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The discovery, location, and development of mineral deposits on federal lands obviously necessitates access to and across such lands. Likewise, numerous situations exist where it is necessary to traverse public lands to reach intermingled private lands. In this article, Mr. Lonergan discusses the procedures to be followed, the difficulties likely to be encountered, and the successes to be expected in securing and exercising such access rights.

ACCESS TO INTERMINGLED MINERAL DEPOSITS, MINING CLAIMS AND PRI- VATE LANDS ACROSS SURROUNDING PUBLIC DOMAIN AND NATIONAL FOREST LANDS

*John B. Lonergan**

THE rising flood of interest in protecting and preserving the environment and the consequent legislation and regulation, growing impatience with alleged and highly publicized instances of the use in bad faith of privileges granted by the federal mining laws and asserted unjustifiable privileges favoring the mining industry under those laws, and increased interest and use by the general public in public lands and forest reserves, have all joined in the last few years to create substantial problems in securing and exercising access to intermingled or landlocked mineral deposits, mining claims and private lands.

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†The paper was first presented at the Legal Session of the April, 1972 Pacific Southwest Mineral Industry Conference of American Institute of Mining, Metallurgical and Petroleum Engineers.

The discussion which follows will be broad enough to inform those interested in securing and exercising access rights of the difficulties which may be encountered, the procedures which should be followed, and the troubles and successes which may be expected.

Some of the terms to be used should be defined. "Public domain" here refers to lands of the federal government under administration by the Bureau of Land Management of the Department of the Interior and which are not reserved, withdrawn, or claimed or occupied by others for particular purposes, and which therefore are open to entry, sale, or other disposal pursuant to general law, including the general mining laws.¹ Mineral deposits within stock raising homesteads are part of the public domain and access to such mineral deposits will be discussed. "Mineral deposits" are those locatable or already located or patented. "National forest land" is that lying within a national forest reserve. Acquired lands are not within the terms as here used.² It should be remembered that not all land of the federal government is public domain. There should be a constant awareness that large areas of public domain and national forests are severely restricted as to use and that public use may be prohibited entirely because of classification action, withdrawal orders, or reservation for or actual and different public or private use.³ This presentation does not attempt to discuss restrictive legislation or regulation in individual states, and local sources should be consulted.⁴

The impact of public environmental interest and of environmental legislation and regulation must not be underestimated. The inspired active concern of environmental and

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1. See *Rawson v. United States*, 225 F.2d 855, 858 (9th Cir. 1955), *cert. denied*, 350 U.S. 934 (1955).
 2. Lands acquired by purchase do not generally acquire a public land status and therefore are not subject to the mining laws of United States. *Ernest v. Smith*, 78 I.D. 368, 4 IBLA 192 (1971).
 3. In national forests, obvious examples are Wilderness and Primitive Areas and Roadless Areas.
 4. "[L]ife for a miner becomes complicated when he must comply with one type of surface protection regulation under the mineral leasing regulations and a second type under a state law. . . ." Edwards, *Federal Hard Mineral Leasing Practice Under Existing Law*, 17 ROCKY MT. MIN. L. INST. 281, 292 (1972).

protective organizations and interested citizens can be expected to continue. Such groups are determined to see to it that the policies, mandates and prohibitions of legislation such as the Wilderness Act of 1964,⁵ the National Environmental Policy Act of 1969⁶ and the organic national forest law, and related executive directives, as well as state and local statutes and regulation, shall be fully reflected in land uses, administrative and other agency regulations, procedures, decisions and actions.

Trends in federal legislation and executive orders, exemplified by the acts just mentioned, and similar trends in state legislation, along with the lack of a desirable public image for the mining industry, and unfortunate pictures painted in the emotions of the public by published articles emanating from interested sources and groups, necessarily affect the philosophies and actions of administrators.

ACCESS TO MINERAL DEPOSITS AND MINING CLAIMS ACROSS PUBLIC DOMAIN

The Mining Law of 1866⁷ officially opened mineral deposits of public lands to exploration, claim and occupation. Section 8 of that Act,⁸ to aid the miner and others, expressly granted rights-of-way across unoccupied public domain for public highway purposes. Nothing was said in the Law about means of access other than this, yet this Act was passed at a time when there were no limitations, one might say, upon the use to which public domain might be put by miners, cattlemen, and settlers.

The Placer Act of 1870⁹ likewise said nothing about access, and simply added provisions for placer locations. The public highway provision was already in federal mining law. The Mineral Location Law of 1872¹⁰ republished the basic

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5. 16 U.S.C. §§ 1131-36 (1970) (originally enacted as Act of Sept. 3, 1964, Pub. L. No. 88-577, 78 Stat. 890).
 6. 42 U.S.C. §§ 4321 to 4347 (1970) (originally enacted as Act of Jan. 1, 1970, Pub. L. No. 91-190, 83 Stat. 852).
 7. Act of July 26, 1866, ch. 262, 14 Stat. 251.
 8. *Id.* § 253 (codified at 43 U.S.C. § 932 (1970)).
 9. Act of July 9, 1870, ch. 235, 16 Stat. 217-18.
 10. Act of May 10, 1872, ch. 152, 17 Stat. 91-96.

mining statutes substantially in the form in which they have continued down to the present, but nothing was said about access across public domain. The public highway section remained (and remains) in the public land law, however.¹¹

The federal mining law, since enactment of the 1866 Act, has stated at its outset that all valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase.¹² This has been administratively and judicially construed as an invitation to enter, discover, locate and claim, and purchase valuable mineral deposits in open public lands.¹³ Procedures for claiming, locating and purchasing are stated with some particularity. The non-exclusive right of access across surrounding public domain for the acceptance of the invitation, although not expressly stated in that law, is necessarily implied in the statutory grant of the right to enter, locate and purchase. It is essential for the exercise of the privilege and in the enjoyment of the opportunities for which the invitation is so clearly extended. The implied right has been said to be a statutory right of access, founded upon the statutory grant of the right to enter, explore and purchase.¹⁴ Legal recognition of the right is as essential as was the necessity recognized by the Supreme Court for the doctrines of *pedis possessio* prior to discovery.¹⁵

Just as the stockmen and others created great public highways in the form of trails such as the Santa Fe, the Chisholm and the Oregon Trails, so the miners, by following one after another along easily traveled ways or through necessarily traversed canyons, accepted the offer contained in the

11. 43 U.S.C. § 932 (1970). The law is construed as a continuing offer, to be accepted only in accordance with local law. *Ball v. Stephens*, 68 Cal. App. 2d 843, 158 P.2d 207 (1945).

12. 30 U.S.C. § 22 (1970).

13. *Union Oil Co. v. Smith*, 249 U.S. 337, 346-47 (1919); *United States v. Carlile*, 67 I.D. 417, 421 (1960).

14. *Access Over Public Lands*, 66 I.D. 361, 363 (1959). While it is the rule that public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of Congress or to withhold what is given either expressly or by necessary or fair implication. *United States v. Denver & Rio Grande Ry.*, 150 U.S. 1, 13 (1893). Acts making grants are to receive a construction as will carry out the intent of Congress. *Winova & St. Peter R.R. v. Barney*, 113 U.S. 618, 625 (1885).

15. *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919).

public highway section¹⁶ and thereby established public highways.¹⁷

In 1895 a right-of-way act¹⁸ authorized the granting of tramroad rights-of-way by the Secretary of the Interior. Again, no express provision was made by Congress for mine access, possibly on the assumption that the general mining law offers necessarily implied grant of a right of access. The Department of the Interior has used the tramroad statute and regulations thereunder in allowing exclusive road rights-of-way for access for mining purposes.

Thus it seems there are three procedures which may be used to obtain access to mineral deposits and patented and unpatented mining claims: the exercise of the implied right, the establishment of a public highway, and the procurement of a private tramroad right-of-way.

Whether the right-of-way for access was considered as granted to the miner as a member of the public or was to be implied from the statutes forming the general mining law, the right of the miner to traverse the public domain went unquestioned, it seems, until the issue was officially raised in 1959 as to whether a rental could be charged a miner for the use of an access right-of-way across public domain for the purpose of exercising rights granted under the general mining law. In 1959 the Acting Solicitor of the Department of the Interior ruled¹⁹ that the right of access was implied necessarily from the statutory right to enter, prospect, mine and purchase, hence no rental could be charged. The opinion pointed out that Congress had recognized the right of "free passage or transit over or through the public lands"²⁰ and that federal law²¹ afforded relief to owners of mining claims where access was denied for any reason. The opinion con-

16. 43 U.S.C. § 932 (1970). See also 43 C.F.R. § 2822 (1972).

17. For an example see *Ball v. Stephens*, 68 Cal. App. 2d 843, 158 P.2d 207 (1945). The public highway statute recognized and confirmed rights-of-way created by use prior to 1866. *Central Pac. Ry. v. Alameda County*, 284 U.S. 463, 473 (1932).

18. Act of Jan. 21, 1895, ch. 37, § 1, 28 Stat. 635, as amended, 43 U.S.C. § 956 (1970).

19. Access Over Public Lands, *supra* note 14.

20. *Id.* at 363.

21. 43 U.S.C. §§ 1063-64 (1970) (originally enacted as Act Feb. 25, 1885, ch. 149, §§ 3-4, 23 Stat. 322), amended, Act of Mar. 10, 1908, ch. 75, 35 Stat. 40.

cluded that the genesis and history of the mining laws made it clear that Congress intended to give the miner free access to minerals in public lands and to leave him free to mine and remove them without charge. The opinion reasoned that Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside the boundaries of their claims for the running of tunnels and for roads. It agreed that roadways are necessary as an adjunct to the working of claims and as a means toward removing minerals, and declared that the Department had recognized that roads were necessary and complementary to mining activities. The opinion further pointed out that if a tramroad right-of-way for an access road were to be granted the miner under the 1895 Act, an annual rental could be charged, but in such case the right when granted would vest an exclusive right of user in the mining claimant, whereas a road constructed by a claimant for purposes connected with his mine, without the benefit of such an express grant by the Department, would not be exclusive.

There is no specific law giving the Secretary discretionary authority to grant a right-of-way for mine access roads under general regulations.²² In practice, one desiring to be doubly secure in his right of access across public domain has either seen to it that his access road is a public highway by public user or acceptance by local authority (according to local law), or has obtained from the land office an exclusive tramroad right-of-way.

A federal court in Nevada in 1963, in a case in which the right to compensation and the amount thereof for the taking by eminent domain by the United States of an existing private mine access road across the public domain were in issue, held²³ that the access road and right-of-way to the mining

22. 30 U.S.C. § 43 (1970) recognizes that easements are necessary means to complete development of mines, and uniform mineral patent language grants "the land described" with "appurtenances" and "rights." The appurtenances are necessarily something other than land and its mineral deposits. The statutory authority for the language cannot be found, and as Congress has countenanced its use over the years it may be well argued that Congress recognized it as descriptive of the implied right of access necessarily granted with the land and affirmed the interpretation by the Secretary of the Interior.

23. *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328 (D. Nev. 1963).

claims (some patented and some unpatented) created in the owner by necessary implication from the mining laws a non-exclusive right of way (quite apart from the rights of the public) which was a property right for the taking of which he was entitled to just compensation under the Constitution. Substantial damages were later awarded.²⁴

A tramroad right-of-way secured by application to the Bureau of Land Management under the 1895 Act and regulations²⁵ requires payment of annual rental and by its terms may exact of the grantee the obligation to maintain and repair, sometimes to allow use by others under particular circumstances, and to hold harmless the United States and its officers. A termination date may be included. It is well to assume that currently appropriate environmental impact provisions will be included. The right granted is not an estate or interest in land²⁶ but the regulation provides that claimants and entrymen junior in time will take subject to the outstanding grant.²⁷ If cancelled or if a term expires, it would seem that the miner in a given case and under appropriate circumstances could still claim his implied right of access over the same route or might even claim it had become a public highway by public user (if permitted by local law).

It is apparent that having acquired a use by a non-exclusive right of access under the implied authority from Congress, the miner seeking to formalize it by procuring a tramroad right-of-way under the 1895 Law probably would be unable to exclude others, who had also used the same way, from use of the right-of-way should he obtain the formal grant. And, in a given instance, he might be unable to obtain a tramroad right-of-way because so many miners or others of the public had used it as to make it a public highway and thus not open, unoccupied public domain.

24. *Fibreboard Paper Products Corp. v. United States*, 355 F.2d 752, 755 (9th Cir. 1966).

25. 43 C.F.R. Pt. 2810 (1972).

26. 43 C.F.R. § 2801.1-1 (1972).

27. 43 C.F.R. § 2801.1-2 (1972).

The Acting Solicitor's opinion²⁸ and the decision of the Nevada federal court²⁹ were foundations for a decision in late 1971 by the Interior Board of Land Appeals³⁰ to the effect that the Bureau of Land Management had no authority to accept an application for a special use permit to accommodate such an access right-of-way, as the claimant already possessed the right, implied by the Congressional enactment of the general mining laws, for a non-exclusive road for such purpose.

The Acting Solicitor's opinion points out that the miner who builds the road under the implied authority from Congress is liable in damages if he unnecessarily causes loss or injury to the property of the United States. A mining claimant who exercises the implied right may be held liable for unnecessary surface damage, unnecessary destruction of vegetation, or for unnecessary use of areas of the public domain for circuitous routing, and, it seems, for failure to restore damaged surface areas upon any abandonment of the mining project, absent intervening use by others or official action so as to create a public highway or another private access way. The right being implied, reasonable conditions and covenants relating to its exercise may be likewise implied, one would think, and these could be somewhat similar to those found in the type of tramroad right-of-way grant obtainable under the 1895 Law, with the exception of the obligation to pay rental and any limitations as to time or term. The law will undoubtedly imply provisions as to restoration and protection of the environment. An abandoned route, with any attendant surface damage, should be reasonably restored. The implied grant must necessarily have its own limitations. Certainly there would be liability in an instance in which a road was constructed for an ulterior motive or otherwise in bad faith or fraudulent exercise of rights granted by the mining laws. It is often asked, what may be the right of the miner who opens up a road by cutting, grading and filling for purposes of prospecting and developing a claim, only to find that the

28. Access Over Public Lands, *supra* note 14.

29. United States v. 9,941.71 Acres of Land, *supra* note 23.

30. Alfred E. Koenig, 4 IBLA 18 (1971).

route is unsatisfactory or the mining activity so great that a second or more desirable route must be selected and improved. It would seem that the implied right of access is co-extensive with the means reasonably required in the bona fide exercise of the granted mining right and that if more than one route or an improved route should become necessary, it could be selected, improved and used.³¹

Public lands entered and patented under the Stock-Raising Homestead Act of 1916³² do not include the mineral deposits therein³³ and the latter, having been reserved to the United States, remain public domain and may be claimed under the general mining laws. But, the prospector "shall not injure, damage, or destroy the permanent improvements . . . and shall be liable to and shall compensate . . . for all damages to crops . . . by reason of such prospecting."³⁴ The prospector may enter without asking. If successful, he may locate and "may reenter and occupy so much of the surface [of the homestead] as may be required for all purposes reasonably incident to mining and removal"³⁵ of minerals, after first securing written consent or waiver by the entryman or patentee, and paying for or secure by bond the payment of damages to the crops or tangible improvements. Where minerals are mined or removed from land in a stock-raising homestead, there is also a possible liability for any damage that may be carried to the value of the land for grazing.³⁶ Access across public domain outside the stock-raising homestead will be by one of the methods already discussed, while access across the homestead surface is limited and conditioned to protect the entryman, patentee or successor.³⁷

Having recognized that there is an implied right of access arising from acceptance of the invitation and the exer-

31. *Compare* Central Pac. R.R. v. Alameda County, 284 U.S. 463 (1932).

32. Act of Dec. 29, 1969, ch. 9, 39 Stat. 862, as amended 43 U.S.C. §§ 291-301 (1970).

33. *Id.* § 299.

34. *Id.*

35. *Id.*

36. 30 U.S.C. § 54 (1970). For discussion of this problem see Note, 11 Wyo. L.J. 116 (1957); 1 AMERICAN LAW OF MINING §§ 3.48-3.50 (1972).

37. One hears of the mining company whose representative asked first to prospect, and returned some time later to receive the good word only to find the owner had done all the prospecting—for himself.

cise of the privilege granted by the general mining laws for location and acquisition of valuable mineral deposits, little in the way of demonstration should be required to show that there should be a similar right of access for exercise of rights granted by a federal mineral prospecting permit or lease. The customary lease form contains a contractual right or privilege to construct and maintain on the lands leased certain improvements including roads necessary to the full enjoyment of the contractual right. But, under the regulations,³⁸ any disturbance by grading or other acts of construction upon the surface of the leased area of land, although necessary to a lessee's operation, including that occurring in the building of necessary roads, may be substantially limited, and certainly delayed, by the need for compliance with Interior regulations designed to avoid, minimize or correct damage to the environment during "operations" for the discovery, development, surface mining and on-site processing of minerals under permits, leases or contracts issued under leasing acts³⁹ and the Materials Act.⁴⁰ "Operations" includes roads which are used in the process of determining the location and quality of the deposit, or in developing, mining and processing the minerals.⁴¹ Outside the leased area, the lessee has an implied right, inherent in the pursuit of his mining activities under the permit or lease, to cross enclosing public domain lands. The lessee can either exercise his implied right or may secure the benefits of a special use permit, or a tramroad right-of-way giving him exclusive use under the Act of 1895. As in instances in which a tramroad right-of-way is desired for the exercise of rights granted to locate valuable mineral deposits, such a tramroad, under some conditions, could be conditioned upon a stipulation by the grantee that the road might be used by others. Of course, such a stipulation ought not to be so phrased or exercised as to substantially interfere with the full enjoyment of the grant made by the act of Congress or the

38. 43 C.F.R. Pt. 23 (1972).

39. Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, as amended 30 U.S.C. §§ 181-287 (1970); Mineral Leasing Act for Acquired Lands, Act of Aug. 7, 1947, ch. 513, 61 Stat. 913, as amended 30 U.S.C. § 351 (1970).

40. Materials Act of July 31, 1947, ch. 406, 61 Stat. 681, as amended 30 U.S.C. § 351 (1970).

41. 43 C.F.R. § 23.3(g) (1972).

mineral leasing laws and the lease itself, nor should it allow others to use without participating in cost and expense.

Rights-of-way needed in the exercise of the contract right to take mineral materials from the public domain under a material sale agreement would seem to be defined and governed in much the same manner as those relating to the exercise of rights under a mineral leasing act agreement, particularly in view of the surface exploration, mining and reclamation regulations.⁴²

Conversion of the possessory right held by virtue of ownership of a mining claim into a fee title by procurement of a mineral patent does not limit the appurtenant right of access across surrounding public domain. Mineral patent language grants the land with attendant "rights and appurtenances," in so many words.

The comments made above with respect to access to mining claims would apply as well to access to valid millsite claims located or purchased and patented under the federal mining laws.

No real delay in a project need be encountered in securing an exclusive tramroad right-of-way grant, for advance permission to construct and use can be obtained upon proper application.⁴³ This must be qualified by an expression of hope that undue delay will not be caused by environmental studies and statements, if deemed required by the National Environmental Policy Act of 1969 or local laws or ordinances.

This portion of the discussion is concluded by a further caution that access ways and areas cannot and should not be acquired by purported mining claim or millsite locations made simply to facilitate access. Additionally, it should be remembered that the Act of July 23, 1955,⁴⁴ reserves to the United States, its permittees and licensees (and this seems to include

42. 43 C.F.R. Pt. 23 (1972).

43. 43 C.F.R. § 2801.1-4(a) (1972).

44. Act of July 23, 1955, ch. 375, 69 Stat. 367, as amended 30 U.S.C. §§ 601, 603, 611-615 (1970). Regulations concerning management of surface resources by the United States and prohibition on a locators interference with access are listed under 43 C.F.R. Pt. 3710 (1972), and more specifically, in § 3712.1(b).

one seeking to exercise rights under the general mining laws), the right to cross over and use the surface of locations made after July 23, 1955 when such use will not endanger or materially interfere with the mining activities of the mineral claimant.⁴⁵

Regulations relating to program policy concerning the management of public lands are found in the Code of Federal Regulations.⁴⁶ These regulations provide that the Bureau of Land Management will continue to administer all lands under its jurisdiction for multiple-use and sustained yield of the several products and services obtainable therefrom.⁴⁷ The regulations further provide that the lands will be managed:

(a) To attain the widest range of beneficial uses of the environment (including the land, water, flora, fauna, and other environmental elements), without undue environmental degradation, risk to health or safety, or other undesirable consequences.

(b) To attain optimum production of its various products and for those other beneficial uses for which the lands are physically and economically suited, consistent with acceptable environmental quality.

(c) To preserve important historic, cultural, and natural aspects of our national heritage.
The following matters will be considered:

(1) Existing or future economic and social needs for the resource, use, value, or commodity.

(2) The effect of any proposed use on all other resource values.

(3) Coordination and cooperation with the resource use and management programs of States, local governments, public organizations and private landowners.

(4) Consistency with national programs.

(5) Compatibility of the possible uses.

45. 30 U.S.C. § 612(b) (1970).

46. 43 C.F.R. Pt. 1720 (1972).

47. 43 C.F.R. § 1725.1 (1972).

(6) Compatibility with the maintenance and enhancement of long-term productivity of the lands and the integrity of the environment.⁴⁸

In view of the listed program policy and environmental considerations, the Bureau, through coordination and cooperative programs with miners and the mining industry, attempts to manage the use of the public domain for appropriate access to mining claim locations. In most cases this approach has been successful with legitimate mining companies and operators who understand the multiple-use principles. Advance contact with the district or land office of the Bureau, having jurisdiction, is usually advisable before a road is constructed.

Subsurface access in public domain would seem to be an unnecessary extension of the discussion. The prospector, excavating by any means including drilling, is vertically proceeding through public domain toward a desired discovery. The privilege is granted by the general mining law and, until now, no special permit has been required. Surface and sub-surface damage considerations and liabilities would be the same, whether one were to create an open cut, shaft, tunnel or drill hole. As such an improvement extends through overlying material, it is a route of access toward a discovery. Until discovery is made, the locator is simply passing through public domain under the license created by statute to prospect for and claim valuable deposits.⁴⁹

The responsibility for restoring excavations created in establishing routes of access seems to have been questioned, and more and more we hear of persons injured or killed as results of alleged failure on the part of prospectors or miners to fill up, close up or warn against excavations. Holes and other dangerous conditions should be capped, covered, marked, posted or restored, or the creators and their lessors, if any, should expect to take the consequences. Otherwise, they are plainly participating in an unsigned and unwritten petition to Congress and state legislatures to enact effective and severe legislation.

48. 43 C.F.R. § 1725.3-2 (1972).

49. 30 U.S.C. § 22 (1970).

ACCESS TO NON-MINERAL PATENTED LANDS
ACROSS PUBLIC DOMAIN

Congress has authorized grants of parcels of public domain through the homestead acts, laws in aid of railroads, and the like, and these are usually the obvious examples of parcels constituting intermingled private ownerships. Access through establishment of public highways under the statutes originally contained in Section 8 of the Mining Law of 1866,⁵⁰ mentioned previously, is available, of course. These roads are necessary aids in the development and disposition of the public lands.⁵¹

Patents under homestead laws are issued under statutes designed to people, colonize, and develop western lands. Access to enter, improve, reside and cultivate was absolutely necessary if one were to take up the offer and seek to obtain the patent. The purposes of the grant were not ended on patent, and access continued to be essential. Development could not have been expected to be held at the level achieved for patent—and a future expansion of use and activities, with newer and improved means of travel, must have been expected and even sought and hoped for by Congress.⁵²

An implied grant of access was recognized by the Secretary of the Interior, whose patents grant land and its appurtenances, to the patentee, his heirs and assigns forever.

The reasoning of those empowered to decide for the Secretary in the mining access cases would apply equally to support their similar conclusions were the questions to be raised as to homestead access. It is an appurtenant and necessarily implied right, not stated, but to be exercised in manner according to the needs and means of the time, to provide access for the uses reasonably to have been foreseen when the patent issued.

Access can also be obtained by a right-of-way obtained from the Bureau of Land Management.⁵³ Rental will be pay-

50. 43 U.S.C. § 932 (1970).

51. *Central Pac. R.R. v. Alameda County*, *supra* note 31, at 473.

52. *Id.*

53. 43 C.F.R. Pt. 2800 (1971).

able and the comments made as to tramroad rights-of-way for mining will generally be applicable here.

THE ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act of 1969⁵⁴ (NEPA) directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies stated in the Act. Section 102(2)(C)⁵⁵ of the Act requires all agencies (among other things) to include in every recommendation or report on major federal actions significantly affecting the quality of human environment, a detailed statement by the responsible officer on certain environmental features. The President's Council on Environmental Quality includes in the meaning of "major actions" projects and continuing activities involving a federal lease, permit, license, certificate or other entitlement for use.⁵⁶ One can conclude from opinions in the federal courts of appeal⁵⁷ that the environmental impact statement procedure under the National Environmental Policy Act may be applied within the federal government even to what one could define as minor federal actions. Thus, proposed actions, though relatively minor, that may threaten harm or damage to the environment are to be assessed and if it is determined that such an action will have significant environmental impact, an environmental statement must be first prepared by the agency. One reason for requiring statements on such minor projects is that in the totality of all such minor items there can be a major environmental effect.⁵⁸ If the proposed action will not have a significant impact on the environment, such a determination must be documented in the case record or field examination report in question.

54. 42 U.S.C. §§ 4321 to 4347 (1970).

55. *Id.* § 4332 (2) (C).

56. 36 Fed. Reg. 7724 (1971).

57. *See, e.g.*, *Hanley v. Mitchell*, 460 F.2d 640, 644 (2d Cir. 1972); *Calvert Cliffs' Coord. Com. v. AEC*, 449 F.2d 1109, 1113 (D.C. Cir. 1971); *Zabel v. Tabb*, 430 F.2d 199, 211 (5th Cir. 1970).

58. *See* President's Council on Environmental Quality, *Guidelines* § 5(b), 36 Fed. Reg. 7724-25 (1971). For a discussion see Lindgren, *Conservation, The Environment and Federal Oil and Gas Operations*, 17 ROCKY MT. MIN. L. INST. 113, 122 (1971).

While no federal action is required when the miner exercises his right of access or locates his claim, or develops or mines it, or locates his millsite and improves it with a mill or reduction works, the very absence of such an opportunity to assess and prevent threatened harm or damage to the environment may alone be sufficient to justify legislation to amend existing mining law short of the extensive changes proposed by various pending bills. Environmental impact studies and statements and other actions under the procedures established under the NEPA in connection with major federal mineral leases are in order. The trend of judicial decisions leaves no doubt that the policy enunciated in NEPA will be strictly enforced by judicial process in appropriate cases. It can be expected in connection with substantial tramroad rights-of-way applications.⁵⁹

Enforcement of the procedures under NEPA will necessarily have a delaying effect wherever federal action under that Act is required. (Also, state legislation may require such studies and reports for state and local agencies.) Those agencies of the federal government which have not reviewed and amended their regulations dealing with procedures and decision making can be expected to do so at an early date. The effectiveness, or lack thereof, of the Mining and Minerals Policy Act of 1970⁶⁰ may soon become apparent.

An executive order of February 8, 1972⁶¹ relating to "off-road" vehicles is of interest. On that date the President sent to the Congress a message⁶² which in part pointed out that many environmental problems are influenced by the way our economy operates and that conversely, efforts to improve environmental quality have an effect on the economy. One portion of the message referred to off-road vehicles of the types used for recreational purposes. He said that the number of off-road vehicles had increased and so had their use on public lands, with the land too often suffering as a

59. See 2 ENVN. L. REPR. 10015 (1972) (Comment criticizing decision in Koenig, *supra* note 30).

60. 30 U.S.C. § 219 (1970).

61. Exec. Order No. 11644, 37 Fed. Reg. 2877 (1972).

62. 118 CONG REC. § 1426 (daily ed. Feb. 8, 1972); Weekly Comp. of Pres. Doc., Vol. 8, No. 7, issue of Feb. 14, 1972.

result. He referred to his executive order of the same date directing the Secretaries of Agriculture, Interior and others to develop regulations providing for control for use of off-road vehicles on federal lands. The order defines off-road vehicle as any motorized vehicle designed for or capable of cross-country travel on or immediately over land, water, sand, snow, ice, etc., with certain exceptions not pertinent here. It requires each agency head to develop and issue regulations and administrative instructions within six months, to provide for administrative designations of the specific areas and trails on public lands on which the use of off-road vehicles may be permitted, the areas in which not permitted, and the date on which such designation of lands shall be completed and effective.

A prospector or miner secures access by jeep, pickup truck, or heavier equipment. All four-wheel drive vehicles are designed for or capable of cross-country travel on or immediately over land. Perhaps the day of the miner's free right of access is at an end? The order applies to both the Secretaries of Interior and Agriculture and thus national forests, in which the Secretary of Agriculture undoubtedly already had the authority to cover the subject by regulations, are now to be included in regulations required of the Secretary by the executive order, along with public domain lands.

ACCESS TO MINERAL DEPOSITS AND MINING CLAIMS ACROSS NATIONAL FOREST LANDS

We turn now to national forest reserves and surface access therein to reach interesting mineral deposits or claimed or operating deposits, whether within mining claims or patented lands.

In 1891 the President was granted authority by Congress⁶³ to establish so-called forest reserves, now known as national forests. In 1897 the body of statutory law which the Forest Service calls its organic law⁶⁴ was expanded to state

63. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103, *as amended* 16 U.S.C. § 471 (1970).

64. 16 U.S.C. §§ 471 to 583 (1970).

in part⁶⁵ that it was not the purpose or intent of the law to authorize the inclusion in such reserves of lands more valuable for the minerals therein than for forest purposes. An 1897 amendment added⁶⁶ that any mineral lands in the national forest which had been or which might be shown to be such, and which were subject to entry under the existing mining laws and rules and regulations applicable thereto, should continue to be subject to such location and entry notwithstanding any provisions relating to national forests. One section⁶⁷ of the 1897 amendment provided in part that nothing therein should prohibit any person from entering upon such national forests for all proper and lawful purposes, including those of prospecting, locating and developing the mineral resources thereof, and that such persons as well as persons entering for any other lawful purpose, must comply with the rules and regulations governing such national forests.

At first there was no restriction upon the exercise by the prospector or miner of his asserted right to construct an access road within national forests. Eventually, Forest Service regulations, while requiring the procurement of a special use permit in advance of the construction of any road, excepted from this requirement a road constructed under a statutory right of ingress and egress.⁶⁸ However, since September 5, 1968 the regulations have required that no road (and this includes a trail) shall be constructed until it is authorized in writing.⁶⁹ Prior to 1968 although a special use permit was required where a road was involved, a trail could be constructed with the consent and under the supervision of the local forest officer without a permit.⁷⁰

The statute previously mentioned relating to public highways on the public domain, does not apply in national

65. 16 U.S.C. § 475 (1970) (originally enacted as Act of June 4, 1897, ch. 2, § 1, 30 Stat. 34).

66. 16 U.S.C. § 482 (1970) (originally enacted as Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36).

67. 16 U.S.C. § 478 (1970) (originally enacted as Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36). See *Access Over Public Lands*, 66 I.D. 361, 363 (1959); 42 Op. Att'y Gen. 7 (1962). See also 16 U.S.C. § 528 (1970). For statutes dealing with acquired lands in national forests see 16 U.S.C. §§ 520, 521 (1970).

68. See 36 C.F.R. § 251.6(c) (1960).

69. 36 C.F.R. § 212.8(a) (1972).

70. See 36 C.F.R. § 251.6(e) (1960).

forests. However, a tramroad right of way may be obtained through the Bureau of Land Management under the 1895 Act, mentioned earlier, the Act of March 3, 1899,⁷¹ and pertinent regulations.⁷²

The Secretary of Agriculture and under him the personnel in the Forest Service, are duty bound to foster, improve, and protect the forest areas and vegetation.⁷³ Whether they admit it or not, some Forest Service personnel seem to wish to exclude private ownership from within large areas of national forests. This is certainly true as to isolated parcels such as homesteads and mining properties, difficult to protect or observe. The ability to control or hinder access gives one great power to control use. A substituted right to be compensated for a taking or to claim damages from an overzealous public officer is not a good substitute for the reasonable use of one's private property, free of compulsion or indirect interference.

The statutes and regulations make it clear that the Forest Service has the duty and responsibility to issue appropriate special use permits for the construction of access roads and ways for mining and in recent years it has been given the added power to grant permanent or temporary easements for access road rights-of-way.⁷⁴ The terms of such permits and easements are prescribed to some extent in the regulations, and some are left to negotiations according to the requirements of the particular situation.

Thus, while mining may continue under the mining laws within national forests, access to the deposit or claim is always subject to the effects of pertinent, applicable and uniform regulations⁷⁵ as contemplated by the organic act. A road or trail should not be constructed in advance of issuance of an appropriate special use permit. This is certainly likewise true where the grant of an easement is sought under the 1964 amendment.

71. 30 Stat. 1233 (codified at 16 U.S.C. § 525; 43 U.S.C. §§ 665, 958 (1970)).

72. 43 C.F.R. Pt. 2810 (1972).

73. 16 U.S.C. § 551 (1970).

74. 16 U.S.C. § 533 (1970); 36 C.F.R. §§ 212.8, 212.10(d) (1972).

75. 16 U.S.C. §§ 471, 478, 482 (1970). For regulations concerning special use permits see 36 C.F.R. § 251.1 (1972).

When one uses a Forest Service road for mining access purposes, he may be required to assist in the maintenance of such a road, commensurate with his use.⁷⁶ One faced with the problem of access in a national forest should consult not only the applicable laws and regulations but also the internal provisions which are quite pertinent and which, as to easements and use permits, are found in the Forest Service manual.⁷⁷ He should also recall that new regulations for mining claim use and access to claims in national forests have been drafted but were under reconsideration in the light of the relatively new environmental legislation and recent judicial decisions which point up the serious aspects of the National Environmental Policy Act of 1969.⁷⁸

One might wonder what the situation is when a road constructed during the period of time in which the Forest Service did not require a permit suddenly becomes the focal point for the interest of a district ranger or forest supervisor who is unhappy or dissatisfied with the positions of the road or the mode of use or its maintenance. The road in such case would have been constructed quite properly and lawfully. Can the forest officer shut it down in the absence of an application for an issuance of a special use permit or on a decision not to renew or extend the term of a permit if granted? When we realize that the road was permitted in the first place only under the rules and regulations of the Secretary (or the absence thereof), it seems reasonable to conclude that, so long as the rules and regulations and the permit conditions and provisions sought to be imposed at a current time are reasonable and are uniform when compared with those required of others for similar roads, compliance with such currently adopted rules and regulations could be enforced. Certainly they could be enforced with respect to substantial changes in routing, maintenance, repair, increased use, or changes in mode of use.

76. 16 U.S.C. § 537 (1970).

77. The Manual is an unpublished intra-departmental instruction guide for Forest Service personnel and which does not have the force of a regulation. See, in it, Titles 2700 and 2800.

78. See 36 Fed. Reg. 7724 (1971).

Forest officers, like all other representatives of the United States, are not authorized to waive compliance with the law. Regulations, properly published, have the force of law. While the user who constructed the road during a period prior to the requirement of a permit might not be forced under the circumstances to restore the road if he declined to secure a permit under current rules and regulations, he could be made liable for trespass and subjected to an injunction prohibiting use until a permit is obtained.

Where a national forest was created after the private right in property was acquired, a number of interesting questions arise. As an example, one might have secured a valid mining claim location or a patented claim within an area later included within a national forest reserve. The mining claimant or patentee certainly possessed an implied right-of-way for access to exercise the mining privilege. The subsequent creation of the forest reservation would have had the effect of imposing upon the property owner the duty of adherence to pertinent rules and regulations adopted by the Secretary, at least to the extent that he might seek to expand or otherwise change the method of use of the access rights or the position of use, as by realignment. The horse and wagon have been replaced by motor vehicle transportation and within the latter category, the equipment has and will become heavier and heavier, larger and larger. The expanded use or heavier equipment could well be the reason for a demand by the Forest Service for a special use permit even though the right of access was originally established and has been exercised by other and lighter means prior to creation of the reservation.

Also, a given regulation or arbitrary refusal of reasonable access could constitute a taking which would create a right to compensation under the Constitution.⁷⁹ Intermingled land is valueless without access, and in a recent controversy the Forest Service representatives took the position that the access, without permit, was limited to hiking, horseback or heli-

79. *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959).

copter, so that the value of the enclosed land for an exchange was substantially lowered.⁸⁰

THE WISDOM OF COOPERATION

One seeking to provide himself with a means of access across the public domain in the situations discussed above would be well advised to cooperate fully with the authorized officers of the federal government and the local area or reservation. The private citizen should never take the law into his own hands and will suffer for it in short order if he does so, either as the defendant in a citation proceeding brought by the Forest Service or in a criminal proceeding brought through the United States attorney or as a result of federal grand jury action.⁸¹ In addition, the civil process of the court is being used more and more to not only control by injunctive order but also to impress and obtain restitution through awards of actual and punitive damages or restoration.

Several recent federal district court cases are illustrative of this trend. *United States v. Denarius Mining Co.*⁸² involved access to mining claims in a national forest. The claimant did not use the route suggested by the Forest Service, but instead chose and used his own route without a permit or an easement. The result in the district court was an injunction and monetary damages. The decision has not been appealed.

*Rogers v. United States*⁸³ was also set in a national forest, but involved land patented as a homestead prior to creation of the national forest. The over-simplified issue was the extent to which the right of access which existed prior to creation of the national forest could be exercised thereafter without a special use permit. The court ordered an injunction and restoration to prior condition of a recently realigned roadway constructed to provide access for heavier vehicles. The decision is presently on appeal to the Ninth Circuit.⁸⁴ The

80. *Rogers v. United States*, No. 71-936 (C.D. Cal. 1972).

81. 18 U.S.C. § 1361 (1970). See also 16 U.S.C. § 551 (1970); 18 U.S.C. §§ 1852-53, 1863 (1970).

82. Civil No. C-2441 (D. Colo. Feb. 11, 1972).

83. *Supra* note 80.

84. *Appeal docketed*, No. 72-2148, 9th Cir., May 16, 1972.

defendants assert they were foreclosed of an opportunity (it was a partial summary judgment) to present evidence that the forest officer had permitted them to accomplish the realignment in 1964 without a special use permit. Although referred to as a road the defendants contend it was in fact a motorized trail which, under the regulations then in effect, required no permit for construction. The defendant's counterclaim seeking a declaration of an appurtenant right of access (subject to a reasonable permit) was also denied on final summary judgment and this decision is the subject of a second appeal.⁸⁵

*United States v. American Land Co.*⁸⁶ involved a road constructed to give access to checkerboard sections of railroad lands in private ownership. The result was an injunction granted on partial summary judgment and an award of damages. The basic issues are also on appeal to the Ninth Circuit at the present time.⁸⁷

Any person or firm contemplating entry within a national forest under the mining law should be careful to coordinate and cooperate with the district ranger and to secure written evidence in every instance in which permission is granted. Advance planning and candor, an exhibition of concern for the environment, and goodwill, will all go a long way in creating good relationships with forest officers who are to be credited with the intent in good faith to do their duty.

Finally, confrontation and animosity should be avoided. Nothing will be gained. When written advice discloses that the particular agency officer is seeking to obtain what is believed to be an unreasonable, harsh or unnecessary agreement in the miner's opinion, it should be remembered always that an exhaustion of timely administrative appeals procedures within the Department of the Interior is usually necessary. Sensitivity to environmental considerations is or ought to be the rule. It seems to be a wise one.⁸⁸

85. *Appeal docketed*, No. 72-2456, 9th Cir., July 25, 1972.

86. No. 68-1119 (C.D. Cal. 1972).

87. *Appeals docketed*, No. 24380, 9th Cir., May 12, 1972 (from partial summary judgment); No. 72-1887, 9th Cir., Feb. 8, 1972 (from final judgment).

88. *Compare City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972).

It would seem wise to presently formalize one's access rights by seeking the tramroad right-of-way grant or a permit or easement under the pertinent statutes and regulations, for the obvious reasons of security of right and protection of property.

We have yet to learn the full extent of the delays which may be anticipated, when securing permission to construct on public domain land or the issue of a special use permit by the Forest Service, because of the effect of the Environmental Act of 1969. Any current application for a use permit, right-of-way or easement could well include the applicant's own version of a proper environmental statement, as though the guidelines (for preparation of such statements inside the governmental agency) were actually obligatory upon the applicant.

CONCLUSION

The author believes that difficulties in securing and holding, and in securing recognition of, rights of access will increase. The days of informality and lack of concern are past. So too are the days of prompt completion of administrative procedures through issue and receipt of formal permits, grants and easements. A wise policy suggests early action seeking a formal evidence of the desired right.