Address of Wm. Philip Horton
Chief Administrative Judge
Interior Board of Land Appeals
Before the CLSA/NALS Joint Conference
Lake Tahoe, NV
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Good afternoon, ladies and gentlemen. I was reading the other day where the most effective antidote for stress is for the individual to take an early afternoon nap. Those of you with high blood pressure, or other stress symptoms, are therefore no doubt relieved that the next hour is devoted to a discourse on the law by a Government bureaucrat. However, your conduct this hour is no concern to me. We lawyers are trained to associate closed eye-lids with thoughtful meditation on the points we are making; the nodding head is simply recognized as demonstrable agreement with what we are saying. As an administrative judge who regularly hears and considers arguments made by other lawyers, I can tell you I've spent many hours in thoughtful meditation, and I have the sore neck to prove it.

It is said there are three great lies: the check is in the mail; I'll respect you in the morning; and I'm from the Government and I'm here to help you. Believe me, if you will, but I am here on the Government nickel to acquaint you with the appeals system that the Department of the Interior has established for resolving disputes involving the public lands including, for your benefit, how challenges to surveys of the public domain are adjudicated. This <u>should</u> be of more than mere academic interest to this assembly. Approximately 48 percent of the land in California is federally owned. In

Nevada, the percentage of land federally owned is a walloping 85 percent. As private land surveyors in these states, it is quite possible that at some time or another you may be confronted with a survey of federal lands with which you take exception, or that you wish to see upheld over objections raised by others.

For the past 18 years, the final word in challenges to surveys of the federal lands, short of court action, has resided with the Interior Board of Land Appeals.

A brief history lesson reveals that the Department of the Interior was formed to carry out the kind of functions now discharged by the Board of Land Appeals. Originally, the public lands were administered by the General Land Office when it was part of the Treasury Department. Decisions of the General Land Office were appealed to the Secretary of the Treasury. In December 1848, Treasury Secretary Robert J. Walker submitted a plan to Congress for the creation of a Department of the Interior, after complaining that he found himself deciding more judicial questions than financial ones. In fact, he testified that he had personally pronounced judgment in more than 5,000 land title cases during his 3-1/2 year tenure. Congress responded by creating the Department of the Interior on March 3, 1849.

Since its creation, the Department of the Interior has consistently provided a right of appeal to the Secretary from decisions by subordinate employees in public land cases. The Board of Land Appeals was established to decide such appeals on behalf of the Secretary, and its decisions are

final for the Department. The Board is an independent body in the Office of the Secreary, and is not affiliated with the agencies it reviews, which include: the Bureau of Land Management, the Minerals Management Service, and the Office of Surface Mining Reclamation and Enforcement.

The principal agency whose work is reviewed by the Board is the Bureau of Land Management (BLM), which is the successor agency to the General Land Office. Among many other duties, BLM is the Secretary's delegate for conducting surveys or resurveys of the public lands and BLM's performance of this delegated function is subject to the oversight of the Secretary, as exercised quasi-judicially by the Board.

The Secretary's reserved authority to oversee or overturn subordinate employee's actions respecting the public lands was addressed in an early opinion by the Supreme Court, frequently cited in administrative law and public land law treatises, known as Knight v. U.S. Land Association. This 1891 Supreme Court case happens to involve the Department's survey of public lands in California, and the Court's opinion contains several passages of lasting value. Thus, the Court held:

> It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding. * * *
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> [It is argued that] the Secretary of the Interior had no authority to set aside the order of the Commissioner [of the General Land Office] approving and confirming the * * * survey [by Deputy Surveyor Stratton], especially in view of the fact that no appeal was taken from such order and the authorities of

the city acquiesced in that survey. This proposition is unsound. If followed as a rule of law, the Secretary of the Interior is shorn of that supervisory power over the public land which is vested in him [by Acts of Congress] * * *. Section 453 [of the Revised Statutes] provides: "The Commissioner of the General Land Office shall perform under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States * * *." * * *

The phrase "under the direction of the Secretary of the Interior" [as used in this Act of Congress] is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. * * *

* * * [T]he Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. * * *

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands. [Emphasis added.]

142 U.S. 142, 176-78, 181 (1881).

The use of a Board or tribunal to act for the Secretary in reviewing BLM decisions in public land cases evolved from a recommendation made in 1969 by a Commission formed by Congress to study the problems of federal land management. Specifically, the Public Land Law Review Commission, in a comprehensive report entitled "One Third of the Nation's Land" made the following findings and recommendation:

Perhaps the most consistent complaint heard at the public meetings was that the review procedures provided for by the administrative review systems of the Bureau of Land Management and the

> Forest Service were largely illusory because those who sat in judgment on "appeal" were part of the establishment that had made or participated in the initial decision. * * *
>
> We recommend that Congress provide for Secretarial review adequately insulated from management officials and legal advisors who have participated in decisions below * * *. This might be an independent adjunct to the Secretary's office staffed by specialized reviewing personnel free from the influence of subordinate officials and legal advisors to such officials.

In June 1970, the Department of the Interior, cognizant of the findings and recommendations of the Public Land Law Review Commission, established the Office of Hearings and Appeals in the Office of the Secretary to serve as the Secretary's quasi-judicial arm. The Office of Hearings and Appeals, also known as OHA, is composed of three separate Boards of Appeals (a Board of Contract Appeals, a Board of Indian Appeals, and a Board of Land Appeals) and, in addition, consists of a Hearings Division comprised of administrative law judges located in various field locations, who act as hearing officers in certain cases.

Administratively, OHA is headed by a Director, who is a political appointee named by the Secretary. Board members and administrative law judges, on the other hand, are not political appointees and serve in the career federal service. Neither the Director, OHA, nor any other Departmental official, may interfere in the Board's deliberations or decision-making. As will be explained in more detail, however, the Director, OHA, or the Secretary may formally remove a case from the Board's docket and personally decide the matter, if he so chooses.

Quasi-judicial review of agency decisionmaking in public lands cases has received Congressional support. In enacting the Federal Land Policy and Management Act of 1976, it was declared that it is a policy of Congress that the Secretary of the Interior be required to structure adjudication procedures to assure "objective administrative review of intitial decisions, and expeditious decisionmaking."

Let's take a look at the jurisdictional statement which governs what is appealable to the Board of Land Appeals. Under 43 CFR 4.410(a): "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal to the Board * * *."

Note that this is a very broad statement of jurisdiction. Virtually any decision made by a BLM officer with respect to any program or function administered by the agency is appealable to the Board. Needless to say, therefore, the Board adjudicates numerous kinds of cases other than survey appeals, and indeed, survey cases constitute a small fraction of the Board's overall caseload. Of the nearly 1,000 appeals now pending before the Board, most involve oil and gas leasing, oil and gas operations, mining claims, rights-of-way, grazing, coal lease readjustment, Alaska Native claims, land exchanges, and color-of-title claims. Other cases entail review of timber sales, desert land entries, special land use permits, trespasses, the wild horse adoption program, geothermal leasing, Indian allotments, herbicide spraying, and, of course, public land surveys. The cases range from the fairly simple to the exceedingly complex. Of not only local, but indeed

national interest, one of the Board's most recent appeals is one brought by the State of Nevada against BLM's granting of a right-of-way to the Department of Energy pursuant to the Yucca Mountain Nuclear Waste Disposal Project. Everyone's entitled to their day in court. Thus, the Board heard from and issued a decision in the case of Joe Rodriquez who wanted a Federal lease as a landing site for flying saucers. Our luncheon speaker may be acquainted with Beverly Horrell; we heard from her when BLM cancelled her Federal lease of public land in Nevada because she was using the site to run a house of prostitution.

Then there was the case of United States v. Elkhorn Mining Co., where the appellant argued it had a valid discovery under the 1872 mining law because of the valuable Radon that could be breathed in the mine tunnel by paying customers. Among other things, the Board held that breathing was not a recognized mining activity.

Certain observations should at this point be self-evident. First, there is no such thing as the Interior Board of Cadastral Survey Appeals, staffed by lawyers specially trained in the intricacies of land surveys. Staff attorneys and judges on the Board of Land Appeals are not experts in cadastral survey matters, anymore than we are experts in the myriad of other technical subject matters which cross our desks, such as oil and gas geology or hard rock mining. Because survey appeals constitute a relatively small percentage of the Board's overall caseload, it is possibly not an exaggeration to state that we know less about survey matters than most every other kind of case we adjudicate.

It must come as a great comfort to any of you seeking to overturn a BLM survey decision to know that the agency's action is ultimately reviewable by a body that professes ignorance in the subject matter. You may well ask: How can the Board be expected to render correct decisions in these circumstances? Others of you may say "That explains the decision I just got from them." However, as a former Supreme Court justice once said: "We are not final because we are infallible, but we are infallible only because we are final."

To further make your day, please be assured that the Board of Land Appeals does not have a lock on subject matter ignorance. If one of our survey decisions is appealed to federal court, it will probably be reviewed by a judge who knows even less than we do. When he hears the Government talking about "proof beyond a reasonable doubt" in establishing that corners are "obliterated," he may assume he's in a criminal trial for the destruction of Government property. Quite possibly, the Government may be represented by a U.S. Attorney willing to plea bargain the case under the First Offender Rule.

The answer to this seemingly unanswerable quandary is that the Board of Land Appeals, as well as the judiciary, are trained to discern whether agency action, whatever the subject matter, is legally supportable under the rules it is required to play by. If the rules of the game are in the Survey Manual and the agency acts by different rules, the lawyer in us says, "You can't do that." The Manual itself may permit the deviation under certain

circumstances. The inquiry on appeal then centers on whether the administrative record compiled by the agency supports a decision to follow survey practices otherwise not favored by the Manual. Two recent appeals decided by the Board, First American Title Insurance Co., 100 IBLA 270 (1987), and Peter Paul Groth, 99 IBLA 104 (1987), are cases where the BLM survey was either set aside or vacated because the Bureau failed to follow survey procedures preferred by the Survey Manual. The Groth case, decided in September, concerned a 1966 dependent resurvey in Colorado. On the basis of this resurvey, BLM charged appellant's cabin with being in trespass on Federal land. BLM sought to convince Groth to move his cabin, or to enter into a sale or lease of the area in question, but Groth refused claiming the dependent resurvey was erroneous.

The dispute centered on the proper location of the northeast corner of section 34. All parties agreed that this was a lost corner, the original monument having been destroyed in a flood.

The legal dispute concerned BLM's use of one point control to reestablish the northeast corner after it was concluded that neither single nor double proportionate measurement could be employed to restore the lost corner. Based on the record as a whole, including a private surveyor's report that appellant provided, the Board concluded there were at least two useable control points and held:

> BLM failed to provide proper justification for not utilizing 2-point control to reestablish the NE corner of sec. 34. In the absence of such justification, 2-point control is mandated

by the 1947 Survey Manual. This failure to conform the resurvey to the requirements of the Survey Manual constitutes gross error.

99 IBLA 104, 119.

Pursuant to its appellate function, the Board possesses what is known as "de novo" review authority. This means that the Board has full power to issue whatever decision it wants in a case, including the authority to substitute its judgment for that of the initial decisionmaker. Unlike some adjudicatory forums, the Board of Land Appeals is not limited to deciding a case only on the basis of issues raised by the parties. This broad review authority is consistent with the premise that the Board acts for the Secretary to correct mistakes made by those who work for the Secretary. The Supreme Court's 1891 opinion in the Knight case, previously quoted, explained the basis for unfettered review authority by the Secretary as follows:

> The rules prescribed are designed to facilitate the Department in the dispatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul.

178 U.S. 161, 178.

This particular statement was offered by the Court in describing why the Secretary is empowered to correct subordinate employees' mistakes whether or not an appeal was before him. The Board, on the other hand, can correct errors by Departmental employees only in the context of an administrative appeal. As with the defective patent example just noted, however, once an appeal is before the Board, it may act on whatever grounds it determines appropriate to affirm or reverse the agency action.

Notwithstanding that the Board of Land Appeals possesses de novo review authority, the Board of Land Appeals normally refrains from substituting its judgment for the agency's. For example, when the Board vacates or sets aside a cadastral survey decision, it almost invariably remands the matter to BLM for further consideration. When reversal or modification of a survey decision is made, such action is generally based upon a finding that it was arbitrary, capricious, or an abuse of discretion, or that BLM incorrectly applied the provisions of the Survey Manual or other law.

In the course of reviewing an agency decision for correctness, factual as well as legal analyses are made. Faced with a possible corner monument that falls in line and appropriate distance to other corners of record, should that monument be accepted when it differs in size or shape or kind from the description of the monument set forth in the original survey? More than likely, neither the Government surveyor nor the Board would consider it proper to answer this question one way or the other without a more searching inquiry into all the relevant evidence available, including how closely other accepted monuments fit with stated descriptions,

the presence or absence of other possible monumentation in the vicinity, bearing tree findings, local knowledge and acceptance of boundary markers, and miscellaneous other evidence.

Appropos to our Tahoe surroundings, it could be said that in survey adjudication, the rules favor the house (meaning BLM); on the other hand, the house does not always win. While any party adversely affected by a BLM survey decision may appeal that decision to the Board, mere differences of opinion with BLM survey results will not suffice to obtain reversal of the BLM decision. It is incumbent on the appellant to show by a preponderance of the evidence, meaning more or greater evidence than exists for the decision made, that the agency action is improper. Simply alleging error, without an affirmative showing of error, will always result in appeal denial. As stated in a 1972 survey opinion, J.W. Moore, 8 IBLA 261:

> It is not the Government's burden to establish that the resurvey is correct; rather, it is appellant's burden to show that the resurvey is in error. It is appellant's obligation, not that of the Board, to identify specifically reversible error. An appellant cannot expect the Department to assume his burden of searching the record and the law in an effort to find some reversible error in the decision appealed from.

Id. at 262.

It should be noted that in light of the considerable technical expertise which BLM brings and applies to its survey work, the rule of law followed by the Board for many years in its adjudication of survey appeals was that the agency decision below should be upheld absent a showing from the

appellant by "clear and convincing evidence" that the decision is in error. In judicial parlance, proof by clear and convincing evidence is a stricter standard for an appellant to meet than proof by a preponderance of the evidence. To the possible benefit of those who seek to challenge BLM survey decisions in the future, the Board, as previously noted, now adheres to a preponderance of the evidence standard. The Board's shift to this standard of proof in survey cases is explained in its 1987 opinion in Peter Paul Groth, 99 IBLA 104. In short, the Board did not, on its motion, decide that it was preferable to abandon the former "clear and convincing evidence" standard. Instead, we deemed such action required because of a decision from the Tenth Circuit Court of Appeals in Bender v. Clark, which was a 1984 federal court decision reviewing an opinion by the Board of Land Appeals in an oil and gas case, in which the court held that it was error for the Board to use a "clear and convincing evidence" standard in discharging its quasi-judicial review function. Like survey cases, the Bender appeal involved an area of technical specialization, viz., the BLM's obligation to determine whether an area to be leased for oil and gas development lies within a known geologic structure of oil and gas paying potential.

What is BLM's track record before the Board? Out of 47 survey appeals decided by the Board since 1970, BLM has been upheld in 31 cases, for a 66 percent affirmance rate. In the other 34 percent, the BLM decision was either reversed or the decision set aside and the case remanded to the agency or for an evidentiary hearing. BLM's record the last 2 years has not been as favorable. Of 9 cases decided, the agency was affirmed in 4 for an affirmance rate of 44 percent. My guess is that agencies think

they should be affirmed more often and that the private sector regards the affirmance rate as too high. Bear in mind, however, that hundreds of survey decisions are rendered by BLM which are never appealed to the Board.

You may be interested to know that throughout its history of survey adjudication, the Board has yet to be reversed judicially. This indicates that the Board has been doing a particularly fine job in this area or, as alluded to earlier, that the courts don't know any more about survey cases than we do.

I wish to walk through exactly how the Board operates in deciding cases, and, for your benefit as potential parties to a case, what constitutes good advocacy before the Board. First, let me acquaint you more specifically with the make-up of the Board.

The Board is made up of nine administrative judges, including myself as chief judge and another member who is Deputy Chief. We are assisted by 15 staff attorneys, one of whom is designated chief counsel to the Board. Staff attorneys are assigned to individual judges for the purpose of drafting proposed opinions in cases and performing legal research. The chief counsel is responsible for management of the Board's docket and the assignment of cases, among other duties.

The background of the judges is quite varied, though all are lawyers. Three are former staff attorneys to the Board, one of whom was previously a BLM adjudicator; one is a mining engineer; two are former trial attorneys

with the Department of Justice. Two members are previous heads of other Departmental appeals boards. Another member is a former Field Solicitor with the Department and Deputy Director of OHA.

How does the typical survey appeal reach the Board and what happens thereafter? Let's assume BLM has undertaken a dependent resurvey, which is what most Board survey appeals entail. As you are probably aware, a dependent resurvey is made to restore the original conditions of the official survey according to the record.

Pursuant to the Survey Manual, BLM is supposed to apprise all interested parties, "During the course of a resurvey * * * as occasion and opportunity allow, that the resurvey is not official or binding upon the United States until it has been duly accepted by the Director, Bureau of Land Management * * *" (Manual at 6-24). BLM's requirement that interested parties be apprised of on-going resurvey activity obviously contemplates that interested parties are entitled to offer evidence or opinions to the Bureau and that such matters will be considered in its decisionmaking. In addition, the policy discourages individuals from making decisions on the basis of an unapproved survey to their detriment. It is my understanding that landowners and private surveyors are frequently able to obtain resolution of concerns they have regarding Government survey work by getting their views across to BLM during this the informal process. The formal procedure by which private party objections to a proposed resurvey decision are heard by BLM (not the Board) is called a "protest." The Department's protest regulation is set forth at 43 CFR 4.450-2, which provides:

> [A]ny objection raised by any person to any action proposed to be taken in any proceeding before [BLM] will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances.

While BLM has not consistently done so in the past, its practice more recently has been to formally allow a period of time for the filing of a protest to the acceptance of a resurvey, as opposed to the mere acceptance of the resurvey without prior notice to interested parties or the general public. Where a BLM decision issues accepting a resurvey without an opportunity for protests, this does not preclude adversely affected parties from perfecting an appeal to the Board. Remember, by regulation, any party to a case adversely affected by a BLM decision "shall have a right of appeal to the Board." Nonetheless, most survey appeals now come to the Board following BLM's allowance of a protest period, the appellant before the Board being a party whose protest was denied by BLM.

The Board's jurisdictional requirement is that an adversely affected party has 30 days from receipt of the decision appealed from in which to file an appeal with the Board. This rule is strictly followed. An appeal received one day late will be dismissed as untimely. Procedurally, the appeal is filed in the office of the BLM officer who made the decision appealed from. That office is then required to forward the appeal to the Board along with the complete administrative record upon which the decision was based.

An appellant is required to furnish a statement of reasons in support of the appeal that fully explains or documents why the decision appealed from

is considered erroneous. This statement of reasons, or appellant's brief, may either accompany the notice of appeal or it may be filed within 30 days from the filing of the notice of appeal. Unlike the notice of appeal, for which no extension of time may be allowed for filing, an appellant may request an extension of time for submitting its statement of reasons and such requests are normally granted. However, the failure to file a supporting brief subjects the appeal to summary dismissal, and, as a matter of practice, the Board routinely dismisses appeals when the appellant fails to file a brief.

It is not necessary for an appellant to be represented by legal counsel in bringing an appeal. Survey cases tend to be complex, however, and the use of counsel is generally to an appellant's benefit.

The Department's rules on who may practice before the Board are fairly strict. While an appellant may represent him or herself or appear through counsel, in a survey case can the appellant be represented by a non-lawyer private surveyor? In a Board opinion called Robert N. Caldwell, 79 IBLA 141 (1984), we were presented with an appeal from a dependent resurvey opinion in which the resurvey determination concluded that a mobile home owned by one Jerald Hepworth was in trespass on federal land. In protesting the matter to BLM, the property owner, Mr. Hepworth, was represented by Mr. Caldwell, a private surveyor who had presented evidence to BLM favorable to Mr. Hepworth. Following the BLM decision denying the protest, Hepworth did not appeal to the Board but the surveyor did. The Board dismissed the appeal, stating:

> [1] At the outset we must point out that Mr. Caldwell brought this appeal on behalf of Mr. Jerald N. Hepworth. Both persons presented arguments to BLM in connection with this protest, Mr. Hepworth as an affected property owner and Mr. Caldwell, a registered surveyor, as Mr. Hepworth's representative. However, Mr. Caldwell's appearance as Mr. Hepworth's representative before this Board violates the regulation governing practice before the Department, codified under 43 CFR Part 1.
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> 43 CFR 1.3(b) lists those who are qualified to practice before the Department. * * * Appellant has not demonstrated that he fits into any of the categories listed. He is not an attorney, nor does he appear to fit any of the special categories outlined in 43 CFR 1.3(b)(3). * * * These regulations were promulgated pursuant to statute. * * * Their purpose is not to penalize appellants but to protect the public against the risk of inadequate representation. John H. Triggs, 74 IBLA 52 (1983).
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> The situation is not altered by any authorization by the property owner. This Board has held repeatedly that an appeal filed for an appellant by an attorney-in-fact [i.e., a non-attorney denominated by a person to perform attorney-type acts] who is not qualified to practice before the Department under 43 CFR 1.3 is subject to summary dismissal. Haruyuki Yamane, 19 IBLA 320 (1975), aff'd sub nom. Burglin v. Secretary of the Interior, No. 77-1655 (9th Cir. Aug. 18, 1978). The appeal will be dismissed.

The Caldwell decision should not be interpreted as an unwillingness by the Board to consider evidence and opinions by private land surveyors. Indeed, quite the opposite is true. Ordinarily, the best challenges to BLM survey actions are those brought by an appellant on the basis of surveyors' opinions which contradict Government surveyors' opinions. There is simply a right way and a wrong way for this to occur. The right way is private surveyors' reports can be filed by an appellant or appellant's counsel.

A word of advice on how an appellant's (or Government's) brief should be written. The Board has little scientific expertise and no science advisors. Do not expect the Board to readily comprehend technical arguments.

Any private surveyor writing on behalf of an appellant should be careful to explain his terms (using definitions as appropriate) to avoid a failure by the Board to understand the proferred argument. Survey has its own jargon. Our system asks a lawyer (IBLA) to settle a dispute between (usually) two surveyors. The Board must be educated in the lingo and assumptions used by survey professionals. How would a surveyor like to settle a dispute between lawyers arguing in legalese? If I'm arguing with a colleague that a case can't be governed by estoppel or laches, but may well be a matter of res judicata requiring an order nunc pro tunc, the lay listener may be inclined to inflict bodily harm. (What do you have with two lawyers up to their necks in sand? Not enough sand.)

When an appellant files a supporting brief with the Board, including any private surveyor's reports or affidavits, it is required that a copy of this brief and all attachments be served on other parties of record, including BLM. Parties opposed to the appeal have 30 days from receipt of an appellant's brief to file an answer brief. A BLM answer brief might be written and filed by the agency itself, such as the office which performed the survey in question. On the other hand, the Solicitor's Office of the Department, which acts as the agency's lawyer, may file an answer brief on behalf of the Bureau. In survey cases, answer briefs are traditionally filed in all cases. However, an answer brief is not required to be filed.

After the time for the filing of pleadings has passed, the matter is considered ripe for adjudication.

Once a case is ripe for adjudication, several things can happen. Typically, however, nothing will happen on the case right away simply because the Board generally considers cases in the order of receipt, and hundreds of cases are always pending. The average time for case disposition is approximately 10.5 months from the date an appeal is received.

However, judges are expected to screen their cases to ascertain if special circumstances apply to a case. Thus, if an appellant's brief is not filed as required, or if a statement of reasons is received which is considered inadequate to serve as a statement of reasons, the appeal will usually be summarily disposed of as soon as possible. Two weeks ago the Board just dismissed a survey appeal, the William Moffatt case, in which the appellant, who was not represented by counsel, filed a three sentence statement in support of the appeal. Taking this case out of turn, the Board held:

> It is well established that an appeal which fails to point out affirmatively why the decision appealed from is in error may be treated in the same manner as an appeal in which no statement of reasons has been filed and may be dismissed. * * * Conclusory allegations of error, standing alone, do not suffice. * * * The statement of reasons quoted above does not meet the requirements of the Board's rules requiring a statement of reasons, because it does not adequately point out the basis for appellant's belief that the decision appealed from is in error. Accordingly, the appeal is * * * dismissed.

A case may also be reviewed outside its docketed sequence to determine if it should be referred to the Hearings Division for an evidentiary hearing. Survey cases, which are prone to being fact-intensive, lend themselves to an evidentiary process where all parties appear in a trial-type proceeding

and evidence is adduced. If appellant believes a fact-finding hearing is appropriate, a request for a hearing should be included in the notice of appeal and reasons for the request should be given. However, regardless of whether an appellant or BLM asks for a hearing, the Board may, on its own motion, refer a case to the Hearings Division when it concludes that it cannot properly decide the case on the basis of the record as constituted. Board members do not hold fact-finding hearings.

In the hearing proceeding, both documentary evidence and testimony from witnesses are received. Witnesses are placed under oath and examined and cross-examined. The presiding administrative law judge rules on the admissibility of evidence, although in administrative hearings, the rules of evidence are relaxed. The purpose of the hearing is to establish the facts in a particular controversy. The proceedings are on the record: a transcript of all testimony is made and all documents are retained as part of the official record. Following the hearing, the judge will render a decision in the case. Parties have 30 days to object to the judge's decision by appealing to the Board; otherwise the judge's decision will be final for the Department.

As in an appeal before the Board, at the evidentiary hearing the burden of proof is on the appellant to show error in the decision at issue. Technically, the burden of going forward in the hearing (proceeding first) is also on the appellant. However, in survey cases the judge may prefer that BLM commence the hearing by having its personnel first testify as to how the Government survey was undertaken; in short, having the agency put its case on first.

The Government surveyor at a hearing actually testifies in two capacities. In the first instance, he is relating exactly what steps he took in the survey or, in other words, stating the facts. In another respect, however, he is also appearing as an expert witness and therefore his opinion testimony on why certain actions were considered appropriate over alternative choices may be offered and received. The appellant usually challenges the BLM survey through testimony of a private surveyor who had drawn the lines differently. In effect, the hearing becomes a war of the experts over which survey is correct. Depending on the evidentiary problems in a case, the presiding administrative law judge may visit the site in question in the company of the parties.

Because it is an adversary, trial-type proceeding, legal counsel is invariably used by both sides at the evidentiary hearing.

If you are called to testify at a formal evidentiary hearing, there are several things you should do. First, make sure you are apprised in advance by the side calling you as a witness as to the realm of questions you will be asked. Do your homework. In addition to any survey you've performed, familiarize yourself with other surveys that have been done. The BLM survey and administrative record are public documents and are available in advance of the hearing for your inspection. The more familiar you are with the record and of your own personal findings and opinions, the better a witness and service to the proceedings you will be.

Hearings are serious business, but they can have their lighter side. Mary Louise Gilman, editor of the publication "The National Shorthand

Reporter," recently published a book entitled Humor in the Court. She sets forth some of her favorite exchanges that she has recorded through her years as a court reporter. I will share some of these with you:

Q. Did you ever stay all night with this man in New York?

A. I refuse to answer that question.

Q. Did you ever stay all night with this man in Chicago?

A. I refuse to answer that question.

Q. Did you ever stay all night with this man in Miami?

A. No.

* * *

Q. What is your name?

A. Ernestine McDowell.

Q. And what is your marital status?

A. Fair.

* * *

Q. Do you know how far pregnant you are right now?

A. I will be three months November 8.

Q. Apparently then, the date of conception was August 8?

A. Yes.

Q. What were you and your husband doing at that time?

* * *

Q. Mrs. Jones, is your appearance this morning pursuant to a deposition notice which I sent to your attorney?

A. No. This is how I dress when I go to work.

* * *

Finally, the author's favorite is from a deposition involving a child:

> Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?
>
> A. Oral.
>
> Q. How old are you?
>
> A. Oral.

So much for hearings. Let's return to the Board and follow what happens when a case is reached for Board decision, whether or not a hearing has occurred.

Panel Adjudication

- Board is a collegial body and decides cases by a panel of 2 or 3 judges.
- Cases are assigned randomly to Board members by the Chief Counsel.
- The lead judge prepares a proposed decision, usually through a draft written by a staff attorney.
- Panel circulation; separate opinions possible.
- Can you call up the assigned judge to discuss the case? Ex parte communications prohibited.
- Cases are decided in turn, but expedited consideration possible.
- Parties are not precluded from discussing the case among themselves and settlement talks are encouraged. Where BLM perceives it may have erred, it may seek remand and such requests are generally granted.
- Oral argument may be sought, but such requests are rarely granted.

Circulation to the Board

- Critical feature of Board operations.
- During circulation, any 3 judges or the chief judge can place a case on hold.

Board Meetings

- Cases placed on hold are discussed in a Board meeting.
- Meetings are informal.
- Among other possibilities, Board may choose to issue a decision en banc.

Issuance of Board Decision

- All dispositions rendered by a 3-judge opinion are published and indexed.
- Board decisions are available for subscription, but are also on hand in all BLM State Offices and most, if not all, BLM District Offices.
- Regularly reported upon by several private services, including Gowers, Public Land News, Inside Energy, and the Surface Mining Reporter. Decisions are also now on West Law.
- ID's contain some IBLA decisions.

Review Authority

- Board will usually defer to findings of fact by ALJ's based on credibility determinations.

- Board cannot declare statutes or duly promulgated regulations to be unlawful.
- Not bound by Solicitor's Opinions, unless approved by the Secretary.
- Not bound by BLM Manual or BLM Instruction memos, however the Survey Manual is unique.

  SM is obviously more than an internal operations brochure. Many, if not all, of the public land states have incorpoated the Manual as part of State codes.

  Prior Board decisions as well as court decisions reflect necessity of BLM to adhere to the Manual.

  It has never been argued to the Board that the Manual cannot be controlling because its provisions are not regulations.

- Board can award attorney's fees in some cases, but not survey appeals.

Reconsideration

- Petition for reconsideration may be filed by any party within 60 days of the date of the decision.
- Cannot come forward with evidence or arguments that could have been offered earlier.
- To have standing, petitioner must have appeared (argued) in the prior proceeding unless he had no notice.

43 CFR 4.5

- Director, OHA, or the Secretary may review Board decisions or assume jurisdiction over cases, but this is rare. No "right of appeal" to these officials.

Judicial Review

- No statutory time limit
- Venue. See 28 U.S.C. 1391. May file in Federal district court where land is situated or in Federal District Court for the District of Columbia.
- Were administrative remedies exhausted?
- Review based on record made before the Department. IBLA cases not subject to trial de novo. It may not consider contentions not pressed upon the Department.
- Board does not get involved

Summation

The Board does not purport to be infallible. I can state unequivocally, however, that we do seek to decide each appeal with complete objectivity and without political or other outside interference. My own opinion is that the general public also gets a fair shake from BLM, which handles an incredible volume of work with limited resources. The fact that its decisions are sometimes reversed or vacated is in no way a reflection on the competence of

the Bureau generally. At the risk of intimating a bias, I submit you will not find many Bureaus or divisions thereof within the Federal Government more effective in its job than BLM and its Cadastral Survey division.

One of the harsh realities in the adjudication business is that you cannot please everybody. Whenever the Board decides a case, there is a winner and a loser; sometimes all the parties regard themselves as losers. Every bureaucracy gets its share of fan mail. IBLA's scrapbook shows us to be: "self righteous martinets," "rotten lying skunks," "stooges of the Papacy and the Court of Inquisition," "public stealing trash," and last, but not least, "damn, public lying, stealing, scum of the earth." If any of those kind words come from any of you, we apologize for the failure to reply.

It's been a pleasure.