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The Forest Service has indicated its intent to issue its first comprehensive regulation of mining activities within the national forests. In this article the authors, Mr. Ferguson and Mr. Haggard, examine the nature and scope of the mining right within the national forests and the authority of the Forest Service to regulate the exercise of that right.

## REGULATION OF MINING LAW ACTIVITIES IN THE NATIONAL FORESTS

*Fred E. Ferguson, Jr.\**

*Jerry L. Haggard\*\**

### INTRODUCTION

THE growing concern voiced about the limited wild lands, the expanding population, the rapidly burgeoning economy with its need for mineral products, increased leisure time, the rise in the popularity of outdoor recreation and the congestion of existing national forest recreation facilities, have all served to focus the attention of the Forest Service and the public on the mining industry and its activities in the national forests. The acceptance by the Secretary of Agriculture of the concept of the wilderness system in 1958<sup>1</sup> probably marked the genesis of a trend toward greater regulation of mining activities within the national forests which will soon culminate in the promulgation by the Forest Service of its first

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1. Hubbard, *Ah, Wilderness!* (*But What About Access and Prospecting?*), 15 ROCKY MOUNTAIN L. INST. 585, 596 (1969).

comprehensive regulation of mining law activities. The initial phases of this trend appeared in the increased restrictions on mining activities in national forests following the enactment of the Multiple Surface Use Act in 1955.<sup>2</sup> The Multiple Use-Sustained Yield Act of 1960<sup>3</sup> and a favorable attorney general's opinion in 1962<sup>4</sup> seem to have accelerated the movement toward regulation.

In this article, we intend to analyze the scope of the mining right within national forests under the Mining Law of 1872,<sup>5</sup> and to review the controversies and legal issues which have been raised by the exercise of that right. We will examine the statutory and case authorities for that right, the authorities available to the Forest Service for limiting and regulating the exercise of that right, and the power of the Secretary to enforce those regulations. The Forest Service lands which will be covered by this article will be only those established from public domain lands. We will also discuss the special limitations which have been applied to primitive areas and wilderness areas within those national forests.

Although the Multiple Surface Use Act would appear to have provided sufficient authority to regulate nonlegitimate uses of the surface of unpatented mining claims, its controls are limited to the surface within the claims. Furthermore the Act prohibited the United States' use of such surface from interfering with prospecting, mining or other related uses.<sup>6</sup> In the late 1960's, exploration activities in several forest areas were promoted to national issue status by environmental groups as examples of the need for tight federal regulation of all mining activities.

The first of these issues arose in early 1969 when a mining company submitted an application for a permit to construct a road to explore and develop its mining claims in the White Clouds area of the Challis National Forest, Idaho. The

2. Act of July 23, 1955, ch. 375, 69 Stat. 368 (codified at 30 U.S.C. §§ 612-15 (1970)).

3. Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-31 (1970)).

4. 42 OPS. ATT'Y GEN. No. 7 (1962).

5. Act of May 10, 1872, ch. 152, 17 Stat. 91, *as amended*, 30 U.S.C. §§ 21-54 (1970).

6. 30 U.S.C. § 612(b) (1970).

particular White Clouds dispute was "solved" by the establishment of the Sawtooth National Recreation Area in 1972<sup>7</sup> which suspended the applicability of the mining laws to the area for five years. Nevertheless, this issue left in its wake the increasing demands for general regulations applying to all national forests. The other issue which furthered the demands for general regulations arose from the mineral development activity in the Stillwater complex in the Custer and Gallatin National Forests of Montana.<sup>8</sup>

The White Clouds issue prompted a letter from the Senators and one Congressman from Idaho, to the Chief of the Forest Service, inquiring into the extent of the Forest Service's authority under existing law to regulate exploration and mining activities in national forests. The Chief replied that the Forest Service does not have the authority to prohibit access to mining claims or to prohibit or restrict mining or processing operations on valid claims, but that the Forest Service does have the authority to restrict or control access.<sup>9</sup>

#### RIGHTS OF PROSPECTORS AND LOCATORS UNDER THE MINING LAW OF 1872

##### Rights of Access and to Prospect

Before considering the authorities available to the Forest Service to regulate mining law activities in national forests, we should first consider the authorities which the mining industry has for such activities. The oldest and most explicit of these is, of course, the Mining Law of 1872.<sup>10</sup> A statutory provision which was enacted as part of the Mining Law of 1866,<sup>11</sup> but which has since been codified separately, provides general authority for the establishment of rights of way over public lands: "The right of way for the construction of highways over public lands, not reserved for public

7. Pub. L. No. 92-400, 86 Stat. 612 (1972).

8. Burns, *Preservationist Pressure On The Forest Service*, 17 ROCKY MT. MIN. L. INST. 91 (1972).

9. Letter from Senators Church and Jordan and Congressman Hansen to Edward Cliff, Chief, Forest Service, May 23, 1969; and replies thereto, June 6, 1969. (Cliff's letter is published in 115 CONG. REC. 18231 (1969)).

10. Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended, 30 U.S.C. §§ 21-54 (1970).

11. Act of July 26, 1866, ch. 262, 14 Stat. 251.

uses, is hereby granted.”<sup>12</sup> An added requirement for receiving the benefit of the statute is that any applicable state laws for establishing rights of way must be complied with.<sup>13</sup> However, no action by the state authorities is required. If consistent with the state law, the mere use by the public for a reasonable period of time establishes the right of way.<sup>14</sup> Roads may be constructed under the authority of Section 932 for access to mining claims and the owner of the mining claims has a compensable property interest in his right to the continued use of the road.<sup>15</sup> Although it has been held that the establishment of a forest reserve subsequent to the establishment of a road under Section 932 would not affect rights to the use of the road,<sup>16</sup> no cases have been found determining whether the phrase “not reserved for public uses” would make the statute inapplicable to established national forests. The establishment of an Indian reservation does remove the reservation lands from the applicability of the section.<sup>17</sup> National forest reserves have been held not be available for railroad rights of way under the Act of March 3, 1875<sup>18</sup> declaring that the authority to acquire rights of way over public lands for railroads shall not apply to any “lands specially reserved from sale.”<sup>19</sup> The phrase in the Forest Service Organic Act<sup>20</sup> that nothing in that Act shall “prohibit any person from entering upon such national forests for all proper and lawful purposes”<sup>21</sup> could cause Section 932 to apply to national forests when the right of way authority is asserted as an incident to the lawful purposes of conducting mining law activities therein.

At least some of the lands which have been withdrawn under the Reclamation Act<sup>22</sup> from certain entries but which have been left open for other entries, such as homestead, are

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12. 43 U.S.C. § 932 (1970).

13. *Ball v. Stephens*, 68 Cal. App.2d 843, 158 P.2d 207 (1945); *Tucson Consol. Copper Company v. Reese*, 12 Ariz. 226, 100 P. 777 (1909).

14. *Wilson v. Williams*, 43 N.M. 173, 87 P.2d 683 (1939).

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

16. *Duffield v. Ashurst*, 12 Ariz. 360, 100 P. 820 (1909).

17. *Bennett County, South Dakota v. United States*, 394 F.2d 8 (8th Cir. 1968).

18. 43 U.S.C. §§ 934-36 (1970) (originally enacted as March 3, 1875, ch. 152, 18 Stat. 482).

19. *Chicago, Mil. & St. P. Ry. v. United States*, 244 U.S. 351 (1917).

20. 16 U.S.C. §§ 473-74, 479-82, 551 (1970).

21. 16 U.S.C. § 478 (1970).

22. 43 U.S.C. §§ 416, 432, 434 (1970).

still public lands within the meaning of the Right of Way Act of March 3, 1875.<sup>23</sup> The rationale of a holding such as this would seem to have additional weight in a circumstance where the purpose of the right of way would be for a use which continues to be allowed after the public land is reserved for a public use, such as mining in national forests.<sup>24</sup>

In addition to the statutory mining right in national forests and its confirmation by the courts, there are non-statutory rights of access for mineral exploration derived from the common law way of necessity. As a general rule, where a part of a tract is conveyed, and it is necessary for the grantee to cross the part retained by the grantor to reach the part granted, there is an implied grant of a way of necessity across the grantor's retained land.<sup>25</sup> This rule has been applied to lands owned by the United States which have been retained from grants to private parties.<sup>26</sup> However, the United States Attorney General has volunteered his opinion that easements by necessity cannot be acquired against the United States over public lands.<sup>27</sup>

In order to exercise the rights of locating and developing the minerals of the public lands, it is necessary that access be available across the public lands for exploration.<sup>28</sup> That an implied right of access arises under the mining law from the location of mining claims on public lands under the jurisdiction of the Bureau of Land Management has been upheld by the Deputy Solicitor of the Department of the Interior<sup>29</sup> and has been reconfirmed by the Interior Board of Land Appeals.<sup>30</sup> The Solicitor's opinion was referred to

23. *United States v. Minidoka & S.W.R. Co.*, 190 F. 491, 494 (9th Cir. 1911).

24. 1 LINDLEY, *MINES* § 197 (3rd ed. 1914). Lindley observes that national forests are in a class by themselves because they differ materially from other classes of reservations such as Indian, military, national parks, and national monuments, in that they are open to the miner.

25. 25 AM. JUR. 2d *Easements and Licenses* § 34 (1966).

26. *Bydton v. United States*, 175 F. Supp. 819 (Ct. Cl. 1959).

27. 42 OPS. ATT'Y GEN. No. 7 (1962). This statement was made in connection with the Attorney General's opinion that the Secretary of Agriculture has the discretionary authority to require actual settlers to grant a reciprocal right to the United States to cross the settler's property in exchange for the settler's right to cross over the national forests.

28. *Union Oil Company v. Smith*, 249 U.S. 337 (1919).

29. *Access Over Public Lands*, 66 I.D. 361 (1959).

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

31. 220 F. Supp. 328 (D. Nev. 1963).

with approval in *United States v. 9,947.71 Acres of Land*<sup>31</sup> where the court stated:

It is not difficult to perceive that such lack of case authority arises from the sheer logic of the proposition that, when the government granted mining rights on the vast mountainous, and often impassable, areas of the West which were in public domain, accessible only by passing over the public domain, it granted, as a necessary corollary to mining rights, the right not only to pass over the public domain but also a property right to the continued use of such roadway or trail, once it was established and used for that purpose. . . .

. . . .

If the builders of such roads to property surrounded by the public domain had only a right thereto revocable at the will of the government, and had no property right to maintain and use them after the roads were once built, then the rights granted for development and settlement of the public domain, whether for mining, homesteading, town-site, mill sites, lumbering, or other uses, would have been a delusion and a cruel and empty vision, inasmuch as the claim would be lost by loss of access . . . .<sup>32</sup>

### Rights of a Locator of Valid Mining Claim

Under the Mining Law of 1872,<sup>33</sup> the locator of a mining claim which has been perfected by the discovery of a presently marketable valuable mineral discovery and by the performance of the other required acts of location, acquires thereby the exclusive right of possession and enjoyment of all the surface included within the lines of his location,<sup>34</sup> including the use of sufficient timber on the claim for development and mining purposes.<sup>35</sup>

All such valuable mineral deposits in lands belonging to the United States are free and open to exploration and purchase under regulations prescribed by law.<sup>36</sup> The inten-

32. *Id.* at 331.

33. 30 U.S.C. §§ 21-54 (1970).

34. 30 U.S.C. § 26 (1970).

35. *United States v. Deasy*, 24 F.2d 108 (D. Idaho 1928).

36. 30 U.S.C. § 22 (1970).

tion of Congress manifested by the Mining Law of 1872 is that the mineral deposit may be mined and removed by the locator so long as he puts one hundred dollars worth of labor or improvements upon the claim each year, and the lands themselves may be purchased and a patent to the lands and minerals obtained after he has put five hundred dollars worth of labor or improvements upon the claim.<sup>37</sup> Prior to patent, however, the right of exclusive possession and enjoyment which the locator has is only for mining and purposes incident thereto.<sup>38</sup> But, for such purposes, the right is good against the United States.<sup>39</sup>

#### RIGHTS OF PROSPECTORS AND LOCATORS IN NATIONAL FORESTS

##### Prior to Multiple Surface Use Act of 1955

The rights of a *bona fide* mineral locator within a national forest are substantially the same as those of one who locates a claim upon the public domain.<sup>40</sup> The President was in 1891 authorized to create national forests for the purposes of improving and protecting forests, of securing favorable conditions of water flows, and of furnishing a continuous supply of timber.<sup>41</sup> However, the executive power to establish national forests is subject to the following limitation:

And any mineral lands in any national forest which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location

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37. *Belk v. Meagher*, 104 U.S. 279 (1881).

38. *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956); *United States v. Rizzinelli*, 132 F. 675 (D. Idaho 1910); *Teller v. United States*, 113 F. 273 (8th Cir. 1901).

39. *United States v. Deasy*, *supra* note 35; *Teller v. United States*, *supra* note 38.

40. *United States v. Deasy*, *supra* note 35; *United States v. Mobley*, 45 F. Supp. 407 (S.D. Cal. 1942); *United States v. Rizzinelli*, *supra* note 38; 38 OPS. ARR'Y GEN. 192 (1935). In *Rizzinelli* the government conceded that by the Act of June 4, 1897, Congress did not intend to, and did not, limit or qualify the rights of a locator in the forest reserves, or confer any authority upon the Secretary of Agriculture, by regulation or otherwise, to limit or qualify such rights, or to intrude upon the exclusive possession or infringe upon the exclusive enjoyment guaranteed to the locator under 30 U.S.C. § 26.

41. 16 U.S.C. § 471 (1970).



and entry, notwithstanding any provisions contained in sections 473-478, 479-482 and 551 of this title.<sup>42</sup>

Further, any lands which have been included in a national forest and which may be found to be better adapted for mining than for forest usage may be removed from the national forests and restored to the public domain.<sup>43</sup> The court in *United States v. Rizinelli*<sup>44</sup> stated that by virtue of 16 U.S.C. § 482 it is the duty of the Secretary to restore to the public domain lands which are found to be better adapted for mining than for forest uses, and is not merely discretionary.

The Organic Act authorized the Secretary to permit, under regulations prescribed by him, the free use of timber and stone within the national forests by miners and prospectors for minerals as may be needed by such persons for mining and prospecting purposes.<sup>45</sup> The Act also granted the right to use all waters within the boundaries of the national forests for mining and milling purposes under appropriate laws and such rules and regulations as might be established.<sup>46</sup>

Prior to the Multiple Surface Use Act of June 23, 1955,<sup>47</sup> a locator within the forest had the right to clear timber on his claim for development purposes and to sell it,<sup>48</sup> or to use all of the timber on his claim for mining purposes. However, he had no right to otherwise sell it at a profit,<sup>49</sup> nor could the government sell the timber on his claim,<sup>50</sup> except in case of emergency, when dead, matured and insect infested timber might be sold in order to prevent younger growth from becoming insect infested.<sup>51</sup> While the locator's possession and enjoyment of the surface of his claim was exclusive as against the government for mining purposes, the government and its

42. 16 U.S.C. § 482 (1970); *United States v. Mobley*, *supra* note 40.

43. 16 U.S.C. § 482 (1970).

44. 182 F. 675 (D. Idaho 1910).

45. 16 U.S.C. § 477 (1970).

46. 16 U.S.C. § 481 (1970).

47. Act of July 23, 1955, ch. 375, 69 Stat. 368 (codified at 30 U.S.C. §§ 612-15 (1970)).

48. *See* FOREST SERVICE MANUAL § 2811.62-2 (hereinafter cited as F.S.M.).

49. *United States v. Teller*, *supra* note 38.

50. *United States v. Deasy*, *supra* note 35.

51. *Bradley-Turner Mines, Inc. v. Branagh*, 187 F. Supp. 665 (N.D. Cal. 1960); *Lewis v. Garlock*, 168 F. 153 (D.S.D. 1909); (Subsequent to enactment of Multiple Surface Use Act.).

licensees might, under proper circumstances, exercise rights of way across the claim so long as in doing so it did not interfere with the development of the claim.<sup>52</sup>

#### Multiple Surface Use Act of 1955

Despite the early decisions respecting the relative rights of the locator and the government in the surface of unpatented mining claims, both the Secretary of Agriculture and the Secretary of Interior felt that additional authority was needed to curb some abuses of the mining laws.<sup>53</sup> These abuses were sought to be curbed by the Multiple Surface Use Act of July 23, 1955,<sup>54</sup> which provides that unpatented mining claims cannot be used for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto, and which reserves to the United States, prior to issuance of patent, the right of the United States to manage and dispose of the vegetative surface resources on any mining claim and to manage other surface resources except mineral deposits subject to location under the mining laws.<sup>55</sup>

Although the United States can now harvest and sell the timber from an unpatented mining claim, if it does so, and the locator later requires more timber for his mining operations than is then available to him from the claim, he is entitled to be supplied free of charge with substantially equivalent timber from nearby sources.<sup>56</sup> The statute expressly provides that any use of the surface of a mining claim by the United States or its licensees cannot endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.<sup>57</sup>

#### AUTHORITY OF THE SECRETARY OF AGRICULTURE TO REGULATE MINING LAW ACTIVITIES

Having reviewed the rights of a prospector and a locator of a mining claim, we will now examine what authority

52. See U.S. DEP'T OF AGRICULTURE, Op. Sol. (Nov. 4, 1915).

53. H.R. REP. No. 730, U.S. CODE CONG. & ADM. NEWS, 84th Cong., 1st Sess. 2474 (1955).

54. Act of July 23, 1955, ch. 375, 69 Stat. 368 (codified at 30 U.S.C. §§ 612-15 (1970)).

55. 30 U.S.C. § 612 (1970).

56. *Id.*

57. *Id.*

the Secretary of Agriculture may have to regulate the exercise of those rights.

The power to dispose of and make rules regarding the property of the United States is vested in the Congress without limitation under Article IV, Section 3, Clause 2 of the United States Constitution.<sup>58</sup> Congress not only has a legislative power over the public domain but it also exercises the powers of the proprietor therein. Congress may deal with such lands precisely as a private individual may deal with his property. It is for Congress alone to say how the trust imposed upon it by the Constitution shall be administered.<sup>59</sup> The Forest Service Organic Act

The statutes which the Forest Service considers its authority to regulate mining law activities were cited in a draft of mining regulations distributed by the Forest Service on March 23, 1971.<sup>60</sup> One of the statutes cited as authority in its draft regulations was the Organic Act of 1897. This Act granted authority to the executive department for the creation and administration of national forests. It provided that any mineral lands in any national forest which have been or which may be shown to be such, and subject to entry under the mining laws should continue to be subject to such location and entry, notwithstanding any provision contained in the Act.<sup>61</sup> It was further provided that nothing therein should prohibit any person from entering upon such national forests for all proper and lawful purposes, including prospecting, locating and developing the mineral resources thereof, provided that persons entering the national forests for such lawful purposes must "comply with the rules and regulations covering such national forests."<sup>62</sup>

The Secretary was directed to make provisions for the protection against destruction by fire and depredation upon the national forests, and was authorized to make such rules and regulations and establish such service as will insure the

58. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

59. *Alabama v. Texas*, 347 U.S. 272 (1953).

60. Proposed F.S. Reg. § 251.12 (1971).

61. 16 U.S.C. § 482 (1970).

62. 16 U.S.C. § 478 (1970).

objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction.<sup>63</sup> A violation of the Secretary's rules and regulations was declared to be punishable as a crime.<sup>64</sup> The question arises as to the nature of the regulations with which the mineral locator must comply. Need he comply only with rules and regulations of general application to the national forests? Does this authorize the Forest Service to promulgate special regulations to require permits to be obtained prior to entering national forests for mineral activities? Can the regulations restrict those activities to the point of practical prohibition?

The right of the Secretary to prevent the use of a mining claim for non-mining purposes, such as operating a saloon, without a permit, was established long ago by *United States v. Rizzinelli*.<sup>65</sup> It was there argued that the Organic Act did not confer authority to make rules and regulations applicable to land within a valid mining claim. The Court held that the government has a legitimate interest in regulating uses of the surface of a claim for other than mining purposes in order to conserve its value and prevent injury and waste. The court reasoned that the right to remove a shrub to build a saloon would give the right to cut all of the timber on the claim for non-mining purposes.

However, the authority of the Secretary to promulgate rules and regulations respecting mining operations on valid mining claims is not so clear. In the *Rizzinelli* case the government suggested that the rule-making authority of the Secretary included authority to regulate mining operations carried on upon validly located mining claims. However, no such regulations had been promulgated and the point was not in issue. Dicta in *Honchok v. Hardin*,<sup>66</sup> limited the rule-making authority of the Secretary to activities outside of mining claims.

Little assistance in answering these questions is provided by the legislative history of the Act of 1897. The

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63. 16 U.S.C. § 551 (1970).

64. *Id.*

65. 182 F. 675 (D. Idaho 1910).

forest management provision of this Act was prepared by the Secretary of the Interior and tacked on to a general appropriations bill by Senator Pettigrew after the appropriations bill had already been passed by the House.<sup>67</sup> Although the debate concerning this amendment was stormy and prolonged, the subject of mining activities in national forests centered mainly on the availability of timber for mining purposes. It is interesting to note Mr. Gifford Pinchot's account of the intent of Congress in passing the 1897 Act.<sup>68</sup> He explained that the intent was to protect the timber from fires and other wastes so that they may be used for legitimate industry such as mining.<sup>69</sup> There was no discussion concerning the scope of the rules and regulations which the Secretary would be authorized to promulgate.

Two approaches can be taken in analyzing the rule-making authority of the Secretary as it respects mining law activities. One of those approaches was taken by the Acting Solicitor of the Department of the Interior in deciding whether the Bureau of Land Management could charge a fee for a mineral locator to construct an access road over public lands to his claims.<sup>70</sup> The Solicitor identified and distinguished two types of land use rights. The first are those granted directly by Congress (such as under the mining law) which involve no discretion or action of an executive agency. The second type includes those rights which Congress authorized the executive agencies to grant and which cannot be exercised until the would-be user applies to the agency and the right is granted by the agency (such as right-of-way under the Act of January 21, 1895).<sup>71</sup> With respect to direct Congressional grants, the Solicitor found that the Bureau of Land Management could not limit such grants by charging a fee because the power to charge would be the power to prohibit by over charging, and thereby nullify the Congress-

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66. 326 F. Supp. 988 (D. Md. 1971).

67. 30 CONG. REC. 899 (1897).

68. Mr. Pinchot, who became the head of the Department of Agriculture Division of Forestry in 1898, was influential in the passage of the 1897 Act. See GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 567-72 (1968).

69. See 1 LINDLEY, MINES § 198 (3rd ed. 1914).

70. Rights of Mining Claimants to Access over Public Lands to Their Claims, 66 I.D. 361 (1959).

71. 43 U.S.C. § 956 (1970).

sional grant.<sup>72</sup> Grants which Congress authorized the executive agencies to make can be conditioned upon the payment of a fee or compliance with administrative regulations because such limitations are consistent with the discretionary authority which Congress delegated to the Executive.<sup>73</sup>

The language of 16 U.S.C. § 478, relied upon in part as authority for Forest Service regulations, is susceptible to the application of this approach. It states that "such persons" must comply with the rules and regulations. The reference of "such persons" is to the preceding sentence in the section which provides that nothing in the statute shall prohibit "any person from entering such national forests for all proper and lawful purposes". The categories of "any persons" entering the national forests range from those who have had rights or privileges granted at the discretion of the Executive, to those who have rights granted directly by Congress. It would not be unreasonable to conclude that Congress intended that the Secretary's rules and regulations could diminish rights or privileges granted at the discretion of the Executive, but could not diminish those granted directly by Congress. The ultimate conclusion to the approach would be that the Secretary has no authority to restrict the exercise of mining law rights.<sup>74</sup>

The second approach to this analysis assumes that Congress intended that the "rules and regulations covering such national forests" can prescribe the manner in which Congressionally granted rights are exercised. It is clear that such regulations could not limit such rights to the point of practicable prohibition or they would nullify the Congressional grant.<sup>75</sup> The task, then, would be to judge the restriction in each situation by a standard of reasonableness. The right to prospect, locate and develop the mineral resources is granted by the mining laws and preserved by the 1897 Act. There-

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72. *McCulloch v. Maryland*, 4 U.S. (4 Wheat.) 415 (1819).

73. *Chicago, Minn. & St.P. Ry. v. United States*, 218 F. 288 (9th Cir. 1914).

74. The Solicitor of the Department of Agriculture has stated, "It seems clear that [the last two sentences of Section 478] was intended only to make certain that the Act would not be construed to deny or *in any way interfere with* mining rights obtained under other laws." (Emphasis added). Op. Sol. 3344 (May 26, 1941).

75. See 42 OP. ATT'Y GEN. No. 7 (1962).

fore, any regulation which would amount to a prohibition or an unreasonable limitation of that right would not be authorized.

In the 63 years intervening since the decision of the *Rizzinelli* case the Secretary has not promulgated any regulations respecting prospecting or mining activities within the national forests, except when such regulations have been expressly sanctioned, as in the Wilderness Act. Until recently it has been the unofficial attitude of the Forest Service, that it lacked adequate authority to impose regulations controlling mining and related activities.<sup>76</sup> In a 1969 letter to Senators Church and Jordan and Congressman Hansen, Edward Cliff, Chief of the Forest Service, stated:

The Forest Service does not have authority to prohibit ingress and egress to and from a valid mining claim. It does have authority to restrict and control such ingress and egress . . . . The Forest Service has no authority to prohibit or restrict actual mining operations on a valid claim or to regulate or control the type of mining involved, such as "open pit", "strip", or "subsurface".

. . . .

Except for those covering areas designated by Congress as Wilderness which were promulgated following enactment of the special provisions of the Wilderness Act, no regulations have been promulgated to enable the Forest Service to control methods by which prospecting is undertaken under the mining laws in order to protect surface areas, water quality, fish, wildlife, timber, and soil resources.<sup>77</sup>

#### Multiple Use-Sustained Yield Act of 1960

In addition to the Organic Act and the Multiple Surface Use Act of 1955 discussed previously, the Forest Service has cited as authority for its 1971 proposed regulation the Multiple Use-Sustained Yield Act of 1960,<sup>78</sup> which authorizes and directs the Secretary of Agriculture to develop and ad-

76. Burns, *supra* note 8, at 94.

77. The Chiefs' letter dated, June 6, 1969, was published in 115 CONG. REC. 18231 (1969).

78. 16 U.S.C. §§ 528-31 (1970).

minister the renewable surface resources of the national forest for multiple use and sustained yield of the several products and services obtained therefrom.<sup>79</sup> The uses for which the national forests are established and for which they may be administered are declared to be: (1) outdoor recreation, (2) range, (3) timber, (4) watershed, and (5) wildlife and fish purposes.<sup>80</sup>

It is clear that the Act applies only to "renewable surface resources" which obviously excludes non-renewable resources such as minerals. Nevertheless, the Act expressly provides that nothing therein shall be construed so as to affect the use or administration of the mineral resources of national forest lands.<sup>81</sup>

This Act apparently constitutes a recognition of the implied authority claimed by the Secretary of Agriculture to administer the national forests under the multiple use-sustained yield principle.<sup>82</sup> But it would seem that the Act cannot provide authority on any independent basis for the regulation of mining law activities within the national forests. However, it will undoubtedly be urged that any rules which the Secretary may promulgate to regulate mining law activities have as their objective the management of the surface uses designated in the Act under the principles of the sustained yield programs.

### National Environmental Policy Act

The Forest Service draft regulations also cited the authority of Section 102 of the National Environmental Policy Act (hereinafter "NEPA").<sup>83</sup> In Section 102, Congress directed the agencies of federal government to interpret and administer the policies, regulations, and laws of the United States in accordance with the policies of the Act and to consider environmental amenities and values in decision making along with economic and technical considerations. A question

79. 16 U.S.C. § 529 (1970).

80. 16 U.S.C. § 528 (1970).

81. *Id.*

82. S. REP. No. 1407 and H.R. REP. No. 1551, U.S. CODE CONG. & ADM. NEWS, 86th Cong., 2nd Sess. 2377 (1960); *McMichael v. United States* 355 F.2d 283 (9th Cir. 1965).

83. 42 U.S.C. § 4332 (1970).



presented in the application of NEPA to Forest Service regulation of mining law activities, is whether the Act is limited to requiring how laws shall be administered when there is flexibility or discretion in their administration, or whether NEPA changed any of those laws to provide for additional flexibility or discretion. For example, if NEPA merely directs the manner in which other public laws will be administered, and if the Forest Service has no independent statutory authority to regulate mining law activities, NEPA could not be correctly cited as authorizing the Forest Service to regulate mining law activities. If, however, the Forest Service has the authority to regulate such activities but has not done so, NEPA might be construed to require that regulation be commenced but only to the extent that such regulation is not inconsistent with the other authority. On the other hand, if NEPA can be said to have changed other law, it could be argued that a regulatory system must be established even though not originally authorized by the other law and even in a manner which may modify the other law.

In one of the first cases arising under NEPA the court stated that the National Environmental Policy Act was nothing more than a statement of federal policy.<sup>84</sup> However, it did not take long for more progressive courts to define in explicit detail the full extent of the substantive procedures Congress actually intended that the federal agencies be required to follow.<sup>85</sup> In determining whether NEPA provides any authority for regulating mining law activities, an examination of the provisions of the Act and a portion of its legislative history is helpful.

Section 102 of the National Environmental Policy Act provides:

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84. *Bucklein v. Volpe*, 2 ENV. REP.—CASES 1082 (N.D. Cal. 1970).

Moreover, it is highly doubtful that the Environmental Policy Act can serve as the basis for a cause of action. Aside from establishing the Council, the Act is simply a declaration of congressional policy; as such it would seem not to create any rights or impose any duties of which a court can take cognizance. There is only the general command to federal officials to use all practicable means to enhance the environment. 42 U.S.C. section 4331. It is unlikely that such a generality could serve or was intended to serve as a source of court-enforceable duties.

*Id.* at 1083.

85. *Calvert Cliffs v. A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971).

The Congress authorizes and directs that, *to the fullest extent possible*: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act . . .<sup>86</sup> (Emphasis added.)

The Senate-House Conference Committee added the words emphasized above and explained their purpose:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such Subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required.<sup>87</sup>

Further support is provided for this proposition by Section 105 of the Act: "The policies and goals set forth in the Act are supplementary to those set forth in existing authorizations of Federal agencies."<sup>88</sup> The Conference Committee explained this section to mean: "The effect of this section, . . . is to give recognition to the fact that the bill *does not repeal existing law*."<sup>89</sup> (Emphasis added.)

Therefore, it appears that the NEPA does not amend other law nor does it provide the authority for agencies to establish regulations which would be contrary to the provisions of other statutes. Thus, to the extent that the Secretary of Agriculture has jurisdiction under 16 U.S.C. § 472<sup>90</sup> to administer mining law activities and promulgate regulations for the same, it may be concluded that the NEPA obligates the Secretary to establish regulations to carry out the policies of NEPA and his other authorities.<sup>91</sup> But, Congress clearly recognized that there would be provisions of existing law which would prevent agencies from carrying out the NEPA policy. Therefore, the Secretary is neither

86. 42 U.S.C. § 4332 (1970).

87. CONF. REP. NO. 91-765, U.S. CODE CONG. & ADM. NEWS, 91st Cong., 1st Sess. 2767, 2770 (1969).

88. 42 U.S.C. § 4335 (1970).

89. CONF. REP. NO. 91-765, *supra* note 87, at 2771.

90. Discussed text *infra* note 94.

91. Calvert Cliffs v. A.E.C., *supra* note 85.

required nor authorized to establish regulations to carry out any of the NEPA policies which would conflict with existing laws authorizing mining law activities in national forests. The Department of Agriculture Office of General Counsel has substantially concurred in this conclusion that the NEPA procedures cannot be applied so as to prevent or unduly interfere with the exercise of the right of access to national forests for mineral exploration.<sup>92</sup>

Act of February 1, 1905

There is a substantial question whether the Forest Service has any jurisdiction at all to regulate activities authorized by the mining laws in national forests. The administration of the Forest reserves was transferred from the Secretary of the Interior to the Secretary of Agriculture by the Act of February 1, 1905.<sup>93</sup> Section 1 of that Act transferred such authority to execute "all laws affecting public lands heretofore or hereinafter reserved" as forest reserves, but excepting "such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any such lands."<sup>94</sup> It is to be noted that this exception is not only of such laws which *provide* for or *effect* these mineral activities but it excepts even more broadly such laws as *affect* those activities. Section 4 of that Act provides that it is the Secretary of the Interior who may prescribe rules and regulations for rights of way through the forest reserves for the construction of certain designated facilities for municipal or mining purposes,<sup>95</sup> further indicating that Congress intended it to be the Secretary of the Interior who would continue to administer rights of way for mineral purposes.

The legislative history of this Act is instructive in determining what Congress intended to be excepted from the transfer of jurisdiction. The form of this legislation which was passed by the House on December 12, 1904 contained the following exception clause: "excepting such laws

92. Memoranda, Office of the General Counsel, U.S. Dep't of Agriculture to Chief, Forest Service, February 24, 1971 and June 10, 1972.

93. Act of Feb. 1, 1905, ch. 288, 33 Stat. 628.

94. 16 U.S.C. § 472 (1970).

95. 16 U.S.C. § 524 (1970).

as affect the surveying, entering, delinquishing, reconveying, certifying, or patenting of any such lands.”<sup>96</sup> However, the Senate added the words “prospecting, locating, appropriating,” which are found in the present statute. The Senate Committee on Forest Reservations and the Protection of Game explained the addition of this language as follows: “The amendment proposed by the committee protects the mining interests, if any, within the forest reserves.”<sup>97</sup>

Shortly after this statute was passed, the Secretaries of the Interior and Agriculture set forth guidelines defining their respective jurisdictions. These guidelines provided that

the Department of Agriculture is invested with jurisdiction to pass on all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued . . . [and the Department of the Interior would retain jurisdiction over all uses within a forest reserve which amount to] an easement running with the land,  
 . . . .<sup>98</sup>

Because mining claims and established access routes to mining claims are obtained under laws which affect prospecting and locating minerals on public lands<sup>99</sup> and are valuable property rights affecting the title of the United States,<sup>100</sup> it seems quite doubtful that the Department of Agriculture has jurisdiction to regulate mining law activities in national forests.

A subsequent United States Attorney General’s opinion dealing with this jurisdiction statute reached a conclusion somewhat inconsistent with the foregoing.<sup>101</sup> It con-

96. SENATE COMM. ON FOREST RESERVATIONS AND PROTECTION OF GAME, S. REP. NO. 2954, 58th Cong., 3rd Sess. (1905).

97. *Id.*

98. Right of Way—Forest Reserves—Jurisdiction, 33 L.D. 609, 610 (1905); See also 29 OPS. ATT’Y GEN. 303 (1912).

99. *E.g.*, 30 U.S.C. § 22 (1970); 16 U.S.C. § 478 (1970).

100. *United States v. 9,941 Acres of Land*, *supra* note 15

101. 26 OPS. ATT’Y GEN. 269 (1907).

cluded that the Secretary of Agriculture, pursuant to his authority to "ascertain the natural conditions upon . . . the national forests,"<sup>102</sup> has authority to employ geologists. The Attorney General, in a head-in-the sand attitude, concluded that so long as the geologists were used to determine those natural conditions, it made no difference that the underlying purpose of their examination was to obtain information to be used by the Department of the Interior to contest mining claims in the national forests.

The interpretation of the excepting clause of the 1905 Act was further restricted by an opinion of the Interior Department Deputy Solicitor in which he stated:

When lands within the national forests are not valuable for the mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands and the timber growing thereon in order to properly administer the lands as the law directs. The problem of how or when to deal with mining claims in the national forests, which are not based on a sufficient discovery of mineral, . . . involves one aspect of administration of the occupancy of the lands which is expressly the responsibility of the Department of Agriculture.<sup>103</sup>

This suggests that any mining law activity conducted in the national forests outside of any valid mining claim and within any mining claim on which no valid discovery has been made would be under the jurisdiction of the Forest Service. However, to come to this conclusion, it is necessary to ignore both the words "prospecting" and "locating"<sup>104</sup> in the excepting clause of the statute.

The Agriculture Department Solicitor reflected an awareness of the questionable jurisdiction of his Department in his November 4, 1915 opinion holding that the Forest Service

102. Act of March 4, 1907, ch. 2907, 34 Stat. 1269; *See also* Act of June 30, 1906, ch. 3913, 34 Stat. 684.

103. *United States v. Bergdal*, 74 I.D. 245, 252 (1967).

104. It was well recognized, even at the time the 1905 Act was passed, that the location of a mining claim may precede the discovery of mineral. *Erwin v. Perego*, 93 F. 608 (8th Cir. 1899); *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 F. 673 (S.D. Cal. 1899); *Jupiter Min. Co. v. Brodie Consol. Min. Co.*, 11 F. 666 (D. Cal. 1881); *North Noonday Min. Co. v. Orient Min. Co.*, 1 F. 522 (D. Cal. 1880); *James Mitchell*, 2 L.D. 752 (1884); *Reins v. Raunheim*, 28 L.D. 526 (1899).

could implement regulations to permit the United States and its vendees to have access over mining claims for timber harvesting purposes. Although the Solicitor did not mention the 1905 Act, he nevertheless commented that since the regulations would affect mineral locations, it may be advisable, in order to avoid any possible question of jurisdiction, to have them issued jointly by the Secretary of the Interior and Secretary of Agriculture.<sup>105</sup>

We have seen that under the approach taken by the Solicitor of the Department of Interior, and under the analysis of the Act of February 1, 1905, the Secretary of Agriculture may have no authority at all to regulate mining law activities in the national forests outside of wilderness areas. We have further seen that neither the Multiple Use-Sustained Yield Act nor the National Environmental Policy Act create any authority for the Secretary of Agriculture to regulate such activities. Nevertheless, in view of certain of the language of the Act of June 4, 1897, the Secretary of Agriculture may be held to have some authority to regulate prospecting, locating and developing mineral resources within the national forests in the furtherance of the purposes for which the forests are established or to promote the uses for which the forests may be administered; provided that the rights granted by the mining law to the prospector and locator are not impaired. If such authority exists, it is likely that as long as such rules and regulations tend to protect the lands and faithfully preserve the interests of the people of the whole country in the lands without unreasonably interfering with legitimate mining activities, the courts will enforce them.<sup>106</sup>

Obviously, the extent to which the Secretary may regulate mining law activities is not as broad as his authority to regulate uses of the forest which are not sanctioned by specific Congressional grants. In *United States v. Frimaud*<sup>107</sup> the Court found that the privilege of using forest reserves for pasturage under an implied license from Congress, had been

105. U.S. DEP'T OF AGRICULTURE, Sol. Op. No. 1388, at 22 (Nov. 4, 1915).

106. See *United States v. Reeves*, 39 F. Supp. 580 (W.D. Ark. 1941).

107. 220 U.S. 506 (1911).

qualified by Congress to the extent such privilege should not be exercised in contravention of the Secretary's rules and regulations. It is arguable that the right to prospect, locate or develop mineral resources on the forests are "lawful uses and purposes" akin to the grazing privilege which must be exercised in compliance with the Secretary's reasonable rules and regulations. However, it is doubtful that an intention on the part of Congress to proscribe such expressly granted mining activities can so readily be found as in the case of rights or privileges arising merely from the assumed acquiescence of Congress to an existing practice. This is particularly true in light of the three separate provisions of the Organic Act which evidence an intention to preserve and protect the right of the prospector and locator on the forest.

Like the grazing privilege examined in the *Grimaud* case, the invitation and right granted by Congress to prospect upon the public lands may be terminated at any time by Congress. However, once the invitation has been accepted and has resulted in a discovery of a valuable mineral deposit, the locator of a mining claim becomes vested with valuable property rights granted by Congress which may not be abridged by the government. Thus the scope of permissible regulation by the Secretary narrows considerably respecting mining activities on a valid claim. Of course, the Secretary of Agriculture cannot withhold a permit to which an applicant is entitled,<sup>108</sup> or adopt rules and regulations which virtually deny rights which Congress has conferred.<sup>109</sup> Further, regulations must be reasonable in relation to the statutory scheme they are designed to carry out. However, if reasonable minds would differ, the question must be resolved in favor of the validity of the regulations.<sup>110</sup> Any determination of the validity of a regulation must be predicated on the regulation being necessary,<sup>111</sup> consistent with the statutes it is intended to implement, and reasonable or appropriate to achieve the purposes of such statutes.<sup>112</sup> The conclusion would appear to be justi-

108. *United State v. Smith*, 282 F. 339 (D. Mont. 1922).

109. *Williamson v. United States*, 207 U.S. 425, 426 (1908).

110. See 2 AM. JR. 2d *Administrative Law* §§ 303, 304 (1962).

111. *Forbes v. United States*, 125 F.2d 404 (9th Cir. 1942).

112. *United Stats v. Morehead*, 243 U.S. 607 (1917).

fied that any restrictions imposed upon mining law activity by the Secretary cannot have the effect of either prohibiting or unreasonably restricting the activities.

CURRENT REGULATIONS RESPECTING  
MINING LAW ACTIVITIES IN NATIONAL FORESTS

The provisions of 36 C.F.R. § 251.12 are the only current regulations which deal specifically with mining law activities in the general national forests. This section provides that the Forest Service may use the surface of mining claims for national forest administrative purposes to the extent that such use will not interfere with the development of the mineral resources of the claim.

All uses of national forests, except those uses "specifically authorized by acts of Congress" must be authorized by special use permits.<sup>113</sup> The use of public lands for exploration, locating and mining provided for in the mining law<sup>114</sup> would appear clearly to be one of those uses excepted by the regulation from the special use permits requirement.<sup>115</sup>

The Justice Department in recent litigation<sup>116</sup> has relied upon 36 C.F.R. § 251.5 as authority for the Forest Service to require a permit for constructing an access trail to mining claims. This section formerly provided that, except where there is a statutory right of ingress and egress, no road may be constructed on national forest land unless the occupancy had been authorized by a permit.<sup>117</sup> However, this section was revoked on September 4, 1968,<sup>118</sup> on the same day that section 212.8(a) was revised to provide that, "No road or highway shall be constructed until it is authorized in writing." It appears that this is the only provision in the current regulations which may require a permit or apply controls on mineral exploration or operations.

When it became apparent the proposed Forest Service regulations would not be put into effect as anticipated, some

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113. 36 C.F.R. § 251.1 (1972).

114. 30 U.S.C. § 22 (1970).

115. See F.S.M. § 2811.62(1).

116. *United States v. Denarius Min. Co.*, Civil No. C-2441, (D. Colo. Feb. 11, 1972).

117. See 36 C.F.R. § 251.5(c) (1964).

118. 33 Fed. Reg. 12550 (1968).



of the regional Forest Service headquarters, during 1971 and 1972, issued guidelines directing their forest supervisors to proceed with an "aggressive minerals management program."<sup>119</sup> The guidelines provided that all mining operators must notify the Forest Service prior to causing any surface disturbance, and special use permits would be required for all mineral activities using mechanical equipment.<sup>120</sup> Those guidelines state that the Forest Service will "determine the need for or the route of roads, the need for other planned developments, and make recommendations and requirements for actions necessary to protect or minimize damage" to the ecological system.

During mid 1972 an addition to the Forest Service Manual was drafted by the Forest Service which would appear to standardize the local actions to implement an aggressive minerals management program.<sup>121</sup> This change would require that a special use permit be obtained prior to the construction of any road or trail or the cross-country travel by heavy equipment. It would also require the forest officer to determine whether the mode and route of access are appropriate and needed based upon the mineral indications of the area to be prospected. The draft states that where "proposed access" is other than over existing roads, an environmental analysis report will normally be required under the National Environmental Policy Act of 1969, and an environmental impact statement will be prepared when deemed appropriate.

### Primitive Areas

Primitive areas are a special category of national forest lands which were established by the Chief of the Forest Service,<sup>122</sup> applying only his general authority to establish rules and regulations for the national forests.<sup>123</sup> The only provision Congress has expressly made for primitive areas is that con-

119. *E.g.*, Memorandum, Headquarters, Intermountain Region Forest Service to Forest Supervisors, July 7, 1972.

120. *See, e.g.*, Guidelines issued by the Northern Region, Forest Service, March 24, 1971.

121. Proposed F.S.M. Pt. 2816.

122. 36 C.F.R. § 251.21a (1964).

123. 16 U.S.C. §§ 478, 551 (1970). The authority of the Secretary to establish primitive areas and to restrict their use has been upheld. *McMichael v. United States*, 365 F.2d 283 (9th Cir. 1965).

tained in the Wilderness Act which provides that areas classified as "primitive" on September 3, 1964, shall continue to be administered under the rules and regulations affecting such areas on September 3, 1964, until Congress has determined otherwise.<sup>124</sup> The result is that whatever new regulations the Forest Service may establish, cannot apply to primitive areas until Congress acts.<sup>125</sup> The regulations then in effect provide there shall be no roads in primitive areas and the use of all motorized equipment is prohibited except as authorized by the Chief of the Forest Service.<sup>126</sup> However, the regulations also provide: "These restrictions are not intended as limitations on statutory rights of ingress and egress or of prospecting, locating and developing mineral resources."<sup>127</sup>

With this provision that exploration and development of mineral resources in primitive areas are not intended to be limited, the regulations would appear to be in conformity with the intention of Congress that primitive areas shall remain open for meaningful mineral exploration:

The conference committee expects that the mining industry and the agencies of the Department of the Interior will explore existing primitive areas so that when legislation pertaining to such primitive areas is considered at a later date Congress will have the benefit of professional technical advice as to the presence or absence of minerals in each area.<sup>128</sup>

The General Counsel of the Department of Agriculture has advised the Forest Service that the authority for restricting mineral operations in primitive areas is no greater than the authority which applies to all national forests: that persons conducting such activities must comply with the rules

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124. 16 U.S.C. § 1132(b) (1920).

125. The rules and regulations applying to primitive areas prior to September 3, 1964 provide that primitive areas shall be administered in the same manner as wilderness areas which were administratively established by the Secretary of Agriculture prior to the Wilderness Act. Therefore, the 1972 regulations for primitive areas, 36 C.F.R. § 251.86 is merely a recodification with slight changes of the 1964 regulations applying to wilderness areas. 36 C.F.R. § 251.20 (1964).

126. 36 C.F.R. § 251.86 (1972).

127. 36 C.F.R. § 251.86(b) (1972).

128. CONF. REP. NO. 1829, U.S. CODE CONG. & ADM. NEWS, 88th Cong., 2nd Sess. 3631, 3632 (1964).

and regulations covering such national forests.<sup>129</sup> He recognized that questions will arise as to the reasonableness of restrictions in individual instances and that regulations which are unreasonable or which, in effect, prohibit mining law activities would be beyond the authority of the Secretary of Agriculture. The General Counsel's Office opinion did recognize, however, that limitations with respect to the location and type of road or the type of motorized equipment to be used may, under the circumstances, be reasonable restrictions in compliance with the statute.

### Roadless Areas

Early in 1971 the Chief of the Forest Service instructed the Regional Foresters to "step up" their program to identify additional areas which should be studied for recommendation as wilderness areas, and report the same to the Chief by June 30, 1972.<sup>130</sup> Those areas to be reported to the Chief were defined to be all unroaded areas of 5,000 acres or larger. On January 18, 1973 the Forest Service announced the selection of 235 roadless areas consisting of 11 million acres to be studied for addition to the wilderness system.<sup>131</sup> Those areas "will be managed to exclude any activity which would depreciate its potential value as wilderness until it is studied and either rejected by the Chief or selected for recommendation . . . ."<sup>132</sup>

The Forest Service states that it is conducting its roadless area review and is imposing the use limitations on the roadless areas pursuant to the authority of the Act of 1897 and the Multiple Use-Sustained Yield Act of 1960.<sup>133</sup> Therefore, the same statutory rights for and authorities for limitations on the conduct of mineral activities in national forests generally would also apply to the areas designated under the roadless area program, and mining law activities cannot be prohibited or unreasonably restricted in those areas notwith-

129. Letter, Office of General Counsel, U.S. Dep't of Agriculture to John R. McGuire, Chief, Forest Service, June 10, 1972.

130. Letter, Chief, Forest Service to Regional Foresters, February 25, 1971.

131. News Release, U.S. Dep't of Agriculture, January 18, 1973.

132. Statement, Forest Service, Multiple Use Management Review of Undeveloped Roadless Areas on the National Forest (March 1, 1972).

133. FOREST SERVICE, U.S. DEPT OF AGRICULTURE, CURRENT INFORMATION REPORT No. 9, at 16 (Jan. 1973).

standing the Forest Service statement that nonwilderness activities will be excluded.

### Wilderness Areas

Among the provisions of the Wilderness Act relating to mineral activities are:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter.<sup>134</sup>

Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment.<sup>135</sup>

Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws . . . shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, . . .<sup>136</sup>

In any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.<sup>137</sup>

Pursuant to the Wilderness Act, the Department of Agriculture has promulgated rather comprehensive regula-

134. 16 U.S.C. § 1133(c) (1970).

135. 16 U.S.C. § 1133(d)(2) (1970).

136. 16 U.S.C. § 1133(d)(3) (1970).

137. 16 U.S.C. § 1134(b) (1970).

tions which, among other things, govern access, and require permits and restoration of the surface after operations.<sup>138</sup> These provisions of the statute and the regulations have been discussed fully in a previous article.<sup>139</sup> However, in response to a contention that the only limitation which the 1897 Act imposes on the Secretary's authority to regulate mining activities is that he may not prohibit mining, one need only look to the Wilderness Act. In the language of the Wilderness Act quoted above, both of the provisions for regulations state that mining activities will be subject to "reasonable regulations".<sup>140</sup> It would be anomalous to conclude that Congress intended for the mining regulations for wilderness areas to be reasonable and not have intended that there be a limitation of reasonableness on the regulatory authority for the national forests generally.

The recent decision in *Izaak Walton League v. St. Clair*<sup>141</sup> held that the owner of reserved minerals in the Boundary Waters Canoe Area in Minnesota could be prohibited from having access across the national forest to explore for the minerals and from developing the minerals which had been reserved to the state and private ownership from conveyances of the land to the United States. The Court stated that all lands in Minnesota were withdrawn from the general mining laws in 1893,<sup>142</sup> and held that 16 U.S.C. § 1133(d)(3), providing that wilderness areas shall be subject to the mining laws (including the right of ingress and egress for purposes authorized by those laws), had no application to the Boundary Waters Canoe Area, even though the Boundary Waters Canoe Area is treated in the Wilderness Act as a wilderness area.<sup>143</sup> The Court concluded that the United States "zoned" the Boundary Waters Canoe Area wilderness area against all mineral exploration and development.<sup>144</sup> Its conclusion was based on the special provisions in the Wilderness Act dealing with the Boundary Waters Canoe Area and upon its reason-

138. 36 C.F.R. §§ 251.82-86 (1972).

139. Hubbard, *supra* note 1.

140. 16 U.S.C. §§ 1133(d)(3), 1134(b) (1970).

141. No. 5-69 Civil 70, 4 ENV. REP.—CASES 1864 (D. Minn., Jan. 5, 1973).

142. 30 U.S.C. § 48 (1970).

143. 16 U.S.C. § 1133(d)(5) (1970).

144. The court made clear that the general owner's right to compensation for the taking was not before the court in this action.

ing that because mining and wilderness are inconsistent, Congress could not have intended to authorize mining in the wilderness. To have concluded that Congress had not intended for mining activities to continue in wilderness areas, the court must have ignored the express provisions for mining in sections 4 and 5 of the Wilderness Act.<sup>145</sup>

#### ENFORCEMENT OF THE SECRETARY'S REGULATIONS

The United States may enjoin activities within the forest which violate the lawful regulations of the Secretary of Agriculture.<sup>146</sup> In addition, the government may recover damages in civil actions against persons who destroy timber, or who otherwise injure the surface or cause waste within the national forest in violation of valid regulations of the Secretary of Agriculture.<sup>147</sup>

The 1897 Act provides that any violation of the valid rules and regulations of the Secretary of Agriculture may be punished by a fine of not more than \$500 or imprisonment for not more than six months, or both.<sup>148</sup>

The constitutionality of making the violation of the Secretary's rules and regulations a crime, received considerable attention in the early 1900's. The Secretary had early promulgated regulations prohibiting the driving or grazing of livestock on the forest without a permit and imposing a fee. Although grazing livestock on the public domain was not a right expressly granted by statute, it was recognized as a lawful and proper use of the public domain under an implied license revocable at the will of the United States. Because grazing livestock on the forest was not prohibited by the Organic Act of 1897, and in fact the use thereof for all lawful and proper purposes was expressly authorized, the authority of the Secretary to issue the regulations was questioned.

The regulations, insofar as a criminal penalty was prescribed for failing to obtain a permit for the driving and

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145. 16 U.S.C. §§ 1133(d) (2), (3), 1134(b) (1970).

146. *Light v. United States*, 220 U.S. 523 (1911).

147. *United States v. Denarius Min. Co.*, *supra* note 116.

148. 16 U.S.C. § 551 (1970).

grazing of livestock on the forest, were held by several district courts to be an unconstitutional delegation of legislative power by Congress,<sup>149</sup> while others held that the rules were a reasonable regulation of the use and occupancy of the forest which were prescribed for carrying out what Congress had expressly declared to be the law.<sup>150</sup>

The Ninth Circuit Court of Appeals had no difficulty in finding early in the game that insofar as the Government's civil remedy for injunction was concerned the Act of June 4, 1897 delegating authority to the Secretary to make rules and regulations for the occupancy and use of the national forests and to preserve forests from destruction was not an unconstitutional delegation of legislative power. Furthermore, the regulations *prohibiting* grazing livestock on the forest without a permit was a proper exercise of the delegated authority and was intended to preserve the forests from destruction which might result from overgrazing and erosion. It was stated that "where the end is required, the appropriate means is given."<sup>151</sup>

In *United States v. Mathews*,<sup>152</sup> the court stated that rules of the Secretary to *prevent* any occupation or use would be contrary to statute, but those simply to regulate such occupation and use are what the statute expressly authorizes and are valid.

The validity of the statute and the regulations promulgated under it prohibiting grazing without a permit and imposing a fee were finally established by the United States Supreme Court, both as to the criminal penalty,<sup>153</sup> and as to civil remedies of the Government.<sup>154</sup> In *United States v. Grimaud*,<sup>155</sup> the Court, on reargument, reversed the position it had taken earlier by an equally divided court, and said:

149. *United States v. Mathews*, 146 F. 306 (E.D. Wash. 1906); *United States v. Blasingame*, 116 F. 654 (S.D. Cal. 1900); *Dent v. United States*, 8 Ariz. 138, 71 P. 920, *rev. on reh'g*, 8 Ariz. 413, 76 P. 455 (1904).

150. *United States v. Bale*, 156 F. 687 (D. S.D. 1907); *United States v. Deguirro*, 152 F. 568 (N.D. Cal. 1906); *United States v. Domingo*, 152 F. 566 (D. Idaho 1907); *United States v. Rizzinelli*, 182 F. 675 (D. Idaho 1910).

151. *Dastervignes v. United States*, 122 F. 30 (9th Cir. 1903).

152. *Supra* note 149.

153. *United States v. Grimaud*, 220 U.S. 506 (1911).

154. *Light v. United States*, 220 U.S. 523 (1911).

155. 220 U.S. 506 (1911).

From the various acts relating to the establishment and management of forest reservations it appears that they were intended "to improve and protect the forest and to secure favorable conditions of water flows." It was declared that the act should not be "construed to prohibit the egress and ingress of actual settlers" residing therein nor to "prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, and locating and developing mineral resources; provided that such persons comply with the rules and regulations covering such forest reservations." . . .

Under these acts, therefore, any use of the reservation for grazing or other lawful purpose was required to be subject to the rules and regulations established by the Secretary of Agriculture. To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. But a limited and regulated use for pasturage might not be inconsistent with the object sought to be attained by the statute . . . .<sup>156</sup>

. . . .

The Secretary of Agriculture could not make rules and regulations for any and every purpose. *Williamson v. United States*, 207 U.S. 462. As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized "to regulate the occupancy and use and to preserve the forests from destruction." A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty.<sup>157</sup>

#### PROPOSED REGULATIONS OF 1971

Some evaluation should be made of the regulations proposed by the Forest Service in early 1971 insofar as they may

156. *Id.* at 515-16.

157. *Id.* at 522.



or may not be within the authority of the Secretary of Agriculture to prescribe. The threshold question remains as to whether the Secretary of Agriculture has any authority at all, in view of the 1905 Act and in view of the Department of the Interior Solicitor's restrictive approach to regulatory authority,<sup>158</sup> to prescribe any regulations for mining law activities in national forests. However, passing that question, the authority for the provisions of the draft regulations may be considered.

The overall approach of the regulations would appear to be within the authority granted under the 1897 Forest Service Organic Act to require those prospecting on the public domain to comply with the rules and regulations covering the national forest.

The regulations would require the operator to submit a plan of operations to the appropriate district ranger before "conducting prospecting, exploration, development, mining, or processing operations" with mechanized equipment.<sup>159</sup> The Forest Service officer would be required to notify the applicant of his approval within 30 days after the date the plan was submitted, or "of any *changes or additions* to the proposed plan" (Emphasis added), or that it has been determined that the environmental impact statement procedures of the NEPA<sup>160</sup> apply. The potential for abuse of these provisions is obvious. They contemplate that the Forest Service officer could substitute his business and technical judgment for the operators' and proscribe the methods of operation. The reasonableness or unreasonableness of the methods required by the Forest Service, and therefore the authority for and validity of the requirement, would necessitate a determination by the courts, unless an agreement could be reached. Security of tenure, deemed by the mining industry to be essential to any system for mining on public lands, may be seriously affected by the necessity to obtain the approval of a plan of operation at each stage of exploration or development of a mining claim. The detail and methods of the plan of

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158. See text *supra* notes 70 and 93.

159. Proposed F.S. Reg. § 251.12(f) (1971).

160. Proposed F.S. Reg. § 102(2)(c) (1971).

operation cannot be determined prior to the completion of initial exploration and development stages, but only after substantial funds have been invested. Under the proposed regulations the opportunity for the Forest Service to change the rules in the middle of the game exists.

The draft regulations provide that any person holding a "valid mining claim" shall be permitted access,<sup>161</sup> but no road or other means of access may be constructed or improved until authorization is provided in writing.<sup>162</sup> The authorization for the access shall "provide the mode of access, route, location design standards, and other conditions." This language suggests that the Forest Service might prescribe, rather than approve, these conditions of access for mineral exploration and development. The Chief of the Forest Service has suggested that these factors should be prescribed with consideration being given to the type of deposit and to the means of access which would be appropriate for exploring or developing that type of deposit.<sup>163</sup>

A special problem arises from the imposition of the NEPA impact study procedures on any regulatory system which requires a federal action, in this case, the approval of the Forest Service. The Forest Service Manual guidelines for the preparation of environmental statements provide that a NEPA study and statement will be required for proposed actions having "major environmental impacts or which are highly controversial".<sup>164</sup> It might be expected that any mineral exploration or mining project would, in some people's minds, have major environmental impacts or be highly controversial. The manual states that in most cases any activities that will significantly affect primitive areas, wilderness areas, unroaded areas, free-flowing streams, scenic attractions, or which are adjacent to national parks, monuments or wildlife refuges, will require an environmental study.<sup>165</sup> It

161. (Query: Does this mean that a valid mineral discovery must be shown before access is permitted for exploration?)

162. Proposed F.S. Reg. § 251.12(1) (1971).

163. "Mining's Access and Tenure on the National Forests", address by John R. McGuire, 78th Annual Convention of the Northwest Mining Association, Spokane, Washington, December 1, 1972.

164. F.S.M. § 1941.

165. F.S.M. § 1941.22.

provides further that an environmental statement should be "seriously considered for mining permits and certain prospecting permits."<sup>166</sup> The time periods for the review process and for the preparation of environmental statements make it impossible for an approval of a plan of operation to be granted within even the longest periods provided by state law for performing discovery work after a claim is located.<sup>167</sup> The General Counsel's office of the Department of Agriculture has expressed the opinion that the NEPA cannot be applied so as to unduly interfere with mineral exploration or the operation of mining claims.<sup>168</sup>

After the proposed regulations were issued in 1971, certain court decisions were rendered which indicate that the NEPA environmental impact statement procedures will be applied even to minor federal actions, and which may require that the environmental study and statement relating to those actions be carried out in the greatest detail.<sup>169</sup> If such requirements were placed upon the Forest Service's proposed regulatory program, considering the number of federal actions which would be involved in such a program, the result could approach the paralysis experienced by both the industry and the Government in the Corps of Engineers' water discharge permit program.<sup>170</sup>

An alternative to a permit and approval regulatory program which could involve a "major" federal action or a "highly controversial matter" in almost every mining activity, is suggested by the surface protection system of the State of Montana. Montana has prescribed by statute<sup>171</sup> and by

166. *Id.*

167. See F.S.M. § 1943.4, Arizona's 120 day period is among the longest provided by any state within which to perform discovery work. The delays and burdens which may be faced by both the Forest Service and the mining industry are indicated by one example in Arizona. More than one year will have elapsed from the time an application was submitted to drill one exploratory hole in the Blue Range Primitive Area to the time the permit will be issued.

168. Letter, Office of General Counsel, Dep't of Agriculture to John R. McGuire, Chief, Forest Service, June 10, 1972.

169. *Natural Resources Defense Council Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); *Calvert Cliffs v. A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971); *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971).

170. *Kalur v. Resor, Id.*; Memorandum, *Exemption of Permits from NEPA*, John R. Quarles, Jr., EPA Assistant Administrator for Enforcement, 3 ENV. REP.—CURRENT DEV. 5 (May 12, 1972).

171. MONT. REV. CODES ANN. § 50-1207 (Supp. 1971).

regulation of the Montana Department of State Lands that a statewide exploration license may be issued to any person or company conducting mineral exploration within the state who has complied with the regulations in preceding years. Rather than requiring a permit for each exploration project, the regulations specify the standards for roads, drill sites, discovery pits or other excavations, disposal of refuse and for the revegetation of the surface after these activities have been completed.<sup>172</sup> Those regulations provide for amendments of the licenses to accommodate special local situations which cannot be accommodated by the standard specifications.

We submit that a similar "self-operating system" providing for standard specifications which provide adequate protection and reclamation of the surface and surface resources of the national forests from mining activities, at least for exploration, would sufficiently protect the national forests without possibly paralyzing the federal agencies and the mining as may occur under the permit and approval program which may be subject to the NEPA procedures. The efficiencies which would result from a self-operating system would preclude the substantial increase in the costs to the Forest Service of administering the regulations, and would preclude the substantial increase in the administrative burden to the industry. These savings would be of substantial benefit to the nation. The self-operating system would also allow the mining industry to schedule and conduct exploration programs without the delays and uncertainties which will necessarily attend a permit program, and would comport with the policy recently declared by Congress to encourage mining in the United States.<sup>173</sup>

#### WHAT IS REASONABLE REGULATION?

Thus far we have determined that with respect to national forests, other than wilderness areas, the authority of the Secretary of Agriculture to regulate mining law activities is limited to the extent that such regulations may not prohibit mining or unreasonably restrict mining law activi-

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172. REGULATIONS OF MONTANA DEP'T OF STATE LANDS, Rule 3.

173. 30 U.S.C. § 21a (1970).

ties. In a large measure the extent of the Secretary of Agriculture's authority to regulate mining law activities in wilderness areas is spelled out in the Wilderness Act and numerous guidelines are established for the exercise of his discretion. On other than wilderness areas, no guidelines have been established by Congress. The draft regulations prepared by the Forest Service in 1971 would provide the Forest Service with the opportunity to regulate, by means of approving and changing operating plans submitted by the mining operator, all facets of mining law activities including when and where to prospect, method or manner of production, surface reclamation, means of access, and so forth. These draft regulations provide the opportunity to discourage if not prohibit mining law activity within the national forests by making it difficult and time consuming to obtain needed permits and uneconomical to explore unproven prospects or to mine low grade deposits. Such fear is not wholly unfounded. It has been suggested that given the inhospitable nature and short working season of most wilderness areas, and given the additional imponderable of a fluctuating world mineral market, it is within the power of the Forest Service to deter the mineral developer from commencing operations in such areas by adding strict government regulation to the list of difficulties in undertaking such mining operations.<sup>174</sup> If such a proposal were implemented it could, no doubt be entirely effective in many nonwilderness areas as well. It is the possibility of just such administrative application of ostensibly reasonable regulations which the industry fears.

The question becomes how to resolve the conflict between regulations of the Forest Service, which seek to implement management objectives for the renewable surface resources but are claimed by industry to unreasonably interfere with the conduct of prospecting, development or mining activities within the forests.

Negotiation between the miner and the Forest Service can no doubt resolve many of the minor administrative matters. Inevitably, there will come a point at which regulations,

174. Hammond, *The Wilderness Act and Mining: Some Proposals for Conservation*, 47 ORE. L. REV. 447 (1968).

if strictly applied, will mean the difference between an economical or an uneconomical operation. In the absence of congressionally established guidelines, that point may be reached sooner than it might otherwise be, for the pressures to impose wilderness-type restrictions may be too great for the Forest Service to resist.

Similarly, recreational conservationists do not trust industry to suggest the limits of the Secretary's authority because they feel most companies will not apply techniques for minimizing the aesthetically objectionable features of mining development or for guarding against adverse effects on the ecology unless industry is concerned about public opinion and governmental regulation and even when such measures are applied, they are usually half-way measures.<sup>175</sup>

A political solution is now being debated in the form of proposals for the revamping of the mining law and the search for a reasonable balance between the needs of the mining industry and the considerations for environmental controls on all public lands.<sup>176</sup> The issue involved is whether in the process of imposing new environmental requirements, the nature and the needs of the industry which is sought to be controlled will be forgotten.

The prospector must have access to the land. To provide a federal administrator the unfettered power to deny access is to provide him with a power to drastically alter or negate future mineral activity on the public lands. To empower a federal administrator to prohibit mining on public lands if, in his view, such land cannot be adequately reclaimed, is to place the domestic mining industry of this nation in serious jeopardy.<sup>177</sup> Until Congress establishes guidelines for the exercise by the Secretary of his authority to control mining activities within the forest, it appears that the question as to the reasonableness of regulations and their application will have to be determined on a case-by-case basis in the courts, if the miner and the Forest Service are unable to agree on the scope of the Secretary's authority.

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175. McCloskey, *Can Conservationists Provide for Mining?* 13 ROCKY MT. MIN. L. INST. 65, 84 (1967).

176. Burns, *supra* note 8.

177. Burns, *supra* note 8, at 111.