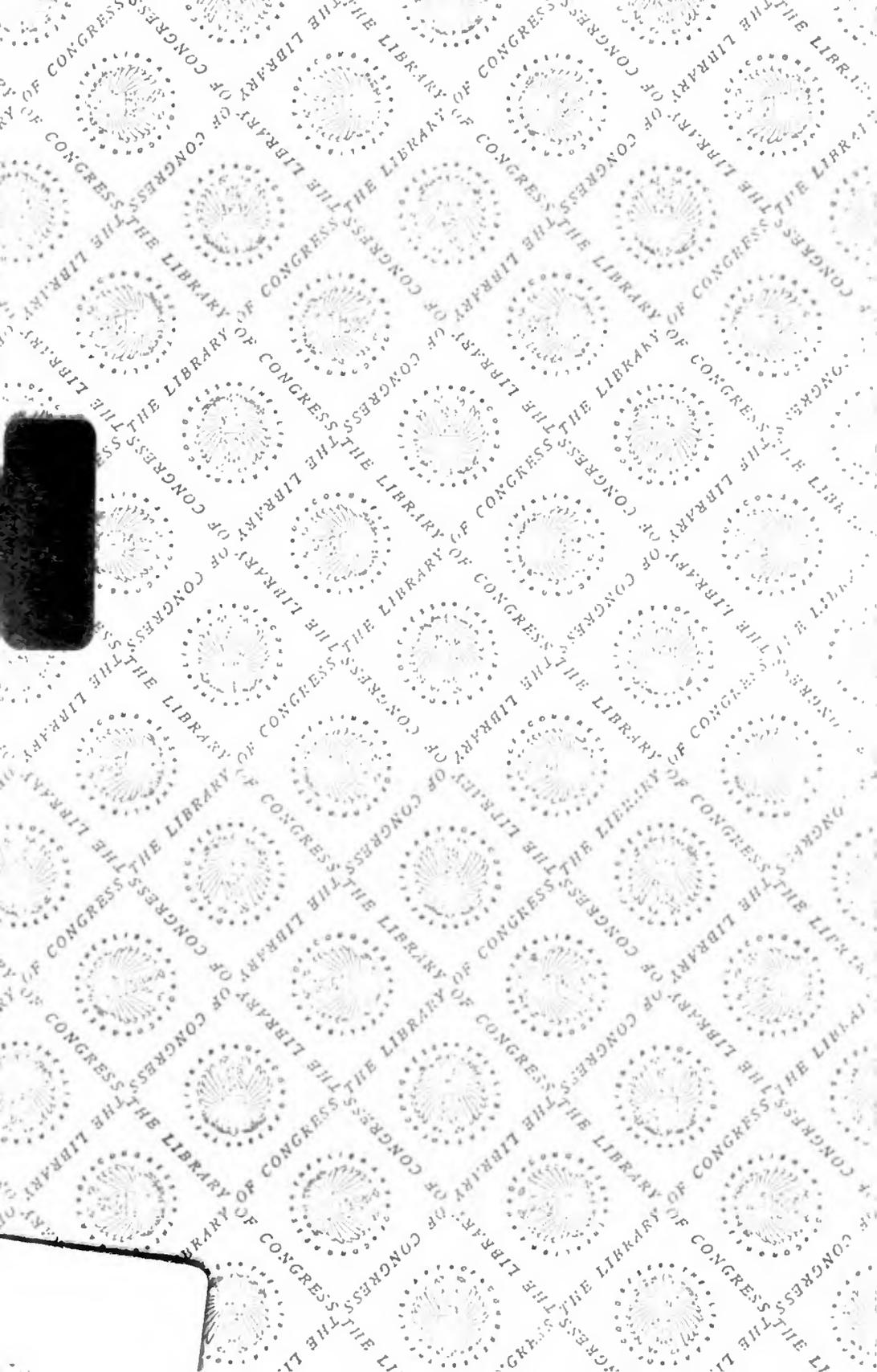
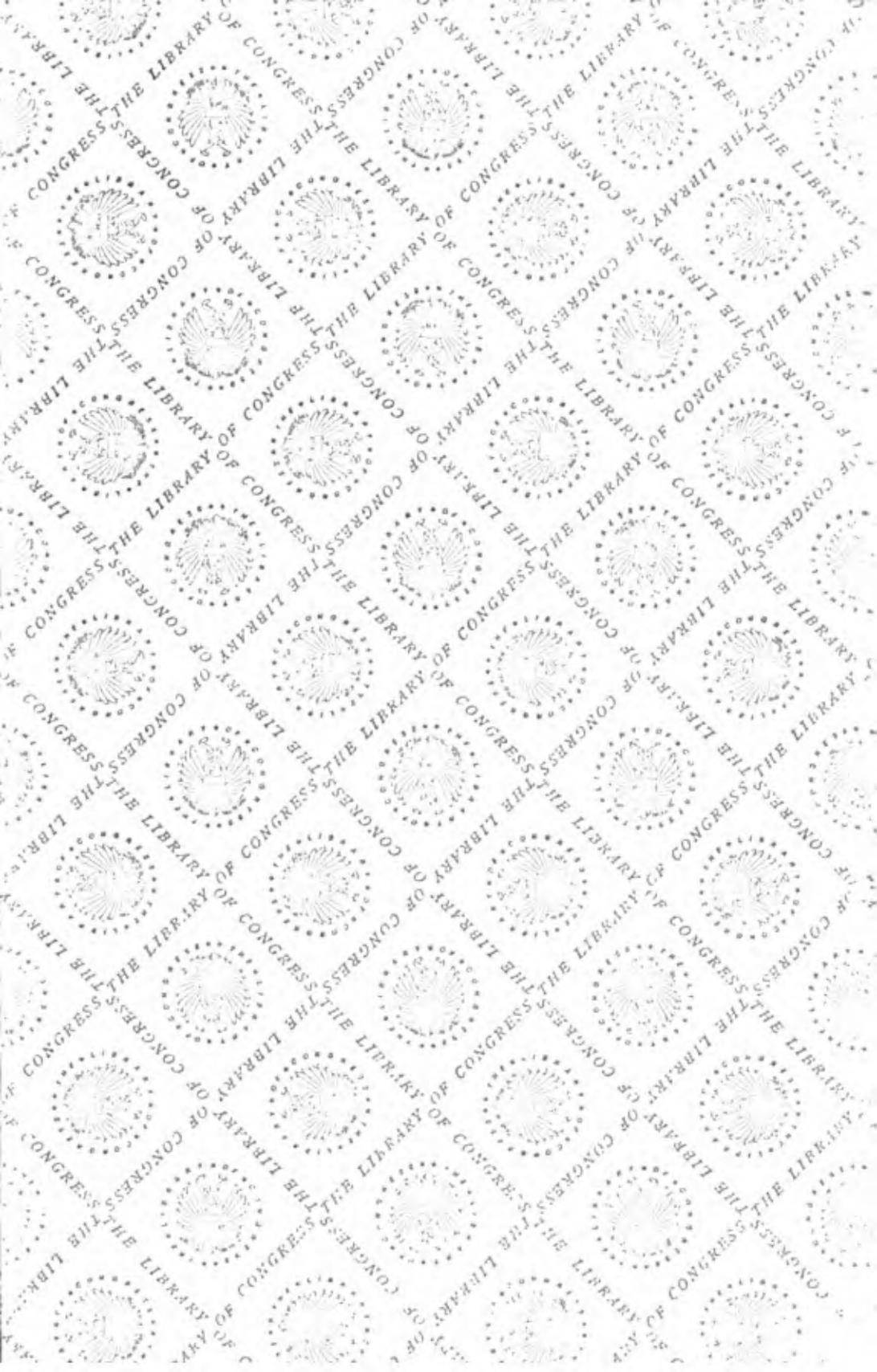


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Respectfully submitted to the Committee on the Judiciary

**SUITS TO ADJUDICATE DISPUTED TITLES TO LAND IN
WHICH THE UNITED STATES CLAIMS AN INTEREST**

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HEARING
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS

SECOND SESSION

Hearing held during the 92d Congress, 2d session

ON

**S. 216, H.R. 11127, H.R. 11411, H.R. 11710, H.R. 11722,
H.R. 12440 and H.R. 12453 of that Congress**

**TO PERMIT SUITS TO ADJUDICATE DISPUTED TITLES TO
LAND IN WHICH THE UNITED STATES CLAIMS AN INTEREST**

FEBRUARY 24, 1972

Serial No. 44



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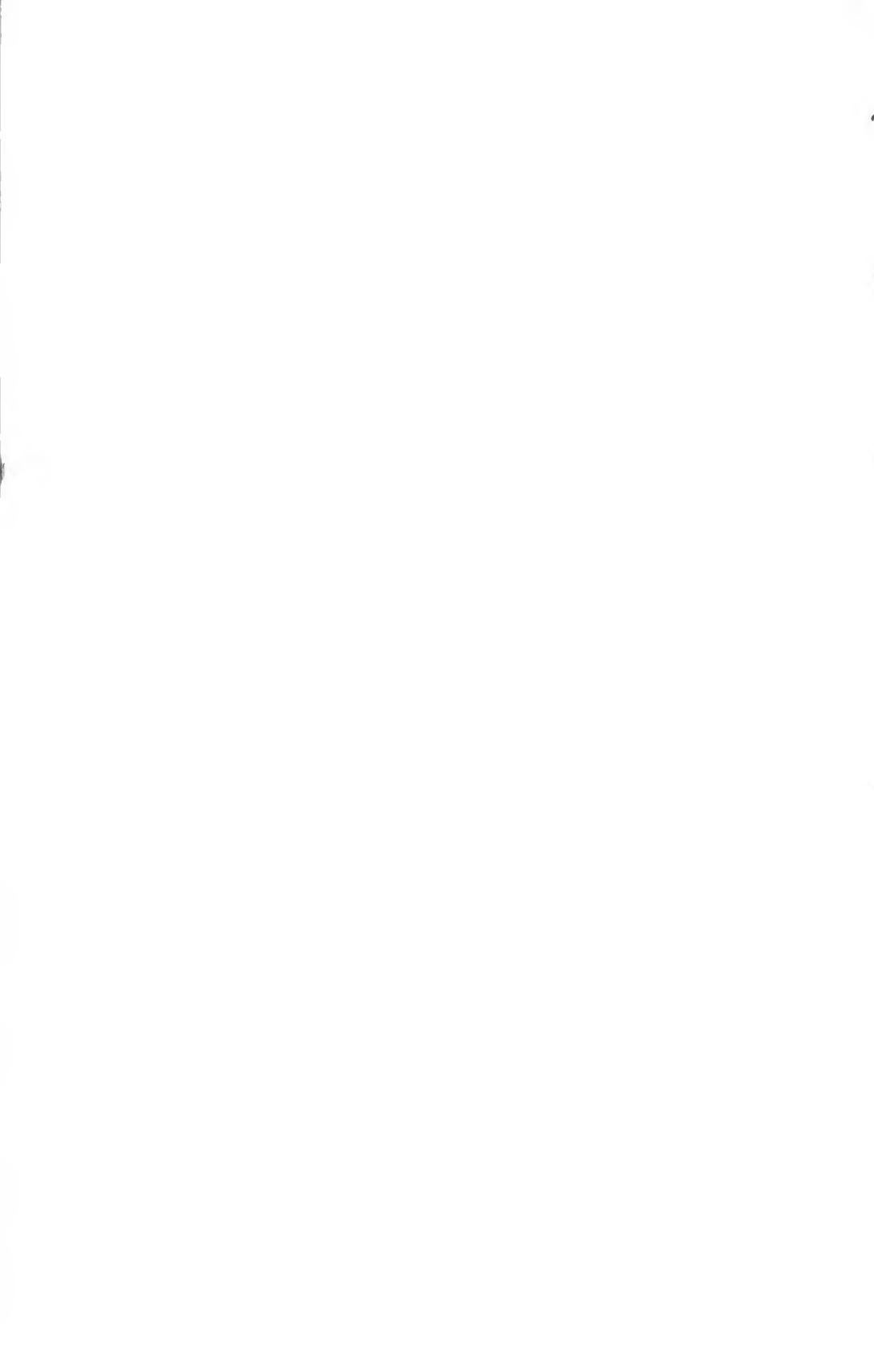
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**SUITS TO ADJUDICATE DISPUTED TITLES TO
LAND IN WHICH THE UNITED STATES CLAIMS
AN INTEREST**

WEDNESDAY, FEBRUARY 24, 1972

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE No. 2,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2237, Rayburn House Office Building, Hon. Harold D. Donohue (chairman of the subcommittee) presiding.

Present: Representatives Donohue and Smith of New York.

Staff member present: William P. Shattuck, counsel.

Mr. DONOHUE. This meeting will now come to order.

The hearing this morning will be on a group of bills providing jurisdiction in the U.S. courts for actions involving titles to lands in which the United States claims an interest.

The bill, H.R. 12440, was introduced by Hon. Emanuel Celler, the committee chairman of the House Committee on Judiciary. He introduced that bill on the recommendation of the Department of Justice which came to us by way of an Executive communication.

Another bill we will consider this morning will be S. 216, which was introduced in the Senate by Senator Church of Idaho and was passed by that body on December 11, 1971.

I believe the bill, H.R. 12453, introduced by our colleagues, Mr. Hansen and Mr. McClure, is substantially identical with the Senate Bill.

The bills H.R. 11127, introduced by our Mr. Smith from New York, H.R. 11411, introduced by our colleague, Mr. Veysey, and bills, H.R. 11710 and H.R. 11772, introduced by our colleague Mr. Wilson, are similar to the chairman's bill introduced at the request of the Department of Justice.

We will now hear from those interested in these bills.

We are very pleased to have with us this morning the honorable, able, and distinguished Senator from Idaho, Senator Church.

**TESTIMONY OF HON. FRANK CHURCH, A U.S. SENATOR FROM
THE STATE OF IDAHO**

Senator CHURCH. Thank you very much.

Mr. Chairman, Mr. Smith, and members of the committee, I have a prepared statement here which it might save the committee's time for me simply to read because it does give the history of the bill and the course which it took in the Senate. It does focus upon

one particular section that needs the special attention of this committee, so, if I may, Mr. Chairman.

I appreciate having the opportunity to testify today on S. 216, a bill to permit suits to be brought against the United States to adjudicate disputed land titles, sometimes referred to as the Quiet Title bill.

Following hearings held by the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs on September 30, 1971, S. 216 was passed in the Senate by unanimous consent on December 11, 1971, and forwarded to the House of Representatives for further consideration.

The Quiet Title bill, S. 216, was one of three bills introduced in the Senate, each embodying a separate approach to deal with a particular problem which has developed in southeastern Idaho.

Following a resurvey of lands bordering the Snake River by the Bureau of Land Management in 1962 and 1965, the BLM identified and replatted some omitted land between the Snake River and a meander line previously established in 1877, by government survey, calling into question the titles of individual owners occupying these lands.

The resurvey is estimated to affect 500 owners along this section of the Snake River and to involve improvement to this land valued at amounts varying between \$250,000 and \$8.3 million.

The term "omitted lands" derives from the difference between the present border of the Snake River—that is, the present meander line—and the original meander line that existed when the Snake River was originally surveyed in 1877. As the river's fluctuating flow has been diminished by approximately three-fourths, an added strip of land exists between the river and the originally surveyed plots.

Homesteaders and other individuals have occupied the lands along the Snake River in good faith since the original survey in 1877, accepting the Federal Government survey as the basis for readying for farming, for making improvements, for building homes, and the other similar activities involved in developing communities.

They occupied and obtained these lands according to the laws established for this purpose and on the basis of information obtained from those Federal officials who administered those laws.

Yet these individuals are now told that they do not own part of the land they have occupied but that it belongs to the Federal Government.

These individuals sought administrative remedy from the Bureau of Land Management but were unable to find it. Consequently, they have turned to their Representatives in Congress for relief.

What are the physical facts in this omitted lands case? The Snake River no longer fluctuates as it did when it was first surveyed in 1877. It has been dammed, diverted, and otherwise controlled so that its maximum flow is one-fourth of that in 1877 and its level is lower. This has made additional lands available for cultivation and development.

The normal procedure for omitted lands in land law is that if additional land created by a change in the meander line of a river is approximately less than 50 percent of the total plot of land

originally surveyed and obtained, this additional land is recognized as the property of the owner.

In this case, the Senate received testimony that the additions brought about by the change in course of the Snake River have certainly been less than 50 percent, and are usually not more than 20 percent. The normal procedure would not involve a challenge to ownership of this land. But the Federal Government chooses to challenge this ownership.

Immediately following the Government's resurvey of the lands along the Snake River, remedy was sought in Congress with a bill that permitted individuals to buy the lands in question at a fair market value, less the value of any improvements, with preference to those holding title to the land in question. This bill was passed by Congress and became law as the Omitted Lands Act of May 31, 1962.

Unfortunately, it has not provided the remedy that it purported to offer. Only a few individuals have had the money necessary to buy their lands again, and the BLM's cost of administering these sales has far exceeded the returns to the Federal Government.

The current owners of the contested land often are retired individuals living on fixed incomes which do not give them the latitude to allow them to repurchase land which they or their ancestors had already purchased. In equity, they do not believe that they should have to pay again for land which they have already paid for.

Senator Jordan and I have introduced in the Senate S. 216, a general bill designed to waive the doctrine of sovereign immunity which currently prevents individuals from bringing suit against the Federal Government in cases of disputed land claims.

We did this, Mr. Chairman, because we believe and the attorneys, one of whom, Mr. Eberle, is here today, also believe that the titles of the individual citizens are sound and valid and will be upheld by courts of law. But up until now, there is no way to get into a court to contest the Government's claim.

Subject to time limitations on claims, this bill provides relief to all claimants.

Following a Senate Interior Committee hearing on September 30, 1971, at which representatives of the Departments of Interior and Justice testified, an amended bill was developed and reported favorably to the Senate by the committee. On December 11, 1971, this bill was passed.

The Quiet Title Bill, S. 216, as passed, provides relief in the following form:

(1) Any civil action to quiet title to real property in which an interest is claimed by the United States shall be brought in the district court of the district in which the property is located.

(2) The United States may be named as a defendant in a civil action to quiet title to an interest in real property in which an adverse interest to the plaintiff is claimed by the United States. This section does not apply to Indian or aboriginal lands.

(3) The United States can disclaim all interest in the real property at any time prior to the actual commencement of the trial, which disclaimer is confirmed by decree of the court, then the jurisdiction of the court shall cease.

(4) A civil action against the United States under this section shall be tried by the court without jury.

(5) The United States retains the right to condemn and purchase any real property found by the court to belong to an individual rather than to the Government.

(6) Any civil action under this section shall be barred unless the action is begun within 6 years after the claim for relief first accrues or within 2 years after the effective date of this act.

Mr. Chairman, it is this last section to which some objection and questions have been raised. I want to address myself particularly to this last section of the bill.

In other words, with this act, the United States abandons the doctrine of sovereign immunity on disputed land claims, allowing itself to be sued in district court. This makes it possible for the individual with a disputed land title to remove any cloud of doubt concerning title to his property, as he is able to do in every other case except where this privilege of sovereign immunity is involved.

I would prefer to have this matter settled by administrative action that would require the Federal Government to file disclaimers on the Snake River omitted lands claims without the necessity of the individual bringing suit against the Government.

The cost of obtaining legal counsel in many of these cases is an unwelcome burden on the owners. However, the Bureau of Land Management has not seen fit to approve a formula that would grant this relief.

So this bill, S. 216, permits an individual to bring suit against the Government in the district court to quiet title to disputed land claims.

A number of questions have arisen since the passage of S. 216 concerning new section 2409a, real property quiet title actions, subsection (f), which states that:

Any civil action under this section shall be barred unless the action is begun within 6 years after the claim for relief first accrues or within 2 years after the effective date of this Act, whichever is later. The claim for relief shall be deemed to have accrued upon actual knowledge of the claim of the United States.

It has been pointed out that the wording of this subsection opens the Government up to litigation of land claims that run back to the first years of our history. Spanish land claims, land claims in the old Northwest Territory in Ohio, and other similar highly controversial and ancient land claims would be open to litigation under some interpretations of the Senate-passed language.

I think this is an extravagant fear but, nevertheless, I think it is fair to say that it was not the intent of the Senate to burden the Department of Justice or other Federal Departments with litigation running back to the earliest years of our history.

We seek rather to provide a means of redress for legitimate land claims that have arisen in the recent past and that will arise in the future.

In looking at the last decade, the initiation of resurveys to identify omitted lands begun by the Department of the Interior and the Department of Agriculture's Forest Service in 1962 marks a watershed in accrual of land claims that would be useful to use as a basemark for this general relief legislation.

Language that provides relief for those claims or potential claims arising from that date forward would seem to fit the requirements of general legislation without placing an undue burden of litigation upon the Government. I would hope that the committee could arrive at substitute language for subsection (f) that would cover that principle.

I have no objections to giving the Federal Government a reasonable statute of limitations on any claims arising subsequent to the passage of this act, in line with the theory involved in normal practice.

I should also point out that the draft bill submitted by the Department of Justice at hearings before the Senate Interior Committee also contained a section purportedly making this bill solely prospective. This section, section 4, stated that "this act shall not apply to any claim or right of action which accrued prior to the date of its enactment."

Since this language would have eliminated all claims for relief or potential claims for relief following the 1962 survey initiated by the Federal Government, it was eliminated in the language passed by the Senate.

Rather than make S. 216 prospective only, I would hope that the language recommended by the House Judiciary Subcommittee would be retroactive for at least 12 years so that the many claims arising in the case of omitted lands following the 1962 resurvey would be covered.

I would also like to emphasize that although this bill originated as a measure of relief for constituents of mine on the Snake River, it has emerged as a more general legislative measure that meets the needs of all individuals seeking relief in the courts for questionable land claims. As such, this bill meets a need recognized by the Public Land Law Review Commission in its report.

As I envision this legislation, it primarily provides prospective relief but does not exclude a significant body of claimants with cases that have arisen since the 1962 resurvey aimed at the identification of omitted lands. As such, this bill will also relieve the Federal Government of the burden of litigating individually each claim arising from the resurvey initiated in 1962.

I say that, Mr. Chairman, because in questions I have raised with the Justice Department, I am told that individual landowners could combine together and bring one action and thus the cost to each could be reduced.

A further question arose concerning the possibility of combining a number of claims in one action to reduce the cost to the individual owners with clouded titles.

I have already covered that, I won't read it again.

Ten years have elapsed since the Federal resurvey of land along the Snake River clouded the titles of individuals owning lands in that area. This has caused hardship, has delayed the normal land transactions which would have occurred, and has placed a financial burden on many individuals for no fault of their own. I urge the committee to act promptly to give these individuals, as well as the many individuals who will be involved in future land claims an appropriate channel of relief. Access to the Federal district courts for adjudication of these land claims will accomplish this purpose.

I thank the chairman very much for this opportunity to present this statement and would conclude simply by saying that the doctrine of sovereign immunity may have had an appropriate place in the common law of England where the sovereign rights of the Crown were concerned but I think it has no appropriate place in our law. Our courts are set up to provide remedies for the citizens of the country and the Government ought not to be immune from that process.

I think this would be a great step forward in the land law of the country.

Mr. DONOHUE. In other words, Senator, if this bill was acted upon favorably as outlined in your bill, or in these other bills, you would confer jurisdiction on the Federal courts to hear the claimants?

Senator CHURCH. Yes.

Mr. DONOHUE. What defenses—what would be the position of the claimants, that they acquired title by adverse possession?

Senator CHURCH. No; in this case—the bill has general applicability. In this case the claimants maintain that the original title they received from the Government, based upon the original survey is the valid title and, indeed, the original survey is the accurate survey rather than the one later.

Furthermore, the substantive law, whatever protection, whatever defense the substantive law gives to the Federal Government would still be available and this bill would not affect the right of the Federal Government with respect to adverse possession.

In other words, the Federal Government is now immune from claims of adverse possession, this would not affect the substantive law but would remove the right of the Government to claim sovereign immunity to being sued.

Mr. DONOHUE. In other words, the same defenses would be available to the Government that are available now to private individuals?

Senator CHURCH. Right, and the substantive position of the Government would not be affected but procedurally, for the first time, the citizen would have a right to come into court and say to the court, "I think my claim under the law is valid and the Government's is not and I ask the court to provide relief on the basis of the substantive law."

I do want to emphasize, Mr. Chairman, once again, that the principle quarrel I have with the Justice Department's bill—I commend the Justice Department at this time because, after many years, the Justice Department has seen the need to make this change. They drafted a bill and we incorporated most of it in S. 216, but the Justice Department's bill is prospective only, it says any existing claims don't come within the purview of the bill. It refers only to future claims and that would not provide any measure of relief to people who, I think, have been unfairly dealt with. I think they have a right to complain when they owned the land or thought they owned it under title and paid taxes on it.

Then many years later they were told on the basis of a new survey, the Government told them they didn't have right title to the land. The only right we have given them is the right to buy the

land a second time on the basis of present values and that is hardly a remedy.

This bill would give them the right to have the validity of their title determined by the courts.

Mr. DONOHUE. In the survey the Department conducted back in 1877; would they have, under that survey, acquired title to this land?

Senator CHURCH. Yes; it is my understanding that this was the basis on which they had originally acquired title and the basis on which, under the normal doctrine of accretion, thought they held the land that adjoined between their lots and the river.

Your see the river is a different river today than in 1877. Then it was a wild river and the flow fluctuated greatly and the meander line was greatly different in 1877 than at the time of the Government's new survey. Because of the dams that had been built, because of reclamation, the river has been controlled and the meander line is quite different.

The Government concluded the original survey had been in error but it is our position the survey originally made was accurate.

Mr. DONOHUE. Under the original survey and the river uncontrolled, would the owners be apt to lose control of some lands with the change in the flow as well as to gain?

Senator CHURCH. Yes; that was the risk they faced. But as it happened the river was brought under control and by the doctrine of accretion this land fell into their possession.

The details of the case can be presented by Mr. Eberle, the attorney for some of these landowners. He is very familiar with the details and could fill you in on that aspect but the basic issue, as I understand it, is whether or not the Government is right in contending that the original survey was in error.

If the Government is wrong and the facts show against it, then it follows that the Government has no claim to any portion of this property under the substantive law. But they can't get into court, Mr. Chairman, and that is where this bill deals simply with that procedural bar.

Mr. DONOHUE. On page 5 of your statement, referring to section 6 again, which reads as follows:

Any civil action under this section shall be barred unless the action is begun within 6 years after the claim for relief first accrues or within 2 years after the effective date of this act.

Do I understand that the claims that would come under the bill, particularly under this section, would only be those claims that arose as a result of the survey made by the Department in 1962, was it?

Senator CHURCH. As far as these particular owners are concerned, Mr. Chairman, that would be the case that they would bring. It would have to do with the validity of the latter survey against the earlier survey. But once we got into this, we felt that we ought not to design a bill that merely undertook to give some remedy to these particular owners, that we ought to face up to the fact that the doctrine of sovereign immunity should not be a device that the Government can use to prevent people from going into court when they have a cloud on their title and they need to have it resolved.

The Congress wisely, in years past, eliminated the doctrine of sovereign immunity in tort claims. The Congress wisely, in the past, eliminated sovereign immunity in contract cases. All this bill seeks to do is follow that pattern and eliminate that right of sovereign immunity where a clear title action is sought and the Government claim to real property which is disputed by the individual holder.

This particular section, Mr. Chairman, does not satisfactorily do that. I hate to come here as a Member of the Senate and confess that we drafted that section rather badly, but I think we did. On reflection this doesn't give the bill the scope we intended. What it says is that claimants must come within 2 years after the effective date of the act or within 6 years after the claim is first accrued.

Mr. DONOHUE. That confuses me.

Senator CHURCH. That cuts is off. What it does, it only gives people 2 years and then the bill has no further effect and the Government is back claiming sovereign immunity.

We think the bill should eliminate the right to claim sovereign immunity so in the future any citizen can go into court and have the court determine his title to disputed land.

We would hope that we not only say citizens may do this in the future but we will go back at least far enough into the past to allow these particular problems that have arisen by virtue of the Government's own resurveys to be determined.

That would not open the Government up to claims that go back to our early history but it would provide a measure of relief to these people affected by these recent surveys of the Government and provide permanent relief for people in the future.

Mr. DONOHUE. In other words, the passage of this bill would give them relief?

Senator CHURCH. It would give them access to the court.

Mr. SMITH. Excuse me, Mr. Chairman, would you yield?

Mr. DONOHUE. Yes.

Mr. SMITH. As I understand, Senator, we need some modification of that statute of limitations in order that we might take in the people for whom you speak plus the future?

Senator CHURCH. Yes; that is the change I hoped this committee would make in that language of the bill.

Mr. DONOHUE. Having in mind that passage of this bill would grant relief, this section reads that a person would have 6 years within which to bring his action.

Then we come to the last two lines: "or within 2 years after the effective date of this act."

You have 6 years and you have 2 years, which would govern?

Senator CHURCH. According to the language, it says whichever is later would govern, but, as I say, I think the whole section is defective. I think it needs to be rewritten so that anyone in the future could bring an action.

I have no objection to a reasonable statute of limitation, you might provide within 6 years, or whatever is a suitable time, the time that the cause accrues, he has to bring the case. But at least in the future anyone who has or is faced with this problem would have access to the courts.

Then I think we need to reach back at least 12 years into the past in order to accommodate the citizens victimized by these new Government surveys and let the court pass on the question of title in those particular cases.

Mr. DONOHUE. Have these landowners involved been notified by the Government already that they are occupying land that the United States has an interest in?

Senator CHURCH. Yes, they not only have been notified but they have been told that they will be dispossessed of this land. The only remedy they have was passed in the Congress some years ago, that simply gives them the right to buy the land the second time, at present value.

Mr. DONOHUE. That is subsequent to 1961?

Senator CHURCH. Yes.

Mr. DONOHUE. During the past 10 or 11 years, have any of these landowners purchased, and to what extent, or what degree?

Senator CHURCH. A few have purchased, thinking that they had no other alternative.

Mr. SMITH. Excuse me, Senator, they didn't have any alternative and don't today?

Senator CHURCH. That is right. On that basis a few purchased. The rest have resisted because they think it is unjust and because many haven't the means to buy the land again.

So, that is the present situation. The irony is that this bill which was passed originally giving them the right, the first option to purchase the lands claimed by the Government has cost the Government more to administer than the total amount of revenue that has accrued to the Government from those landowners who have opted to purchase.

Mr. DONOHUE. Tell me this, Senator—

Senator CHURCH. Congressman Hansen reminded me under that bill they don't have the absolute right to choose, either. The option is left with the Government. The Government can permit them to purchase and in many cases it has not chosen.

Mr. DONOHUE. Tell me, if this bill were passed, would it entitle those that did purchase the land subsequent to 1961 to reimbursement?

Senator CHURCH. This bill would not, Mr. Chairman. We have a bill we introduced that would do that as a specific remedy. Frankly, we have received no administration support and without that support, we are fearful that even if the bill were passed it would be vetoed.

So, instead we have placed our reliance on this approach. It will reach most of the owners. It will not provide for a return of money for those that have opted under the present law.

Mr. DONOHUE. Now, this bill that was passed previously giving them the option to purchase, who introduced that bill?

Senator CHURCH. That was introduced by Congressman Harding, as I recall, and I sponsored it on the Senate side. At the time it was all we could get.

Mr. DONOHUE. Was that at the urging of these people involved?

Senator CHURCH. Yes: they urged us to do something and we found in dealing with the executive agencies the only bill we were

likely to secure the approval of in the Congress and get signed downtown was this bill.

As it turned out it provided no measure of remedy at all.

Mr. DONOHUE. How many other areas will be involved or affected if this bill were to be passed in other sections of the country, say?

Senator CHURCH. This bill would have general applicability and it would go only to the question of procedure. But if the bill were modified as I have suggested and I hope this committee will change it in that way, then it would remove the right of the Government to claim sovereign immunity in the future on cases involving disputed land titles and give the citizen the right to bring a clear title action in the court.

The substantive law would remain the same but procedurally any citizen finding he had property where the Government disputed title, the courts would have a right to decide that question.

Mr. DONOHUE. Has the Department given you any idea of what other areas of the country would be involved other than those 500 owners along certain stations of the Snake River?

Senator CHURCH. I would think, Mr. Chairman, that most of those who would be affected by this bill would be western land owners in the public land States. A number of these resurveys have been undertaken and I think problems of this kind have arisen in connection with each.

Mr. DONOHUE. Has the Department given you any idea?

Senator CHURCH. I do not have the figure and I don't know that the Department has made an estimate, at least I don't have the figure.

In Idaho there would be about 500 landowners who are affected.

Mr. DONOHUE. Is it your opinion that those 500 would join in one action against—

Senator CHURCH. I think there will be a grouping, it may not be 500, I think there would be a grouping of landowners, appropriate grouping. Just a few cases are likely to settle the whole issue.

Mr. DONOHUE. Any questions?

Mr. SMITH. Yes, Mr. Chairman.

I want to compliment the Senator from Idaho for a fine statement.

In the additional lands the U.S. claims, is there generally, do you feel, Senator, a need by the United States for additional lands for any purpose, or any cases is there a need by the United States?

Senator CHURCH. Well, in my State two-thirds of the land is already owned by the United States.

Mr. SMITH. I meant these omitted lands.

Senator CHURCH. No.

Mr. SMITH. The Government might feel it needs it to maintain dams or channels.

Senator CHURCH. I have looked at the lands and Congressman Hansen is familiar with them. I am at a loss to know why the Government is insisting upon reclaiming these lands. Why they have not simply opted to permit all purchasers under the old law who were willing and had the money to do so, to buy back the Government claim. It is hard for me to see what public use most of this land has.

It is connected with farms that have been farmed in the past, in many cases it has been fenced and developed. It has only utility in connection with the farm operation. It is not needed for public access to the river. We have other adequate access to the river and other ways of obtaining access through the Fish and Game Commission and other programs set up for that purpose.

No matter how you look at the equity, the citizens are right. All I want is to get them into court so the Federal court can decide whether or not they have the right to this land or if the Federal Government does.

Mr. SMITH. You mentioned buying the land for the second time under the legislation now in force and I suppose you mean by that to the extent these people are not original owners or descendant owners, they bought from the immediate grantor and the United States claimed the immediate grantor didn't own it?

Senator CHURCH. Yes; later. But at the time there was no reason for any to suspect the lands they were buying there the title wasn't good. It was only 50 years later, more than that, that a new survey established the Federal Government's claim.

Mr. SMITH. I don't quite understand the details of that but I will ask Mr. Eberle when he testifies.

Senator CHURCH. Yes; he will be able to give you the factual information. He is very familiar with all these details.

Mr. DONOHUE. Tell me this, Senator, who has control or jurisdiction over the Snake River?

Senator CHURCH. Well, the title—the Snake River as a navigable river is under the jurisdiction of the Federal Government insofar as—

Mr. DONOHUE. It is navigable for a distance?

Senator CHURCH. Yes; it would come within the definition of a navigable river. On the other hand, the State owns the river bottom under the original enabling act that brought Idaho into the Union. There is a confusion of ownership with respect to the river.

Mr. DONOHUE. I was wondering under the Idaho law, does the owners, the abutting owners to the river, own land to the middle of the stream?

Senator CHURCH. No; to the meander line, I believe. The State owns the riverbed itself.

This question pertains to which is the right meander line, the original survey or whether the later survey was right. So the question of the ownership of the river or riverbed does not come into the case.

Mr. DONOHUE. Could you tell the committee what the law of Idaho is with reference to riparian rights?

Senator CHURCH. I would like Mr. Eberle to answer that question; I am sure he could give you an accurate answer.

It has been a long time since I studied the laws of the water rights; generally they permit the riparian rights. The rights depend on the time of the diversion. With the first diversion, they have a subsequent right to the use of the water.

Mr. DONOHUE. Any further questions?

Mr. SMITH. Yes; one more, Mr. Chairman.

Senator, you stated:

In looking at the last decade the initiation of resurveys to identify omitted lands begun by the Department of the Interior and the Department of Agriculture's Forest Service in 1962 marks a watershed in accrual of land claims.

Was this a national policy of those agencies?

Senator CHURCH. Yes; and it has created all this difficulty.

Mr. SMITH. So, under that national policy there might be other omitted lands besides this on the Snake River in other States?

Senator CHURCH. Yes.

Mr. SMITH. It is for this reason of a national policy being adopted at that time that you have fixed that as a reasonable date to go back to?

Senator CHURCH. Yes.

Mr. SMITH. Without subjecting the United States to claims from as far back as the Spanish land grant?

Senator CHURCH. Right. And I think it is a reasonable benchmark from which this relief could stem. Also, we have an opportunity to look to the future and provide a remedy for citizens finding themselves in this situation in the future.

Mr. SMITH. Thank you, sir.

Mr. DONOHUE. I, too, Senator, want to thank you very much for permitting us to have the benefit of your views.

Senator CHURCH. Thank you, Mr. Chairman.

Mr. DONOHUE. It was a fine statement, I appreciate it.

[Letter addressed to Senator Church follows:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., December 30, 1971.

Hon. FRANK CHURCH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CHURCH: This letter is in reply to the questions you asked the Director of the Bureau of Land Management on Friday, December 17, and our reply assumes the enactment of S. 216, 92nd Cong., 1st Sess., in the form passed by the Senate on December 11, 1971. Generally the Department is without authority to settle land title disputes in favor of private persons except within the framework of pending litigation involving the parcel of land in question. The addition of 28 U.S.C. § 2409a(d) that would be made by section 4(a) of S. 216 would not change this, inasmuch as the disclaimer by the United States must be confirmed by court decree. Consequently, under S. 216 there can be no settlement of the land title disputes except by court proceeding. If the facts pertaining to the parcels of land along the Snake River in Idaho are sufficiently similar, then the claimants could bring one action that would involve all of those parcels; separate actions would not be necessary. We know of no provision to lessen the cost of such litigation other than the joining together of all affected land claimants; however, such joinder should spread the costs sufficiently broadly so that they will not be unduly burdensome on any one claimant.

The Department does not now have any authority to issue a quit claim deed, even pursuant to court judgment. A judgment against the United States quieting title to land in favor of a private person, however, is a recordable instrument and as such would be just as effective as a quit claim deed.

We hope the foregoing subsequently answers the questions you asked.

Sincerely yours,

RAYMOND C. COULTER,
Acting Solicitor.

Mr. DONOHUE. We will now hear from our colleague, Congressman Orval Hansen.

**TESTIMONY OF HON. ORVAL HANSEN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF IDAHO**

Mr. HANSEN. Mr. Chairman and distinguished members of the subcommittee, let me first of all express my sincere personal appreciation for your scheduling hearings on this legislation.

If I might, I will submit a statement for the record that I will not read. I can add little to the very clear and I think compelling statement that was made by Senator Frank Church.

I would like to add one or two comments on some of the questions that were raised during the course of the discussion to highlight some of what I consider to be the key issues.

First of all, I should point out that the great bulk of these claims do lie within the Snake River, within my district. Since I have come to Congress and some years before I came to Congress, as a practicing lawyer in the area, I had been painfully aware of the great hardship that this resurvey has caused to so many landowners along the river.

In addition to requiring many of these landowners, under the Omitted Lands Act, to buy their land twice, in effect, as the Senator pointed out, resulting in an economic hardship, I think, in many cases; the hardship resulting from the uncertainty of titles to land has been much more severe, the fact that you couldn't sell it, couldn't mortgage it—there was just this cloud on the title that people could not come into court and get removed that has caused great difficulty.

I have also had the opportunity to visit a number of the landowners along the river, and while there are a number of farmers who live along the river and have some of these omitted lands included within their farms, there are a great many owners of small parcels of land, very modest residences, lived in largely by widows, by older people, who are trying to get by on social security—you can imagine the frightening experience that they have when they are served with a notice that the Federal Government is claiming the land on which they have lived for many years and improved and paid taxes. When you have the whole of the might of the Federal Government arrayed against you, it is a frightening experience; and that has happened to many, many people who live in some of the small communities that lie along the Snake River.

As the Senator pointed out, and I have attached to my statement more detailed evidence, the Omitted Lands Act has not only not been a remedy in most of these cases, but has resulted in considerable expense to the Federal Government and that is to the taxpayers of the country. Up until the end of 1970, which covers most of these transactions, the cost to the Government has been about \$13 for every dollar of revenue realized from the sale of land under the Omitted Lands Act; and as Senator Church also pointed out, it is purely a matter of discretion with the Federal Government whether they will offer to the landowner that land for purchase. In many cases, the Federal Government has taken the position this could be used for fishing, game, or some municipal purpose, and has not given the owners the option even of buying the land which they claim.

Mr. DONOHUE. Let me interrupt you. Can you tell the subcommittee why it cost the Government so much—you say, \$13, you get \$1

back? Why should it cost the Government 13 times as much as the value of the land—to convey the title from the Government to—

Mr. HANSEN. The specific breakdown is attached to my statement, which will be part of the record, but a lot of it is just the cost of survey.

Mr. DONOHUE. That has been done, hasn't it? That was done back in 1962?

Mr. HANSEN. These are a part of the costs. These are part of the costs of the administration of the Omitted Lands Act, the surveying and all of the making of the claims, the communication, the litigation that has resulted.

Mr. SMITH. If the Chairman will yield—I would suspect, when you say, here, surveying for additional costs, that would be individual surveys for that one owner that your are dealing with?

Mr. HANSEN. Right, on a specific parcel of land as distinguished from the overall research.

Mr. SMITH. But, I would assume, if this bill or another one like it goes through, it would then cost 13 times, without any recompension?

Mr. HANSEN. There is going to be some expense in any event which of the several remedies that are proposed might be adopted. The point of submitting those figures is that the taxpayers have not really benefited from the administration of the Omitted Lands Act and obviously the landowners have not.

Mr. DONOHUE. In your statement, you mentioned the litigation. Up until now there hasn't been any litigation has there, because the owners of, or the alleged owners of the omitted lands have no rights?

Mr. HANSEN. Unless the Federal Government goes into court.

Mr. DONOHUE. Up until now, neither side has gone into court, has it?

Mr. HANSEN. In some cases, there have been court actions, yes, sir. I think Mr. Eberle can give you more details of the litigation. In a few cases, they have gone to court. The Government has to initiate that action.

Mr. SMITH. Is this an action to dispossess?

Mr. HANSEN. I think that is the nature of the action but in those few instances—

Mr. DONOHUE. What has been the outcome of whatever litigation there has been?

Mr. HANSEN. I think some of it is still pending. I think much of it, if not all or it, is still pending.

Mr. DONOHUE. Have any of the cases been decided?

Mr. HANSEN. I am not aware that any have gone to a final decision.

Mr. DONOHUE. All right. Proceed.

Mr. HANSEN. The basis of the claims that would cover the great majority of those who are effected, is that the original survey was, in fact, correct, and again the figures that will be furnished to you and alluded to by Senator Church, will show that during the period of the original survey, the average monthly flow of the Snake River was something on the order of 40,000 c.f.s. That is now about 12,000 c.f.s. because of the irrigation dams, diversion and channeling that has developed along the river to the meander line was a consider-

able distance, in many cases, from the present meander line, so it is purely a matter of requesting the opportunity to come to court to make a legal claim for what these landowners believe they would be entitled to under the applicable principles of the law.

Mr. DONOHUE. If you would permit me to interrupt you again. Since the survey back in 1877, has the course of the Snake River changed?

Mr. HANSEN. Let me say the meander line has changed in many places rather considerably in some parts of the—

Mr. DONOHUE. And that would result from a change in the flow—I mean, a change in the course of the river?

Mr. HANSEN. Not in the course of the river. The course has been substantially the same. You can take the center line and it is probably about the same place it was then but because of the much greater flow, at that time, some of the flatter areas of the meander line of the river extended out some considerable distance from what it is now.

Mr. DONOHUE. I have in mind the situation that arose in the Rio Grande when the course was changed and resulted in Shamesau claims with the Republic of Mexico, where we had to pay the Mexican Government a lot of money.

Mr. HANSEN. As I understand those cases, that would not apply in this instance. That is not to say, at a given point, there might not have been a slight change in the course of the river, as a result of a heavy flow cutting across a sand bar, for example, but that would not apply in the case of these claims. These claims relate, essentially, to where the banks of the river were, rather than where the course of the river was, so I don't think we would have that kind of a legal problem in the course of trying to adjudicate these claims.

Mr. DONOHUE. Well, what does the law of Idaho say, if you know, and I assume you do, with reference to riparian rights?

Mr. HANSEN. In terms of accretion, the abutting landowner would become the owner of any land that the accretion results.

Mr. DONOHUE. He might lose land?

Mr. HANSEN. He might lose land and this happens on both sides of the river as there is the slow changes in the boundaries of the river.

Mr. DONOHUE. Well, do you know if the United States recognizes the riparian rights of the people, say, in Idaho, in that respect?

Mr. HANSEN. It is my understanding that if the people could come to court to present their claims that the laws of the United States would recognize that right.

Mr. DONOHUE. And they, by virtue of that fact, become the rightful owners of the land?

Mr. HANSEN. That would be correct. If they can make their claim under the applicable laws, by getting into court, by some legislation such as this, then, in most of the cases, that is not to say all of them, but in most of the cases along the Snake River, we believe that the landowners, those who claim ownership, could make a valid claim and take title to those lands.

Mr. DONOHUE. Now, what is the basis for the United States claiming that they own this? I assume they owned it originally and deeded it to the State, and the State, in turn, or was it—

Mr. HANSEN. Well, based on the original survey, then, land was acquired largely by patent, I would expect that most of that along the Snake River was homestead, and they acquired a patent based on that survey, and when the Government comes in later and says, we were wrong, within the original survey, we claim the land in between that and where the meander line is, now—

Mr. DONOHUE. And was not included at the time that you homesteaded it?

Mr. HANSEN. That is right.

Mr. DONOHUE. You may proceed.

Mr. HANSEN. I will just make a brief comment on the bills before the committee. The one that comes the closest of those available to providing some kind of reasonable relief is Senate 216, or my own bill, which, as the chairman noted is identical, H.R. 12453, which would have some retroactive effect and would give those who now claim title to the lands they occupy, an opportunity to come to court to establish a legal title to that land. I would defer to the Senator who was instrumental in the drafting of the language under discussion a few moments ago, but I had somewhat of a different interpretation, and that is that the 2-year provision, as I interpret it, would cover all of those claims that have now accrued as a result, primarily, of the surveying done during the 1960's, so if you had some provision to that effect in the bill, then, anyone who has a claim that had accrued prior to the passage of that act, would have 2 years to come into court and make his claim. If that is not the effect of it, I would hope the committee will report a bill that has some application to those whose claims have accrued as the result of this resurvey by the Federal Government.

Mr. SMITH. Excuse me. As I understand it, one of the problems here is to try to get in your people and try to keep out people who go back to the Spanish land grant or 150 years, and therefore, if you put in a 6-year statute of limitations for prospective people, you have got to give your people, for instance, a chance to come in after the law becomes effective, but you have got to put some termination retroactive termination point beyond which we will not look at plaintiffs coming in. This is the problem of wording and I am inclined to feel that Senator Church's explanation of that was correct and I think we can work out proper wording. If it becomes properly equitable for this committee and the Congress to give it to your people, so I don't think this will be a particularly—I don't think it will hold us back, particularly. I think it is a technical matter that can be worked out.

Mr. HANSEN. I would hope that is so.

Mr. DONOHUE. Well, I have in mind this—a survey was made back in 1877, and then another survey was made in 1962. Now, between 1877 and 1962, people staked out these lands along the Snake River. Now, the Government came along in 1966 and said, you don't own this land, we made a mistake back in 1877. Now, that land has been handed down from owner to owner since 1877, and found itself in the hands of those that owned it in 1962—

Mr. SMITH. Or thought they did.

Mr. DONOHUE. Or thought they did. What about that chain of title going back to 1877?

Mr. SMITH. Mr. Chairman, I have the same question, but I have been waiting for Mr. Eberle who is the expert, in order to get the details.

Mr. DONOHUE. I would like to get that cleared up.

Mr. SMITH. There have been no answers here and I want to get those details, but I don't think Congressman Hansen is the one to answer this.

Mr. Hansen. I think Mr. Eberle is more qualified. Most of that, I think you will find, has been in the last 40 or 50 years, those changes of title stemming from a patent, but Mr. Eberle has had to live with many of the problems resulting from the resurvey for many years, and I think he is well qualified to discuss with you many of the details. The principal point I want to make is if there is justification for passing some legislation, recognizing the basic equity, fairness of giving an individual landowner the basic right to come into court and present his claim, it seems to me those same principles of justice say that the people that have been the victims of the decade ought to have that same right. I would be pretty bitter medicine to say to them we recognize the law ought to be changed but we are not going to give it any kind of retroactive effect so you will have the right to have the wrong done you remedied, so my plea to the subcommittee is to try to include in any legislation reported some kind of retroactive provisions. I would suggest, and I think—

Mr. SMITH. May I say I think we sympathize with your plea. Whenever the sovereign gives up immunity, somebody gets hurt. I hope it isn't going to be your people.

Mr. HANSEN. That is true, Mr. Smith, and I think perhaps there are some other ways that will be suggested in the course of the testimony wherein the legislation may be further limited as a matter of compromise. For example, the meander and boundary line disputes that come to my attention, and might very well cover most of the kinds of cases that might be anticipated to arise as a result of the passage of this legislation. There may be other kinds of language that can effectively limit the potential liability of the Federal Government at the same time assuring fairness and justice to the obvious cases that we now know about.

Mr. DONOHUE. Well, thank you very much, Congressman Hansen.

Mr. HANSEN. Thank you. If I might, I would like to leave with the committee, for the record, the statement of Congressman McClure, who was unable to be here.

Mr. DONOHUE. Do you have a statement of your own, also?

Mr. HANSEN. I have a statement of my own and also a statement of—

Mr. DONOHUE. Without objection, your statement and that of Congressman McClure will be made a part of the record.

[The documents referred to follow:]

STATEMENT OF HON. ORVAL HANSEN OF IDAHO

FEBRUARY 24, 1972.

Mr. Chairman and distinguished members of the subcommittee, I am grateful for this opportunity to present a statement in support of S. 216, and my companion House bill, H.R. 12453, co-sponsored by Jim McClure, which would permit the U.S.

Government, under certain circumstances, to be named a party in a civil action to quiet title to land claimed by the United States Government.

Though none of the bills before you today would go as far as is probably needed, passage of S. 216 and H.R. 12453 would be an important first step in implementing one of the recommendations of the Public Land Law Review Commission, which was that citizens should be permitted to bring quiet title actions in which the Government could be named as defendant.

As each of you is so well aware, such a bill is necessary because of the rule embodied in the defense of sovereign immunity, that the United States cannot be sued without its consent. Of obscure origin, and with no constitutional or statutory basis, it is my opinion that its rationale is no longer compelling, especially in a suit whose only purpose is to determine the validity of the Government's claim to title to real property. The doctrine of sovereign immunity has generally been applied across the board to prevent suits against the United States, except as Congress has authorized such suits. The major statutory ameliorative measures occurred with the passage of the Tucker Act in 1887, waiving sovereign immunity as to contracts, and the Federal Tort Claims Act in 1946, waiving it as to torts. In other areas, however, the doctrine continues to thrive.

As we are each aware, inequities have resulted to private citizens who lack recourse in obtaining a judicial resolution of title to lands which are claimed by the Federal Government. This is possibly especially true in the western part of the nation, where so much acreage is owned by the Federal Government. My primary interest in this proposal arises from the problem known as the "omitted lands controversy." Some such omitted lands are located in the Second District of Idaho adjacent to the Snake River and its main tributaries. These river properties were first surveyed by the United States Government in the 1870's and 1880's when the rivers were wild—with widely fluctuating courses. In the 1960's, the U.S. Government decided to recheck these lands for omitted properties along the river, as it was apparent in some places that the meander lines established some 100 years ago were now some distance from the actual water in the Snake River. The result has been to develop extreme uncertainty in land titles for many miles along the Snake River, thereby casting a cloud on the title to properties in the possession of private individuals. In nearly every instance, these private property owners had occupied the land in full belief of their ownership, many with a chain of title exceeding forty year. Because they were threatened with the loss of their property, Congress passed the "Omitted Lands Act" in 1962, which provided that under certain conditions they could repurchase their property at the current fair market value, minus the cost of improvements. This obviously was no true long-range solution, as the owners were obliged to, in effect, pay for their property twice.

The inequities are well documented, and in the course of these hearings the unfairness, the inconvenience, and the expense which must be borne by these property owners will be amply shown. To compound the inequities, is the fact that there is a lack of monetary benefit to the United States Government. This is demonstrated by the fact that the cost to the Government in applying the 1962 Act through the year 1970 has been in excess of \$790,800 whereas the total revenues from the sale of these lands to both the preference and the non-preference right claimants is \$60,500. These figures indicate that for every \$13 of expense to the Government, there has been revenue generated of about \$1. The details for these figures are documented in a letter which I received last year from the Bureau of Land Management, a copy of which I have attached to and would like to include as a part of my statement.

So, Mr. Chairman, who benefits from the application of the Act? Obviously, the Government has not benefited and these figures show that the losers are the taxpayers who are supposed to be protected in their interests by the passage and implementation of the original Act. Obviously, the people whose lands are affected have not benefited, as they have suffered not only monetarily, but more importantly they have suffered because of the uncertainty that accrues with having a title in suspension over a long period of time. The inability to obtain financing to make a sale, and the inability to take over actions with respect to the property are among the costs which should be considered by this Subcommittee.

Last year I had the opportunity to visit many of the affected landowners in St. Anthony, Idaho by going door to door with the Mayor of that city. This was an enlightening experience for anyone to go and talk with some of the widows on very limited incomes who were faced with the prospect of having to buy back their land, the only thing they own in many cases. In addition to the cost that is involved, is the anguish and uncertainty which I mentioned, the price of which cannot be equated in terms of dollars. Though in many of the cases, the landowner lacked the resources to engage in a legal contest with the Federal Government, I believe it

equally important to remember that they are, under present law, even precluded from attempting to do so. Surely this is unnecessarily compounding one grievous injustice on top of another.

Though this bill would not allow the citizens to equitably assert the theory of adverse possession against the Federal Government, which I believe citizens must eventually be allowed to do, passage of S. 216 is highly desirable to many victims of the omitted lands resurvey because of peculiar facts concerning the use by the Government of wrong survey standards; its failure to locate original mean high water marks; and no effort being made by the Government to locate where the actual 1877 mean high water mark was. I have seen sufficient evidence to indicate that once all of the facts are assembled, that three-quarters of the affected property owners will be able to prove their good title should they be permitted a day in court with the Federal Government.

In my study of this problem, I have noted that the Administration's position is that any such legislation be prospective in nature only, thereby denying any type of a "grandfather" clause. Though I can understand the Government's desire not to open a floodgate of litigation, I believe that it is simply not fair to exclude the accumulation of claims by the United States, which have accumulated for years. It is apparent that the majority of claims of potential claims have already accrued, as there is very little land left in the nation subject to disposition. Therefore, it would be reasonable to assume, as does the American Land Title Association, that the basis for any such claims has already occurred in 90 percent of the circumstances. So without a "grandfather" clause, I fear that any bill which the Committee approves would be, by and large, meaningless in 90 percent of the cases. It is therefore my hope that the Committee will be able to work out with the Administration, some acceptable compromise, whereby boundary or meander line disputes will have some type of "grandfather" clause such as, for example, two years.

Another advantage of compromise, limiting the "grandfather" clause to boundary line disputes and meander line land disputes, would be that it would go a long way toward obviating the Government's understandable reluctance to subject itself to such legal actions involving ownership of large tracts of land back to time immemorial.

Thank you again, Mr. Chairman, for extending to me the opportunity to appear before you.

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT,
Washington, D.C., April 5, 1971.

Hon. ORVAL HANSEN,
House of Representatives,
Washington, D.C.

DEAR MR. HANSEN: This is in further reply to your letter of February 1 requesting a report covering the activities taken by the Bureau of Land Management in implementing the Omitted Lands Act along the Snake River in Idaho.

Twenty-eight townships involving about 14,505.76 acres of omitted lands have been identified and surveyed. However, additional surveys may be required as a result of disputes which may arise. Twenty-five townships plats have been approved and a final determination has been made on 16 of the 25 plats as to the disposition of the land. Sixty-three separate title transactions have been processed and patents issued to the individuals involved.

A breakdown of the funds expended and moneys received is as follows:

Idaho Falls District Office	\$157,000
Idaho State and Land Office	52,000
Litigation Costs:	
Ruby Co. Inc.....	7,550
Burt A. Wackerli, et. al	4,000
Phillip P. Hoehn, et. al	2,000
St. Anthony.....	500
Survey Costs	567,750

A breakdown of the surveying costs is as follows:

<i>Year</i>	<i>Amount</i>
1957.....	\$26,400
1958.....	23,400
1959.....	23,400
1960.....	22,000
1961.....	26,000
Subtotal	121,200
Committed Land Act 1962 (year):	
1962.....	28,700
1963.....	26,000
1964.....	28,700
1965.....	20,700
1966.....	
1967.....	
1968.....	56,250
1969.....	35,600
1970.....	25,000
Subtotal	220,950
Total	342,150
Cadastral survey omitted lands, Office costs:	
1957 to 1966 (estimated).....	\$150,000
1967 to 1970.....	75,000
Total	225,600
The office cost includes drafting, note preparation, and related costs:	
Field costs	\$342,150
Office costs	225,600
Total survey costs	567,750
Total costs all activities	790,800

The following are amounts received from the disposal of lands to preference and nonpreference right claimants:

Amount received from preference right claimants.....	\$50,160
Amount received from nonpreference right claimants (public sale)	10,340
Total	60,500

Sincerely yours,

JOHN O. CROW,
Acting Director.

STATEMENT OF HON. JAMES A. McCLURE BEFORE SUBCOMMITTEE NO. 2 OF THE
HOUSE COMMITTEE OF THE JUDICIARY

FEBRUARY 24, 1972.

Chairman Donohue, and members of the Subcommittee, I am Congressman James A. McClure, representing the First Congressional District of Idaho. Before you today is a bill which I have co-sponsored, H.R. 12453. Its intent is to resolve for many hundreds of people the question of who owns the land they have occupied and cultivated for years.

Essentially, my bill will allow these people to bring the federal government into court to settle the disputes. This avenue has previously been pursued only with the blessings of the government itself—and then only rarely. In my own opinion, very simple, basic rights of the landowner have been violated, but we just don't happen to have a legal vehicle which will substantiate this claim. I hope to provide one.

The history of this problem will undoubtedly be spelled out to you many times today, and I will therefore be brief.

Original surveys of American territory date back into the 19th Century. Many have said that this early work itself is much to blame for our present situation. While this is true, let it suffice to say this morning that some of the work was indeed sloppy, but does not account for the bulk of the problems we must now resolve.

What has happened is that surveyors in the 1800's failed to account for the fact that rivers move—often and far. The description of a river at its flood stage would hardly be recognized a week later when the waters have receded. And this was especially true in the 1800's before the erection of networks of dams to harness and control these waters.

At that time, government surveyors failed to take into account the swollen conditions of rivers during certain seasons. A meander line was plotted and from these inaccurate statistics emerge a great many of our problems today. As floodwaters receded, acres of "omitted lands" began to dry out.

Another serious setback to the achievements of these early pioneer surveyors has been the tendency of rivers to change course. It is not unusual in Idaho, for instance, for the Snake River to dramatically alter its channel as much as three miles distant in a matter of a very few years. It is no coincidence then that landowners along the Snake were among the first to demand some discussion on omitted lands.

In this instance, the Department of the Interior has held that where there is a substantial amount of land between the original meander line and the actual edge of the river, the meander line will be treated as the boundary of the tract. The land between again falls under the classification of "omitted".

Today, all of these errors have come to rest as a burden primarily on the shoulders of small family farmers whose livelihood and welfare are met with limited resources. In many cases, the land has passed down to them from their ancestors. In many more, new parties have acquired the land in good faith of a clear title.

My files are full of letters to document these cases. While the details vary little, the frustrations these people are undergoing must be considered at a very personal level of conscience. As it becomes appropriate this morning, I will cite some of the details surrounding these cases.

One which I consider a typical example is the property owned by Mr. Wayne E. Tibbitts of Jefferson County, Idaho. He has told me that under an original survey, his parents purchased approximately 26 acres. Some time later, another survey was run, and Tibbitts himself purchased the property between his parents' farm and the Snake River. At that time, it was his understanding that he owned *all* the land between the farm and the river. Following a third federal survey around 1940, he learned that the government contended that he did *not*. The issue was unresolved for another 20 years. A fourth survey in the 1960's amended previous work and resulted in bringing even more of Tibbitts' land under question. The problem is still unresolved today after nearly 70 years and four surveys.

I can cite example after example that follow a similar pattern. In each case, the property owner has acted in good faith. In each case, I contend that the Federal government, too, originally intended clear title. But in each case, the government has come back years later and opened up doubts. Unfortunately, they have not also opened up feasible channels to resolve those doubts.

You cannot expect these people to quietly give up all rights to property they have owned and maintained in good faith for years. They have paid the taxes on this land. They have banded together to protect themselves from flood and natural disasters. They have made improvements on the land that often represent every cent they own in this world. And they feed their families off the fruits of this labor.

I cannot believe that this government will find those lands more useful, or even more profitable, than those people who have occupied their properties for decades. Indeed, our economy stands to lose much by removing these lands from the tax roles and by taking from these people their means to contribute to our gross national product.

Before I move to a more technical discussion of my bill, I want to outline briefly two more examples of the inequities of this public land dispute. We can speak in technical terms all day, but there is no better illustration than the experiences of a number of my constituents.

The first is an elderly lady in Boise who approached me a number of years ago for assistance in quieting title to her lands along the Boise River. I do not know her exact financial condition, but her story led me to believe that she had great need for the money which could result from the sale of this land.

She had experienced no difficulty in granting the State of Idaho right-of-way on a portion of her land in order to run a major highway alongside the property. Her difficulties arose when she tried to sell the remaining acreage to a private party but

was refused title insurance. While the government was exercising no claim against the property, they in turn refused to sign any documents quitting claim in the future.

Her lawyer took the matter into the Idaho Court system and won a favorable ruling on her claim to clear title. But since the Federal government was not a party to the suit, it not only rejected the findings of that Court, but also failed to recognize the probability of a legitimate claim. Authorization to properly survey the land was refused, and to this much, at least, I felt the woman was entitled.

To this day, she is left holding the bag. She has inherited a piece of property upon which she cannot afford to pay taxes and of which she cannot dispose.

In northern Idaho, we have much the opposite situation. Here, a corporation is seeking desperately to prove their right to retain property in which they invested years ago.

Original purchase of the land was made by a lumber company which subsequently failed to pay its taxes. The county took a tax deed. Later, the County Commissioners conveyed the land to the Federal government, although they lacked the authority to make the transfer.

Then, the original property owner sold to another company which exercised the right of redemption and claimed title to the property. It has held that property now for 50 years and paid the taxes, but suddenly the U.S. Forest Service is claiming the right to the timber stands. They are threatening, as a matter of fact, to cut the timber down, and the owner is powerless to stop them. It seems to me that the owner should have the right to bring the Forest Service before the District Court for a binding settlement of the argument.

The present law allows only one recourse in the Omitted Lands Act of 1962. It says that these people under certain conditions may be allowed to purchase their lands at the present fair market value minus the cost of improvements. No one is entirely certain what those conditions might be, but it is perfectly clear that they are determined at the discretion of the Federal government. The law is entirely unsatisfactory.

What we have actually done, then, is force the landowner to buy his property twice. In practice, we have seen little progress under this law in efforts to clear up title disputes. My friends in Idaho report that the standard federal response is, in effect, "You may be allowed to buy this land sometime in the future at a yet-to-be-determined price". I ask you, gentlemen, whether you would be satisfied with such an arrangement. Does the government mean that maybe these men are *not* going to be allowed to retain their land. Will this decision be made next week? Or in the next century? Just what is the fair price to pay for a piece of land you have already owned for fifty years and put your life into? It is little wonder that these people are disillusioned.

I think it's interesting to note here that where landowners have been allowed to repurchase their lands, the administrative costs to the government have exceeded the revenues of the sale. It would seem to me that for this reason alone, the Federal government cannot afford not to give up their interests in these lands.

So before you today is a solution offered by the Idaho Congressional delegation to the owners of some 15,000 disputed acres in our State. If it seems to this Subcommittee that we are talking about a relatively few American citizens, do not be misled. Most of the present disputes are in my State, but I predict that you will soon be seeing more and more problems of omitted lands in other jurisdictions—particularly in the Western states where mere vastness of territory has defied accurate survey.

As I have pointed out before, the bill which I have co-sponsored holds out justice to some very disgruntled citizens. It allows them to take their government to court to settle disputed land titles. It is collective relief for people sharing a common problem who would otherwise be forced to seek legal help at an overwhelming expense—and most cannot afford to do so. Or rely on a flood of private relief bills—and most efforts in this direction so far have produced no results.

The Department of Justice has objection to my measure, and favors instead other proposals which you will consider today. While we differ in approach on this problem, it has been my happy experience that all parties involved in this truly desire to reach an equitable solution. I have complete confidence that this Subcommittee will hit upon that solution.

During hearings before the Senate Subcommittee on Public Lands, the Department of Justice raised issue with S. 216, objecting to the lack of provisions to make it clear that the bill will not waive sovereign immunity to suits based upon adverse possession. In addition, they expressed a desire for safeguards against involving lands held in trust for Indians and Indian restricted lands.

I agree, and my measure reflects these concerns. In addition, questions of water rights, national security, and tax payments are also treated.

A basic difference, then, in these proposals is the discretionary option to return claimant's property. Under the proposal of the Justice Department, the United States may exercise discretion and choose to financially compensate for property rather than return it to the landowner. Under my bill, claimant retains his property, and the government has the option of starting condemnation proceedings if it so desires.

I must object to any efforts to retain federal discretionary powers. Gentlemen, that is exactly what you have under existing law. The government *already* has the right to take these properties—we do not dispute the lack of clear private title. The Department of Justice is merely proposing that where the District Court rules in favor of the private citizens preference right, the Federal government may choose to turn over money rather than property.

These people don't want compensation. They want their land. They want what has already been theirs for some fifty years. If they can prove in court that they have rightfully occupied and worked that land all these years, then they must also be allowed to retain the discretionary power to sell that land. We must not be guilty of allowing a federal land grab.

Mr. DONOHUE. We will now hear from Mr. Eberle. Do you have a written statement?

Mr. EBERLE. Yes, and I have delivered it to your counsel and it is available, I believe, up there. If it pleases the committee, I will not read my statement. It is lengthy and most of it covers details that may or may not become important as we proceed, so I would like to merely state the general area and then perhaps answer some of the questions you have asked Senator Church and Congressman Hansen about.

Mr. DONOHUE. Do you want your statement made a part of the record?

Mr. EBERLE. Yes.

Mr. DONOHUE. Without objection, it will be made part of the record and you may summarize that for us, if you will.

[The document referred to follows:]

STATEMENT OF T. H. EBERLE IN SUPPORT OF S. 216 AND H.R. 12453

This written testimony is submitted to the Judiciary Committee of the United States House of Representatives in support of the above legislation, which in effect provide for the waiver of sovereign immunity of the United States for actions to quiet title in disputes with the United States to land. My name is T. H. Eberle and I am an attorney engaged in the general practice of law in Boise, Idaho, duly admitted to practice before the Supreme Court of the State of Idaho and the Supreme Court of the United States. I appear on behalf of numerous owners and mortgagees of land along the Snake River and its major tributaries. I am also counsel in an omitted land case before the Federal District Court in Idaho.

GENERAL SUMMARY OF TESTIMONY

I would first outline my testimony. The details will follow.

A. *Injustices needing a remedy.*—The injustices relate to issues involving boundary lines between private and government lands, meander lines along water courses relating to omitted lands, and lands long occupied by private citizens under a cloud of government claim. We do not urge legislation generally allowing quiet title actions as to the chain of title as between the government and a private party, nor as to the right of the private person to adversely possess public lands. Our experience in Idaho has been that the administrative factfinding function, not reviewable by court on appeal, has been inaccurate and unfair, primarily relating to the question of meandered water courses and determinations of what omitted lands are. On the flimsiest facts the government is upsetting the settled principle of law that a government survey is presumed to be accurate until it is proven inaccurate, and the government, primarily the Department of the Interior, is steadfastly refusing to even concede the accuracy of its own printed reports of the early years as to many of the facts which it now seeks to ignore. In the omitted land area the Department of the Interior is holding lands lying between the original survey meander line along the Snake River to have been omitted in the original survey. The findings of

fact arrogantly assert that the river today is where it should have been surveyed 90 years ago, despite the fact that the river now carries only one-fourth of the water that it originally did.

B. Possible alternate to the proposed bill.— We recognize that the legislation we support is opposed by the Justice Department because it allows a 2 year period for existing claims to be sued upon, contrary to the Justice Department's desire of no retroactivity. We must concede to the Justice Department's claim that this grandfather clause is too broad. For the statute of limitations section of this bill we would be amenable to a change that would limit such retroactive application to matters of boundary lines, meander lines and omitted lands, and patented lands where the private citizen has been in possession despite some cloud of government interest. We would thus exclude general questions of chain of title. We have attached as Exhibit "A" a proposed new section (f) for the bill. Nevertheless, we must state that since the government began its resurvey efforts in Idaho about 1960, there are numerous instances of boundary line and omitted land problems which in all justice should be properly made available for quiet title actions, which do not involve either adverse possession or basic questions of chain of title.

C. The Snake River problem.—Some 1,500 miles of the Snake River and its major tributaries in Idaho are outside of National Forests and inaccessible canyons, and are subject to resurvey, part of which is being done today. Numerous tracts of allegedly "omitted lands" still belonging to the government are being originated on the basis that the 1870-80 survey was grossly in error. Lands between the meander lines and the present river are claimed to be omitted, on the basis that the water line of the present river must be where it was 90 years ago. The Snake River proper has had its flow reduced by flood storage and irrigation dams, diversion and irrigation from its original wild river state with flows as high as a daily 76,000 c.f.s. with an average monthly flow of over 40,000 c.f.s. to a present 12,000 c.f.s. See Exhibit "B". Despite the reduction to one-quarter of its previous size, the Department of Interior has found that the river must have been in 1877 where it is today. Homesteaders who thought they were taking to the river by patents of fractional lots are now told they don't own the land next to the river, and that it is available for highways, hunting, fishing and in many cases cannot be repurchased by the person who has long improved it.

D. Errors made in determining omitted lands.—Not only has the government ignored this question of where the river was in 1877, but it has also ignored the following:

(1) The original surveys have not been shown to be inaccurated. Under the instructions given at the time and on reconstruction of the actual surveys made, they have been shown to be in complete compliance with the directions to the surveyor at the time.

(2) Reconstruction of surveys by wrong standards. The original 1877 surveys were made under the 1871 Instruction to Surveyors General of Public Lands Manual which required a considerable less accuracy in surveying than the present 1947 Manual Surveying Instructions.

(3) No effort has been made to locate the original mean high water mark. This is discussed above.

(4) There is a refusal to recognize established principles of law in determining what is omitted land: The Department has changed the rule as to the amount of land that must be found to be located between a survey meander line and the river, reducing the amount they feel is necessary to show a fraudulent error to very minor amounts. See example in Idaho Falls, Idaho. In the Blackfoot area it is determined that the difference in the volume of the river between the 1880's and the 1965 resurvey period could have amounted to as much as 7 feet additional vertical height on the average, and as much as 12 feet occasionally, and this would have expanded the width of the river about a mile, much beyond the place the government now says the river was in 1877.

TEXT OF TESTIMONY

A. Injustices needing remedy

The primary example I will speak of here is the determination of where there is omitted land from a public survey, which determination then makes it available for gift to local government or purchase by the public. The Bureau of Land Management, Department of Interior, makes the determination and one may appeal in writing to the Secretary. The Secretary is refusing to give hearings because the facts of where the river is today are very clear, and it does appear there is a considerable amount of land between it and the old meander line in many cases.

Appeal to the court is sometimes made, but many land owners are not acquainted with procedures and have let their right of appeal lapse. They have no other remedy if a quiet title action isn't available. Even where an appeal has been made from the administrative proceeding, the federal court will not review the findings of fact made by the Secretary, which as we will note below are in most cases substantially inaccurate.

In essence, as to these omitted lands along the Snake River, and potentially along its major tributaries, the government is taking advantage of a fortuity, the drying up of a substantial riverbottom due to flood control and irrigation damming, and substantial withdrawal of water for irrigation. The Snake River has been converted from an extremely wild river fluctuating from the maximum day of some 76,000 c.f.s. with a monthly average of 40,000 c.f.s. in two flood periods of May and late July to a current monthly low of maybe only 10,000 c.f.s. and an average of not over 12,000 c.f.s. The lands do not fall in the category of omitted lands due to gross error in the original survey. The drying up of these lands occurred after Idaho became a state in 1890 and if they were riverbottom at the time of statehood, the federal government had no interest in them, the interest being in the state.

As will appear from the following testimony, there is no manner in which the boundary line of these lands and the amount of omitted lands can be litigated under the present circumstances. There are also problems relating to the location of forestry boundaries with private timber interests due to the inability to locate these and disputes do arise which should be settled in quiet title actions.

B. Possible alternate to the proposed bill

We are sympathetic through discussions with the Justice Department of the fact the present bill may include the right to bring action during the 2 year grandfather clause period that date back many years and involve many matters of great uncertainty. Therefore, we would suggest a revision in the bill as to the statute of limitation provision which would read as Exhibit "A" attached hereto.

The effect of this language is to eliminate the question of how one has knowledge of a "claim" of the United States by relating to the bar to sue to the actual occupancy of the government. It also seeks to limit the 2 year grandfather clause to matters that could not involve old and ancient title questions, by limiting them only to boundary lines between properties or along streams, resurveyed omitted lands, and titled lands which a private person has been occupying for not less than 10 years in which the government may have some record cloud. This should eliminate much of the objection the Justice Department had to the 2 year grandfather area.

C. The Snake River problem

The Snake River and its main tributaries flow through Idaho outside of national forests and inaccessible canyons for perhaps 1,500 miles. Public lands surrounding these rivers were surveyed by the United States Government in the 1870's and 1880's when they were all wild rivers. By this I mean there were no irrigation dams, irrigation diversions, flood control levies, channelization and dams. These rivers rose in the very high lands of the Rocky Mountains or its adjacent ranges, fed by deep, high snow pack as well as valley snow pack, with little rain during the summer. They had an extremely wide range of seasonal volume of flow.

Now almost 100 years have gone by since these rivers were meandered in the survey by the government of public lands to be sold or located on. What the general surveyors found in the way of location of the banks, the mean high water mark, of these rivers in the 1880's has completely changed. In the upper Snake River area where the omitted land questions exist today, commencing with the first dam on Jackson Lake in 1907, that reservoir alone by 1917 was impounding 847,000 acre feet a year of runoff. Subsequently the North Fork was controlled by the construction of Henry's Lake Reservoir in 1922 and the Island Park Reservoir in 1936, and a smaller Grassy Lake Reservoir in 1939. In addition, in the 1910's and thereafter numerous small diversion dams and large canals took water out of the river at its second major flood peak, in July, materially reducing the flow in the river. The Snake River had two crests, one in May when the valley snow melted, and one in July from the melting of the heavier high mountain snow packs.

The result is that from the earliest measurements of flow in 1890 to 1895 the maximum monthly discharge rate on the Snake River was reduced from some 50,000 cubic feet per second maximum with an average of 40,000 cubic feet per second, to what is today an average of less than 12,000 second feet on a monthly maximum discharge. See attached graph. As an uncontrolled river, the Snake and its tributaries had very high maximum flood periods and very low late fall minimums because there is very little rain in the area in the summer.

Commencing around 1960 the United States Government decided to check for omitted lands along this river, because it was apparent in places that the meander lines established in the 1870's and 1880's were now some distance from the actual water in the Snake River. The result has been to develop extreme uncertainty in land titles for many miles along the Snake River, and potentially along the other major tributaries to the Snake, the Boise River, the Payette River and certain other tributaries. While it should be obvious to everyone that the lands that are now between the surveyed meander line and the water have developed because of the reliction and accretion caused by a material reduction of the flow of water, nevertheless, the government claimed these lands were the result or errors made by its general land surveyors 90 years before. A wild river had become a controlled irrigation canal, much of it the result of reclamation funds being paid for by the farmers along its shores for building the dams.

Section 43 U.S.C.A. 772 gives the Secretary of the Interior the right to resurvey and locate omitted lands. He is using this power to claim these lands that have resulted from the taming of these rivers. The government by this technique now proposes that they own the center of the town of St. Anthony, built astride the North Fork of the Snake River. They now claim they own a large section of platted lots in Idaho Falls, built along the east bank of the Snake River. Numerous farm lands are now claimed to be owned by the federal government subject perhaps to being sold. Power lines, railroads, communication facilities are located on land which the Secretary of the Interior asserts has never been sold to the public.

The basic problem I would point out to you in the balance of my testimony is simply that the federal government intended to allow these lands to be located upon for nothing, or to sell them for very little, 90 years ago. The government did not intend to retain land between a meander line and the water, but to sell down to the water. A homesteader under a patent had a right at law to the land as he occupied it, and getting to the water was the most important part of his land in many cases. Neither the United States Government nor the homesteader intended the meander line as it was then drawn to be the boundary, but one sold and the other bought to the river. Now, because of the nature of the river and the quantity of its water, the government is taking advantage of a fortuity to seek to acquire a lot of land along waterways, an item that has developed as a very high value recreational item.

ERRORS IN MAKING DETERMINATION OF OMITTED LANDS

The bills presented are necessary to allow citizens a day in court to contest unfair government actions, and to vest long standing private rights. The reasons the Snake River resurveys of omitted lands are in error are:

1. *The original surveys were not in error.*—Each surveyor along the Snake River and its tributaries was to survey the public lands pursuant to the 1871 Instruction to Surveyor Generals of the Public Lands Manual and special instructions. Because I am going to speak of the single example in Idaho Falls, I will speak of the particular instructions given to such surveyor for these lands in the upper Snake River Valley. Specifically, on August 8, 1877 the particular surveyor was told that he was not to survey lands "except those adopted to agriculture without artificial irrigation, irrigable lands or such as can be redeemed and for which there is sufficient water . . . (and) . . . timber lands bearing timber commercial value . . ." Surveyors generally, and the courts have so sustained them, were not required to include in public lands to be sold swampy areas along a river which could not be developed, or rocky outcroppings and broken lands that simply were not developable for farming, also along rivers. The survey was to develop a quantity measure of the good land to be sold, excluding such nonarable land.

As you may also be aware, when it came to surveys along navigable rivers, the law was quite clear that meander lines are not established as the boundaries of fractional lots, but are for the purpose of defining the sinuosities of the banks of the streams and as a means of ascertaining the quantity of land in the fraction subject to sale, which is to be paid for by the purchaser. Such meander line represented the boundary line of the stream but the stream itself, not the meander line, is the actual boundary of the land. *Railroad Co. v. Schurmeir*, 7 Wallace 286-287:

"Lots platted under the public land laws, according to a plat showing them bordering on a lake, extend to the water as a boundary and embrace pieces of land found between it and the meander line of the survey where the failure to include such piece within the meander was not due to fraud or mistake but was consistent with a reasonably accurate survey, considering the areas included and excluded, the difficulty of surveying them when the survey was made, and their value at that time. *United States v. Lane*, 260 U.S. 662."

An example is the attached copy of the resurveyed area of the Highlands Addition to Idaho Falls, Idaho. The area the government claims is omitted land, being many platted lots, consisted to a substantial part of a swampy lower portion that has been partially filled to avoid flooding during high water as well as a lava rock point which could never be farmed whether it was flooded at the high water mark or not. Thus, not only was a large amount of the alleged omitted land below the 1877 mean high water line of the Snake River, but survey was not justified to go out around a minor, worthless rocky point excluded by the surveyor's instructions. It is not a fair reconstruction of the original plat to assign the present water line of the Snake River as if it were the mean high water mark of the river as a wild river with in excess of four times the present volume of water.

2. *Use of wrong survey standards.*—The 1871 Instruction to Surveyors General of Public Lands Manual required substantially less accuracy than the present 1947 Manual of Surveying Instructions. Pages 23 and 24 of the 1871 manual, and page 237 of the 1947 manual, show this comparison. As you know, surveying today is done by extremely accurate instruments and new mathematical and electronic techniques. In the old days it was done with a chain consisting of 100 iron links, and if the chains were well worn it was at least a foot and a half longer than a new chain. But as to the manual specifications, in surveying irregular meandered lots the present manual requires an error of not more than $12\frac{1}{2}$ links per mile. The 1871 manual allowed 150 links per mile. Thus twelve times as high an accuracy is required today. In making the relocations of the old survey, new techniques are applied. Old monuments cannot be located and are reconstructed on an entirely different basis. To find the original surveyor made errors based on the present manual is a miscarriage of justice. To measure the alleged omitted land on this new standard is equally wrong.

3. *No effort made to locate original mean high water mark.*—In the exhibit plat attached for the Highland Addition of Idaho Falls the survey that is now claimed to establish omitted lands uses the exact edge of the Snake River water as it existed in 1962 as the meander line. Ninety years after the original survey the assumption that this is the proper mean high water mark as it existed in 1877 at the original survey is so fallacious to need no further comment. No effort was made to locate where the actual 1877 mean high water mark was, and the government in answering interrogatories in the lawsuit denies it has any way to locate where the original mean high water marks may have been. As noted above, these rivers are no longer wild rivers. Most of the summer flood is stored and diverted, and the maximum monthly discharge from the Snake River at Idaho Falls has been reduced from some 40,000 cubic feet a second to less than 10,000 cubic feet a second.

It should be obvious that what is today the mean high water mark of these streams bears no approximation to what it was at the time of the 1877 survey. The meander lines which at that time properly reflected an approximation of the high water mark of the stream today have considerable land lying between them and the actual water line of the controlled river. Yet the Secretary of the Interior through his solicitor, in what many Idahoans believe is an outright effort to gather greenbelts along the river without justification in law, blandly holds this must have been where the water was in 1877 and therefore there was omitted land. This is because, and I quote his words in one instance,

"The meander line established in the original survey . . . follows a course that does not touch the actual course of the river and which varies from the true water course by as much as 15 chains, and it clearly shows the meander corners were established points within that distance which reflects something other than the bank of the river . . . the omission of an area of land of the size represented does not appear to be the result of a reasonable accurate representation of the river's course . . . the results are the same whether the error arose from mistake, inadvertence, incompetence or fraud on the part of the man who made the former survey."

I would call this Congress' attention to the fact that the Department insists on using the present water line of the river, which in all effects is a controlled canal today, and then claims the original surveyor must have been completely wrong when he surveyed the same stream in the 1870's and 80's as it flowed in its undiverted, uncontrolled wild river state.

3. *Refusal to recognize applicable law on omitted lands.*—The basic principle of omitted lands developed in the midwest along streams with much less variation in flow, and ones which have not been dammed and thoroughly controlled for irrigation as in Idaho. The rule there for many years was where the river was more or less as it had been in the survey period, if the land between the survey meander line and the actual mean high water mark was less than approximately 50 percent of the patented fractional lots, it was not deemed disproportionate and went with

the patented lots. Numerous cases have applied this rule with considerable flexibility. Now the Department refuses to apply these cases.

Further the question is how to measure the omitted land. In the plat attached to this testimony the government proposes to measure the amount of omitted land from the exact edge of the present Snake River back to a relocated original meander line. In this Section 13 this would amount to 29.68 acres omitted in relation to the 68.40 acres originally patented in the fractional lots, the omitted land being 43 percent of the actual platted land. In the first place, it is obvious that the amount of omitted land is erroneous and should be a considerable lesser figure. An examination of a 1954 topography map indicates at least 25 percent, and perhaps 50 percent of the land was subject to flooding at a reasonable high water, assuming the flow would be four times what it is today. This would reduce the omitted land to at the most 15 to 18 acres, only 20 percent of the patented fractional lots. Further, meanders by the 1871 manual would not have used the exact water's edge. Thus, a proper new meander line would contain even less omitted area. It would not have been disproportionate to the patented area. However, the Department in administrative proceedings refuses to admit these facts or the law. Further, what land was probably above the original mean high water mark is extremely rocky with little soil. It could not have been farmed and, in fact, even after the development of farms in the area very little of it was farmed beyond the originally surveyed meander line. Now, how can the Department hold the original surveyor committed an error so grievous as to be a fraud upon the government when they instructed him how to survey which excluded rocky, swampy marginal land along the rivers? Only because this land has been improved, platted, developed as a part of a city, and happens to lie along a river, has it become valuable. And now the government claims it was never sold, based on completely erroneous standards of the resurvey and changed river conditions.

An example:

We have spoken about the attached Section 13, in which the government has filed resurvey and determined that the platted lots along the river between the old meander line and the river have never been sold. The history of this is that a gentleman made a homestead entry in the 1880's on this land. He acquired some 160 acres by a patent issued in 1888 based on the 1877 survey. He bought on a plat that showed he took to the river, an important valuable right at a time when there was no irrigation system in the area. Yet based on a 1962 and 1965 survey, the government in October 1966, replatted the area between the river and the reestablishment meander line of 1877.

The first example map shows the general area, and the second the government plat as filed with the detailed lot area being that which is now claimed to be unlocated land subject to resale or to claim by any government agency. The area is near downtown Idaho Falls and has been subdivided for many years. The third page of the identical exhibit shows by black blocks houses and other buildings located in the area. There are some 21 buildings on 18 parcels of land which together have a value of some \$337,000, including both buildings and land. In addition, there are 150 other lots, each 25 feet wide which are worth another \$150,000 at a very minimum price of \$1,000 a lot. The City of Idaho Falls had installed a water system and a sewer system in most of the area at the time of the government replat.

We would call your attention to a topography elevation line across the river showing its elevation at the current time, in that it is rather a fixed stream year around, at 4,695 feet mean sea level and a line drawn along the omitted property area at a 20 foot higher mark of 4,715 feet. There is testimony of old-time citizens that in the early 1900's before the irrigation dams were built the river flooded about up to this elevation which included a little further down stream into the lower part of the city center of Idaho Falls. The houses nearer the river are those more recently constructed, being below and in the area that was previously flooded. The smaller, older houses are those substantially at the higher elevation.

This third map merely proves that the 1877 surveyor was approximating the mean high water mark of a wild river at that time when he didn't go down into streambed and out around a rocky headland, staying approximately above the mean high water mark at that time.

CONCLUSION

On behalf of land owners and mortgagees of property now claimed to be owned by the United States, we urgently request passage of the three bills above enumerated. The most important is the quiet title action because the present interpretation of the law by the Bureau of Land Management and the Department of the Interior has little respect for existing rights in what we believe to be a deliberate change of

policy to acquire without compensation waterfront lands. Section 43 U.S.C.A. 666 allows quiet title actions against the government on water rights, and land should be included.

Large segments of the Snake River and other of its major tributaries in Idaho can be resurveyed with just as many unfair results as this example sets forth. Only if the citizens have a right to a fair adjudication in the federal court when the United States claims their lands can justice be done.

Respectfully submitted.

T. H. EBERLE.

EXHIBIT A

(f) Any civil action under this section shall be barred unless the action is commenced not later than six years after the United States enters into continuous occupancy of the real property, provided, however, that no such civil action shall be barred during the two years immediately succeeding the effective date of this act if the action pertains to one or more of the following:

- (i) The correct location of a boundary line or a meander line,
- (ii) Real property which has been found by the Secretary of the Interior, upon survey, to be omitted public lands of the United States;
- (iii) Real property which pursuant to mesne conveyances from the United States has been actually and continuously occupied by a private party, or his predecessors in interest, for not less than ten years next preceding the effective date of this act.

EXHIBIT B

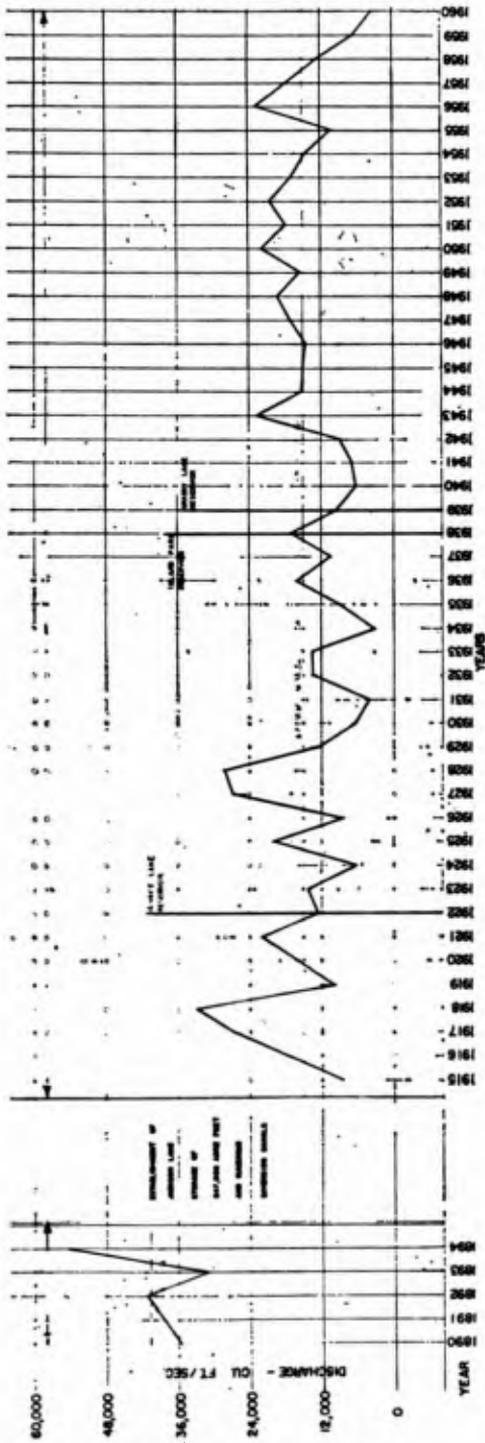


CHART
SHOWING AVERAGE MAXIMUM MONTHLY DISCHARGE RATES
OF THE SNAKE RIVER

EXHIBIT C



EXHIBIT D

T1P 2 NORTH, RANGE 37 EAST, OF THE BOISE MERIDIAN SURVEY OF OMITTED LANDS

106
100
Ad-

Sec. 13

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TESTIMONY OF T. H. EBERLE, ATTORNEY, BOISE, IDAHO

Mr. EBERLE. Thank you. In summarizing my statement, I will merely say there are numerous injustices that have arisen because of the sovereign immunity problems because of titles. You have heard about the particular one relating to omitted lands in Idaho. There are others that deal with forestry land wherein it is difficult to know where boundaries are and people think they have land and pay taxes, and the Government comes in and says, that is our timber, where there is no question of basic title. All of these fall within the problem of there being no way to go into court to contest either no administrative ruling or an unfavorable one. We have helped Senator Church and Senator Jordan in this bill, and we have some alternatives which we will provide to the committee.

I will say I have read the Justice Department's statement which they will file with you today, and we are in agreement except for the part on the retroactivity with a few minor details. I will summarize my statement on the Snake River problem.

I believe it is more serious than Senator Church and Congressman Hansen have stated it to be. It happens for about a 100 miles the resurvey has occurred, but we are very concerned, representing a number of title people and private citizens, that the same applicable principals can extend over approximately 1,500 miles of rivers in Idaho that are tributaries to the Snake River, where there is open valley land, where the river has wandered considerably.

It also applies to other parts where the river wanders considerably. There are other areas in the Northwest where we are still using the desert entry and homestead, and some of this is along rivers this is applicable to. I don't think it is applicable to the areas that have been long settled, but where there has been high mountains nearby, low valleys, flat meandering streams. There were extreme floods in the areas before control, extremely wide river plains. These problems do exist in many places besides Idaho. They include rivers going through cities with valleys to a large extent on these rivers, where possible resurveys could occur, so not only in the area of eastern Idaho, where it is currently a problem, but in numerous areas in the West can this arise and the need for proper administration is important, and it is our feeling, from our experience in Idaho, only if there is the possibility of a court adjudication, can we deal with this at the administrative level with any success.

As I will explain further, the problem we have had in the administration of this with the Department of the Interior, we believe there has been poor administration of the law and with the threat of the quiet title action, if it were possible that administration might be materially improved. I would not tell this committee there have not been areas in survey where there is omitted lands, but I believe it is a small area of the land that is now being called omitted. The Senate bill 216 and companion House bill, which are identical, are matters dealing with the right to go to court. It is a removal of the immunity of its sovereign, but does not change the substantive law.

Mr. DONOHUE. What do you mean by that, it doesn't change the substantive law?

Mr. EBERLE. This answers a question you asked Senator Church. That is a substantive law question, and this bill merely allows it to be adjudicated by removing the immunity question, the point being, when I bought, if I were a pioneer—because rivers cut off—this fractional law on a plat is drawn, and I come in and want to homestead a fractional lot, and it shows against a river. That was made in 1870, and I buy in 1890 or homestead—subsequently, the Snake River has had its flow reduced approximately three-fourths and has become a controlled irrigation canal in effect. That meander line is no longer realistic because it may be as much as a half-mile or more from the present river.

Mr. SMITH. The original meander line?

Mr. EBERLE. That is right. The Government comes in and says, first, your surveyor must have been out of his mind to put that meander line there. He has omitted 180 acres of that land that has never been sold. The rule is, you take to the monument unless there is a major error, of course. This is the principle of law that we have at fault. He homesteaded to a meander line which was roughly defining the sinuosity of the river. It did not require him to—he approximated a river that had high floods and long period of high flood water, which created a relatively high mean water mark. That is no longer where that river is—we all agree, but the old law was that so long as the amount of land that was omitted was not substantially large, compared to the lot he bought, he took that additional land with his fractional lot.

You bought to the monument and if there was additional land, it went with it. Today, the surveys are being made on where the river was as of 1965, and they took a photograph from the air and they platted the waterline. Well, this is the problem now, the land between there and the old meander line, and this is the injustice.

Mr. DONOHUE. When we talk about the meander line, we talk about a line that runs down through the center of the river. Is that correct?

Mr. EBERLE. No, Mr. Chairman. Your survey manuals of the Government Land Office say you will go along the mean high water mark and survey it in setting off the amount of land available for sale by the Federal Government for homestead.

Mr. DONOHUE. In other words, does the Government contend that they own to the high water mark or to the center of the river?

Mr. EBERLE. We have a Spanish law, basically, on our river land. Most areas to the West, California, Idaho, Nevada, Arizona, we do not own to the thread of the river unless it is nonnavigable. It is different from the common law.

Mr. SMITH. What is the thread of the stream?

Mr. EBERLE. It is the centerline of the course of the river, but the committee here—this is not particularly important as to the issue of the Federal Government. When Idaho became a State, for example, in 1890, the streambed was then given, by the Federal Government, to the State of Idaho in trust for the use of the public. Then, we have the questions of drying up or moving or evulsion coming in, which are another question. We don't need to get into that here other than to say there are other property rights of the States involved in this question that can be litigated in Idaho.

Determining where this meander line is and who owns between the old 1870 meander line, which at that point represented roughly where the river was and down to where the river now is, is the dispute that exists in Idaho that the Senator and the Representative have spoken to you about, and I have gone into detail with an example in here where the Federal Government has resurveyed a portion of the city of Idaho Falls. The city has a water and sewer system installed and platted in lots and the Federal Government has come in and said, well, that wasn't surveyed right in 1898, and therefore it is omitted land and therefore we own it.

Mr. DONOHUE. I don't know if I am following you. If you don't mind, I would like to have something clarified. You say, when Idaho became a State, the Federal Government granted to the State of Idaho the land over which this river flows, is that correct, and the river in trust for the use of the public?

Mr. EBERLE. The Idaho Admissions Act does this.

Mr. DONOHUE. And therefore the Government, having granted that to the State of Idaho, how can they now claim it? Should that not be the lawful claim of the State of Idaho?

Mr. EBERLE. Mr. Chairman, the problem is there that the river, as it dries up, reduces the trust land under law. It still leaves a piece of land, which probably belongs to somebody else, from the State of Idaho. It depends on other facts.

Mr. DONOHUE. Would you give us the benefit of your opinion as to who actually owns it? Is the ownership in the State of Idaho or is it in the Federal Government?

Mr. EBERLE. Well, the State of Idaho, under recent cases in Idaho, does not own the dried up river bed, if it has not made a claim to repossess it when the river dried up, and in most cases it has not.

Mr. DONOHUE. I was wondering what the rationale of the court was in coming to that conclusion. Couldn't the State say, and point to the grant made to it by the U.S. Government when Idaho was admitted to the Union?

Mr. EBERLE. Mr. Chairman——

Mr. DONOHUE. How did the court get around that?

Mr. EBERLE. You have asked me to bless a court decision I don't agree with, in effect.

Mr. DONOHUE. You have read the decisions. How do they arrive at the conclusions that the State of Idaho didn't own it?

Mr. EBERLE. Idaho and California both adopted the New York Federal Code and Procedure and that code says if the State, for 10 years, does not bring an action to possess property that belongs to it, it cannot bring such an action, and they used this statute of limitations against the State of Idaho recently, but that doesn't affect the problem that we have with the Federal Government, because the landowner, who bought the patent of the fractional on what was the river takes to the river even though the survey line wasn't exactly where the river was. Now, the river has moved and the argument arises between the Federal Government and that individual, who gets this land that is now dried up.

We only ask, by this bill, the right to go to court to argue that point. We do not ask to change the law and there is a body of law on who owns these lands. They have come up because the Federal Government has commenced the action which allows the private person to bring a counterclaim. There is a body of law governing who gets these lands. Our problem is we cannot get into court, and that is why we support Senate bill 216. The nature of that statute is a peculiar one. What we are saying, in effect, is this is opening up a procedural remedy. It is not creating a substantive right. The normal statute of limitations cut off a substantial and procedural right. This is the reverse situation where we are doing away with the sovereign immunity to create a procedure and I think I have pretty well gone through the summary of what I would say in general but I would like to devote the balance of my testimony to the procedural nature of the statute.

I guess there was one other question you wanted me to answer, first, and that was, what litigation is proceeding now. There are three types of cases, and I only know of three in Idaho at the moment.

One, is Judge Ritter is suing the Federal Government. His action is direct contravention.

The other kind is one that involved, in Idaho Falls—this is a direct appeal from the administrative holding of the Secretary of the Interior for its first count.

The second count is the same as Judge Ritter's action which is flying right in the face of the sovereign immunity problem. The judge has told us if we push the case, he will throw us out of court. We are in trouble with the appeal from it—we can't examine the facts.

The third type of case is one that I know about and am not in, called the *Ruby* case. This is one where the Federal Government said, finally, we will bring a quiet title action against you waiving sovereign immunity by consent of the Justice Department. That will proceed to trial not too far from now, perhaps.

Therefore, the Government by agreement of the Justice Department, agreed to waive the sovereign immunity rights. The real trouble is many people who have had this problem and want to get their land back know they didn't sue at the time the administrative determination, the plat, was made. They have lost any appeal rights they perhaps had.

By the way, the Department of Interior has no procedural rules for appealing from the decision by the Justice Department—concedes there probably, constitutionally, has to be, so they are not disputing that. These people have not followed the administrative appeal or direct action, lack of knowledge—all of the problems you run into with small property owners.

We are not here asking a cure to a litigation problem. We are asking the right to litigate.

Mr. SMITH. Mr. Chairman, could I interrupt just at that point? The litigation which you are engaged in, you might face the problem, I hope you won't, if you proceed with the appeal under administrative matter and keep in the other part of your action, you might face, if this case passes—

Mr. EBERLE. Yes, you are right. Well, the court and the parties involved have agreed to await, because the court is a logical person and knows the problem, hopefully some legislation will come along to solve this problem. The Justice Department recognizes the injustice involved, and has made a rather reasonable approach in it.

Getting to the actual statute involved here, I would adopt the Justice Department's statement down to page 9, with only the comment that we do feel strongly a degree should be entered when the Government does disclaim its interest.

If I say I own something, and the United States files a disclaimer, which is a normal quiet title—we feel strongly a decree has to be made adjudicating with prejudice the disinterest. Other than that, the minor changes they have recommended up through page 9, we will endorse and I helped the Senator in the redrafting of the Senate bill 216.

Mr. SHATTUCK. May I just interrupt. To refer to the administration bill which relates to the disclaimer you have just referred to, except in different language—I understand there it says if the United States disclaims all interest in real property at any time prior to the actual commencement of trial, the jurisdiction shall cease. How does that comport with your entry of decrees or order? Would it be possible to patch that up?

Mr. EBERLE. We inserted the words, I believe, "Which disclaimer is confirmed by the decree of court," in the Justice Department's draft, and the idea was, after the decree was entered, the Federal court's jurisdiction would cease unless founded on other grounds. There might be three parties in jurisdiction, the Federal Government and two landowners. The Federal Government disclaims—of the whole Federal jurisdiction depended on suing the Federal Government, the whole thing would be dismissed, but we wanted the dismissal of the Federal Government confirmed. I agree that I should be removed.

Mr. SHATTUCK. I am getting at, it says, "Prior to the commencement of any trial," any time prior to trial, the order or decree you referred to could be entered?

Mr. EBERLE. That is the understanding, Mr. Counsel and Mr. Chairman.

Referring to then, only the point that is really the crux of the question this committee should decide, which is the statute of limitation provision, which is section IV, paragraph F, I have in my draft attached a proposal for amending that, but I think a better proposal is now being circulated in the room that might work out superior, based on Senator Church's comments.

The question we have in the present bill is 2 years after the effective date, you can bring in old claims. The Justice Department really says, we are willing to concede there ought to be some limitation. I propose to do it by defining the type of claim. It has now been discussed, a limitation of time would be a more easily handled matter.

Mr. DONOHUE. To go back to 1877?

Mr. EBERLE. No, sir, 1960, Mr. Chairman.

In other words, I said, we will name the kind of old claims you will get in, but this gets hard to do so we suggest to the committee to use a time limitation—only claims that came in by 1960, and

can be adjudicated in this first limited period. We feel most strongly that particularly on the Idaho claims, because the survey started in 1962, and these things have arisen since then, there has to be a period of retroactivity to the statute.

There are two ways to do it. One is a time way and the other is a definition of what limited claims that can be brought. The ones I named are boundary disputes, omitted lands disputes, and clouds on deeded lands. This is complicated. Then, I would make one suggestion. That is the way you word the paragraph here. The whole question that I have just had with the Justice Department, and I am concerned with equally, is what is actual knowledge of the claim of the United States.

The forestry ranger may walk along the fence line and say, you are on the wrong side of the line or you don't own that 40. Is that actual knowledge? To give you an example, in north Idaho, there is a lot of private timberland. The other day a private timber owner is reading—putting up for timber cutting, and he reads in there there is this 40 acres that he has been paying taxes on for 40 years. They are selling the trees on this. What happened is the owner got it—says there was a mistake. These are the kind of things. We would prefer language that says when the Government is occupying it, obviously, you have had notice, or when the Government records some notice in the county records, you have obviously had constructive notice. These are specifics. We do not even like the language we originally put in which was, "upon actual notice," because this is pretty—

Mr. SHATTUCK. It is the subjective quality that is difficult?

Mr. EBERLE. Yes. We would like to work with the committee in working out the proper language. The other is where, when a private person is in possession, notice of a cloud or a claim—it has got to be something they come in and dispossess or file something. When the Federal Government is in possession, that is easy to define.

Mr. SHATTUCK. On that point, you have been talking, Mr. Smith indicated to me, we had a case like this brought to our attention before, having to do with a timber situation, in which there—in lieu of land, and it was a mistake and so on—I believe my question relates to a mistake someplace along the line. It occurs to me that the Government, then, asserts a mistake was made. If they are right, the land goes to them and that is the end of the story. As a matter of fact, in your case, or at least in a case somewhat similar, where you have a surveying 100 years, poor surveying, as a matter of fact he probably sat around the campfire and did other things and that now works to the Government's advantage, he was so bad he made mistakes—the Government says he made a mistake, we now own the middle of Burbank—how does the jurisdictional bill help you in this case?

Mr. EBERLE. I grant you there will be cases where he made a bad mistake and it will be a serious problem because the Government did not properly survey and sell that land, and it is still owned by the Government. We will clearly admit to you there are cases where we cannot win in court, but this bill will help in 80 percent of the cases because our problem in Idaho has come up because of the river shrinkage. We know that his lines were fairly accurately

drawn and in the old manual—he was surveying under the 1870 manual—he did do an accurate survey, but the river has changed because it is a quarter of what it was then. The Government refuses to recognize—over 1 million acres of a monthly flow. It was 1890 to 1895. During that period, the average monthly flow was 40,000 cubic seconds feet. Today it is 10,000 cubic seconds feet, because we are storing the high flow. In one place the surveyor has the river almost 2 miles wide. Today it is closer to 400 feet wide. The Government comes in and says that surveyor says that every 4,000 second feet of the river raises it 1 foot. If you raise it 7 feet, it will be 1½ miles wide. You can prove, therefore, that under the law of accretion, as the river declines, that, of course, is what has happened. It has been farmed and has been built on. Many of those cases can be ones against the present claim of the Government but they refuse to admit that the river today is not the same river as it was in 1870, and so if we can put the facts to the court where we think the Department Secretary has made a wrong determination—

Mr. DONOHUE. Assume, for the moment, that we did act favorably on this bill, wherein the Government would waive its immunity, permitting you to go into court or these claimants to go into court, what would you allege in your bill of complaint?

Mr. EBERLE. Mr. Chairman, having filed such a complaint, I can be very specific. We allege the original survey, so that the amount of land lying between the 1870 survey and the river was a small amount, and therefore went with the fractional lot.

Mr. DONOHUE. Would you mind stating again what you mean by the meander line?

Mr. EBERLE. Mr. Chairman, I understand that only too well. It is the way you define the sinosity of the bank of the river. My instructions say to survey the public land so the quantity of them can be determined for sale, and I am told to cover those riverines, roughly where they are.

Mr. DONOHUE. that is the bank?

Mr. EBERLE. Following the bank. It has to be the mean high-water line.

Mr. DONOHUE. Midway between the high and low?

Mr. EBERLE. It all depends, but the average.

Mr. DONOHUE. It is not to the center of the stream?

Mr. EBERLE. No, sir. There is a stream of some width between these two lines. Today the river may not even be between those two lines, if it is on a wide flat plain where it can meander. In most cases, it is reasonably close to where the original were. The lines are supposed to be close to the river. On the Snake River, they aren't.

Mr. DONOHUE. That would be one of your allegations?

Mr. EBERLE. Yes, sir.

We would have to allege that the amount of land laying between this old river bank and the river at the time of the survey, was not disproportionate to the amount purchased by the patent owner or the homestead because the law is well established that if the omitted land is disproportionate to the amount purchased, it does not go with it. The monument is then wrong and the—

Mr. DONOHUE. Tell me this—

Mr. SMITH. Let me ask one question there, Mr. Chairman. Does the law of accretion, with which I am not particularly familiar, does that operate against the U.S. Government as well as against any private owner or the State of Idaho? Would it operate in favor of the adjacent land owner against whoever might claim the—

Mr. EBERLE. Your counsel has hit the question. You see, yes, accretion operates to the fellow who owns to the river bank. What is added to his river bank goes with him, but that assumes a natural ordinary change of the stream in slow course. You may have a sudden change, and that is evulsion. You don't own the evulsion. We have got all of these elements operating in the Snake River valley, so these questions are serious.

Mr. SMITH. Each case is a different case?

Mr. EBERLE. Yes. I would say this, though, that if the proof can be made that in 1870 the river was relatively close to this meander line, the government is out, of course. That is very difficult to prove. It requires a soil expert to go down and look and see when the trees might have started to grow, and so forth, to establish where the river might have been.

Mr. DONOHUE. And this acquired land would result from the river changing its course in most instances, or as a result of the damming of the river.

Mr. EBERLE. Both things have happened on the Snake River. It is a wide flat plain in many instances. It may change its course. It may just shrink down and stay on the same course.

Mr. DONOHUE. Take occasions where the river changes its course.

Mr. EBERLE. Then, you have the proof question.

Mr. DONOHUE. The person on one side of the river would acquire new land. What about the fellow on the other side of the bank that might lose land—what about him?

Mr. EBERLE. Mr. Chairman, under the law that everybody owns to the thread of the river, the center line, this was established that when that middle line moved, his property line may have moved, unless it moved by evulsion in which case the property line did not move. This has limited application in Idaho because we don't own to the center of the river. We rely on accretion and evulsion.

Mr. DONOHUE. I am wondering if that answers the question I propounded to you. What about the fellow on the other side of the river? In other words, let us take the situation—

Mr. EBERLE. I understand your question, sir. Let me answer it this way—

Mr. DONOHUE. This is the river, originally. It changes its course. Say, this is the middle line. It changes its course and instead of coming along here, it goes along here. The person on this side of the river acquires this land. Is that right?

Mr. EBERLE. Mr. Chairman, we have a two-step question. The first question deals with the Federal Government. Regardless of where the river is today—

Mr. DONOHUE. Forget the Federal Government. The person acquires all of this land. Now, the fellow that owned that land before the river changed its course, what happens to him?

Mr. EBERLE. If the stream moved gradually farther away from the southern owner, he would still own the land. If it moved by a

sudden channel course, the fellow on the north probably still owns it.

Mr. DONOHUE. Riparian rights?

Mr. EBERLE. Yes; it comes in that general area of law.

Mr. DONOHUE. The fellow on the other side of the river that lost the land as the result of the river changing its course, does he have any remedy?

Mr. EBERLE. No, sir, he would not, under the case I mentioned wherein it moved gradually over. This doesn't effect the problem we have here. The question here, Mr. Chairman, goes back to the original survey at the time of the sale of land.

Mr. DONOHUE. Claim you are right on the basis of adverse possession?

Mr. EBERLE. No, sir, between private parties, Mr. Chairman, but not against the Federal Government. This bill does not allow a private citizen to use adverse possession as a—but that is not the question before the committee.

Mr. DONOHUE. Now, what is the law of Idaho insofar as adverse possession. Must you occupy a piece of land or property for 20 years?

Mr. EBERLE. No, sir. We have a rather short period. If you are occupying under a written document, color of title, you have to adversely possess it by a fence or cultivation for 5 years.

Mr. DONOHUE. It is 20 years in Massachusetts.

Mr. EBERLE. But that does not, I submit, effect the question for this bill because the Federal Government is not subject to adverse possession. Neither is the State of Idaho.

Mr. DONOHUE. If it waives its immunity, isn't it subject to all of the other rights, in other words, placing itself in the same position as a private individual?

Mr. EBERLE. Section G of section IV.

Mr. DONOHUE. Much like under the Tort Claims Act.

Mr. EBERLE. We specifically say, in this bill, suits may not be based on adverse possession. The Justice Department said it should be in there—we don't like it but it is there and we are not arguing about it.

Mr. DONOHUE. Have you any questions?

Mr. SMITH. Yes. I just have one. This, really, again, is a detailed legal thing, and not particularly involved with what is in this bill—in my district, for instance, the Erie Canal goes through, and we have a line called the New York State Blue Line, which is a surveyed line, and this was, at one time, the high water mark of the canal, plus some feet for the State use and in our deeds, we deed by meets and bounds instead of plats, and so we say, to the high water mark, which is a definite surveyed line, we know where it is and it always stays that way. Now, as I understand it, in your meander line, that is a mean high water mark?

Mr. EBERLE. Yes.

Mr. SMITH. And it 1877, the survey was made for the Government that you claim was reasonably accurate, which may have been a good way toward the river from the high water mark in flood position and a good way toward the landowner or the position of the land water in rising, but as I understand it, the land-

owner bought by plat, which showed that mean high water mark, and his land extended by plat to that line. Would this be correct?

Mr. EBERLE. Yes, Mr. Smith.

Mr. SMITH. You say he paid so much an acre if he bought it and the acreage was defined by where that line was, and that line was an actual surveyed line?

Mr. EBERLE. Yes, sir. He determined the quantity of the line.

Mr. SMITH. The actual monument?

Mr. EBERLE. Yes.

Mr. SMITH. All right.

Mr. EBERLE. But it is a monument within land law and it takes precedent because it is supposed to be where the river is. The sale goes to the actual water course even though you pay for a little less, actually, than you get. It also says if, in fact, the surveyor was grossly in error, you don't pay for the water, because the monument was in there and we want to adjudicate that question.

Mr. SMITH. I understand, then, if you could prove that that was reasonably accurate, and thereafter, any accretion that has come about becomes part of the landowners land—that is the case—

Mr. EBERLE. Not quite. Accretion that occurred after the survey and sale would be immaterial as to whether the survey and sale was correct when it was made. It is the problem today to determine where all of this land came from. Was it an error in the beginning or did it occur after the survey and after the sale.

Mr. SMITH. If it occurred after the survey and after the sale, then I assume that the Government wins?

Mr. EBERLE. No, it is only if the error was made in the survey that the Government wins. If we can prove, and it is very difficult, that 90 years ago that the water was close to the survey water line, then he takes whatever happened after that.

Mr. SMITH. As these deeds come down from owner to owner, do they come down again by plat, not by meets and bounds?

Mr. EBERLE. No. In many cases these have been added to big tracts or added to little tracts. They have come down in many ways. There is no common rule. Some of the land has been subdivided, as in exhibit C, in my statment.

Mr. SMITH. No further questions, Mr. Chairman.

Excuse me—I have one further question—I think it has been testified that the State of Idaho owns the bed of the present Snake River, wherever that may be.

Mr. EBERLE. That is correct, and it is held in trust so it is not subject to sale.

Mr. SMITH. Thank you.

Mr. DONOHUE. Thank you, gentlemen.

We will now hear Mr. Blair Reynolds.

Mr. REYNOLDS. I do have a prepared statement. I would appreciate it if I could use my prepared statement, but I will be more than happy to answer any questions which you may have.

Mr. DONOHUE. Without objection, his statement will be made part of the record.

[The document referred to follows:]

STATEMENT ON S. 216 BY THE CALIFORNIA LAND TITLE ASSOCIATION PRESENTED BY
R. BLAIR REYNOLDS, VICE PRESIDENT-COUNSEL

FEBRUARY 24, 1972.

For the record, my name is R. Blair Reynolds and I am Vice President-Counsel of the California Land Title Association, with its offices in Sacramento, California. The CLTA is a trade association representing nearly all of California's title insurance industry. I am here today to present my Association's thoughts on S. 216, by Senator Church of Idaho.

Initially, let me state that we are in strong support of the fundamental concept of S. 216, that of removing the obstacle of federal sovereign immunity in quiet title actions. We feel, however, that the bill in its present amended form raises several questions which would leave a great deal of uncertainty in this area, which should be resolved at this juncture rather than being left to the courts. In addition, we fear that the restrictions in the present form of S. 216 may raise or defeat substantive rights and we do not understand that as the purpose of this measure. Let me clarify our concerns more specifically.

In its original form, S. 216 was nothing more than a procedural bill lifting the bar against bringing suits to quiet title against the Federal government. This, by itself, we feel is accomplishing a great deal and is of considerable merit—we support this concept wholeheartedly. I used the term "nothing more" not in derogation of what it would accomplish but to bring the whole question which is before you today into proper perspective. This was nothing more than a suggested procedural change. As introduced, no substantive rights to land were changed in any way whatsoever, nor could anyone conceivably, by any stretch of imagination, contend that S. 216 would raise, defeat, or cloud land titles in any manner. S. 216, as introduced, simply allowed the matter to get to court—no more. But, gentlemen, amendments have been made since its introduction and we have considerable doubts concerning whether this bill is still only procedural in character.

Let me begin my comments on the amended bill and its restrictions with a statement that, although my Association would like to see a bill authorizing quiet title actions in as broad an area as possible, our objections go only to the manner of restriction and not, in general, to the amount of restriction. For example, it is totally appropriate that the bill exclude from its provisions suits which under present law are already permitted against the government, such as disputes over tax liens and specified water rights. S. 216, as it now appears before you, makes such an exclusion and we have no objection. Likewise, the express inapplicability of S. 216 to actions based on adverse possession is also appropriate, as the policy considerations for that issue are completely different from those before you today. And in a similar vein, the bill is presently structured to exclude its application to trust or restricted Indian lands and if, for policy reasons, it is desired to continue this exclusion you will hear no objection from us (other than a mild protest that many situations revolve around questions of whether or not some area is, in fact, Indian lands and that is fairness these questions should also be allowed to be settled—if the bill is fair in one area, it is also fair elsewhere). A like comment could be made with respect to the exclusion in subdivision (a) of "security interest and water rights" generally. But exclusions of this nature are not why I am here today.

The major concern of my Association—an Association, incidentally, which has within it a great deal of land law experience—is with subdivision (f) of page 5 of the amended bill, which would establish a period of limitations on these actions. Under its provisions, any quiet title action brought under the authority of S. 216, if with respect to a claim of the United States against that title which accrues from and after four years before the effective date of the act, would have to be commenced within six years from the first "actual knowledge" of such claim; if with respect to a claim accruing earlier than four years ago (and regardless of how much earlier), the plaintiff would have only two years from the effective date to bring his suit.

Let us look first at the situation where the claim first accrued within four years prior to the effective date of the act or thereafter. In these cases the landowner or other party in interest has, under this subdivision, six years in which to bring an action to quiet his title (parenthetically, let me point out that up to four of those six years will already have run on him in many cases) I repeat—"to quiet his title." Mr. Chairman, this is a most ingenious statute of limitations, almost without precedent. I respectfully point out that, except with respect to adverse possession (which is specifically excluded from this bill on the plaintiff's side), this is the first instance I have ever heard which would require the person against whom a claim is made to take affirmative steps to dispute that claim or be forever barred from doing so later. Every statute of limitations of which I am aware but one operates in exactly the

reverse manner—the claimant must affirmatively bring suit in challenge of the title or he is forever barred from asserting it. That one exception is, of course, adverse possession, and in that case I would submit that there, too, the claimant must act affirmatively, albeit not in court but rather to the world in general, strongly asserting his adversity to the earlier title. And it is this similarity to the limitation burdens of adverse possession that has the California Land Title Association so concerned.

Will this statute of limitations be construed as a new form of adverse possession, vesting title absolutely in the United States to any claim by the government with respect to which an action is not commenced by the owner within the appropriate time period? Can the government, merely by asserting a claim, even one demonstrably based upon an error, wait six years or less and gain substantive foundation to its claim through the inaction of the owner? I recognize that such is not the intent of S. 216 but could it be the effect? In California we are not sure and are very concerned about the answer. But the fact that subdivision (f) places the limitations period burden upon the owner and not the claimant, coupled with its very language, language in bar and nearly identical to that of many states' laws on prescription, must be recognized as raising this possibility, however unintended.

Mr. Chairman, without embarking upon a parade of horrors, let me give this committee one quick example of our concern. Suppose a landowner has allowed his six, or four, or two year period to lapse and thereafter the government sues him on its claim. It is perfectly clear that today, under present law, the landowner could counterclaim to quiet his title. But, Mr. Chairman, with all due respect for the abilities and imagination of the department, let me point out that it is the policy of the Department of Justice, as I understand it, generally to assert all possible procedural defenses (often even some that are singularly imaginative) and I can easily picture a federal attorney in this hypothetical case asserting vigorously that such a counterclaim would not be proper, since the period of limitations had run. This possibility, a dramatic shift from present law, I do not believe is intended by S. 216 and in any event is undesirable, but it is possible under a strict construction of subdivision (f).

Other problems arise with subdivision (f) as well. As written, the statute would begin to run upon "actual knowledge of the claim of the United States." Excuse me, Mr. Chairman, but whose actual knowledge? and what constitutes knowledge? Assume a tenant in possession and a Division of Forestry employee comes onto the property saying that he is looking for a good place to build a fire vehicle access road on government property. The tenant boots him off in one fashion or another, and never hears any more of it. Does he now have actual knowledge of a federal claim of ownership? And if so, is that knowledge imputed to his landowner? If a sale of the land occurs two years later, does the period continue to run, such knowledge being imputed to successive owners and "tacked on"? These problems are very akin to many which have been raised in adverse possession cases over the years simply because the proposed statute is so similar, except that there apparently here needs be no open, notorious and hostile possession to bring home knowledge of the claim, and without such, if the answer is "yes" to any of the above questions, somebody is getting taken and it isn't the Federal government.

And now, what of the claim which accrued (whatever that means) earlier than four years prior to the act's effective date? All of my above remarks, of course, are equally applicable here but now we run into additional inequities of major proportion. For the plaintiff is now given only two years from the effective date of this act to bring his suit. If—I repeat, if—subdivision (f) is construed as effecting a substantive change in title, or any part of it, in a manner akin to adverse possession, two years seems a rather short time to give a man to assert his rights of title against governmental claims at the alternative risk of forever losing them. Let me illustrate the particularly egregious hardship that can occur under this provision. Incidentally, I am personally acquainted with the landowner in the case I am about to relate with a simple statement of the facts, and I am reliably informed that there are thousands of acres of land in California alone which are similarly affected.

In this case we go back to the Forest Lieu Selection Laws (Act of June 4, 1897, 30 Stat. 11, 36, as amended), which authorized the exchange of private lands within a public forest reserve for public lands outside the forest reserve. Under this Act, the landowner could apply for the lieu lands (those outside the forest reserve) in exchange for his base lands (those inside the forest) only if he accompanied his application with a quitclaim deed to the United States of his base lands. As attorneys, we all are aware that a deed, to be effective, must be delivered and accepted and, in point of fact, several cases have held, with respect to deeds submitted under this Act of 1897, that such deeds were merely offers to exchange until accepted. In the particular instance, a California landowner deeded his base lands in 1902 to the

United States with an application for exchange. While his application was still pending, on March 3, 1905 (33 Stat. 1264) the Act of 1897 was repealed, leaving this owner and others with a deed outstanding and no provision in the law for a quitclaim deed back to the offeror. Under the Act of September 22, 1922 (42 Stat. 1017, 16 U.S.C. 483), there was such authorization for a limited time and periodically since then such authorization has from time to time existed. Such authorization no longer exists, however, and has not since the Act of July 6, 1960 (74 Stat. 334).

Now put yourself in the position of the 1905 landowner and his successors; in this case, as in most, a layman. He is assured in 1905 that he has no problem, since his deed was not accepted and is therefore a nullity. Around 1920 he sells the property to a cautious buyer, so cautious in fact that he writes the General Land Office of the Department of Interior. His reply, signed by Commissioner Spry himself, specifically traces the title of such base lands from the patent to the 1902 deed, gives a legal description of the land, states that the deed proffered by the landowner in 1902 was never accepted, cites *Roughton v. Knight*, 219 U.S. 537, as authority that such failed to convey title, and states that the United States is not asserting any claim or right to such tracts under the 1902 deed. The buyer is satisfied—as he should have been for, indeed, there was nothing more that could have been done under the law of that time—records the Spry letter and peacefully enters possession.

From that day forward to 1960, none of the successive owners felt any need to get a quitclaim deed from the United States when it periodically became possible to obtain one. Indeed, I doubt that most of the successive owners even knew of the possibility whenever it existed.

All right. Now comes the Bureau of Land Management which, on January 26, 1965, issued instructions to its local offices to attempt to "recapture" certain lands, including the thousands of acres of offered base lands, by refusing to honor the letters of disclaimer issued by the Commissioner of the General Land Offices between March 3, 1905 and September 22, 1922, and suddenly, on these "recapture" instructions, a very serious cloud is raised against all these base lands.

Mr. Chairman, although I personally think that these landowners would prevail in an action against the United States on these facts, that is not important to us today. Conceivably, I suppose, they could be held guilty of laches, or found otherwise to be lacking in merit on their claim to title. But what is important is that they have no remedy today and have been told whenever and by whomever they asked that they never have had any right to go into court on these issues. Which brings me finally to the two main points I wish to make today.

First, there is no just reason at all why in cases like this the United States should hide behind sovereign immunity. We strongly urge the passage of S. 216 or like legislation which would not decide the merits of these issues but which would simply allow the average citizen his right to have the issues tried on their merits, win or lose.

And second, it is totally unfair to impose on owners such as I described, and others who today have existing federal claims against their title, a two year statute of limitations or one for any other unreasonably short period when you have told them for seventy years in some instances that they have no judicial remedy. I cannot believe that most owners would even find out about the existence of S. 216 in two years, or even six, much less be able to act under it. And if this particular statute of limitations is ever held to be a prescriptive limitation in favor of the government, the effect on many of your constituents will be catastrophic.

We must urge as forcefully as possible either the elimination of subdivision (f), or its recasting into, for example, a statement of lack of jurisdiction after a period of time, which should be at least six years, preferably ten. Or, if a governmental disclaimer provision of a simple but binding nature is written into the bill, whereby the United States could avoid becoming tied up in litigation where it would claim no interest whatsoever, a period of limitations could and, we feel, should be eliminated altogether. As written, however, the limitations provision is unfair, unclear in its application, and potentially devastating. If governmental agencies are seriously concerned over opening up particular areas for litigation, they should come before you to specifically identify those areas and ask that they be eliminated from the bill, rather than to so restrict the remedy given that, in practical effect, it is no remedy at all. This they asked, for example, in the case of trust and Indian lands—it could also be accomplished in other specified areas.

In summary, Mr. Chairman, innumerable situations exist which cry out for the passage of S. 216, in its fundamental precepts. I related only one example of a case involving the full title to property, but there are many others, I assure you. And there are examples that could be given all day long relating to boundary and survey disputes, mineral rights, alleged defects in patents or purported cancellations thereof, meander problems and accretion, avulsion, and erosion along our great rivers,

and so on. Without a bill like S. 216, private landowners cannot test the validity of federal clouds against their titles in court, which in turn frustrates the use, development and marketability of these lands, as well as simply being patently unfair to the citizens—your constituents—owning these lands.

The protection of public rights necessarily includes the protection of the rights of the private citizen from the improper acts of a sometimes overreaching government. Perhaps "the King can do no wrong" but his agents can, demonstrably have, and predictably will, and so a remedy must be provided. Our only fear with respect to S. 216 is its limitations—as written, perhaps the solution is worse than the problem. The operation was a success, but the patient died. On the other hand, S. 216 began as a vitally necessary but simple, procedural bill. It could be so again—perhaps with some limitations if necessary but please, not as presently written in the bill. The California Land Title Association stands ready to lend its hand in the discussions and drafting of whatever amendments which we hope this subcommittee will feel desirable, and with appropriate amendments we strongly urge the passage of S. 216. It is long overdue.

I apologize for the length of my remarks, Mr. Chairman, but the seriousness of our concerns, first that S. 216 might not be enacted, and second, that it might be enacted in its present form, required a full discussion. I greatly appreciate the opportunity and courtesy you have afforded me to present my Association's views, and I will be happy to remain to answer any questions if you have any. Thank you.

TESTIMONY OF R. BLAIR REYNOLDS, VICE PRESIDENT- COUNSEL OF THE CALIFORNIA LAND TITLE ASSOCIATION

Mr. REYNOLDS. For the record, my name is R. Blair Reynolds and I am vice president-counsel of the California Land Title Association, with its offices in Sacramento, Calif. The CLTA is a trade association representing nearly all of California's title insurance industry. I am here today to present my association's thoughts on S. 216, by Senator Church of Idaho. Incidentally, any remarks I make would apply to H.R. 12453.

Initially, let me state that we are in strong support of the fundamental concept of S. 216, that of removing the obstacle of Federal sovereign immunity in quiet title actions. We feel, however, that the bill, in its present amended form raises several questions which would leave a great deal of uncertainty in this area, which should be resolved at this juncture rather than being left to the courts. In addition, we fear that the restrictions in the present form of S. 216 may raise or defeat substantive rights and we do not understand that as the purpose of this measure. Let me clarify our concerns more specifically.

In its original form, S. 216 was nothing more than a procedural bill lifting the bar against bringing suits to quiet title against the Federal Government. This, by itself, we feel is accomplishing a great deal and is of considerable merit—we support this concept wholeheartedly. I used the term "nothing more" not in derogation of what it would accomplish but to bring the whole question which is before you today into proper perspective. This was nothing more than a suggested procedural change. As introduced, no substantive rights to land were changed in any way whatsoever, nor could anyone conceivably, by any stretch of imagination, contend that S. 216 would raise, defeat, or cloud land titles in any manner. S. 216, as introduced, simply allowed the matter to get to court—no more. But, gentlemen, amendments have been made, since its introduction, and we have considerable doubts concerning whether this bill is still only procedural in character.

Let me begin my comments on the amended bill and its restrictions with a statement that although my association would like to see a bill authorizing quiet title actions in as broad an area as possible, our objections go only to the manner of restriction and not, in general, to the amount of restriction. For example, it is totally appropriate that the bill exclude from its provisions suits which under present law are already permitted against the Government, such as disputes over tax liens and specified water rights.

S. 216, as it now appears before you, makes such an exclusion and we have no objection. Likewise, the express inapplicability of S. 216 to actions based on adverse possession is also appropriate, as the policy considerations for that issue are completely different from those before you today. And, in a similar vein, the bill is presently structured to exclude its application to trust or restricted Indian lands and if, for policy reasons, it is desired to continue this exclusion you will hear no objection from us—other than a mild protest that many situations revolve around questions of whether or not some area is, in fact, Indian lands and that in fairness these questions should also be allowed to be settled—if the bill is fair in one area, it is also fair elsewhere. A like comment could be made with respect to the exclusion in subdivision (a) of security interests and water rights generally. But exclusions of this nature are not why I am here today.

The major concern of my association—an association, incidentally, which has within it a great deal of land law experience—is with subdivision (f) of page 5 of the amended bill, which would establish a period of limitations on these actions. Under its provisions, any quiet title action brought under the authority of S. 216, if with respect to a claim of the United States against that title which accrues from and after 4 years before the effective date of the act, would have to be commenced within 6 years from the first “actual knowledge” of such claim, if with respect to a claim accruing earlier than 4 years ago—and regardless of how much earlier—the plaintiff would have only 2 years from the effective date to bring his suit.

Mr. DONOHUE. What do you mean by actual knowledge?

Mr. REYNOLDS. We are not sure and I would like to point out a few uncertainties. Actual knowledge is a term that is used in the bill, and that is why I put that in quotes in my statement. I think it is very nebulous and we would like to see some clarification.

Mr. DONOHUE. Do I understand you to say that the person in adverse possession need not take any affirmative steps to clear his title if the person claims that he was in adverse possession, that is, the real owner, record the fact, in say, the registry of deeds that this person is unlawfully occupying his land?

Mr. REYNOLDS. The real owner would have to take an action in which to clear his title to remove that cloud but he is not placed under any statutory period which he can bring that action. He could wait 20 or 30 years until he is ready to sell his land to bring that action. We are saying you have 6 years to do this. After 6 years you can no longer bring your action for quiet title, with respect to adverse action.

Mr. DONOHUE. Will you continue on with your statement because the warning buzzers have been summoned and we will have conclude this hearing very, very shortly.

Mr. REYNOLDS. I will continue as briefly as possible.

Mr. DONOHUE. You go on with your statement.

Mr. REYNOLDS. Let us look first at the situation where the claim first accrued with 4 years prior to the effective date of the act or thereafter. In these cases the landowner or other party in interest has, under this subdivision, 6 years in which to bring an action to quiet his title (parenthetically, let me point out that up to 4 of those 6 years will already have run on him in many cases), I repeat—"to quiet his title". Mr. Chairman, this is a most ingenious statute of limitations, almost without precedent. I respectfully point out that, except with respect to adverse possession (which is specifically excluded from this bill on the plaintiff's side), this is the first instance I have ever heard which would require the person against whom a claim is made to take affirmative steps to dispute that claim or be forever barred from asserting it. That one exception is, of course, adverse possession, and in that case I would submit that there, too, the claimant must act affirmatively bring suit in challenge of the title or he is forever barred from asserting it. That on exception is, of course, adverse possession, and in that case I would submit there there, too, the claimant must act affirmatively, all be it not in court but rather to the world in general, strongly asserting his adversity to the earlier title. And it is this similarity to the limitation burdens of adverse possession that has the California Land Title Association so concerned. Will this statute of limitations be construed as a new form of adverse possession, vesting title absolutely in the United States to any claim by the Government with respect to which an action is not commenced by the owner within the appropriate time period? Can the Government, merely by asserting a claim, even one demonstrably based upon an error, wait 6 years of less and gain substantive foundation to its claim through the inaction of the owner? I recognize that such is not the intent of S. 216 but could it be the effect?

In California we are not sure and are very concerned about the answer. But the fact that subdivision (f) places the limitations period burden upon the owner and not the claimant, coupled with its very language, language in bar and nearly identical to that of may States' laws on prescription, must be recognized as raising this possibility, however unintended.

Mr. Chairman, without embarking upon a parade of horrors, let me give this committee one quick example of our concern. Suppose a landowner has allowed his 6- or 4- or 2-year period to lapse and thereafter the Government sues him on its claim. It is perfectly clear that today, under present law, the landowner could counterclaim to quiet his title. But, Mr. Chairman, with all due respect for the abilities and imagination of the department, let me point out that it is the policy of the Department of Justice, as I understand it, generally to assert all possible procedural defenses (often even some that are singularly imaginative) and I can easily picture a Federal attorney in this hypothetical case asserting vigorously that such a counterclaim would not be proper, since the period of limitations had run. This possibility, a dramatic shift

from present law, I do not believe is intended by S. 216 and in any event is undesirable, but it is possible under a strict construction of subdivision (f).

Other problems arise with subdivision (f) as well. As written, the statute would begin to run upon "actual knowledge of the claim of the United States." Excuse me, Mr. Chairman, but whose actual knowledge and what constitutes knowledge? Assume a tenant in possession and a Division of Forestry employee comes onto the property saying that he is looking for a good place to build a fire vehicle access road on Government property. The tenant boots him off in one fashion or another, and never hears any more of it. Does he now have actual knowledge of a Federal claim of ownership? And if so, is that knowledge imputed to his landowner? If a sale of the land occurs 2 years later, does the period continue to run, such knowledge being imputed to successive owners and "tacked on"? These problems are very akin to many which have been raised in adverse possession cases over the years simply because the proposed statute is so similar, except that there apparently here needs be no open, notorious and hostile possession to bring home knowledge of the claim, and without such, if the answer is "yes" to any of the above questions, somebody is getting taken and it isn't the Federal Government.

And now, what of the claim which accrued (whatever that means) earlier than 4 year prior to the act's effective date? All of my above remarks, of course, are equally applicable here but now we run into additional inequities of major proportion. For the plaintiff is now given only 2 years from the effective date of this act to bring his suit.

If—I repeat, if—subdivision (f) is construed as effecting a substantive change in title, or any part of it, in a manner akin to adverse possession, 2 years seems a rather short time to give a man to assert his rights of title against governmental claims at the alternative risk of forever losing them. Let me illustrate the particularly egregious hardship that can occur under this provision. Incidentally, I am personally acquainted with the landowner in the case I am about to relate with a simple statement of the facts, and I am reliably informed that there are thousands of acres of land in California alone which are similarly affected.

In this case we go back to the Forest Lieu Selection Laws (Act of June 4, 1897, 30 Stat. 11, 36, as amended), which authorized the exchange of private lands within a public forest reserve for public lands outside the forest reserve. Under this act, the landowner could apply for the lieu lands (those outside the forest reserve) in exchange for his base lands (those inside the forest) only if he accompanied his application with a quitclaim deed to the United States of his base lands. As attorneys, we all are aware that a deed, to be effective, must be delivered and accepted and, in point of fact, several cases have held, with respect to deeds submitted under this Act of 1897, that such deeds were merely offers to exchange until accepted. In the particular instance, a California landowner deeded his base lands in 1902 to the United States with an application for exchange. While his application was still pending, on March 3, 1905 (33 stat. 1264) the Act of 1897 was repealed. Leaving this owner and others with a deed outstanding and no provision in the

law for a quitclaim deed back to the offeror. Under the Act of September 22, 1922 (42 Stat. 1017, 16 U.S.C. 483), there was such authorization for a limited time and periodically since then such authorization has from time to time existed. Such authorization no longer exists, however, and has not since the Act of July 6, 1960 (74 Stat. 334).

Mr. DONOHUE. You are talking about the laws California, now?

Mr. REYNOLDS. No. This is the law of the U.S. Act of Congress we are talking about.

Now, put yourself in the position of the 1905 landowner and his successors; in this case, as in most, a layman. He is assured in 1905 that he has no problem. Since his deed was not accepted and is therefore a nullity. Around 1920 he sells the property to a cautious buyer, so cautious in fact that he writes the General Land Office of the Department of Interior. His reply, signed by Commissioner Spry himself, specifically traces the title of such base lands from the patent to the 1902 deed, gives a legal description of the land, state that the deed proffered by the landowner in 1902 was never accepted, cites *Roughton v. Knight*, 219 U.S. 537, as authority that such failed to convey title, and states that the United States is not asserting any claim of right to such tracts under the 1902 deed. The buyer is satisfied—as he should have been for, indeed, there was nothing more that could have been done under the law at that time—records the Spry letter and peacefully enters possession. From that day forward to 1960, none of the successive owners felt any need to get a quitclaim deed from the United States when it periodically became possible to obtain one. Indeed, I doubt that most of the successive owners even knew of the possibility when-ever it existed.

Mr. DONOHUE. I was wondering, sir, and I don't want to destroy your trend of thought, but is what you are saying contained in the summary on page 8 of your statement, because, as you probably know, your entire statement will be made part of the record, and all of the members of our subcommittee will have the opportunity, not only to read it, but to review it and to study it.

Mr. REYNOLDS. Very fine, then.

Mr. DONOHUE. I must bring to your attention that those lights indicate that we are drawing to a point where we will have to close.

Mr. REYNOLDS. The remarks are in the summary, and I will therefore close, subject to any questions you may have, just with a statement that—

Mr. DONOHUE. Do you have any questions?

Counsel. Yes. I believe Mr. Reynolds just had almost arrived at the point in his statement where he said the Bureau of Land Management, which issued instructions to attempt to recapture certain lands which included the land that he referred to in these quitclaim deeds.

Mr. REYNOLDS. Yes. The Bureau of Land Management has chosen to dishonor the old letters written by the Commissioner of the General Land Office. This raises a tremendous cloud on thousands of acres in all of the Western States.

Mr. DONOHUE. Fine. Thank you very much, Mr. Reynolds.

Mr. Frizzell, would you step forward, please?

Mr. FRIZZELL. We are willing to submit a statement for the record, Mr. Chairman.

Mr. DONOHUE. We will have to go off the floor, now, and we were wondering, would it be inconvenient for you to come back another day?

Mr. FRIZZELL. Not at all. May I submit my statement for the record, now, and come back for questioning later?

[The prepared statement of Mr. Frizzell follows:]

STATEMENT OF KENT FRIZZELL, ASSISTANT ATTORNEY GENERAL, LAND AND
NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE

My name is Kent Frizzell. I am the Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice and am here in response to this Committee's request. With me today are Mr. Walter Kiechel, Jr., Deputy Assistant Attorney General, and Mr. David R. Warner, Chief of the General Litigation Section in my Division.

I have come to discuss seven bills having the common objective of authorizing suits against the United States to quiet title to real property. In reality, only two bills are presented for consideration. Five bills (H.R. 11127, 11411, 11710, 11772 and 12440) are identical in their provisions with a draft bill previously prepared and submitted to the Congress by the Department of Justice. A sixth bill (S216) contains the provisions which passed the Senate on December 11, 1971. The seventh (H.R. 12453) is identical in content with the Senate passed bill.

On September 30, 1971, my predecessor in this office testified before the Subcommittee on Public Lands of the Senate Interior and Insular Affairs Committee in connection with an earlier version of S. 216. At that time he offered, a substitute for the Senate bill, the Department's draft bill. Subsequently, S. 216 was completely revised. The bill, as passed by the Senate, incorporates most of the features of the Department's bill with certain changes in the language thereof. It is to those changes that I address myself today. For convenience I shall refer to the respective versions hereafter as the "Department's bill" and the "Senate bill".

Most of the changes made by the Senate are relatively minor. However, in several places the Senate has added words which seem to add no meaning. Other alterations by the Senate have, unintentionally we believe, resulted in objectionable substantive changes.

Initially, it is to be noted that the Senate bill describes the nature of the actions authorized thereunder as "suits to adjudicate certain real property quiet title actions." The Department's bill described them as "suits to adjudicate disputed titles to lands in which the United States claims an interest." Although we believe that our language describes the bill's purpose with more precision, we do not see any substantive change resulting from the Senate's choice of language or from subsequent changes made solely to insure internal consistency.

The Department's bill would add a new section 1347a to title 28 of the United States Code, conferring upon the district courts "exclusive original jurisdiction of civil actions under section 2409a." The Senate bill would also add such a section. It would also add a new subsection "(f)" to section 1346 which would confer "original jurisdiction of any civil action under section 2408a." (The reference to "section 2408a" is obviously a typographical error, as there is no section "2408a" in the existing Code, and none is proposed in the Senate bill.) We elected to add a new section 1347a, rather than to add a new subsection to section 1346, in a choice between two logical points in the Code for the insertion of the new jurisdictional provision. We have no particular objection if the Congress prefers to add a subsection to section 1346. However, we do feel strongly that there should be only one provision conferring jurisdiction upon the district courts and that it should confer *exclusive* original jurisdiction. Two jurisdictional section, one of which speaks of *exclusive* jurisdiction and the other of which does not have that limiting language, would obviously be confusing at best.

In what is clearly an inadvertent transposition, section 2 of the Senate bill changes a reference to "Chapter 85 of title 28" to chapter "58".

Section 2409a, as proposed in section 3(a) of the Department's bill, would authorize suits against the United States "to adjudicate disputed titles to real property in which the United States claims an interest, other than security interests and water rights." The same provision, as proposed in section 4(a) of the Senate bill, would authorize suits "to quiet title to an estate or interest in real property, other than security interests and water rights, in which an interest adverse to plaintiff is

claimed by the United States." Presumably, the Senate did not intend to change the nature of the action which would be authorized by the bill. However, we believe that its language would have such an effect. It is the objective of the Department's bill to permit the resolution of questions of title to real property in which the United States claims any interest other than an interest in one of the excepted categories. (The categories excepted are so excepted because they are covered by existing laws 28 U.S.C. § 2410 and 43 U.S.C. § 666, and we perceive no need, at present at least, to change the existing law as to them.) But the Senate has so rearranged the wording of the section that the phrase "other than security interests and water rights", which previously modified the interest claimed by the United States, now modifies the estate or interest claimed by the plaintiff. We believe the language proposed by this Department to be clearly preferable. Moreover, we see no purpose in modifying the "interest" claimed by the United States by the phrase "adverse to plaintiff." We suggest, therefore, that those words be deleted from proposed section 2409a(a) of title 28 as set out in section 4 of the Senate bill as well as from proposed section 2409a(d) where they also occur.

While the Justice Department bill excepts from its application "trust or restricted Indian lands", the Senate bill would except also "any lands claimed by Indian or Native people based upon aboriginal right, title, use or occupancy." It is not clear whether the purpose of this additional exception is to protect "Indian or Native people" from suits by others or whether it is to protect the United States from suits by "Indian or Native people". Whatever the purpose, it does appear that it might have the latter effect, and we wish to note that it is not the intention of this Department, in proposing legislation consenting to suits against the United States, to bar suits by Indians or Native people asserting claims based upon aboriginal right, title use or occupancy. If the intent is to protect the Indian or Native people against suit with respect to lands claimed by them which are not in a trust or restricted status, we question the appropriateness of attempting to do so by an exception in this bill. The bill does no more than consent to suit against the United States. Whether Indians or Native people are suable with respect to any lands not in a trust or restricted status will continue to depend on considerations other than the provisions of this bill. We recommend that this additional exception in the Senate bill be deleted.

The Senate bill would limit the right of the United States to remain in possession or control of property pending an adjudication of title to that property as to which "possession or control existed at least ninety days prior to the commencement" of an action. We are aware of nothing that happens during ninety days' possession that warrants this particular distinction. We think this limitation could be prejudicial to the United States in some cases, e.g., in the event of an inadvertent but necessary encroachment in the course of project construction, and we recommend that the ninety-day provision be omitted.

The Department's bill would permit both the question of title and the question of compensation by the United States, in cases where the plaintiffs prevailed on the title question, to be resolved in a single proceeding. The Senate bill would require a second proceeding to determine compensation in such cases. The single proceeding would be advantageous to all parties concerned in terms of time and money involved. Whether these advantages are outweighed by the right of a landowner to a jury trial on the question of fair compensation for his land in a separate condemnation proceeding is a question which the Congress will have to answer. Inasmuch as the effect of the proposed law is to confer upon private citizens a right against the sovereign which they have not previously enjoyed at all, we do not believe that failure to provide for jury trial on the issue of compensation can properly be viewed as a deprivation of any right. It should be noted that with minor exception there is now no right to a jury trial in actions brought by a citizen against the United States.

If it is the view of the Congress that there is need for judicial confirmation of a disclaimer by the United States where joined as a defendant under this bill, we suggest that the word "order" be used instead of "decree" in line 7, page 4, of the Senate bill. This, we believe, would more accurately reflect the nature of the action which the court would take.

The Senate bill would provide for the "remanding" of cases to appropriate State courts upon the cessation of jurisdiction resulting from the filing of a disclaimer of interest by the United States. For a case which originates in a Federal court, as would all cases under these bills, there is no such thing as "remanding" the case "to the appropriate State court", and we doubt that a Federal Court can direct a State court to assume jurisdiction of a controversy simply by finding that no Federal question is involved. We, therefore, urge the omission of the provision in the Senate bill for remand to State courts.

The Senate has deleted altogether section 4 of the Department's bill which would have limited the proposed law to prospective operation. The Senate would provide a statute of limitations of six years from the date on which the "claim for relief" first accrued, or two years from the date of the act, whichever is later. The claim for relief would be deemed to have accrued "upon actual knowledge of the claim of the United States."

There are two principal reasons for the desire of this Department to limit the proposed law to prospective application. The first is purely administrative convenience. The second is founded upon more equitable considerations. The number of potential litigants who might avail themselves of the opportunity to file actions against the United States to quiet title to real property is unknown. Since most of the prospective suits are likely to be based on controversies which originated much more than four years ago, it is not unrealistic to apprehend a flood of litigation within two years after enactment of the bill. This, of course, would result in a significant burden both for this Department and the courts. We would not suggest, however, that rights accorded some should be denied others solely on grounds of administrative convenience. The second reason, we believe, is more compelling.

The problems leading to the proposed legislation are not new. For many years Congress has declined to relax the restrictions of sovereign immunity to the extent necessary to permit quiet title actions against the United States. During those years many claims have been submitted to the Congress. Some of those claims have been found to warrant special relief legislation, while others have been found lacking in merit and have been rejected. We do not believe that the door should be opened to the revival of all of the old controversies which were not settled agreeably to the complainants. To the extent to which old claims have not been heard at all, the traditional remedies could still be made available where warranted.

Should the Congress nevertheless see fit to give greater breadth to this legislation, we urge the adoption of a more adequate basis for determining the date of accrual of a claim for relief than the Senate bill provides. It is virtually impossible in many cases to ascertain when an individual first received "actual knowledge of the claim of the United States" to property which he supposed to be his own. If, contrary to our basic recommendation, accrual of a claim by an individual is to be dependent at all on his knowledge of the United States' interest or claim, we would suggest that the right of action, or claim for relief, be deemed to accrue on the date on which the claimant, or his grantor, first asserted his ownership of the land unless he establishes that he did not know or have reason to know of the United States' interest or claim until a later date. This would permit, and impose a burden upon, a claimant to show that he did not have, and could not be expected to have had, knowledge of the claim of the United States prior to a date within the statutory limitation. It would also permit the United States to establish facts from which prior knowledge or duty to know on the part of the claimant could reasonably be inferred.

In conclusion, then, I wish to emphasize that the Department of Justice favors the enactment of legislation which will permit, in orderly fashion and with adequate safeguards for the protection of the public interest, the institution of suits against the United States to quiet title to real property. We have suggested a bill which we believe, if enacted, would attain that goal. We feel that the Senate's changes in that bill have been, for the most part, detrimental rather than beneficial. For that reason, we urge, that the Department's bill be adopted, or at least to the extent to which I have suggested here, that the language of the Department's bill be adopted in preference over that of the Senate bill.

Mr. DONOHUE. How much time do you need for lunch. Lets say we come back at 1:30.

Mr. FRIZZELL. That is fine with me.

Mr. DONOHUE. I would like to have the other gentlemen available here so they might hear your testimony. This meeting is recessed until 1:30.

[Whereupon, at 12:30 p.m., the meeting was recessed until 1:30 p.m., on the same day].

AFTER RECESS

[The committee reconvened at 2 p.m., Chairman Donohue presiding].

Mr. DONOHUE. We will now resume the hearing that was recessed at 12:30 on the bills H.R. 12440 and on Senate bill 216 and the following companion bills on the same subject, to wit, H.R. 12453, 11127, 11411 and 11710, and 11772, having to do with providing jurisdiction in the Federal court for actions involving titles to lands in which the United States claims an interest.

We will now hear from Mr. Kent Frizzell, Assistant Attorney General in the Land and Natural Resources Division of the Department of Justice. Mr. Frizzell.

TESTIMONY OF KENT FRIZZELL, ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY WALTER KIECHEL, DEPUTY ASSISTANT ATTORNEY GENERAL; AND DAVID R. WARNER, CHIEF, GENERAL LITIGATION SECTION, NATURAL RESOURCES DIVISION

Mr. FRIZZELL. Good afternoon, Mr. Chairman, and gentlemen. My name is Kent Frizzell. I am the Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice and am here in response to this committee's request. With me today are Mr. Walter Kiechel, Jr., Deputy Assistant Attorney General, and Mr. David R. Warner, Chief of the General Litigation Section in my Division.

I have come to discuss seven bills having the common objective of authorizing suits against the United States to quiet title to real property. In reality, only two bills are presented for consideration. This is true because 5 bills (H.R. 11127, 11411, 11710, 11772, and 12440) are identical in their provisions with a draft bill previously prepared and submitted to the Congress by the Department of Justice. A sixth bill (S. 216) contains the provisions which passed the Senate on December 11, 1971. The seventh (H.R. 12453) is identical in content with the Senate-passed bill.

On September 30, 1971, my predecessor in this office testified before the Subcommittee on Public Lands of the Senate Interior and Insular Affairs Committee in connection with an earlier version of S. 216. At that time he offered, as a substitute for the Senate bill, the Department's draft bill. Subsequently, S. 216 was completely revised. The bill, as passed by the Senate, incorporates most of the features of the Department's bill, with certain changes in the language thereof. It is to those changes that I address myself today. For convenience I shall refer to the respective versions hereafter as the "Department's bill" and the "Senate bill".

Most of the changes made by the Senate are relatively minor. However, in several places the Senate has added words which seem to add no meaning. Other alterations by the Senate have, unintentionally, we believe, resulted in objectionable substantive changes.

Initially, it is to be noted that the Senate bill describes the nature of the actions authorized thereunder as "suits to adjudicate certain real property quiet title actions". The Department's bill described them as "suits to adjudicate disputed titles to lands in which the United States claims an interest". Although we believe that our language describes the bill's purpose with more precision, we do not see any substantive change resulting from the Senate's

choice of language or from subsequent changes made solely to insure internal consistency.

The Department's bill would add a new section 1347a to title 28 of the United States Code, conferring upon the district courts "exclusive original jurisdiction of civil actions under section 2409a". The Senate bill would also add such a section. It would also add a new subsection "(f)" to section 1346 which would confer "original jurisdiction of any civil action under section 2408a". (The reference to "section 2408a" is obviously a typographical error, as there is no section "2408a" in the existing Code, and none is proposed in the Senate bill). We elected to add a new section 1347a, rather than to add a new subsection to section 1346, in a choice between two logical points in the Code for the insertion of the new jurisdiction provision. We have no particular objection if the Congress prefers to add a subsection to section 1346.

However, we do feel strongly that there should be only one provision conferring jurisdiction upon the district courts and that it should confer exclusive original jurisdiction. Two jurisdictional sections, one of which speaks of exclusive jurisdiction and the other of which does not have that limiting language, would obviously be confusing at best.

In what is clearly an inadvertent transposition, section 2 of the Senate bill changes a reference to "Chapter 85 of title 28" to chapter "58".

Section 2409a, as proposed in section 3(a) of the Department's bill, would authorize suits against the United States "to adjudicate disputed titles to real property in which the United States claims an interest, other than security interests and water rights". The same provision, as proposed in section 4(a) of the Senate bill, would authorize suits "to quiet title to an estate or interest in real property, other than security interests and water rights, in which an interest adverse to plaintiff is claimed by the United States". Presumably, the Senate did not intend to change the nature of the action which would be authorized by the bill. However, we believe that its language would have such an effect. It is the objective of the Department's bill to permit the resolution of questions of title to real property in which the United States claims any interest other than an interest in one of the excepted categories.

(The categories excepted are so excepted because they are covered by existing laws 28 United States Code, section 2410, and 43 United States Code section 666, and we perceive no need, at present at least, to change the existing law as to them.) But the Senate has so rearranged the wording of the section that the phrase "other than security interests and water rights", which previously modified the interest claimed by the United States, now modifies the estate or interest claimed by the plaintiff. We believe the language proposed by this Department to be clearly preferable. Moreover, we see no purpose in modifying the "interest" claimed by the United States by the phrase "adverse to plaintiff". We suggest, therefore, that those words be deleted from proposed section 2409a(a) of title 28 as set out in section 4 of the Senate bill as well as from proposed section 2409a(d) where they also occur.

While the Justice Department bill excepts from its application "trust or restricted Indian lands", the Senate bill would except also

"any lands claimed by Indian or Native people based upon aboriginal right, title, use or occupancy." It is not clear whether the purpose of this additional exception is to protect "Indian or Native people" from suits by others or whether it is to protect the United States from suits by "Indian or Native people". Whatever the purpose, it does appear that it might have the latter effect, and we wish to note that it is not the intention of this Department, in proposing legislation consenting to suits against the United States, to bar suits by Indians or Native people asserting claims based upon aboriginal right, title use or occupancy.

If the intent is to protect the Indian or Native people against suit with respect to lands claimed by them which are not in a trust or restricted status, we question the appropriateness of attempting to do so by an exception in this bill. The bill does no more than consent to suit against the United States. Whether Indians or Native people are suable with respect to any lands not in a trust or restricted status will continue to depend on considerations other than the provisions of this bill. We recommend that this additional exception in the Senate bill be deleted.

The Senate bill would limit the right of the United States to remain in possession or control of property pending an adjudication of title to that property as to which "possession or control existed at least 90 days prior to the commencement" of an action. We are aware of nothing that happens during 90 days' possession that warrants this particular distinction. We think this limitation could be prejudicial to the United States in some cases, for example, in the event of an inadvertent but necessary encroachment in the course of project construction, and we recommend that the 90-day provision be omitted.

The Department's bill would permit both the question of title and the question of compensation by the United States, in cases where the plaintiffs prevailed on the title question, to be resolved in a single proceeding. The Senate bill would require a second proceeding to determine compensation in such cases. The single proceeding would be advantageous to all parties concerned in terms of time and money involved. Whether these advantages are outweighed by the right of a landowner to a jury trial on the question of fair compensation for his land in a separate condemnation proceeding is a question which the Congress will have to answer. Inasmuch as the effect of the proposed law is to confer upon private citizens a right against the sovereign which they have not previously enjoyed at all, we do not believe that failure to provide for jury trial on the issue of compensation can properly be viewed as a deprivation of any right. It should be noted that with minor exception, there is now no right to a jury trial in actions brought by a citizen against the United States, and when I speak here of a minor exception, only one comes to mind and that would be in the nature of a taxpayer refund suit.

If it is the view of the Congress that there is need for judicial confirmation of a disclaimer by the United States where joined as a defendant under this bill, we suggest that the word "order" be used instead of "decree" in line 7, page 4, of the Senate bill. This, we believe, would more accurately reflect the nature of the action which the court would take.

The Senate bill would provide for the "remanding" of cases to appropriate State courts upon the cessation of jurisdiction resulting from the filing of a disclaimer of interest by the United States. For a case which originates in a Federal court, as would all cases under these bills, there is no such thing as "remanding" the case "to the appropriate State court," and we doubt that a Federal court can direct a State court to assume jurisdiction of a controversy simply by finding that no Federal question is involved. We, therefore, urge the omission of the provision in the Senate bill for remand to State courts.

The Senate has deleted altogether section 4 of the Department's bill which would have limited the proposed law to prospective operation. The Senate would provide a statute of limitations of 6 years from the date on which the "claim for relief" first accrued, or 2 years from the date of the act, whichever is later. The claim for relief would be deemed to have accrued "upon actual knowledge of the claim of the United States".

There are two principal reasons for the desire of this Department to limit the proposed law to prospective application. The first is purely administrative convenience. The second is founded upon more equitable considerations.

The number of potential litigants who might avail themselves of the opportunity to file actions against the United States to quiet title to real property is unknown. Since most of the prospective suits are likely to be based on controversies which originated much more than 4 years ago, it is not unrealistic to apprehend a flood of litigation within 2 years after enactment of the bill. This, of course, would result in a significant burden both for this Department and the courts. We would not suggest, however, that rights accorded some should be denied others solely on grounds of administrative convenience. The second reason, we believe, is more compelling.

The problems leading to the proposed legislation are not new. For many years Congress has declined to relax the restrictions of sovereign immunity to the extent necessary to permit quiet title actions against the United States. During those years many claims have been submitted to the Congress. Some of those claims have been found to warrant special relief legislation, while others have been found lacking in merit and have been rejected. We do not believe that the door should be opened to the revival of all of the old controversies which were not settled agreeably to the complainants. To the extent to which old claims have not been heard at all, the traditional remedies could still be made available where warranted.

Should the Congress nevertheless see fit to give greater breadth to this legislation, we urge the adoption of a more adequate basis for determining the date of accrual of a claim for relief than the Senate bill provides. It is virtually impossible, in many cases, to ascertain when an individual first received "actual knowledge of the claim of the United States" to property which he supposed to be his own. If, contrary to our basic recommendation, accrual of a claim by an individual is to be dependent at all on his knowledge of the U.S. interest or claim, we would suggest that the right of action, or claim for relief, be deemed to accrue on the date on which the claimant, or his grantor, first asserted his ownership of

the land unless he establishes that he did not know or have reason to know of the U.S. interest or claim until a later date. This would permit, and impose a burden upon, a claimant to show that he did not have, and could not be expected to have had, knowledge of the claim of the United States prior to a date within the statutory limitation. It would also permit the United States to establish facts from which prior knowledge or duty to know on the part of the claimant could reasonably be inferred. So I want to make it clear at this point that the present language of the Senate bill would, in our opinion, open the floodgates to all of the land claims of the last century and more, for a period of 2 years, thereby casting a grievous burden upon the courts, the Department of Justice, and the people of the United States. The Congress, in opening the doors for a new forum for land claims against the Government, should exercise caution with respect to these effects.

In conclusion, then, I wish to emphasize that the Department of Justice favors the enactment of legislation which will permit, in orderly fashion and with adequate safeguards for the protection of the public interest, the institution of suits against the United States to quiet title to real property. We have suggested a bill which we believe, if enacted, would attain that goal. We feel that the Senate's changes in that bill have been, for the most part, detrimental rather than beneficial. For that reason, we urge that the Department's bill be adopted, or at least to the extent to which I have suggested here, that the language of the Department's bill be adopted in preference to that of the Senate bill.

Gentlemen, one last statement. The purpose and intent of this proposed bill by the Department was not to cure all of the inequities and the hardships that have existed for almost 200 years due to the doctrine of sovereign immunity as it is applied to quiet title actions against the U.S. Government. To attempt to solve all of those ills of the past would not only open up the floodgates of litigation, but additional objections would be heard by this committee and from other sources, governmental and private, that might well culminate in the very defeat of the objective of this bill.

Of course, there are going to be inequities that are going to arise if we say the provisions of this bill extend only to prospective claimants, but this will occur, also, if the provisions of the bill extend retroactively to 1962 claimants and plaintiffs. What about those aggrieved prior to 1962, 1952, 1900? The aggrieved parties do have a remedy available, though not as desirable. They can wait until the United States asserts its claim or come in through a special act of Congress. You have to have a cutoff date somewhere. Wherever it may be put, there are going to be some aggrieved parties. But some of the complaints against the Department's bill, I feel, are like the guy that says, "I am hungry and there is bread, but if I can't have cake, I will starve." We think ours is a good bill and that it merits your consideration.

Thank you for the opportunity to appear.

Mr. DONOHUE. Mr. Flowers?

Mr. FLOWERS. No questions, Mr. Chairman. It is a very good presentation.

Mr. FRIZZELL. I have, as I indicated in the first part of my statement, two gentlemen here who are, frankly, more expert than

I on this subject matter. I would like to give them the opportunity, if the chairman has no objection, to possibly give you a little insight on some of the points raised earlier this morning that were confusing, at least to me. I think that would be helpful to the chairman and this committee.

Mr. DONOHUE. Well, on page 2, in the last paragraph——

Mr. FRIZZELL. Yes.

Mr. DONOHUE [continuing]. You go on to say, "Initially, it is to be noted that the Senate bill describes the nature of the actions authorized thereunder as suits to adjudicate certain real property quiet title actions. The Department's bill described them as suits to adjudicate disputed titles to lands in which the United States claims an interest. Although we believe that our language describes the bill's purpose with more precision, we do not see any substantive change resulting from the Senate's choice of language or from subsequent changes made solely to insure internal consistency.

In other words, you can't see any real difference of conflict between the wording of the Senate bill in this regard than the language recommended by the Department?

Mr. FRIZZELL. A mere choice of words, Mr. Chairman; no substantive changes in that particular aspect of the two bills, true. It depends on who takes pride of authorship, I suppose.

Mr. DONOHUE. On page 4, the second and third paragraphs, in what is clearly an inadvertent transposition, section 2 of the Senate bill changes a reference to "chapter 85 of title 28" to "chapter 58."

What does that do, by changing it from chapter 85 of title 28 to 58?

Mr. FRIZZELL. I think that is a mere housekeeping amendment we were asking this committee to take care of. It is an inadvertent transposition and properly should be referred to as chapter 85. It is only a typographical error.

Mr. DONOHUE. In the second paragraph, section 2409a, as proposed in section 3(a) of the Department's bill, would authorize suits against the United States "to adjudicate disputed titles to real property in which the United States claims an interest, other than security interests and water rights." The same provision, as proposed in section 4(a) of the Senate bill, would authorize suits "to quiet title to an estate or interest in real property, other than security interests and water rights, in which an interest adverse to plaintiff is claimed by the United States."

What is meant by that?

Mr. FRIZZELL. Well, we feel, Mr. Chairman, that the Senate language herein quoted does, in fact, change the substantive nature of the original intent of the bill.

Mr. DONOHUE. In what way?

Mr. FRIZZELL. Well, I am going to defer to my chief of the Litigation Section, who deals with this type of litigation day in and day out, to give you a more precise answer.

Mr. WARNER. We started out with the proposition that under title 28, section 2410, of the existing code, the United States can be sued in suits to quiet title, where the United States has a lien interest. This section does not give the United States consent to

suit if the United States claims a title interest, but if it has only a lien interest, it can presently be sued under that authority. The Department's bill was drafted with the idea there is nothing wrong with section 2410 as it presently exists.

We have done quite a lot of litigation under that—there is no reason to change the existing law as to suits presently authorized by 2410, so the bill was drafted so as to except from the authority granted here the existing authority under 2410. The same situation applies with respect to suits to adjudicate water rights. There is existing authority to sue the United States for the adjudication of water rights. This is under 43 U.S.C. 666. So, not wishing to disturb the existing law, as to that grant of consent, there was included in the bill an additional exception as to suits relating to property with respect to which the United States claims water rights.

Now, what the Senate did, in its revision of the Department's proposal, was to put this exception as to security interests and water rights, as a modification upon the interest claimed by the plaintiff, and we don't think the Senate really intended to do that. We don't see any need to do that. We intend this bill, if adopted, to permit any claimant of an interest in real property to maintain an action against the Government to quiet title unless the authority to do that is already existent in one of these other laws, so that is what this is about.

Mr. DONOHUE. On page 7, you say, "The Senate bill would limit the right of the United States to remain in possession or control of property pending an adjudication of title to that property as to which "possession or control existed at least 90 days prior to the commencement of an action."

What does that really mean?

Mr. FRIZZELL. Here, again, I will defer to Mr. Warner.

Mr. WARNER. The Department's bill—

Mr. DONOHUE. Gentlemen, due to certain activities on the floor, it will be required by us to suspend this hearing again.

Mr. FRIZZELL. We understand.

Mr. DONOHUE. I would suggest you await a call from Mr. Shattuck so you can appear before us at some later date.

Mr. FRIZZELL. We will be happy to do so. I do have, Mr. Chairman, a five-page comparison of the bill as passed by the Senate with the bill as submitted by the Department of Justice. We have gone to some effort and time, and I think it will save counsel and the committee time to have an accurate comparison, line by line. We would like to submit this as part of the record, if you have no objection.

Mr. DONOHUE. I agree with you and we have no objection.

Thank you again.

[Whereupon, at 2:30 p.m., the meeting adjourned.]

ADDITIONAL STATEMENT

STATEMENT OF HON. SAM STEIGER OF ARIZONA

Mr. Chairman, your Committee is to be commended for tackling a difficult problem—the legal obstacles confronting landowners near Federally owned property in the vicinity of a river. Many land titles in my own State of Arizona which are adjacent to the Colorado River are caught in a web of conflicting claims by the State and Federal Government and private landowners.

Under the present law as the river changes its course slowly and naturally, title to the former riverbottom land that becomes exposed cedes to the adjacent landowner. Unfortunately, the river sometimes changes its course quite suddenly. In that case, the titles remain unchanged.

The landowners must then sort out the titles. Among private landowners the problem is at best difficult, but when the Federal Government is a party to the proceeding the problem is worse by far.

I urge you to consider favorably the bill before you which would allow the United States to be made a party to an action in the Federal district courts to quiet title to lands in which the United States claims an interest.

STATEMENT OF HON. VICTOR V. VEYSEY OF CALIFORNIA BEFORE THE CLAIMS SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY IN SUPPORT OF H.R. 11411, TO PERMIT SUITS TO ADJUDICATE DISPUTED TITLES TO LANDS IN WHICH THE UNITED STATES CLAIMS AN INTEREST

Mr. Chairman, I would like to commend this distinguished Committee for considering ways to end the grossly inequitable treatment presently accorded private property owners along the rivers of America. No other class of landowners that I am aware of face the kind of obstacles to development and transfer that confront owners near Federally owned property in the vicinity of a river. While the Government tries to be a good neighbor, its very sovereignty can make this almost impossible.

A painfully clear example of this is the insurmountable problem faced by private landowners along the lower Colorado River in California and Arizona. Many land titles in this area are caught in an unresolvable tangle of conflicting claims by the State and Federal Government and private landowners. Ownership is so unclear in the area that mortgages, and titles insurance are not available.

The problem stems from the difficulty in tracing movements of the river that occurred many years ago. The State of California acquired large tracts of Colorado River bottom lands under the Swamp and Overflow Act of 1850. During the 1870's the State issued patents to these upland areas to pioneer settlers. These patents describe the land based on a survey of 1874.

The property that these settlers acquired was for the most part wild, unsettled, and of relatively little value. The Colorado River flooded frequently, inundating on occasion as much as 60,000 acres, and it has been known to change its course by as much as a full mile in a single day. The river continued these wild, sudden changes along with gradual changes until the Hoover Dam was closed in 1935. Before that time the lands in question were sometimes on the east side of the river, sometimes on the west side of the river, and quite often under the river.

The law provides that when the river changes its course slowly and naturally, title to the former riverbottom land that becomes exposed cedes to the adjacent landowner. But when the river changes its course suddenly, titles remain unchanged.

Between private parties the problem of sorting out titles under these conditions would be difficult. But with the Federal Government as one of the disputing landowners, a fair solution becomes almost impossible. The Government not only has much greater resources for such litigation, but is clothed in sovereign immunity and may not consent to be sued at all.

The bill before this Committee today would declare the Federal Government's willingness to cooperate in good faith in the resolution of these tangled titles. I am pleased that the Department of Justice concurs in the need to waive sovereign immunity in situations like this.

Under present law, title disputes between private parties and the Federal Government can only be resolved when the Government decides to sue to settle the title. Under this bill the private parties could initiate suits of their own in the Federal District Courts without regard for the jurisdictional amount. They would have 6 years from date of enactment to commence such suits.

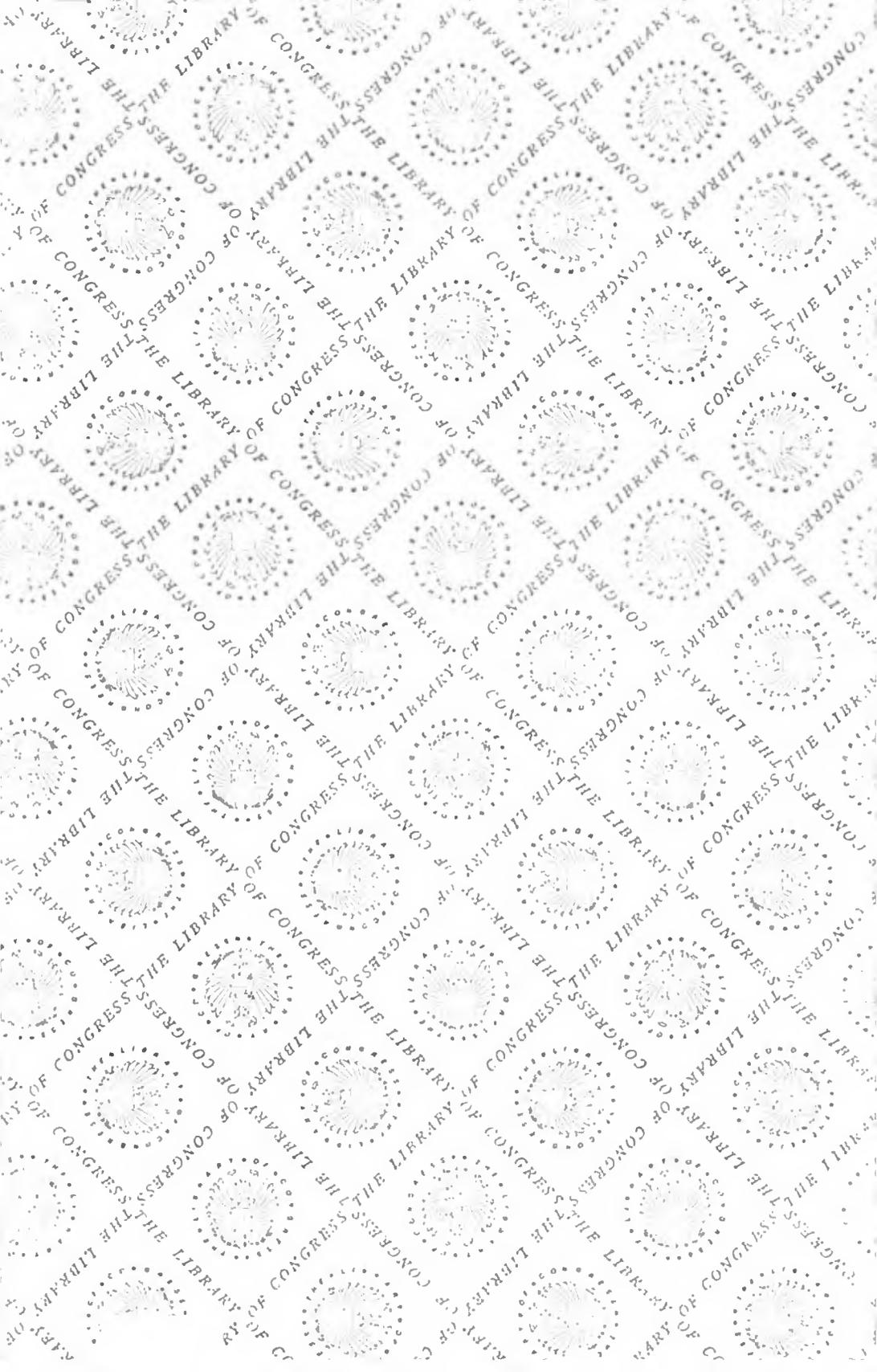
The bill authorizes suits to settle legal questions such as accretion and avulsion, easements and mineral titles. It does not authorize suits over water rights, or equitable claims of adverse possession, or challenges to trust and restricted Indian lands. It would leave intact all State real property law relating to issues not covered in the bill.

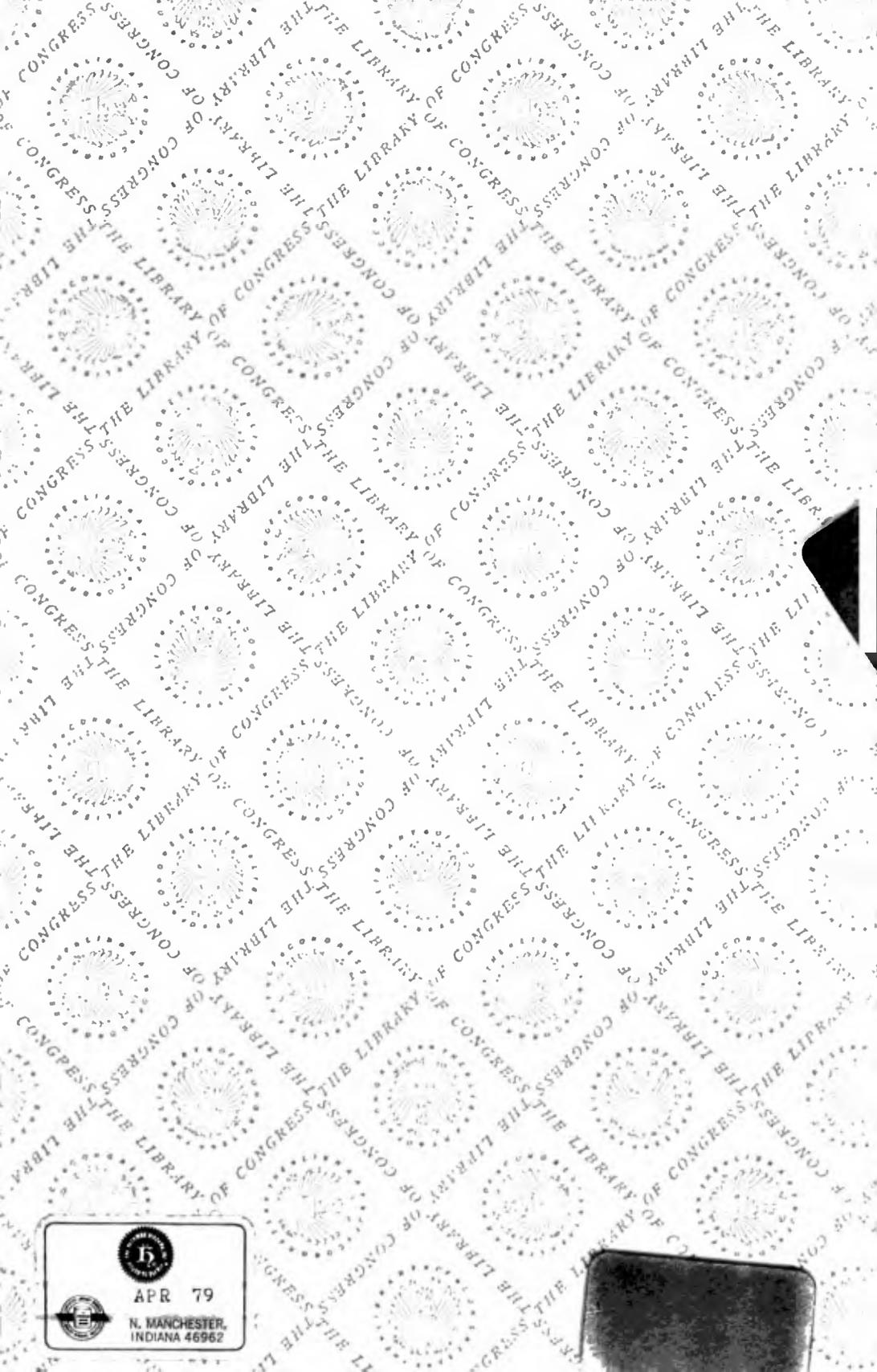
Mr. Chairman, the courts are the traditional forum for the resolution of disputes such as this. I hope this distinguished Committee will look into the need for this legislation and give landowners across the Nation access to the courts to settle these conflicting claims once and for all.



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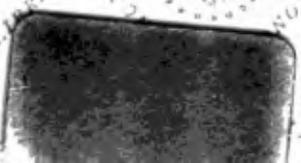







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