

1-1-1971

## Public Rights in Public Lands

James D. Moore

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

James D. Moore, *Public Rights in Public Lands*, 32 Mont. L. Rev. (1971).  
Available at: <https://scholarship.law.umt.edu/mlr/vol32/iss1/9>

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

## PUBLIC RIGHTS IN PUBLIC LANDS

### INTRODUCTION

The management of state lands epitomizes, in many respects, the need for comprehensive planning by governmental agencies. A single acre of land has many diversified and often competing uses, and a potential return which spans decades. The isolated land management decision, channeled through its sometimes subtle ramifications, may affect numerous collateral interests. Since we live in a world of limited resources, upon which are made unlimited demands, a comprehensive, total approach to land management is vital to our continued physical and economic well being. A proposed land development which offers the alluring promise of immediate return often carries with it a potential for destructiveness. A decision which enables one interest to use land without regard to other values may result in the reduction or destruction of future land productivity. Fish and wildlife, miles removed, may be victims of the shortsighted decision. Unforeseen yet harsh economic and social pressures may be imposed upon surrounding municipalities. Land management is inherently complex, and land management decisions are uncomfortably far reaching.

The very nature of land management reveals the need for managing bodies, such as the State Board of Land Commissioners, to act in a planning capacity. The responsible administration of state lands requires clear guidelines and comprehensive overviews, aimed at the long range good. Legal machinery is needed to insure that our state lands will be managed to assure maximum present *and* future productivity. We can no longer afford the luxury of wearing blinders into land management decisions. We can no longer afford the luxury of short term gain wrought at the expense of long term losses. Resource planning is an area where "buy now, pay later" is too potentially catastrophic to be permitted.

### THE EXAMPLE

On March 18 and April 8, 1970, public hearings were conducted before the Montana State Department of Health,<sup>1</sup> the Montana State Fish and Game Department,<sup>2</sup> and the Montana State Water Resources Board<sup>3</sup> acting in pursuance to an official request of the Montana State Board of Land Commissioners.<sup>4</sup>

The hearings were not required by law, nor were the various boards required, by law, to act in this advisory capacity. The Anaconda Copper Mining Company had found it "necessary" to request an easement on

<sup>1</sup>REVISED CODES OF MONTANA, § 69-103 (1947) [hereinafter cited as R.C.M.1947].

<sup>2</sup>R.C.M.1947, § 26-106.

<sup>3</sup>R.C.M.1947, § 89-103.1.

<sup>4</sup>MONT. CONST., Art. XVII, § 1; R.C.M.1947, §§ 81-101 et. seq.

state lands for a proposed open pit mining operation.<sup>5</sup> The target area was the untouched mountain region at the headwaters of the Blackfoot River near Lincoln, Montana, a favorite recreational area for many Montanans. Because of this projected location, and because of concern regarding mining practices,<sup>6</sup> the request immediately sparked a heated public reaction. The response was a decision by the Land Board to conduct two public hearings.

Since the hearings were not statutory, the procedural format was left to the discretion of the Land Board. The first hearing was to be restricted to the presentation of the Anaconda Company statement,<sup>7</sup> and to the proposals from the Hearing Board.<sup>8</sup> The Anaconda Company was not required to respond to the concern which had predicated the hearings, nor was anyone allowed to be cross-examined. The hearings were therefore limited from their inception, to something less than a comprehensive planning tool.

The second hearing, held April 8, 1970 was the public's opportunity to be heard. Thirty-seven statements were presented,<sup>9</sup> ten of which favored the immediate easement grant, although cognizant of the development's potentially adverse affect on the environment.<sup>10</sup> While no

<sup>5</sup>Or so they had claimed at the March, 1970 State Board of Land Commissioner's meeting [hereinafter cited as Land Board], in their plea for the immediate grant of requested easements. They were unable to substantiate the urgency of their request, and in the face of heated public opposition, the Land Board deferred judgment.

<sup>6</sup>See, e.g., *Great Falls Tribune*, October 9, 1968 at 5, col. 1; *Great Falls Tribune*, December 6, 1969, at 5, col. 3, in connection with *Forbes*, March 1, 1970; *Great Falls Tribune*, December 31, 1969, at 13, col. 6; *Great Falls Tribune*, February 7, 1969, at 7, col. 1 and at 20, col. 1; *Great Falls Tribune*, February 15, 1969, at 1, col. 1.

<sup>7</sup>First hearing on the Heddleston Mining Development, March 18, 1970, [hereinafter cited as 1st Heddleston Hearing] before the special advisory board to the Land Board. It is noteworthy that the Anaconda Company statement was so preliminary that, despite expressing the urgent need for immediate easement grants, the company was not yet "in a position to indicate whether or not the property . . ." would ever ". . . be brought into production." Anaconda Company Statement, at 1.

<sup>8</sup>1st Heddleston Hearing, *supra* note 7; Statements of the Fish and Game Dept., The Montana Water Resources Board, and the Montana State Department of Health.

<sup>9</sup>Second Hearing on the Heddleston Mining Development, April 8, 1970 [hereinafter cited as 2nd Heddleston Hearing], before the special advisory board to the Land Board.

<sup>10</sup>It was the classic struggle between those arguing the need for new tax sources, and of those demanding the prevention of environmental degradation. The ends sought by both sides were legitimate. Consequently, the majority of the statements read like negative pregnant, i.e., admitting one value while stressing the other.

The immediate grant of the easements was urged on the ground that the revenue therefrom was necessary to the state, the county, and the community of Lincoln. (See "Statement of Thomas M. Powers", *infra* note 11, for a view that the demand for new public services might render the magnitude of such economic benefit illusory.) Proponents of the development countered environmental objections by urging that the company would be required to abide by the Montana law. (For a view on the insufficiency of Montana pollution laws, see "Statement of Lester R. Rusoff", *infra* note 11.)

Montana's ex-national N.B.C. news commentator, Chet Huntley, suggested that the easements be granted on the ground that the Anaconda Company had been required to put up a bond insuring environmental nondegradation. While such a bond might have accomplished this end, no such bond had been required nor, for that matter, requested.

one opposed the development, per se, twenty-seven statements urged postponement of the final decision until more information was available, preliminary studies were completed, and alternatives were investigated.<sup>11</sup>

In making their final decision the Land Board was able to exercise great discretion. The hearing board had been advisory only, and no statute had imposed a standard to be followed. The Land Board granted the easement, but appended eleven conditions.<sup>12</sup> The majority of these conditions required nothing of the Anaconda Company which was not required in the absence of these conditions.<sup>13</sup> Condition eleven, however, required the Anaconda Company, upon termination of the easement, to reclaim that land "covered by the easement."<sup>14</sup> The insertion of this condition, however, proved too much. The Anaconda Company withdrew its request, and intimated that should it desire to proceed, it would do so on its own lands.<sup>15</sup>

<sup>11</sup>The immediate grant of the easement was opposed on the ground that the development had *not* been justified economically, "Statement of Dorothy Bradley", 2nd Heddleston Hearing, April 8, 1970, and on the ground that economic considerations alone no longer justified such a carte blanche grant. "Statement of Mr. Cecil Garland", 2nd Heddleston Hearing, April 8, 1970.

The pertinent history of the Anaconda Company was outlined and cited as authority for taking safeguards in advance. "Statement of Bernard D. Shanks", 2nd Heddleston Hearing, April 8, 1970.

A concern for the health of workers employed in the Anaconda Smelter was submitted, with a request that the grant be delayed until it could be shown that the Heddleston development would not add to the already serious condition. "Statement of Dr. C.C. Gordon", 2nd Heddleston Hearing, April 8, 1970, presented by Phil Torangeau.

A proposal that soil porosity and permability tests precede any final determination was presented. "Statement of Professor of Geol., Arnold Silverman", 2nd Heddleston Hearing, April 8, 1970, presented by David Alt.

The insufficiency of sealants was raised. "Statement of Professor of Zool., George F. Weisel", 2nd Heddleston Hearing, April 8, 1970.

The paucity of available facts and the potentially adverse economic and sociologic impact of the development on the town of Lincoln, itself, were offered as reasons for postponing the final decision. "Statement of lecturer in Economics, Thomas M. Power", 2nd Heddleston Hearing, April 8, 1970.

The inadequacy of present pollution law and the difficulty in enforcing those provisions presently available was cited as a necessary consideration, "Statement of Professor of Law, Lester R. Rusoff", 2nd Heddleston Hearing, April 8, 1970, presented by Cindy Price, and drew support from the statement of the League of Women Voters of Montana.

In addition, it was urged that ground water and seasonal high water studies precede final Land Board action, and that the Anaconda Company should be required to make available plans for the transportation of ore. This writer had the opportunity to suggest the creation of a model project, aimed at long range comprehensiveness, and the integration of conflicting, competing interests. "Statement of James D. Moore", 2nd Heddleston Hearing, April 8, 1970.

<sup>12</sup>See "Proposed Conditions for the Granting of the Lincoln Easement", Land Board Meeting, May 20, 1970.

<sup>13</sup>Conditions one through four required, essentially, the submission of certain plans to the Water Pollution Control Council for approval, before the commencement of operations. This was already required under R.C.M.1947, §§ 69-4806, 69-4807. Condition number five demanded that the Anaconda Company promise to comply with conditions one through four. Condition six restated conditions one through four in yet another way: "(6) Anaconda agrees to obtain all necessary permits from the appropriate pollution control agencies . . ." Condition seven stated: "Anaconda agrees to comply with all current air and water pollution control laws . . ."

<sup>14</sup>See Proposed Conditions, *supra* note 12.

<sup>15</sup>Recalling, of course, an earlier claim that the project could *not* proceed without the requested easements, *supra* note 5.

The Heddleston Hearings thus concluded, visibly, where they had begun. This writer believes, however, that in so doing four fundamental objectives were served.

First, they indicated the need for comprehensive, long range planning in land management. They served to reveal the public sentiment that the future role of the Land Board must be as a planning agency.

Second, they provided an insight into the inherent complexity of environmental considerations, and exemplified the usefulness of the public hearing as a tool for providing information.

Third, they voiced the immense public concern over environmental and collateral considerations, as these relate to land management decisions. They manifest the inadequacy of short-term economic return as the land-management yardstick.

Finally, these hearings made it clear that the public desires a voice in land-management decisions, and that the realities of responsible planning often require that the public be permitted that voice.

### THE LAW

Under the Montana Constitution all lands of the state are public lands and are held in trust<sup>16</sup> for the people.<sup>17</sup> The State Board of Land Commissioners, composed of the governor, the superintendent of public instruction, the secretary of state, and the attorney general, are charged with the duties of managing these lands.<sup>18</sup>

The lands themselves are divided into four classifications<sup>19</sup> and must be managed pursuant to the rules and regulations prescribed therefor by law.<sup>20</sup> Although the classifications set forth in the Montana Constitution have persevered to date, a provision was included by which such classifications could be changed or expanded to meet the particular exigencies of future times.<sup>21</sup>

<sup>16</sup>For an enlightening discussion of developments in the public trust doctrine see Sax, *The Public Trust Doctrine In Natural Resource Law*, 1 ENV. L. REV. 599. See also Sax, *The Public Trust Doctrine in Natural Resource Law*, CONTEMPORARY DEVELOPMENTS IN WATER LAW 137 (Johnson and Lewis eds. 1970).

<sup>17</sup>MONT. CONST., Art. XVII, § 1.

<sup>18</sup>" . . . shall have the direction, control, leasing, and sale of the school lands of the state . . .", MONT. CONST., Art. XI, § 4; and ". . . shall be the governing board of the department of state lands and investments; it shall have and exercise general authority, direction and control over the care, management and disposition of all state lands . . ." R.C.M.1947, § 81-103.

<sup>19</sup>These include those lands valuable for grazing purposes, those valuable for the timber upon them, those valuable in agriculture, and those which fall within the limits of any town or city, or which fall within a three mile radius thereof. MONT. CONST. Art. XVII, §§ 1, 2.

<sup>20</sup>MONT. CONST., Art. XVII, § 2.

<sup>21</sup>" . . . provided, that any of said lands may be reclassified whenever, by any reason of increased facilities for irrigation or otherwise, they shall be subject to different classification." MONT. CONST., Art. XVII, § 2.

The standards or guidelines to which the Land Board must adhere in the management of state lands are minimal. The only constitutional restriction on the disposition of these lands is a requirement that the full market value<sup>22</sup> of any land disposed of be secured to the state.<sup>23</sup> Although the Constitution also provided that the administration of state lands would be subject to the "rules and regulations prescribed by law,"<sup>24</sup> and that ". . . none of such land . . . shall ever be disposed of except in pursuance of the general laws providing for such disposition, . . ."<sup>25</sup> the legislature has not gone far toward molding a more workable standard. The lands must be held in trust "for the support of education and for the attainment of other worthy objects helpful to the well-being of the people of this state,"<sup>26</sup> and must be so administered as to secure the largest measure of "legitimate and reasonable advantage" to the state.<sup>27</sup>

The courts have rightfully interpreted these legislative land management standards as vesting in the Land Board a large degree of discretionary power over the subject of the trust.<sup>28</sup> So long as the Board acts short of clear abuse, that discretion is virtually unlimited. While this permits a wide latitude and great flexibility in land management, (which is, to a degree, necessary to responsible planning), the absence of a more refined standard carries with it a diversity of drawbacks, such as the difficulty of review of Land Board decisions.<sup>29</sup>

<sup>22</sup>MONT. CONST., Art. XVII, § 1. For an interesting split of authority as to what constitutes "market value" contrast the test in *Rider v. Cooney*, 94 Mont. 295, 305 et. seq., 23 P.2d 261 (1933), with that applied in *Thompson v. Babcock*, 146 Mont. 46, 52, 409 P.2d 808 (1968).

<sup>23</sup>It is now well settled that the term "lands" includes mineral rights, *Texas Pac. Coal and Oil Co. v. State*, 125 Mont. 258, 260, 234 P.2d 452, (1951); and that the leasing of lands for a term of years is the disposal of an "interest" or "estate" in such lands, within the purview of MONT. CONST., Art. XVII, § 1, *Rider*, *supra* note 22 at 308.

<sup>24</sup>See R.C.M.1947, §§ 81-101 through 81-2304.

<sup>25</sup>MONT. CONST., Art. XVII, § 1.

<sup>26</sup>R.C.M.1947, § 81-103.

<sup>27</sup>*Id.*

<sup>28</sup>See *State ex. rel. Gravely v. Stewart*, 48 Mont. 347, 349, 137 P. 854 (1913); See also, *Leuthold v. Brandjord*, 100 Mont. 96, 106, 47 P.2d 41 (1935), and *Thompson v. Babcock*, *supra* note 22 at 54.

<sup>29</sup>This is immediately apparent to anyone searching the limited amount of pertinent case law. In a case frequently alluded to in Land Board litigation, involving the State Board of Equalization, the court stated: ". . . having proceeded in the matter, exercising its own judgment and discretion, in the absence of any statutory provision directing how the board should proceed, and in the absence of fraud . . . the court is powerless to compel the board to proceed in any particular manner . . ." *State v. State Board of Equalization*, 56 Mont. 413, 414, 186 P. 699 (1920).

Another case, involving the Land Board itself, constitutes an equally poignant expression on the limited character of land management review. Here, the plaintiff was provided with notice of a land sale which contained the wrong date, and therefore was deprived of his opportunity to bid. The court stated that the "Board, in determining whether it shall approve or reject a sale, acts quasi-judicially, and unless there has been a manifest abuse of discretion, the courts will not interfere . . ." *State ex. rel. Robbins v. Bonner*, 128 Mont. 45, 49, 270 P.2d 400 (1954). See also *State ex. rel. Gravely v. Stewart*, 48 Mont. 347, 350, 137 P. 854 (1913); *State ex. rel. Harris v. District Court*, 27 Mont. 280, 281, 70 P. 981 (1902); and *Mont. Ore. Pur. Co. v. Lindsay*, 25 Mont. 24, 27, 63 P. 715 (1901).

It is this writer's opinion that Montana land management law, while constitutionally sound, lacks the statutory machinery necessary to insure the proper administration of public lands. There are no provisions requiring public hearings nor, for that matter, for notice of impending sales of state lands.<sup>30</sup> There are no standards to guide the Land Board toward responsible planning, no standards by which to check their actions, and no provisions for judicial review. Where the law is sufficient, as in requiring complete minutes of Land Board meetings,<sup>31</sup> it has been customarily ignored.<sup>32</sup> Judicial review, impeded by the absence of a standard and of a provision therefor, is made impossible by the absence of a record.

When construed in light of the susceptibility of the Land Board<sup>33</sup> to political and economic pressures,<sup>34</sup> the present law lacks adequate safeguards. Viewed in light of the tremendous task of truly comprehensive and long range land management, the present law lacks teeth. This writer is therefore compelled to suggest certain elements which are not incorporated in our present law, but which this writer believes to be fundamental to an adequate land management law in Montana. These include the public hearing, the workable standard, and judicial review.

### THE PROPOSAL

#### I. A PUBLIC HEARING PROVISION

That a public agency,<sup>35</sup> such as the Land Board, should be required by the public to provide safeguards to protect the public interest and the public priorities may seem unusual. The growing tendency, however, is for public rights to be asserted, not by governmental agencies acting on behalf of the people, but by citizen groups claiming interests to be protected, and a legal right to judicial enforcement. "Moreover, these citizen groups frequently assert their rights against the very governmental agencies which are supposed to protect the public interest."<sup>36</sup>

The question of whether a public agency is adequately protecting the public on whose behalf it acts has been raised with increasing fre-

<sup>30</sup>The forwarding of notice to interested parties has been the customary procedure. But see Robbins, *id.* note 29.

<sup>31</sup>R.C.M.1947, § 81-104.

<sup>32</sup>This was noted in *Thompson v. Babcock*, *supra* note 22 at 54-56.

<sup>33</sup>Recalling, of course, the political composition thereof.

<sup>34</sup>"The absence of clear guides in organic legislation renders administrators particularly susceptible to pressure from narrow but well-organized interest groups and may lead to a situation in which the dispositive consideration in determining whether or not to grant a license application becomes the political connections of the applicant." *Hornsby v. Allen*, 326 F.2d 607, 608 (5th Cir. 1964).

<sup>35</sup>The Land Board is a public agency. See *State v. State Board of Land Commissioners*, 109 Mont. 127, 133, 94 P.2d 201 (1939). The Land Board is also an agency within the meaning of that term as defined in the Proposed Montana Administrative Procedure Act.

<sup>36</sup>Sax, *supra* note 16 at 136.

quency, and by some notable legal personalities. In a Federal Communications case the now Chief Justice Burger concluded:

The theory that the commission can always effectively represent listener interests . . . without the aid and the participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. Whenever it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the commission can continue to rely on it.<sup>37</sup>

Environmental considerations, by their very nature, constitute another strong argument for public hearings. They are inherently complex and are generally considered anti-economic.<sup>38</sup> Where the state finds itself continually underfunded it turns to traditional sources for new tax money, i.e., to new industry. Since the preservation of collateral land values is a capital-expending rather than a capital-acquiring proposition, such considerations, strongly urged, often have a deterrent effect on new industry. A governmental agency, acting alone, under a preoccupation with the *now* need for income, too often overlooks the *tomorrow* need for collateral resources. The public hearing has certain disadvantages, but it is nevertheless an important tool, and particularly to a planning agency.

The public hearing also serves other functions. It is generally given lip-service credit as a cornerstone to democracy, providing a device for citizen participation.<sup>39</sup> This function is too often understated. Public hearings encourage and incubate an informed public. They provide an opportunity for the citizen to "blow off steam," promote acceptance of final determinations, and in so doing deter future adjudication.<sup>40</sup>

The public hearing also serves as a primary forum for information gathering.<sup>41</sup> This is particularly important where, as here, the agency must deal with noneconomic considerations and where, as here, the subject matter is multifarious, highly complex, and requires great synthesis.<sup>42</sup> To the agency which assumes the affirmative burden of in-

<sup>37</sup>Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (D.C. Cir. 1966) [hereinafter cited as Church of Christ].

<sup>38</sup>It should be clear that I am speaking to only short-term gain, or immediate return. Long term benefits are manifestly proportional to future land productivity. A development which destroys collateral land values diminishes future productivity and constitutes a drain on long-term gain.

<sup>39</sup>Symposium—*The Public Hearing*, 21 ADMIN. L. REV. 125 (1968).

<sup>40</sup>Prize Winning Essay by F. W. Taylor, in *Phi Delta Phi Brief* at 169 (1970).

The recent developments in the private attorneys general-standing doctrine has increased the availability of review to concerned citizens. Consequently, the deterrence of post-administrative adjudication becomes an increasingly important consideration.

<sup>41</sup>See Symposium—Hearings, *supra* note 39 at 155.

<sup>42</sup>See Heddlestone Hearings, *supra* notes 8-11. Relevant information was often highly technical. Among those offering presentations were professors of law, economics, geology, biology, zoology, a host of graduate students and well-informed citizen groups.

quiry,<sup>43</sup> the public hearing may lose a part of its potency as a source of information. But where, as here, information must be supplied, the public hearing is an invaluable tool. In the one party hearing that information can only be one-sided. The cost of administration and the time necessarily consumed may be reduced to a minimum, but the public interest cannot be served.

Finally, the public hearing requirement may serve to impress upon the agency, and the public, the fact that the matter before the agency is something more than a preliminary inquiry or proceeding of little or no significance.

This function may be particularly useful in the land use area, where planning commissions spend (theoretically, at least) considerable amounts of meeting time on long range planning matters. . . .<sup>44</sup>

There are, of course, disadvantages to a requirement of public hearings. They are costly, both in expense and delay. But, all in all, when the matter before the agency is inherently complex and significant, as here, the agency should not begrudge the public, on whose behalf it acts, the time and effort required to do the job properly.<sup>45</sup>

The public hearing, therefore, is not only justifiable, but is particularly useful in the field of land management. If, however, we require public hearings, we must venture one step further to insure that such a requirement will be both viable and effective. Three elements of the public hearing merit cursory attention.

#### A. Notice

Unless interested parties are informed that public hearings will be held on the matter before the Board, the hearing requirement is little more than a shell. For this reason, the provision requiring public hearings in land management decisions should include a provision for notice thereof. This latter provision should express:

<sup>43</sup>Symposium—Hearings, *supra* note 39 at 122. Such a duty has also been imposed upon the Federal Power Commission. "The failure of the Commission to inform itself of these alternatives cannot be reconciled with its planning responsibilities under the Federal Power Act." *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 622 (2nd Cir. 1965) [hereinafter cited as *Scenic Hudson*].

<sup>44</sup>Symposium—Hearings, *supra* note 39 at 154.

<sup>45</sup>As regards delay, an emergency-action provision should be incorporated into any public hearing provision. Such a provision would permit immediate action under exceptional circumstances, but allows the action to stand for only a limited period. Within this time the Board should be required to invoke the proper procedures. *ANN. CAL. GOV. CODE*, §§ 11421 and 11422.1 (West 1966).

In addition, the public hearing need not be required as a condition precedent to all Land Board action. It is this writer's opinion that the hearing requirement could be effectively limited, without any loss of potency, by a requirement similar to Wisconsin's, *WIS. STAT.* § 227.02, under which the public hearing is mandatory only upon the request of twenty-five persons, or of a group whose membership represents an equivalent number.

- 1). A minimum time element. Most such provisions require that notice be sent from ten to thirty days prior to the commencement of the hearing.<sup>46</sup> The controlling considerations here are twofold. A six month notice provision would severely encumber the Land Board in its ability to act. A six day notice would give interested parties no time to conduct independent investigations nor to prepare presentations. These considerations must be balanced. Where, for instance, environmental considerations are interwoven into the matter before the Board, the projected development should be set forth in near final detail, and the time allotted for preparation should be commensurate with the complexity of the problem.
- 2). The notice should be both published and sent individually to all parties, and to all persons and groups who have signified their interest by requesting such notice.<sup>47</sup>
- 3). The notice should include statements of time, place, and the nature of the hearings, with reference to the legal authority under which the hearing is to be held, reference to the statutes and procedural rules involved therein, and a statement, in the greatest possible detail, of the matters and issues to be considered.<sup>48</sup>

### B. *Standing*

If the public hearing is to function most effectively in land management, all interested individuals must be permitted to participate and be able to seek judicial review from final determinations of the Land Board. Where noneconomic issues are implicit in the matter before the Board, standing cannot be limited to those capable of showing an economic interest in the outcome.<sup>49</sup> Those who, by their activity and conduct, have exhibited a special interest, should be given standing in the proceedings.<sup>50</sup> In the management of public lands "standing is accorded to persons not for the protection of their private interest, but only to vindicate the public interest."<sup>51</sup>

At present, in both judicial and administrative proceedings, the scope of standing is in flux. While some courts have granted standing

<sup>46</sup>See REVISED MODEL STATE ACT, § 3 (a) (1) and (2). See also 1 Cooper, STATE ADMINISTRATIVE LAW, 187 (1965).

<sup>47</sup>See REVISED MODEL STATE ACT, § 3 (a) (1). See also ANN. CAL. GOV. CODE, § 11423 (West 1966); and Cooper, *supra* note 46 at 187.

<sup>48</sup>See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 9; and ANN. CAL. GOV. CODE, § 11424 (West 1966).

<sup>49</sup>See Church of Christ, *supra* note 37 at 1002.

<sup>50</sup>See Scenic Hudson, *supra* note 43 at 617; and Namekagon Hydro Co. v. Federal Power Comm., 216 F.2d 509, 511 (7th Cir. 1954).

<sup>51</sup>Church of Christ, *supra* note 37 at 1006.

in the absence of direct economic injury or of special statutes,<sup>52</sup> others have adamantly refused to do so.<sup>53</sup> Considering the present state of standing law, standing should be granted expressly by statute<sup>54</sup> to all interested individuals, regardless of direct economic injury, in the capacity of private attorneys general<sup>55</sup> for and on behalf of the general public interest in land management proceedings.<sup>56</sup>

### C. Evidence, Findings and the Record

When acting as a planning agency the Land Board must deal with complex and diversified considerations.<sup>57</sup> Collateral interests, such as environmental protection, are nevertheless important facets of the comprehensive plan,<sup>58</sup> and require complete investigation. On the other hand, decisions required in the management of public lands often evoke highly emotional and irrelevant statements. Again, therefore, balance must be sought. Rules on admissibility of statements and of extraneous evidentiary matter must be designed in such a way that the irrelevant may be weeded from the relevant, while assuming that information commensurate with the complexity of the problem will be admissible into the record.<sup>59</sup> Since special interest proponents are likely to overstate their own concerns, a right to cross-examination would be useful<sup>60</sup> and should be incorporated into the law.

<sup>52</sup>Road Review League, *Town of Bedford v. Boyd*, 270 F. Supp. 650, 661 (S.D. N.Y. 1967). See also *Scenic Hudson*, *supra* note 43; and *Assoc. of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150 (1970).

<sup>53</sup>*Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970).

<sup>54</sup>"Only occasionally will courts, absent specific statutory authority, protect the interests raised by increasingly aroused environmental groups." Sax, *supra* note 16 at 137.

<sup>55</sup>Were this writer designing the standing provision he would simply give recognition to the public attorneys general concept discussed by the now Chief Justice Burger in *Church of Christ*, *supra* note 37.

<sup>56</sup>The fear often voiced by agencies, that liberal standing provisions would result in "inundation by thousands" seeking to intervene and demand judicial review has been expressly rejected. See *Scenic Hudson*, *supra* note 43 at 617. See also *Assoc. Industries, Inc. v. Ickes*, 134 F.2d 694, 707 (2nd Cir. 1942), vacated as moot, (320 U.S. 707, 708 (1943)), 64 S. Ct. 74 (1943)) wherein it was noted that "no such horrendous possibilities exist."

<sup>57</sup>An understatement of those considerations involved in land management decisions is revealed by pertinent considerations in highway planning, which include not only highway engineering expertise, but considerations of scenic and aesthetic interests, housing, demography, pollution control, and a panoply of other elements. *Road Review*, *supra* note 52 at 660-62.

<sup>58</sup>See *Heddleston Hearings*, *supra* notes 8-11.

<sup>59</sup>The agency is not, of course, required to proceed within the evidentiary confines established for courts. The rules of evidence section, 302 (A), of the Proposed Montana Administrative Procedure Act recognizes this, stating: "agencies shall not be bound by common law or statutory rules of evidence." The section would permit the exclusion of "... irrelevant, immaterial, and unduly repetitious evidence," although, as a general rule, the agency will follow a liberal policy in accepting evidence. This, because a record silent on relevant considerations may sow the seed of remand for rehearing, upon review of the decision.

<sup>60</sup>"It is my conviction that the prospect of cross-examination imposes a discipline on these economic judgments, together with the requirement of advance written preparations, which would not otherwise be possible." W.C. Burt, 20 ADMIN. L. REV. 117 (1967).

It is essential, of course, that the record be a complete repository of hearing considerations.<sup>61</sup> There should be evidence, on the record, that all issues and alternatives raised by the hearings received the consideration of the Land Board.<sup>62</sup> In accordance therewith, the Board should be required to issue a statement of their reasons for accepting or rejecting all substantive points urged in the hearing.<sup>63</sup> This will serve the twofold purpose of reassuring the public that a responsible decision has been made while simultaneously providing a complete record, should judicial review be necessary. The record should, in short, reflect the scope and depth of the hearing.<sup>64</sup>

## II. A LAND MANAGEMENT STANDARD

Equally as vital to the responsible management of public lands is the formulation of a more definite, more inclusive standard. There is perhaps no tenet as fundamental to the administrative law student than that requiring an agency to proceed within the limitations of a prescribed standard.<sup>65</sup> The standard under which the Land Board presently operates requires the Board "to administer this trust so as to secure the largest measure of legitimate and reasonable advantage to the state."<sup>66</sup>

This standard, as written, is potentially deleterious to comprehensive land management. First, it is distressingly vague. While it may be advantageous to permit the Land Board to operate under a standard sufficiently general to allow its members reasonable freedom to weigh the issues, public interest and public priorities, "there is a point at which generality merges into vacuity."<sup>67</sup> The incorporation of certain values into the standard does not, by necessity, narrow the agency's

<sup>61</sup>"If an administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action." Securities and Exchange Comm. v. Chenery Corp., 332 U.S. 194, 196 (1947).

Contrast this with the closing comments of Justice Castles in *Thompson v. Babcock*, *supra* note 32.

<sup>62</sup>See *Scenic Hudson*, *supra* note 43 at 617.

<sup>63</sup>See *Assoc. Industries*, *supra* note 56 at 194. A failure here would erode the very reasons for requiring public hearings, and would render judicial review virtually as weak as it presently is. For this reason alone it is apparent that conclusions, without supporting rationale, should not be permitted. Section 304 of the Proposed Montana Administrative Procedure Act would appear to support such a requirement.

<sup>64</sup>"... the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire, blandly calling balls and strikes for adversaries appearing before it." *Scenic Hudson*, *supra* note 43 at 621. The court continued that the public was entitled to know upon the record, which would appear to apply equally to hearings conducted in the management of public lands.

<sup>65</sup>*U.S. v. Chicago, M., St. P., & Pac. R.R.*, 282 U.S. 311, 324 (1931). See also 1 Davis, *ADMIN. LAW TREATISE*, §§ 2.01 through 2.16 (1958) and 1 Cooper, *STATE ADMIN. LAW*, 54 through 91 (1965).

<sup>66</sup>*R.C.M.1947*, § 81-103.

<sup>67</sup>*Koslow, Standardless Administrative Adjudication*, 22 *ADMIN. L. REV.* 407, 412 (1970). Although Mr. Koslow's reference was to such standards as "in the best interests of the public", our "largest measure of advantage" formula certainly rivals public interest standards for negligible identifiable content.

range of choice. It is rather the assertion of "a more inclusive definition of the goals or values which the agency must consider."<sup>68</sup>

Second, the present standard, when read in conjunction with corresponding constitutional and statutory provisions, delegates to the Land Board virtually unlimited discretion.<sup>69</sup> Discretion can be benevolent, but it can also be tyrannical. Since a great proportion of the corruption which mars American political life occurs in those agencies which engage in planning and allocation,<sup>70</sup> this point must not be summarily dismissed. Authorities contend that the failure lies not in the legislative delegation of broad discretionary powers, but rather in the failure of the agencies, through their rule-making powers, to replace the vagueness with clarity.<sup>71</sup> The Land Board would appear to be no exception to this rule, having promulgated and published regulations only in the area of oil and gas leases. And where, as here, an agency is empowered to give greater definition to its task,<sup>72</sup> yet persists in procrastination, the legislature should exercise no hesitancy in providing those guidelines which the agency has failed to express.

Finally, a third and natural outgrowth of the present "largest . . . advantage" standard has been the tendency to interpret it strictly in terms of economic advantages.<sup>73</sup> Recent decisions<sup>74</sup> have provided a more generous verbal tribute to non-economic collateral issues,<sup>75</sup> however the Board still finds immediate pecuniary return to be the most alluring consideration. Protection of the environment, enhancement of multiple uses, public interest and public priorities are manifestly vexatious in terms of dollar and cents evaluation.<sup>76</sup> And yet the incorporation of these, and such considerations as scenic and historical significance, into the standards which presently govern other major administrative agencies,<sup>77</sup> renders clear their inherent value.

<sup>68</sup>Reich, *The Law of the Planned Society*, 75 YALE L. J. 1227, 1249 (1966).

<sup>69</sup>See Gravely, *supra* note 28.

<sup>70</sup>Reich, *supra* note 68 at 1245. See also Hornsby, *supra* note 34.

<sup>71</sup>Davis, DISCRETIONARY JUSTICE 56 (1968).

<sup>72</sup>E.g., "The state board of land commissioners is hereby authorized to lease in such manner as it may deem for the best interests of the state." R.C.M.1947, § 81-501. See also Leuthold, *supra* note 28 at 104.

<sup>73</sup>Again, this writer refers to the short-term economic gain, as opposed to the long-term economic gain.

<sup>74</sup>Both of the Land Board, and of the court, sitting in review of the Land Board.

<sup>75</sup>Thompson, *supra* note 32 at 53 and 54 contained some hopeful language. The court intimated that the Board must consider "preserving the productive capacity of the land" and "that which will continually benefit the public in general." Even allusions to maximum return were qualified by "with the least injury occurring to the land."

<sup>76</sup>" . . . in many cases where unique and special types of recreation are encountered a dollar evaluation is inadequate, as the public interest must be considered and it cannot be evaluated adequately in only dollars and cents." Namekagon, *supra* note 50 at 511. This statement is manifestly applicable to public land management.

<sup>77</sup>See, e.g., the TRANSPORTATION ACT, 49 U.S.C. 1653 (f) (Supp. IV 1968); the FISH AND WILDLIFE COORDINATION ACT, 16 U.S.C. 662 (a) (1964); and the COLORADO RIVER STORAGE PROJECT ACT, 43 U.S.C. 620 (b) and (g) (1964). See also ANN. CAL. STS. AND H'WAYS CODE, § 210.1 (West 1969); and ANN. MASS. GEN. LAWS, ch. 81 (West 1958). In Montana, see R.C.M. 1947, § 26-1501.

The effect of omitting clear standards from land management law can best be seen through its results. A standardless licensing statute furnishes no uniform guide to which the agency must adhere when acting as a planning organ of the state. That which is not required is often not considered.<sup>78</sup>

In addition, the omission of a statutory standard leaves the reviewing court without a yardstick with which to measure the validity of decisions promulgated by the agency in accepting or rejecting considerations and alternatives. This, of course, leaves the agency, as here, free to discriminate among alternatives in a manner that is virtually immune to judicial review.<sup>79</sup>

Before these statutes, government followed a policy that allowed the traditional agencies, such as highway departments, free to go at their jobs with excessive singlemindedness, determined to find the shortest, straightest, and cheapest routes, without sufficient sensitivity to or knowledge about the other interests that their projects affected.<sup>80</sup>

The standard to be adopted should require the Land Board to act in a comprehensive manner, oriented toward the long range good. It should require the Board to justify their final determinations in the light of alternatives offered and issues raised.<sup>81</sup> Such factors as present and future compatibility of the potential development with other legitimate land uses,<sup>82</sup> and of the desirability of preserving scenic, historical, and recreational values, should be expressed in the standard.<sup>83</sup> No infringement thereon should be permitted unless the record manifests the absence of feasible alternatives while indicating that the development has been approved in a harm minimizing form. All lands, waters and resources should be managed to the end that the same will be available for all time, without change, except as may be necessary and appropriate after the consideration of all factors involved.<sup>84</sup> The final standard, in short, should reflect the scope of consideration expected in the responsible management of public land, and should set forth expressly those noneconomic values which might otherwise be overlooked or summarily dismissed.

<sup>78</sup>See Long, *Arbitrary Administrative Decisions*, 47 NEB. L. REV. 459 (1968).

<sup>79</sup>1 Jaffe, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 77 (1965).

<sup>80</sup>Sax, *supra* note 16 at 138.

<sup>81</sup>As was stated in *Scenic Hudson*, *supra* note 43 at 622, "The failure . . . to inform itself of these alternatives cannot be reconciled with its planning responsibilities."

<sup>82</sup>The following quote from T. Roosevelt's letter appointing the Inland Waters Commission, 42 Cong. Rec. 6968 (1908), is expressive of the inclusiveness which this writer would interject into a standard for the management of public lands: "Such a plan should consider and include all the uses to which streams may be put, and should bring together and coordinate the points of view of all users of waters."

<sup>83</sup>As they have been in the standards which govern other planning agencies. See, e.g., FED. AID HIGHWAY ACT OF 1966, *as amended*, 23 U.S.C. 138 (Supp. IV 1968).

<sup>84</sup>See R.C.M.1947, § 26-1501, regarding state policy governing decisions on construction and hydraulic projects affecting fish and game.

### III. JUDICIAL REVIEW

The formulation of a more inclusive standard goes far toward rendering judicial review of Land Board decisions a true check on the management of public lands.<sup>85</sup> While it would be convenient to consider public agencies as infallible protectors of the public interest such is not always the case. Judicial review is a necessary safeguard and should be expressly incorporated into Montana land management law. Review should be accessible to all interested persons, as private attorneys general, from any final decision of the Land Board. Review should be based on the record, and where the record is incomplete the matter should be remanded to the Board for further proceedings. The court, of course, should not substitute its judgment for that of the Land Board, but must be permitted to require that the Board's findings and conclusions be supported by substantial evidence.

### CONCLUSION

Land management law is particularly important in that it controls the means by which our resources, and therefore our destiny, are to be determined. In a field where comprehensive planning is imperative the present law, moving from a basically sound constitutional foundation, has received minimal development. Although the field is one involving inherently complex collateral considerations, real public priorities, and often intense public interest, public hearings are not required by law. Where one decision may adversely affect not only future productivity, but also unexploited collateral values, the Land Board operates under a standard which offers virtually no statutory guidelines. Even a provision guaranteeing the right to judicial review is lacking.

The past management of public lands, where successful, has been so, largely because its administrators have exhibited unusual responsibility and foresight. We can no longer afford to proceed with a weak law and a prayer for strong administrators. The time has come to incorporate, in land management law, those safeguards which are imperative to land management itself.

JAMES D. MOORE

<sup>85</sup>A rehearing provision, such as that included in the Federal Power Act, 16 U.S.C. 8251 (a), might be incorporated, in order to preclude the possibility of premature review.