because delays can cause project abandonment, delay itself can become the goal of third

228. See supra note 108 and accompanying text.


230. Conversation with David Hughes, Chief Counsel for the IBLA (May 24, 1988). Cases that may be resolved on procedural issues or that are controlled by well-settled precedent are placed on a fast track. Two-judge panels issue dispository orders in three to four months. On the other end of the spectrum, one case decided in April of 1988 had been at the Board for 58 months. Others were at the Board between two and four years. Id.

231. Professor Stewart argues that the “current system of administrative law wastes resources, penalizes new investment, and discourages entry by new competitors.” Stewart, supra note 218, at 680–82; see also Ogden, Analysis of Three Current Trends in Administrative Law: Reducing Administrative Delay, Expanding Public Participation, and Increasing Agency Accountability, 7 Pepperdine L. Rev. 553, 593 (1980) (providing examples of increased cost, including that of the Storm King project, which went from $162 million to $465 million in ten years). But see Murphy & Hoffman, Current Models for Improving Public Representation in the Administrative Process, 29 Admin. L. Rev. 391 (1976) (public participation enhances decisionmaking and improves public confidence, although delays and costs are increased).


233. See, e.g., Skiffington, Federal Administrative Delay: Judicial Remedies and
party objectors. However, interest groups with a continuing nexus to the area or issue might temper their tactics due to their need to retain credibility and a smooth working relationship both with the BLM and with industry representatives. Furthermore, the appeal can be used as a weapon to force concessions or coerce actions that might not be wise or necessary. The mere possibility of an appeal may disrupt the ability of the agency and the applicant to arrive at a meaningful solution, because it could be thwarted by as yet unknown dissidents.

The interest representation model as currently employed by the IBLA is not a cure-all for unbridled agency discretion. It does not necessarily result in the decision most beneficial to the public. Underrepresentation of interests can still exist, both from lack of knowledge of an action pending before the BLM and from the difficulties of obtaining effective legal and scientific assistance. More importantly, those who do not have meaningful input may manipulate the system and create undue administrative burdens. Therefore, some accommodation between openness and efficiency is necessary.


234. See J. SAX, DEFENDING THE ENVIRONMENT xviii (1971) (courts should not serve as a substitute for legislative process but as a means for increasing time to gain access to reluctant lawmakers); Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 VA. L. REV. 585, 595 (1972) (if a decision is viewed as resolute, delay rather than victory is the goal).


236. See Stewart, supra note 218, at 669 (once the power to delay is gained, environmentalists bargain).

237. Judicial review without effective statutes of limitation or prior participation in the process may further frustrate useful negotiation, whether the players include just the agency and the applicant or include public representatives as well. Cf. Park County Resources Council v. United States Dept. of Agriculture, 817 F.2d 609 (10th Cir. 1987) (NEPA challenge to oil and gas lease issuance was not barred by exhaustion, statutory time limit or laches).

238. See Sunstein, supra note 220 (agencies should not simply aggregate preferences but must identify values); Stewart, supra note 7, at 1776-81 (increasing participation emphasizes polycentric nature of task and therefore courts’ deference to the substance of discretionary decision); Mashaw, The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction, 122 U. PA. L. REV. 1, 54-70 (1973) (participation complicates and stifles rational thought necessary for complex problems). But see 1. MASHAW, supra note 176, at 255-64 (participation is a necessary ideal in our political society).
VI. CONCLUSION: A MODEST REVIsON IS IN ORDER

The foregoing criticism is not meant to encourage the BLM to retreat from its invitation to the public to aid in its decision-making. The right to participate in government is central to our national ethic. One of our nation’s truisms is that laws derive from the consent of the governed. The Constitution itself is designed to protect the ability of all to participate. But while the theoretical underpinning for open decisionmaking is formidable, practical concerns, both pro and con, also must also be considered.

The first practical benefit which participation in agency action can provide coincides with the theoretical underpinnings of such participation. The BLM’s decisions, with their attributes of planning, resemble legislation. However, the BLM acts pursuant to statutes in which legislators did not resolve conflicts as to how the public lands should be used. Their failure to provide guidance on the resolution of these conflicts could lead, in effect, to a lack of popular consent to the BLM’s allocations. Public participation can provide the opportunity for that consent.

The legitimacy of a decision might be questioned less if potential objectors have had an opportunity to persuade the decisionmaker. Such an approach resembles the “town hall” model of democracy. To a greater or lesser extent, an emotional catharsis may take place, fulfilling the participant’s need to communicate and influence his or her surroundings. Allowing participation substantially affirms values that emphasize individuality and are basic to our society.

240. Cramton, supra note 191, at 527–32.
243. Certain commentators identify values that should determine the appropriate amount of procedural safeguards necessary to satisfy due process in differing situations. Many would include elements of “human dignity” and “satisfaction” as goals, which indicate that some participation is required. See, e.g., Summers, Evaluating and Improving Legal Processes—A Plea for “Process Values,” 60 CORNELL L. REV. 1, 4 (1974); Saphire, Spec-
Participation serves another vital function as well—it expands the available information base. Agencies have been criticized as only tending to search for information consistent with their own viewpoint. But even if individual BLM employees display professionalism and conscientiousness to counter this tendency, relevant information may be missed. Such data may relate to the impacts of the proposed action on physical or sociological aspects of the human environment, or conversely, to its economic impacts on the economic viability of affected activity. Additionally, divergent views on the BLM’s legal authority under various statutes could mandate a reinterpretation of the appropriate action.

However, while broad public access to the BLM adjudicatory process is valuable, there are practical considerations which call for placing some restraints on public entry. Although the public must be allowed to place relevant information in the record, excessive access can paralyze the decisionmaking process.

Public participation in BLM informal adjudication begins with the basic protest regulation. It allows “any person” to provide input into “any proceeding” that is ongoing “before the Bureau.” This is a completely open right of intervention, intervention being simply “the procedure by which a third person, not originally a party to the suit, but claiming an interest in the subject matter, comes into the case, in order to protect his right or interpose his claim.” Therefore, intervention is clearly the issue relevant to public participation pursuant to a protest.


244. See Ingram, Information Channels and Environmental Decisionmaking, 13 NAT. RESOURCES J. 150 (1973); O’Riordan, supra note 219, at 62–63.

245. Many agency officials do make good faith efforts at professionalism. See supra note 156.


247. Professor Stewart asserts that agency concern for a “safe” environment often ignores the economic effects of rules on industry. Stewart, supra note 218, at 667–68.

248. Multiple levels of review engendered delay and were criticized in the BLM’s pre-1970 procedures. See generally Frishberg, Hickey & Kleiler, supra note 20, at 555.


251. BLACK’S LAW DICTIONARY 736 (5th ed. 1979).
Despite a tendency by courts to blur the concepts of intervention and standing to appeal an administrative decision, the two concepts are not coextensive. The APA does not necessarily mandate public entry into agency adjudication. It merely provides that "so far as the orderly conduct of public business permits, an interested person may appear before an agency . . . in a proceeding . . . or in connection with an agency function." Whether or not this provision grants a right of intervention or merely invites agencies to allow intervention, it clearly enables an agency to structure the participation. Additionally, the APA envisions participation in two distinct situations: "in a proceeding" and "in connection with an agency function."

The IBLA, however, has not recognized that the flexible doctrine of intervention should govern participation in the adjudicatory process. It invariably requires the BLM to respond to a protest by way of a decision that at least ostensibly provides a right to appeal to the IBLA. The IBLA then ascertains whether the newly created "party" has been "adversely affected" and therefore is entitled to appeal. The IBLA employs standing doctrines in this interpretation, which it need not do.

Intervention has not played an extensive role in the adjudicatory process. BLM regulations only govern intervention in graz-

252. See National Welfare Rights Org. v. Finch, 429 F.2d 725, 732-33 (D.C. Cir. 1970) ("Except for the adjustments necessary for assuring the manageability of administrative proceedings, the criteria for standing for review of agency action appear to assimilate the criteria for standing to intervene."); Office of Communication v. Federal Communications Comm'n, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966); Note, supra note 242, at 684-85 (the theories are often confused).


254. 5 U.S.C. § 555(b) (1982).

255. Compare Shapiro, supra note 253, at 764-67 (the APA's use of the permissive "may" means that intervention is permitted at the agency's option) with Note, A Generic Approach to Intervention in Administrative Proceedings—Increased Participation and Efficiency through Regulatory Reform, 28 WAYNE L. REV. 1427, 1446-47 (1982) ("may" gives an interested person the election to intervene).

256. 5 U.S.C. § 555(b) (1982).

257. 43 C.F.R. § 4.410(a) (1987); see also supra notes 80-82 and accompanying text.

Occasionally, the IBLA refers to an applicant who has received an authorization to use the public lands as "intervening" in the adjudication of a protest to its grant. Technically, the applicant should be named as an "adverse party" in the decision dismissing the protest and hence be an original party in the case. Therefore, the IBLA's use of the term "intervenor" in these situations is inappropriate.

The IBLA has correctly applied the concept of intervention most often in ongoing, adversarial, trial-type hearings. In so doing, it has limited intervention as of right to those persons who could have initiated a private contest; that is, to those with a direct interest in the contested lands. For permissive intervention, the IBLA has endorsed a flexible approach.

In one case, which unlike the others did not involve a hearing, the IBLA quoted the five-part test proposed by Judge Bazelon, in which he listed the following five factors for consideration:

1) The nature of the interest asserted by the potential participant;
2) The relevance of this interest to the goals and purpose of the agency;
3) The qualifications of the potential participant to represent this interest;
4) Whether other persons could be expected to adequately represent this interest; and
5) Whether special considerations indicate that an award of standing would not be in the public interest.

This formulation resembles that of the Administrative Conference of the United States, which also suggests that agencies employ a

263. U.S. Pumice, 37 I.B.L.A. at 156–58. Private contests are governed by 43 C.F.R. § 4.450–1 (1987); see also supra note 76.
264. See generally Frishberg, Hickey & Kleiler, supra note 20, at 561–65 (case law has applied a functional approach varying between amicus and full party status).
balancing test that approaches intervention on a case-by-case basis.\textsuperscript{266}

The IBLA should adopt the balancing technique more widely. Items present in balancing tests that provide meaningful flexibility include consideration of the prospective intervenor’s interest in the subject matter and ability to provide relevant argument and evidence. Such a review can both broaden and narrow participation.\textsuperscript{267} Ideological groups, whether representing industry or concerns such as the environment, could enter the process without having to locate a member directly impacted by the decision.\textsuperscript{268} Additionally, wider access would result for members of the public who have cogent legal arguments, but have no injury that could be directly and conclusively redressed by a reversal of the decision at issue. If standing tests were employed which emphasize the presence of an “injury in fact,” the prerequisite for participation would not be met.\textsuperscript{269} Based on the tests for intervention, the IBLA

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\textsuperscript{266} See Public Participation in Administrative Hearings, Recommendation 71-6, 1 C.F.R. § 305.71-6 (1987). The five factors for consideration are:

1) The nature of the contested issues;
2) The potential intervenor’s interests in the subject matter;
3) The adequacy of representation provided by existent parties;
4) The ability of the prospective intervenor to present relevant evidence and argument; and
5) The effect of intervention on an agency’s implementation of its mandate.

\textit{Id.} For a general background of these standards, see Gellhorn, \textit{supra} note 191; Cramton, \textit{supra} note 191.

\textsuperscript{267} The IBLA used such a test to ascertain standing to appeal in \textit{State of Alaska}, 86 Interior Dec. at 366, 41 I.B.L.A. at 325. However, because it found the state to have an “interest in the land” appropriate for initiating a contest, its use neither broadened nor tightened access. \textit{Id.}; see also generally Frishberg, Hickey & Kleiler, \textit{supra} note 20, at 564–65 (although use could increase participation, efficiency may arise through control). For more generalized considerations of the effects and desirability of basing intervention on the participant’s ability to enhance decisionmaking, see Shapiro, \textit{supra} note 253, at 764–67; Comment, \textit{supra} note 253; MacIntyre & Volhard, \textit{Intervention in Agency Adjudication}, 58 Va. L. Rev. 230 (1972).


should assume jurisdiction; the emphasis of these tests is on whether or not proposed intervenors can make cogent arguments in support of a position within the agency's cognizance. Conversely, a person may be excluded if they allege use of the public lands, and therefore an injury, but only express a preference for a certain outcome without presenting any coherent arguments or useful evidence.

A similar analysis of a purported appellant's ability to aid decisionmaking perhaps has entered the IBLA's reasoning in a surreptitious manner. Despite the IBLA's general tendency to allow participation, it dismissed certain appeals on the basis of standing by holding that those seeking review had failed to allege clearly an "injury." Most likely, the quality of the statement of reasons was poor, offering no additional information to the decisionmaking process. Denials of participation on this basis should be made openly pursuant to intervention theory, rather than through strained justifications made under the standing doctrine. To this end, the regulations controlling BLM appeals must be modified or reinterpreted.

There is no need to change the approach taken before the BLM renders a decision. During the time when there is actually a proceeding pending before the BLM, all persons should have access and be able to "protest" the proposed action. However, when the BLM dismisses a protest, it should not necessarily be by an appealable "decision" that could invoke the automatic stay provisions. Filtering is appropriate at this juncture, which marks a transition to the second situation for which the APA recognizes a need for participation. Participation at this point would be "in connection with an agency function" rather than being "in a proceeding." Although both situations involve intervention questions, they do not demand uniform procedural treatment.


270. See supra note 105 (recent cases disallowing standing); see also Altman, 93 I. B. L. A. at 266.

271. See, e.g., Altman, 93 I. B. L. A. at 266 (involving extravagant allegations of injury from the drilling of a well); cf. In re Trailhead Timber Sale, 97 I. B. L. A. 8, 9 (Apr. 20, 1987) and cases cited therein (involving the open affirmances of BLM decisions when appellants merely express a difference of opinion).

If the BLM dismisses a protest and determines to act in a manner not objected to by the directly affected party, the case before the BLM is effectively completed. In essence, then, the would-be "intervenor" is no longer seeking to "intervene" in an on-going proceeding, but is seeking to initiate a new level of activity. To allow participation in this situation would thus be more burdensome than integrating additional interests into an existing decisionmaking framework.\textsuperscript{273} The agency should therefore balance relevant concerns.

The potential adverse affect on the protestant need not be the sole criterion for access to the IBLA. The unsuccessful protestant should receive the right to request intervention before the IBLA by petition or by a limited right of appeal that would not trigger a stay (or would trigger only a temporary one) until the IBLA ascertains the protestant's ability to enhance the decisionmaking process. If the protestant is denied access to the IBLA and has met the threshold of standing for judicial review, the courts could review the decision.

The incongruence between the availability of access to the courts and the IBLA is not logically inconsistent, but related to the differing duties of the two branches of government. The primary argument in favor of granting intervention rights to a person with standing for judicial review rests in efficiency. The potential plaintiff must have an opportunity to create a record before the agency so that the agency itself would have an opportunity to respond and give the court a complete picture of the controversy. The BLM's protest regulation provides this ability.\textsuperscript{274} Therefore, the agency may allow other elements of its duty to administer the public lands to predominate and allow the courts to rectify any situation that eluded IBLA review.

By adopting and enforcing the interest representation model of administrative law, the IBLA has taken the first step in acknowl-

\textsuperscript{273} See Koniag, Inc. v. Andrus, 580 F.2d 601, 616 n.13 (D.C. Cir. 1978), cert. denied, 439 U.S. 1052 (1979) (Bazelon, J., concurring) (distinction, in practical effect, between initiating action and contributing to ongoing proceeding influences the propriety of participation); cf. MacIntyre & Volhard, supra note 267 (FTC's hierarchy of standing for various levels of participation).

\textsuperscript{274} See 43 C.F.R. § 4.450-2 (1987). A beneficial side effect of emphasizing record creation at the protest stage would be that protestants would provide sufficient information to the BLM initially, which could convince officials to change their decision. Often, under the current procedure, the BLM receives a generalized objection. Only when the objection comes before the IBLA are the arguments and evidence refined.
edging the nondirective nature of the statutes subject to the BLM's informal adjudicatory process. Filtering the second level of public participation should help balance desires for openness and efficiency. Nevertheless, in order for the process to be successful, the BLM must not only listen in good faith to the concerns of interested parties, but also help them present useful arguments by educating the public in the nature of activities that occur on their public lands.