



# FEDERAL PROCEDURE



*Lawyers Edition*

**Public Lands and Property**

**to**

**References, Referees, and Masters**

A problem-solving textual analysis of  
federal judicial and administrative  
procedure

**§§ 66:1-68:200**

1997



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 §§ 304-308

14 Fed Proc Forms, Public Lands and Property § 55:77

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A. DUTIES INVOLVING PUBLIC LANDS

§ 66:468. Generally

The Secretary of the Interior has the statutory authority to issue patents for public lands.<sup>83</sup> However, the Secretary has delegated all executive duties pertaining to the surveying, sale, and issuance of patents to public lands, formerly performed by the General Land Office,<sup>84</sup> to the Bureau of Land Management.<sup>85</sup>

§ 66:469. Enforcement of Federal Land Policy and Management Act regulations

The Secretary of the Interior may request the Attorney General to institute a civil action in any United States District Court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of the regulations issued by the Secretary under the Federal Land Policy and Management Act of 1976 (43 USCA §§ 1701 et seq.).<sup>86</sup>

B. ACTIONS ATTACKING VALIDITY OF LAND PATENTS

1. IN GENERAL

§ 66:470. Requirement of privity

A patent to public land which is not void on its face cannot be attacked, either directly or collaterally, by persons who do not show themselves to be in privity with a common or paramount source of title.<sup>87</sup> A party may attack a patent on the ground of fraud or irregularity of issue only if he was in privity with the government in any respect at the time of issuance of the patent.<sup>88</sup>

§ 66:471. Presumption of validity

There is a presumption that a land patent is valid and passes the legal title.<sup>89</sup> Moreover, a patent is presumptive evidence of the performance of every pre-

83. 43 USCA § 15.

84. 43 USCA § 2.

85. Reorg. Plan No. 3 of 1946 § 403 (43 USCA § 1 Historical Note).

86. 43 USCA § 1733(b).

87. *Burke v Southern P. R. Co.* (1914) 234 US 669, 58 L Ed 1527, 34 S Ct 907.

88. *Bateman v Southern Oregon Co.* (1914, CA9 Or) 217 F 933.

89. *Minter v Crommelin* (1856) 59 US 87, 18 How 87, 15 L Ed 279; *Maxwell Land-Grant Case* (1887) 121 US 325, 30 L Ed 949, 7 S Ct 1015, reh den 122 US 365, 30 L Ed 1211, 7 S Ct 1271; *United States v Marshall Silver Mining Co.* (1889) 129 US 579, 32 L Ed 734, 9 S Ct 343.

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90. *Patte*  
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91. *Bige*  
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92. *Lee*  
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93. *Saba*  
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94. *Lea*  
 US 493, 21

95. *Ore*  
 Idaho 362,  
 1027, 32 S

96. *LeR*  
 No. 8271.

97. *Unit*  
 378, 102 O

requisite to its issuance.<sup>90</sup> However, a patent is not evidence of the date of entry.<sup>91</sup>

All reasonable presumptions are indulged to uphold the actions of the officers of the Bureau of Land Management entrusted with the supervision and control of the various proceedings required in issuing land patents.<sup>92</sup> All grants of public land and acts of public officers in issuing warrants and ordering surveys, when purported to have been made in an official capacity and by public authority, are presumed to have been legitimate exercises of authority.<sup>93</sup> For example, it is presumed that a register who makes a change in a patent does so in the course of his official duties and a party who attacks the act as illegal must prove it to be so.<sup>94</sup> However, if the Bureau of Land Management had no jurisdiction to convey the public land, there is no presumption of conclusiveness of the patent.<sup>95</sup>

### § 66:472. Presumption of acceptance

Although the acceptance of a patent on the part of the patentee is necessary to the taking effect of the patent, acceptance of the patent by the grantee will be conclusively presumed, unless immediately upon knowledge of its issue his refusal to accept is explicitly declared and communicated to the Bureau of Land Management.<sup>96</sup> Acceptance may also be presumed from the efforts of the patentee to procure the patent or from the benefit he is to derive from it.<sup>97</sup>

## 2. GOVERNMENT ACTIONS TO CANCEL PATENTS

### § 66:473. Generally

Neither the Secretary of the Interior nor any other government officer has the power *ex parte* to cancel a patent after it has been issued.<sup>98</sup> The United States may, however, maintain an action to set aside patents or grants of public land which were issued or made by reason of fraud,<sup>99</sup> mistake,<sup>1</sup> violation of law,<sup>2</sup> or where there is an entire want of authority in the Bureau of Land Management to grant lands held for public purposes.<sup>3</sup>

90. *Patterson v Jenks* (1829) 27 US 216, 2 Pet 216, 7 L Ed 402; *De Guyer v Banning* (1897) 167 US 723, 42 L Ed 340, 17 S Ct 937; *Ross v Stewart* (1913) 227 US 530, 57 L Ed 626, 33 S Ct 345.

91. *Bigelow v Chatterton* (1892, CA8 Minn) 51 F 614.

92. *Lee v Johnson* (1885) 116 US 48, 29 L Ed 570, 6 S Ct 249.

93. *Sabariego v Maverick* (1888) 124 US 261, 31 L Ed 430, 8 S Ct 461.

94. *Lea v Polk County Copper Co.* (1859) 62 US 493, 21 How 493, 16 L Ed 203.

95. *Oregon S. L. R.R. v Stalker* (1908) 14 Idaho 362, 94 P 56, *affd* 225 US 142, 56 L Ed 1027, 32 S Ct 636.

96. *LeRoy v Jamison* (1875, CC Cal) F Cas No. 8271.

97. *United States v Schurz* (1880) 102 US 378, 102 Otto 378, 26 L Ed 167, 26 L Ed 219.

98. *United States v Stone* (1865) 69 US 525, 2 Wall 525, 17 L Ed 765; *Moore v Robbins* (1878) 96 US 530, 96 Otto 530, 24 L Ed 848; *Pan American Petroleum Corp. v Pierson* (1960, CA10 Wyo) 284 F2d 649, 4 FR Serv 2d 326, 13 OGR 709, *cert den* 366 US 936, 6 L Ed 2d 848, 81 S Ct 1661, 15 OGR 262.

99. *Exploration Co. v United States* (1918) 247 US 435, 62 L Ed 1200, 38 S Ct 571; *United States v Southern Pacific Co.* (1919) 251 US 1, 64 L Ed 97, 40 S Ct 47.

1. *United States v Minor* (1885) 114 US 233, 29 L Ed 110, 5 S Ct 836; *Germania Iron Co. v United States* (1897) 165 US 379, 41 L Ed 754, 17 S Ct 337; *Krueger v United States* (1918) 246 US 69, 62 L Ed 582, 38 S Ct 262.

2. *United States v Marshall Silver Mining Co.* (1889) 129 US 579, 32 L Ed 734, 9 S Ct 343.

3. *Morris v United States* (1899) 174 US 196, 43 L Ed 946, 19 S Ct 649.

The government has a right to bring suit only when it has an interest in the remedy sought by reason of its interest in the land, or because fraud has been practiced on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action.<sup>4</sup> The government may not bring suit to cancel a patent when the only purpose of bringing the suit is to benefit one of two claimants to the land,<sup>5</sup> but when the United States is the party entitled to legal title, it may sue to set aside a patent even though the suit is for the benefit of another party.<sup>6</sup>

■■■■ *Comment:* The United States is not entitled to relief in canceling a patent for errors and irregularities in entering and procuring title to the public lands which could have been corrected within the Bureau of Land Management, so long as there are means of revising the proceeding and correcting the errors within the Bureau.<sup>7</sup>

#### § 66:474. Cancellation versus damages

The United States may affirm a transaction by which a patent to land was obtained by fraud and sue for damages for the fraud,<sup>8</sup> or may disaffirm the patent and sue to cancel it, but it cannot do both.<sup>9</sup> If the United States elects to sue for damages, it may also recover interest on such damages.<sup>10</sup>

■■■■ *Comment:* In a suit by the United States to cancel a patent, relief is not conditioned upon a return of the consideration paid.<sup>11</sup>

#### § 66:475. Burden and degree of proof

The burden of proof to show fraud in obtaining a patent for land is upon the government.<sup>12</sup> The degree of proof required has been variously stated to be clear, strong, and satisfactory;<sup>13</sup> clear and convincing;<sup>14</sup> or by that class of evi-

4. *Cramer v United States* (1923) 261 US 219, 67 L Ed 622, 43 S Ct 342 (superseded by statute on other grounds as stated in *United States v Dann* (CA9 Nev) 873 F2d 1189, cert den 493 US 890, 107 L Ed 2d 185, 110 S Ct 234); *United States v Minnesota* (1926) 270 US 181, 70 L Ed 539, 46 S Ct 298 (not followed on other grounds by *Noatak v Hoffman* (CA9 Alaska) 896 F2d 1157, cert gr 498 US 807, 112 L Ed 2d 14, 111 S Ct 37 and *revd on other grounds, remanded sub nom Blatchford v Native Village of Noatak*, 501 US 775, 115 L Ed 2d 686, 111 S Ct 2578, 91 CDOS 4792, 91 Daily Journal DAR 7421, affd (CA9 Alaska) 38 F3d 1505, 94 CDOS 8252, 94 Daily Journal DAR 15234 and (criticized on other grounds in *Ashker v California Dep't of Corrections* (CA9 Cal) 112 F3d 392, 97 CDOS 2846, 97 Daily Journal DAR 5045)).

5. *United States v Morillo* (1864) 68 US 706, 1 Wall 706, 17 L Ed 626; *United States v San Jacinto Tin Co.* (1888) 125 US 273, 31 L Ed 747, 8 S Ct 850.

6. *United States v Great N. R. Co.* (1918, CA9 Wash) 254 F 522.

7. *United States v Marshall Silver Mining Co.* (1889) 129 US 579, 32 L Ed 734, 9 S Ct 343.

8. *United States v Koleno* (1915, CA8 Wyo) 226 F 180.

9. *United States v Oregon Lumber Co.* (1922) 260 US 290, 67 L Ed 261, 43 S Ct 100.

10. *United States v Carlson* (1927, DC Minn) 17 F2d 628.

11. *Causey v United States* (1916) 240 US 399, 60 L Ed 711, 36 S Ct 365; *Pan American Petroleum & Transp. Co. v United States* (1927) 273 US 456, 71 L Ed 734, 47 S Ct 416, later app (DC Cal) 24 F2d 206.

12. *Moffat v United States* (1884) 112 US 24, 28 L Ed 623, 5 S Ct 10; *United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195.

13. *United States v Des Moines Navigation & R. Co.* (1892) 142 US 510, 35 L Ed 1099, 12 S Ct 308.

14. Sup Ct—*United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195.

5th Circuit—*United States v Mills* (1911, CA5 Ala) 190 F 513.

8th Circuit—*United States v Collett* (1908, CA8 Ark) 159 F 932.

9th Circuit—*United States v Mahaffey* (1916, CA9 Mont) 235 F 704; *United States v Anderson* (1917, DC Mont) 238 F 648; *La Clair v United States* (1910, CCD Wash) 184 F 128.

dence which commences conviction.<sup>15</sup>

#### § 66:476. Bona fide

The title and right to a patent which was obtained title to the land without materially and without a remedy.<sup>16</sup>

#### § 66:477. General

Generally, when the title is regular and sufficient, the government is immune from collateral attack if it is void on its face issued without authority to the land.

#### § 66:478. Complaint

A complaint to set aside a patent is not a mistake or fraud.<sup>23</sup>

#### § 66:479. Presumption

On collateral attack, the government is presumed to have acted lawfully unless the prerequisites exist to set aside a lawful act.<sup>24</sup> However, the Bureau of Land Management is an administrative official.<sup>25</sup>

15. *Diamond Coal & Oil Co. v United States* (1914) 233 US 236, 58 S Ct 236, 58 L Ed 236 (superseded by statute stated in *Watt v Western United States* (1914) 233 US 236, 58 S Ct 236, 58 L Ed 236, 19 OGR 596); *United States v Sierra Nevada Wood Co.* (1914) 233 US 236, 58 S Ct 236.

16. *United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195; *United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195; *United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195.

17. *United States v Iron Silver Mining Co.* (1888) 128 US 673, 32 L Ed 571, 9 S Ct 195.

18. *Pettibone v Cocroft* (1882) 31 F Supp 881, aff'd 850.

19. *Rice v Railroad Co.* (1882) 104 US 636, 104 US 636, 104 US 636.

dence which commands respect and that amount of evidence which produces conviction.<sup>15</sup>

### § 66:476. Bona fide purchasers

The title and rights of a bona fide purchaser from the patentee, who relied on a patent which was valid on its face, will be protected,<sup>16</sup> and where a patentee obtained title through fraud and bribery and the patent cannot be canceled without materially affecting the interest of innocent holders, the government is without a remedy.<sup>17</sup>

## 3. COLLATERAL ATTACK

### § 66:477. Generally; when relief available

Generally, when the Bureau of Land Management has issued a patent which is regular and sufficient to convey title to land described in it, such patent is immune from collateral attack.<sup>18</sup> However, a patent may be impeached collaterally if it is void on its face,<sup>19</sup> was obtained on false and fraudulent proofs,<sup>20</sup> was issued without authority or in violation of statute,<sup>21</sup> or if the United States had no title to the land.<sup>22</sup>

### § 66:478. Complaint

A complaint to set aside a patent must specifically allege the existence of mistake or fraud.<sup>23</sup>

### § 66:479. Presumptions

On collateral attack, a land patent is deemed to be conclusive evidence that the government has passed its title to the lands granted and that all prerequisites existed and were complied with so as to render it a complete and lawful act.<sup>24</sup> However, the record of proceedings before the Bureau of Land Management is admissible in evidence on the question of misconduct of a land official.<sup>25</sup>

15. *Diamond Coal & Coke Co. v United States* (1914) 233 US 236, 58 L Ed 936, 34 S Ct 507 (superseded by statute on other grounds as stated in *Watt v Western Nuclear, Inc.*, 462 US 86, 76 L Ed 2d 400, 103 S Ct 2218, 13 ELR 20849, 79 OGR 596); *Washington Sec. Co. v United States* (1914) 234 US 76, 58 L Ed 1220, 34 S Ct 725.

16. *United States v Debell* (1915, CA8 SD) 227 F 760; *United States v Beaman* (1917, CA8 Colo) 242 F 876; *United States v Minor* (1886, CCD Cal) 12 Sawy 164, 29 F 134; *United States v Sierra Nevada Wood & Lumber Co.* (1897, CCD Nev) 79 F 691.

17. *United States v Calcasieu Timber Co.* (1916, CA5 La) 236 F 196; *Lynch v United States* (1903) 13 Okla 142, 73 P 1095.

18. *Pettibone v Cook County* (1940, DC Minn) 31 F Supp 881, affd (CA8 Minn) 120 F2d 850.

19. *Rice v Railroad Co.* (1862) 66 US 358, 1 Black 358, 17 L Ed 147; *Smelting Co. v Kemp* (1882) 104 US 636, 104 Otto 636, 26 L Ed 875.

20. *Washington Sec. Co. v United States* (1914) 234 US 76, 58 L Ed 1220, 34 S Ct 725.

21. *Rice v Railroad Co.* (1862) 66 US 358, 1 Black 358, 17 L Ed 147; *Wright v Roseberry* (1887) 121 US 488, 30 L Ed 1039, 7 S Ct 985.

22. *Rice v Railroad Co.* (1862) 66 US 358, 1 Black 358, 17 L Ed 147.

23. *Reed v St. Paul, M. & M. R. Co.* (1915, DC Wash) 234 F 207; *Le Marchel v Teegarden* (1904, CCD Ark) 133 F 826.

24. *Burke v Southern P. R. Co.* (1914) 234 US 669, 58 L Ed 1527, 34 S Ct 907; *Northern P. R. Co. v McComas* (1919) 250 US 387, 63 L Ed 1049, 39 S Ct 546.

As to the presumption of validity, generally, see § 66:471.

25. *Carr v Fife* (1895) 156 US 494, 39 L Ed 508, 15 S Ct 427.

4. ACTION FOR IMPOSITION OF TRUST;  
REFORMATION

§ 66:480. Generally

When a patent is issued to the wrong person by reason of fraud, mistake of law, or gross mistake of fact by the Bureau of Land Management, the person rightly entitled to the patent may sue and have the patentee declared the trustee for the plaintiff.<sup>26</sup>

A patent issued upon a mutual mistake may be corrected by reformation.<sup>27</sup>

§ 66:481. Grounds and limitations on relief

To succeed in a suit to charge the holder of the legal title under a patent as trustee for another, the claimant must show a better right to the land than the patentee, and it is not sufficient to show that the patentee should not have received the patent.<sup>28</sup> No suit may be maintained to enforce a trust where the trust is based on a contract involving a fraudulent imposition upon the government.<sup>29</sup> An attempt to impose a trust upon the patentee may be defeated by laches.<sup>30</sup>

C. PROCEEDINGS TO ENJOIN UNLAWFUL  
ENCLOSURES ON PUBLIC LANDS

§ 66:482. Generally; jurisdiction

The United States is entitled to maintain a suit for an injunction against the maintenance of an unlawful enclosure on public lands.<sup>31</sup> Any United States District Court having jurisdiction over the public lands enclosed has jurisdiction to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the act prohibiting unlawful enclosures on public land (43 USCA § 1061).<sup>32</sup>

Practice pointer: While the United States is not entitled to an injunction if the defendants are not currently maintaining the enclosure, the dismissal of the injunction suit will be without prejudice to an action by the United States in a court of law for damages it may have sustained by the maintenance of such an enclosure in the past.<sup>33</sup>

§ 66:483. Filing affidavit of violation—with United States attorney

Any citizen may file with the United States attorney for the proper district an affidavit showing that the act prohibiting unlawful enclosures on public land<sup>34</sup> is

26. Meader v Norton (1871) 78 US 442, 11 Wall 442, 20 L Ed 184; Steel v Smelting Co. (1882) 106 US 447, 106 Otto 447, 27 L Ed 226, 1 S Ct 389; Rector v Gibbon (1884) 111 US 276, 28 L Ed 427, 4 S Ct 605; Lee v Johnson (1885) 116 US 48, 29 L Ed 570, 6 S Ct 249; Fisher v Rule (1919) 248 US 314, 63 L Ed 263, 39 S Ct 122.

27. United States v Hudson (1920, CA8 Wyo) 269 F 379.

28. Fisher v Rule (1919) 248 US 314, 63 L Ed 263, 39 S Ct 122.

29. Doepel v Jones (1917) 244 US 305, 61 L Ed 1158, 37 S Ct 645.

30. Holt v Murphy (1908) 207 US 407, 52 L Ed 271, 28 S Ct 212.

31. 43 USCA § 1062.

32. 43 USCA § 1062.

As to injunctive relief, generally, see 19 Federal Procedure, L Ed, INJUNCTIONS AND RESTRAINING ORDERS §§ 47:1 et seq.

33. United States v Bothwell (1921, CA8 Wyo) 277 F 419.

34. 43 USCA § 1061.

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being violated.<sup>35</sup> Such affidavit must show a description of the land enclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the enclosure may be identified.<sup>36</sup> The affidavit must also identify the persons guilty of the violations as nearly as may be possible, and, if the name cannot on reasonable inquiry be ascertained, by description.<sup>37</sup>

#### § 66:484. —With Bureau of Land Management

Even though the execution of the law prohibiting unlawful enclosures on public lands devolves primarily upon the Department of Justice,<sup>38</sup> charges or complaints against unlawful enclosures upon the public lands may also be filed with the state director of the Bureau of Land Management of the state in which the lands are located.<sup>39</sup> Such charges or complaints, when possible, should give the name and address of the party or parties making or maintaining such enclosure or obstruction and should describe the land enclosed in such a way that it may be readily identified, if possible, by section, township, and range numbers.<sup>40</sup>

#### § 66:485. Institution of suit; service of process

Upon receipt of an affidavit or complaint, the United States attorney must institute a civil suit in the proper United States District Court in the name of the United States against the parties named or described in the affidavit or complaint.<sup>41</sup> In an action arising under the unlawful enclosure statute, it is sufficient to give the court jurisdiction if service of process is had on any agent or employee having charge or control of the enclosure.<sup>42</sup>

#### § 66:486. —Private actions

The Unlawful Inclosures of Public Lands Act<sup>43</sup> does not provide for a private cause of action; rather, the Act provides for federal enforcement with an explicitly defined role for private citizens in the process—filing an affidavit alerting the United States Attorney for the district of the allegation that the Act is being violated.<sup>44</sup> However, once a case is properly commenced by the United States under the Unlawful Inclosures of Public Lands Act, it is possible for an interested party to obtain permission to intervene.<sup>45</sup>

#### § 66:487. Evidence

Evidence consisting of the official plat and field notes of the deputy surveyor is sufficient to establish that an enclosure is on public land in a suit by the United States.<sup>46</sup> In a suit by the United States for an injunction and summary destruction of illegal enclosures on public lands, where the records of the local

35. 43 USCA § 1062.

36. 43 USCA § 1062.

37. 43 USCA § 1062.

38. § 66:483.

39. 43 CFR § 9239.2-4.

40. 43 CFR § 9239.2-4.

41. 43 USCA § 1062.

42. 43 USCA § 1062.

43. 43 USCA §§ 1061 et seq.

44. *Crow Tribe of Indians v Repsis* (1994, DC Wyo) 866 F Supp 520, *affd* (CA10 Wyo) 73 F3d 982, cert den (US) 134 L Ed 2d 951, 116 S Ct 1851.

45. *Crow Tribe of Indians v Repsis* (1994, DC Wyo) 866 F Supp 520, *affd* (CA10 Wyo) 73 F3d 982, cert den (US) 134 L Ed 2d 951, 116 S Ct 1851.

46. *Burch v United States* (1930, CA9 Cal) 41 F2d 709; *Beard v United States* (1930, CA9 Cal) 41 F2d 711, cert den 282 US 886, 75 L Ed 781, 51 S Ct 90.

land office have been destroyed, a book prepared under the direction of the commissioner of the former General Land Office from data in his office, certified by him to be a true copy of his records, is admissible to prove the fact that the lands alleged to have been unlawfully enclosed were part of the public domain.<sup>47</sup>

**§ 66:488. Disposition**

If the court finds the enclosure to be unlawful, it must make the proper decree for the destruction of the enclosure in a summary way unless the enclosure is removed by the defendant within 5 days after the order of the court.<sup>48</sup>

The defendant in such an action is not entitled to trial by jury, and the case may be reviewed on appeal.<sup>49</sup>

**D. REVIEW OF DEPARTMENT OF INTERIOR ACTIONS**

**§ 66:489. Interlocutory review**

Generally, matters relating to public lands which are committed to the Bureau of Land Management for regulation and decision are beyond the jurisdiction of the courts while such matters are pending in the Bureau.<sup>50</sup> Prior to the issuance of a patent, controversies over claims to public lands are within the jurisdiction of the Bureau of Land Management, rather than the court,<sup>51</sup> and, generally, the courts will not interfere with the interlocutory actions of the Secretary of the Interior in the administration and disposal of public lands.<sup>52</sup> However, courts can act, prior to an adjudication by the Bureau of Land Management, in order to protect or restore lawfully acquired possessory interests,<sup>53</sup> and when the Secretary of the Interior goes beyond the powers conferred upon him by statute, the courts have jurisdiction over the question.<sup>54</sup>

**§ 66:490. Standing**

Before a party may challenge an official act of an officer of the Bureau of Land Management, the controversy must relate to the rights existing in the parties, or one of them, derived from the act.<sup>55</sup>

**|||| Illustration:** As a competing claimant, a corporation was a proper intervenor in, and could properly appeal from, proceedings in District Court reversing a decision of the Department of Interior Board of Land Appeals, which held that an unpatented mining claim filed by the corporation's competitor had been forfeited for failure to comply with statutory filing requirements, since the corporation asserted an interest in specific claims of the competitor

47. *Jesse D. Carr Land & Live Stock Co. v United States* (1902, CA9 Or) 118 F 821.  
 48. 43 USCA § 1062.  
 49. *Cameron v United States* (1893) 148 US 301, 37 L Ed 459, 13 S Ct 595.  
 50. *Johnson v Towsley* (1871) 80 US 72, 13 Wall 72, 20 L Ed 485; *Kirwan v Murphy* (1903) 189 US 35, 47 L Ed 698, 23 S Ct 599; *Cosmos Exploration Co. v Gray Eagle Oil Co.* (1903) 190 US 301, 47 L Ed 1064, 23 S Ct 692; *Pacific Land & Improv. Co. v Elwood Oil Co.* (1903) 190 US 316, 47 L Ed 1073, 23 S Ct 698; *United States v Hammers* (1911) 221 US 220, 55 L Ed 710, 31 S Ct 593; *Northern P. R. Co. v McComas* (1919) 250 US 387, 63 L Ed 1049, 39 S Ct 546.  
 51. *Best v Humboldt Placer Mining Co.* (1963) 371 US 334, 9 L Ed 2d 350, 83 S Ct 379.  
 52. *Union Oil Co. v Udall* (1961) 110 US App DC 124, 289 F2d 790, 15 OGR 263.  
 53. *Northern P. R. Co. v McComas* (1919) 250 US 387, 63 L Ed 1049, 39 S Ct 546.  
 54. *Santa Fe P. R. Co. v Fall* (1922) 259 US 197, 66 L Ed 896, 42 S Ct 466.  
 55. *Craig v Leitensdorfer* (1887) 123 US 189, 31 L Ed 114, 8 S Ct 85.

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**§ 66:491. Scop**

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Upon review of lands, a party is n quiry as to whetl dence.<sup>59</sup> The cour absent a finding o

**§ 66:492. Conc**

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**|||| Comment:** Alt tters of law are not are clearly erronec

**§ 66:493. Mand**

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56. *NL Industries, In* (1985, CA9 Nev) 777 F

57. *Brennan v Udall* F2d 803, 29 OGR 1, ce Ed 2d 468, 88 S Ct 47 other grounds by Calif 99, 51 L Ed 2d 192, 97 Cas 1112); *Richardsc* Idaho) 253 F Supp 72

As to review under th dure Act, generally, see Ed, ADMINISTRATIVE P seq.

58. *Lutzenhiser v U* 432 F2d 328.

59. *Standard Oil Co.* CA9 Cal) 107 F2d 402 84 L Ed 1003, 60 S Ct 697, 84 L Ed 1036, 60 309 US 673, 84 L Ed 10

60. *Zwang v Udall* (1 634.

Review of decision of Appeals concerning acq ing rights in federally-o review under "arbitrary



that were being adjudicated in District Court, and the corporation's interest in the property was significantly different from the interest of the Secretary of Interior, which therefore could not adequately represent the corporation.<sup>56</sup>

### § 66:491. Scope and standard of review

Decisions of the Secretary of the Interior that adversely affect a party's title to land are reviewable under the standards of review of the Administrative Procedure Act,<sup>57</sup> under which, review of discretionary actions which do not deprive a party of a vested property right may not be had.<sup>58</sup>

Upon review of a decision of the Secretary of the Interior relating to public lands, a party is not entitled to a trial de novo, and review is limited to an inquiry as to whether the Secretary's decision was based on substantial evidence.<sup>59</sup> The courts will not set aside actions of the Secretary of the Interior absent a finding of arbitrary or capricious action.<sup>60</sup>

### § 66:492. Conclusiveness of administrative determination

In the absence of fraud, a decision of the officers of the Bureau of Land Management as to matters within their jurisdiction is final and conclusive,<sup>61</sup> whether the decision is right or wrong.<sup>62</sup> A construction of law by the Bureau of Land Management, however, is not conclusive on the courts.<sup>63</sup>

■■■■ *Comment:* Although decisions of the Bureau of Land Management on matters of law are not binding on the courts, they will not be reversed unless they are clearly erroneous.<sup>64</sup>

### § 66:493. Mandamus

Mandamus will not lie against an officer of the Bureau of Land Management to compel the exercise of a judicial function,<sup>65</sup> or the discharge of an official duty involving judgment or discretion.<sup>66</sup> However, mandamus lies to compel

56. *NL Industries, Inc. v Secretary of Interior* (1985, CA9 Nev) 777 F2d 433.

57. *Brennan v Udall* (1967, CA10 Colo) 379 F2d 803, 29 OGR 1, cert den 389 US 975, 19 L Ed 2d 468, 88 S Ct 477 and (disapproved on other grounds by *Califano v Sanders*, 430 US 99, 51 L Ed 2d 192, 97 S Ct 980, 42 Cal Comp Cas 1112); *Richardson v Udall* (1966, DC Idaho) 253 F Supp 72.

As to review under the Administrative Procedure Act, generally, see 2 Federal Procedure, L Ed, ADMINISTRATIVE PROCEDURE §§ 2:245 et seq.

58. *Lutzenhiser v Udall* (1970, CA9 Mont) 432 F2d 328.

59. *Standard Oil Co. v United States* (1939, CA9 Cal) 107 F2d 402, cert den 309 US 654, 84 L Ed 1003, 60 S Ct 469, reh den 309 US 697, 84 L Ed 1036, 60 S Ct 708 and cert den 309 US 673, 84 L Ed 1019, 60 S Ct 715.

60. *Zwang v Udall* (1967, CA9 Cal) 371 F2d 634.

Review of decision of Interior Board of Land Appeals concerning acquisition of private mining rights in federally-owned land is limited to review under "arbitrary and capricious" stan-

dard of 5 USCA § 706. *Dredge Corp. v Conn* (1984, CA9 Nev) 733 F2d 704.

61. *Daniels v Wagner* (1915) 237 US 547, 59 L Ed 1102, 35 S Ct 740; *West v Standard Oil Co.* (1929) 278 US 200, 73 L Ed 265, 49 S Ct 138.

62. *James v Germania Iron Co.* (1901, CA8 Minn) 107 F 597, app dismd 195 US 638, 49 L Ed 356, 25 S Ct 786; *King v McAndrews* (1901, CA8 SD) 111 F 860.

63. *Calhoun v Violet* (1899) 173 US 60, 43 L Ed 614, 19 S Ct 324; *De Cambra v Rogers* (1903) 189 US 119, 47 L Ed 734, 23 S Ct 519.

64. *Ross v Wright* (1911) 29 Okla 186, 116 P 949, affd 232 US 110, 58 L Ed 528, 34 S Ct 233.

65. *United States v Commissioner* (1867) 72 US 563, 5 Wall 563, 18 L Ed 692; *Secretary v McGarahan* (1870) 76 US 298, 9 Wall 298, 19 L Ed 579.

As to mandamus, generally, see 2A Federal Procedure, L Ed, APPEAL, CERTIORARI, AND REVIEW §§ 3:399 et seq.

66. *United States ex rel. Riverside Oil Co. v Hitchcock* (1903) 190 US 316, 47 L Ed 1074,

action for the adjudication of water rights, even though it is not an indispensable party to such action.<sup>84</sup>

### § 66:496. Removal of actions

The McCarran Amendment neither permits nor prohibits removal of an action in a state court in which the United States has been joined as a defendant.<sup>85</sup> The fact that the United States is a defendant pursuant to such Act does not affect removability,<sup>86</sup> and the removal of such actions is governed by the law governing removal of actions generally.<sup>87</sup>

### § 66:497. Abstention doctrine

While under the McCarran Amendment, the fact that proceedings are pending both in state and federal court concerning the same federal water rights does not warrant the dismissal of the federal action on the basis of the abstention doctrine, the federal action may be dismissed for reasons of wise judicial administration and the conservation of judicial resources, when: (1) the dismissal would further the policy of avoiding piecemeal adjudications; (2) there have been no proceedings in the federal court other than the filing of a complaint prior to the filing of the motion to dismiss the federal court action; (3) state water rights are extensively involved in the actions; (4) there is a great distance between the District Court and the state court; and (5) the United States has participated in the state proceedings.<sup>88</sup>

### § 66:498. Actions involving Indian water rights

Under the McCarran Amendment (43 USCA § 666), the United States may properly be joined as a party defendant to represent the federally reserved water rights of Indian tribes in a state court general water rights adjudication proceeding, and while such a state action is pending, an Indian tribe's complaint seeking an adjudication of identical rights in federal court may be dismissed on the ground that an identical action has been previously filed in state court.<sup>89</sup>

In a water rights dispute under the McCarran Amendment, the fact that an Indian tribe does not believe the federal government's claim on behalf of the

grounds (CA9 Cal) 293 F2d 340, 4 FR Serv 2d 340, mod on other grounds (CA9 Cal) 307 F2d 96, affd 372 US 627, 10 L Ed 2d 28, 83 S Ct 996.

84. Rank v United States (1956, DC Cal) 142 F Supp 1, affd in part and revd in part on other grounds (CA9 Cal) 293 F2d 340, 4 FR Serv 2d 340, mod on other grounds (CA9 Cal) 307 F2d 96, affd 372 US 627, 10 L Ed 2d 28, 83 S Ct 996.

85. National Audubon Soc. v Department of Water & Power (1980, ED Cal) 496 F Supp 499, later proceeding (CA9 Cal) 858 F2d 1409, 28 Env't Rep Cas 1373, 19 ELR 20198, later proceeding (CA9 Cal) 869 F2d 1196.

86. New Mexico ex rel. Reynolds v United States (1975, DC NM) 408 F Supp 1029.

87. As to removal of actions, generally, see 29 Federal Procedure, L Ed, REMOVAL OF ACTIONS §§ 69:1 et seq.

88. Colorado River Water Conservation Dist. v United States (1976) 424 US 800, 47 L Ed 2d 483, 96 S Ct 1236, 9 Env't Rep Cas 1016, reh den 426 US 912, 48 L Ed 2d 839, 96 S Ct 2239 and (criticized as stated in NYLife Distribs. v Adherence Group (CA3 NJ) 72 F3d 371, cert den (US) 134 L Ed 2d 931, 116 S Ct 1826).

As to the abstention doctrine, generally, see 1 Federal Procedure, L Ed, ACCESS TO DISTRICT COURTS §§ 1:570 et seq.

**Forms:** Motion—To dismiss action brought by United States for determination of water rights—Deference to pending state water adjudication proceeding. 14 Fed Proc Forms, Public Lands and Property § 55:77.

89. Arizona v San Carlos Apache Tribe (1983) 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201, 13 ELR 20817.

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## VIII.

### General Reference

15 USCA § 2210  
16 USCA §§ 24, 37  
1604, 1612  
18 USCA §§ 874, 1  
38 USCA §§ 901, 9

90. United States v  
Tribe (1986, CA9 /  
proceeding (CA9 Ari  
479 US 1006, 93 L E  
reh den 479 US 1070  
Ct 965.

91. White Mountai  
(1986, CA9 Ariz) 784  
1006, 93 L Ed 2d 70  
479 US 1070, 93 L Ec

tribe is proper in all respects does not divest the state court of jurisdiction to hear the dispute, nor does it absolve the United States of its responsibility as trustee for the tribe to assert a claim it believes appropriate.<sup>90</sup>

▣▣▣▣ *Practice pointer:* The United States government's dual role as trustee for the Indian tribe and representative of other federal water interests does not, per se, disable it from making water claims for Indians in state litigation under 43 USCA § 666, since the government remains under a firm obligation to represent the tribe's interest forcefully despite other representative obligations, and may be liable for breach of duty. If the tribe is convinced that the United States cannot adequately represent the tribe, the proper remedy is intervention in the state proceeding.<sup>91</sup>

#### § 66:499. Service of summons

In an action in which the United States has been joined by virtue of the McCarran Amendment, summons or other process on the United States must be served upon the Attorney General or his designated representative.<sup>92</sup>

#### § 66:500. Costs

No judgment for costs may be entered against the United States in any such suit in which it may be joined under the McCarran Amendment.<sup>93</sup>

▣▣▣▣ *Caution:* The McCarran Amendment (43 USCA § 666(a)) does not waive the sovereign immunity of the United States from payment of filing fees imposed by a state on all claimants to water rights in one of the state's rivers, where under state law the state department of water resources has commenced an action in state court to adjudicate water rights among claimants and the fees are required to be submitted with a claimant's notice of claim to the state, because: (1) state law (a) recently denominated as "fees," and required to be paid into court at the outset, many items which had formerly been taxed as "costs" to the parties at the conclusion of water rights adjudications, and (b) thus blurred the distinction between "costs" and "fees" in the context of such adjudications; and (2) the language of the McCarran Amendment making "the State laws" applicable to the United States—although submitting the United States generally to state adjective law, as well as to state substantive law of water rights—is not sufficiently specific to constitute a waiver of the sovereign immunity of the United States as to the filing fees.<sup>94</sup>

### VIII. MANAGEMENT OF PUBLIC PROPERTIES

#### General References

15 USCA § 2210

16 USCA §§ 24, 372, 457, 480, 495, 497, 516, 521d-521f, 544c, 544f, 544m, 559, 612, 1604, 1612

18 USCA §§ 874, 1361, 1362, 1852

38 USCA §§ 901, 902

90. *United States v White Mountain Apache Tribe* (1986, CA9 Ariz) 784 F2d 917, later proceeding (CA9 Ariz) 784 F2d 921, cert den 479 US 1006, 93 L Ed 2d 700, 107 S Ct 644, reh den 479 US 1070, 93 L Ed 2d 1012, 107 S Ct 965.

91. *White Mountain Apache Tribe v Hodel* (1986, CA9 Ariz) 784 F2d 921, cert den 479 US 1006, 93 L Ed 2d 700, 107 S Ct 644, reh den 479 US 1070, 93 L Ed 2d 1012, 107 S Ct 965.

92. 43 USCA § 666(b).

93. 43 USCA § 666(a).

94. *United States v Idaho* (1993) 508 US 1, 123 L Ed 2d 563, 113 S Ct 1893, 93 CDOS 3206, 93 Daily Journal DAR 5475, 23 ELR 20821, 7 FLW Fed S 242.

40 USCA §§ 19, 101, 255, 318a, 489  
 36 CFR §§ 211.17, 211.18, 251.53, 251.54, 251.59-251.62, 251.64  
 36 CFR Parts 215, 217, 219, 251, 254, 262  
 44 CFR §§ 151.11, 151.12, 15.13, 15.14  
 ALR Index: Cemeteries; Logs and Timber; National Parks; Public Lands and Property

**KeyCite<sup>SM</sup>/Insta-Cite<sup>®</sup>:** Cases referred to herein can be further researched through the KeyCite<sup>SM</sup> and Insta-Cite<sup>®</sup> computer-assisted services. Use KeyCite or Insta-Cite to check citations for form, parallel references, and prior and later history. For comprehensive citator information, including citations to other decisions and secondary materials that have mentioned or discussed the cases cited, use KeyCite. ALR and ALR Fed Annotations referred to herein can be further researched through the WESTLAW<sup>®</sup> Find service.

**A. PUBLIC BUILDINGS, MONUMENTS, AND CEMETERIES**

**1. JURISDICTION OVER PROPERTY**

**§ 66:501. Public buildings and works**

The head or other authorized officer of any department, independent establishment, or agency of the government may accept or secure from a state in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not already obtained, over any such lands or interests as he may deem desirable.<sup>95</sup>

The jurisdiction of the Federal Government is exclusive if the United States acquires land within the borders of a state by purchase or condemnation with the consent of that state's legislature, or if land is acquired without such consent and later the state gives consent.<sup>96</sup> The principal factors in determining the exclusive jurisdiction of the United States are ownership of the area, cession of jurisdiction to the United States by a state, and acceptance of such jurisdiction by the United States.<sup>97</sup>

**§ 66:502. —Acceptance of jurisdiction**

Acceptance of jurisdiction on behalf of the United States must be made by filing a notice of acceptance with the Governor of the state or in the manner prescribed by the laws of the state in which the lands are situated.<sup>98</sup> A state may prescribe, by law, the mode by which acceptance of jurisdiction is to be indicated should the United States deem it desirable to acquire jurisdiction over a federal enclave within the boundary of any state.<sup>99</sup> However, in the absence of a state's provision of any other manner for acceptance, notice of acceptance of jurisdiction by the Federal Government must be filed with the Governor of the state.<sup>1</sup>

A letter from a federal agency accepting exclusive jurisdiction over lands acquired by the Federal Government, receipt of which is acknowledged by the

95. 40 USCA § 255.

96. Paul v United States (1963) 371 US 245, 9 L Ed 2d 292, 83 S Ct 426 (ovrld on other grounds as stated in Minnesota by Alexander v Block (CA8 Minn) 660 F2d 1240, 16 Env't Rep Cas 2199, 11 ELR 21033, cert den 455 US 1007, 71 L Ed 2d 876, 102 S Ct 1645, 16 Env't Rep Cas 2216).

97. Fountain v New Orleans Public Service, Inc. (1967, ED La) 265 F Supp 630.

98. 40 USCA § 255.

99. De Kalb County v Henry C. Beck Co. (1967, CA5 Ga) 382 F2d 992.

1. Cincinnati v Nussbaum (1968) 14 Ohio Misc 19, 42 Ohio Ops 2d 359, 233 NE2d 152.

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**§ 66:503. —Qualificati**

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**§ 66:505. Yellowstone**

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**§ 66:506. Hot Springs J**

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2. United States v Jones (1973)  
 480 F2d 1135.

3. 40 USCA § 255.

4. James v Dravo Contracting Co  
 US 134, 82 L Ed 155, 58 S Ct 26  
 318.

5. Lord v Local Union No. 2088,  
 MD Fla) 481 F Supp 419, 103 BNA  
 87 CCH LC ¶ 11741, affd in part  
 part on other grounds (CA5 Fla) 6-  
 107 BNA LRRM 2662, 91 CCH  
 reh den (CA5 Fla) 654 F2d 723 a  
 458 US 1106, 73 L Ed 2d 1366, 10  
 110 BNA LRRM 2744, 94 CCH LC