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The problems in administering national forests in the Eastern Region differ from those in the west. Mr. Curtis believes a distinction must be made in the administration of acquired as opposed to reserved lands. Other problems of population pressures, environmental legislation, and irregular patterns of federal ownership increase the complications.

“FOR THE SNARK WAS A BOOJUM, YOU SEE”: COUNSELING WITH CAUTION IN ADMINISTERING ACQUIRED EASTERN NATIONAL FOREST LANDS SINCE NEPA*

*Eric J. Curtis***

“You must know-” said the Judge: but
the Snark exclaimed “Fudge!
That statute is obsolete quite!
Let me tell you, my friends, the whole
question depends
On an ancient manorial right.”¹

INTRODUCTION

My duties as a field lawyer require me to try somehow to “make the shoe fit” in daily controversies or disputes

*The statements or view expressed herein are exclusively those of the author, and do not necessarily represent the views or policies of the United States Department of Agriculture, nor any service, function or agency included within or connected with that department, or other federal body.

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1. L. CARROLL, *The Hunting of the Snark*, THE COMPLETE WORKS OF LEWIS CARROLL, Random House, Inc. (Modern Library Edit.) at 774 and 778.

I leave to the reader's poetic imagination or interpretive bent just what “that statute” refers to, and why I felt, with the Snark, that an “ancient manorial right” was indeed involved, or being claimed in some of the litigative and claim activities discussed in this article.

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involving the acquisition or administration of national forest lands. Historical accidents, geography, and population distributions have resulted in wide variations in daily administrative techniques and acquisition patterns between the "reserved" national forest lands in the West and the "acquired" national forest lands in the East. (For a clear outlining of this distinction, see *Thompson v. United States*, 308 F.2d 628, 631 (9th Cir. 1962).)

It would be most helpful to my office, in advising Forest Service field personnel who are trying dutifully to cope with or enforce current rashes of "environmental" legislation, regulations, executive orders, guides, and court decrees, if the legislative draftsmen, judges (and their law clerks), together with other authors of these worthwhile fiats and documents, could be induced to delve a bit deeper and exercise a bit more selectivity and sensitivity in attempting to reflect the historic, demographic, and geographic "facts of life," as they seek to respond to popular pressures. It is the plea of this article that needed ecological remedies involving national forest lands could be much more realistically, economically, and efficiently applied if we could at least minimize the constant embarrassing effort of having somehow to fit "size 7 shoes" to "size 11 feet," and vice versa.

Our office in Milwaukee is one of a number of similar small legal offices scattered throughout the country acting as "house counsel" to a wide variety of U.S. Department of Agriculture programs. Our particular specialties include programs of the Forest Service and the Soil Conservation Service, with occasional miscellaneous duties involving other programs. We handle, on the average, 450 to 500 tracts of land a year.

We have the rather unusual distinction of advising a 20-state program area, the United States Forest Service Eastern Region, which stretches from Maine to include Minnesota and Missouri, taking in all of the states north of the Ohio River, West Virginia, Pennsylvania, and back through Vermont and New Hampshire to Maine. (See map, Appendix I.) This Region generates a wide variety of legal problems, prin-

cipally from the 17 national forests, 10 purchase units, and miscellaneous other units shaded on the map. We must, perforce, call upon the usually effective, but often greatly overburdened, litigative talents of 15 separate and constantly changing United States Attorneys' staffs in the 15 federal judicial districts of the Region on an almost daily basis. Although we draw occasional legal problems from all 20 states, the 13 states where the basic national forests are located provide the bulk of our work, and we must maintain a fairly complete state as well as federal library to cover tort claim, land acquisition, and like matters where state law is of principal concern. Sooner or later, due to the variety of program activities, and the sheer area involved, we are on the receiving end of nearly every conceivable novel legal situation that can arise in natural resources administration—from timber sale contracts to off-road vehicle closures, and law enforcement problems on national forest campgrounds.

To avoid unduly extending this article, I shall pass over many equally important program activities to concentrate upon major national forest acquisition and administrative problems in the Eastern Region, more particularly those historical accidents which have resulted in distinct deviations in administrative techniques on acquired lands in the East from those on national forest lands in the West reserved from the public domain.

From the moment of the enactment of the National Environmental Policy Act of 1969,² we began to encounter very peculiar enforcement problems arising from the sheer number of states, the diversity of their laws and the legacy of past acquisition practices in the Eastern Region. On many forests only relatively small percentages of the authorized areas (by proclaimed boundary) have been achieved. Federal ownerships are often separated by crazy-quilt patterns of private, and sometimes state, ownerships. At times in the past, as a condition of voluntary acquisition of vitally needed "base" tracts, the mineral estates were often left outstanding in perpetuity in third parties, or reserved to the grantors for

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 to 4347 (1969) (hereinafter NEPA) and related guidelines and directives.

lengthy periods subject to rules and regulations of the Secretary of Agriculture.³ For a number of reasons more fully outlined below, effective federal control cannot always be exercised even as to the latter, more favorable, reservation status.

From discussions with my counterparts in the Ogden, Missoula, Albuquerque, San Francisco, and other western offices, and from my general reading on the subject,⁴ I am well aware of the massive problems faced by the national forest surface administrator in the West because of the claim-generating propensities of the Mining Act of 1872.⁵ We do not have to bear this particular cross as to metalliferous minerals since none of the 20 states of the Eastern Region are subject to this Act, but as to iron ore, taconite, copper, and other metalliferous minerals, we have its practical equivalent in reserved and outstanding rights on acquired lands which I will touch upon later in this article. As to coal, oil, gas, etc., withdrawn in 1910 by Congress under the Pickett Act,⁶ and subject to the Mineral Leasing Act of February 25, 1920,⁷ the Eastern Region can meet and match the West in controversies and complexities created by its Mineral Leasing Act for Acquired Lands,⁸ since, as will later be demonstrated, the question of federal ownership due to reserved and outstanding rights, and the complications in mineral ownerships arising from intermixed surface ownerships (government and private) have to be experienced on a case-by-case basis to be believed.

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3. Act of March 1, 1911, 36 Stat. 961, *as amended*. Act of March 4, 1913, 16 U.S.C. § 518 (1970). Current mineral regulations on exercise of mineral rights reserved in conveyances to the United States are found in 36 C.F.R. § 251.15, 251.17-251.18 (1973). See Appendices II, III, and IV for earlier version.
 4. Surface Mining and Our Environment, U.S. Department of Interior (1967) [hereinafter cited as INTERIOR REPORT]; W. DOUGLAS, THE THREE HUNDRED YEAR WAR, 111 (1972); P. GATES, HISTORY OF LAND LAW DEVELOPMENT (1968) [hereinafter cited as GATES]; G. LAYCOCK, THE DILIGENT DESTROYERS, 129-153 (1970), [hereinafter cited as LAYCOCK], and others as listed in "Credits" of a general nature throughout these footnotes.
 5. Act of May 10, 1872, 30 U.S.C. §§ 21-50 (1970); INTERIOR REPORT, *supra* note 4, at 97; GATES, *supra* note 4, at 723. Ferguson and Haggard, *Regulation of Mining Law Activities in the National Forests*, 8 LAND & WATER L. REV. 391.
 6. Act of June 24, 1910, ch. 421, 36 Stat. 847; *See also* GATES, *supra* note 4, at 733-736; *Id.* at 726 for coal withdrawal discussions. Act of June 25, 1910, ch. 407, 36 Stat. 835; Act of June 22, 1910, ch. 318, 36 Stat. 583.
 7. Act of Feb. 25, 1920, 30 U.S.C. §§ 181-287 (1970); *see also* INTERIOR REPORT, *supra* note 4, at 97.
 8. Act of Aug. 7, 1947, 30 U.S.C. §§ 181-263 (1970); *see also* INTERIOR REPORT, *supra* note 7, at 97.

It further appears from current popular articles that now, riding triumphantly astride a juggernaut labelled "The Energy Crisis," King Coal may once again be attempting to assume the rule by divine right he so long held in the East.⁹ For readily understandable economic reasons, it further appears that he is now in the process of moving the center of his domain further to the West,¹⁰ although the East, and particularly Appalachia, will not be unduly neglected while these new western domains are being consolidated. If the current federal legislation now being proposed in the 93rd Congress¹¹ to extend federal regulation to strip mining and mine acid pollution control is eventually enacted in some form, its enforcement may be complicated by the variations between Forest Service control techniques and ownership patterns on acquired lands as opposed to national forest reserves. I am quite certain from cases and correspondence crossing my desk that there is a great deal of misunderstanding on this subject,¹² about which no one has ever taken the trouble to even attempt an explanation. To cast a little light on these variations is a main purpose of this article.

A BRIEF HISTORICAL SUMMARY

Numerous excellent treatises and shorter studies are available on the subjects of the genesis of the national forest

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9. *State Regulation of Strip Mining*, 2 ABA NATURAL RESOURCE LAW—NEWSLETTER 8 (1969); LAYCOCK, *supra* note 4, pt. III; H. CAUDILL, MY LAND IS DYING 84-85 (1971).
 10. Ward and Dubos, *Only One Earth*, INTERNATIONAL WILDLIFE, May-June 1970, at 18-19; J. Stein, *Coal is Cheap, Hated, Abundant, Filthy, Needed*, SMITHSONIAN, Feb. 1973 at 19-27; Borrelli and Austin, *The Strip Mining of America*, SIERRA CLUB, July 1971; Brooks, *West Virginia, the Paradox of a Forgotten State*, NATIONAL WILDLIFE, Dec.-Jan. 1972 at 57-62.
 11. See, e.g., H.R. 3, H.R. 181, H.R. 726, S. 196, and S. 425. The Committee on Interior and Insular Affairs of the Senate reported favorably on S. 425, the Surface Mining Regulation Act of 1973, on September 10, 1973. The Council on Environmental Quality prepared a massive and exhaustive report entitled "Coal Surface Mining and Regulation" and submitted it to the Senate I&IA Committee in March 1973. This report was requested by Senator Jackson on November 2, 1972, and covers virtually every conceivable regulation and the social, economic, technical and legal aspects of the regulation in great detail. It is entitled, "An Environmental and Economic Assessment of Alternatives." Data was furnished by seven federal agencies and the regulatory agencies of the 16 states surveyed in the report.
 12. It appears that in at least one state whose mining lobbyists have argued vigorously that state legislation is more than adequate, and federal legislation unnecessary, the position is also being taken by coal operators that state legislation does not apply on national forest lands. See discussion *infra* at 44-45. W. DOUGLAS, THE THREE HUNDRED YEAR WAR, 121 (1972). Compare with PUBLIC LAND LAW COMMISSION, ONE THIRD OF THE NATIONAL LAND, 16 (1970) [hereinafter cited as REPORT (PLLRC 1970)]; INTERIOR REPORT, *supra* note 7, at 106.

system,¹³ and why the Department of Agriculture, rather than the Department of the Interior,¹⁴ supervises the 154 national forests (which aggregate approximately one-quarter of all federal lands, almost 187 million acres by 1972).¹⁵ In my view, the best concise summary to date, on the history, management authorities, philosophies, and goals of the national forest system as a whole, is to be found in Richard M. Alston's *Forest: Goals and Decision Making in the Forest Service*;¹⁶ and the best authority by far on the reservation, acquisition, and technical control authorities available to the Forest Service is Paul W. Gates, *History of Public Land Law Development*.¹⁷ I shall draw heavily upon these two sources (as well as others) in the brief summary which follows. If I have any criticism at all of these two works, it is their lack of emphasis on what I consider the importance of the eastern forests, due to population pressures and their proximity to large urban complexes. However, I can scarcely afford to complain, since they have left in the pond an ample stock for brewing my own kettle of fish.

I. NATIONAL FORESTS IN GENERAL:

A. *Genesis*: The Creative Act of 1891¹⁸ set aside, during the Harrison and Cleveland Administrations, some 13 million acres of remaining public domain land in the western states which had not been taken up by claim or settlement under the much-maligned Timber & Stone Act of 1878.¹⁹ Professor Alston quotes with approval the views of Henry J. Vaux that the 1878 Act, amid the statutes and policies reflecting exclusive use of the public domain for agriculture or mining (farms, mine pit-posts, or ships' masts), reflected "for the first time that there was such a thing as land chiefly valuable

13. F. GRAHAM, *MAN'S DOMINION* (1971) [hereinafter cited as GRAHAM]; M. FROME, *THE NATIONAL FORESTS OF AMERICA* (1968); A. CARHART, *THE NATIONAL FORESTS* (1968); GATES, *supra* note 4. for other bibliographical works, see GRAHAM, at 321 et seq.

14. See, GRAHAM, *supra* note 13, at 123-138.

15. REPORT (PLLRC 1970), *supra* note 12, at 19-21.

16. Alston, *Forest: Goals and Decision Making in the Forest Service*, USDA FOREST SERVICE RESEARCH PAPER INT-123, Sept 1972 [hereinafter cited as ALSTON].

17. GATES, *supra* note 4, at ch. 23.

18. Creative Act of 1891, 26 Stat. 1103, as amended, Act of June 7, 1924, 16 U.S.C. § 471 (1970). See GATES, *supra* note 4, at 550; ALSTON, *supra* note 16, at 12-13.

19. Act of June 4, 1878, Ch. 151, 20 Stat. 89 (codified at 16 U.S.C. § 606 (1970)).

for forest"²⁰ in a country seemingly determined to clearcut its way into the same condition as China,²¹ Greece, and the Middle East. The new "forest reserves" were to be managed by the Department of the Interior. Meanwhile, in the Department of Agriculture, a Division of Forestry was created in 1881, and by 1886 was being led by the dynamic Bernhard E. Fernow,²² while a young man named Gifford Pinchot was learning scientific forestry and management in France and Germany.²³ The term "conservation" was beginning to achieve a form of recognition among men of good will in the country,²⁴ a change from the previous "cut-and-run" attitude toward the forests.

B. The Organic Act of 1897²⁵ was a Congressional response aimed at putting enforcement teeth into the supposedly toothless Creative Act of 1891, since, for reasons now obscure, many argued that the President lacked effective enforcement powers to prevent fires, timber thefts, and other trespasses and depredations on the forest reserves.²⁶ Like the Mosaic Law, the Organic Act lends itself to a wide and wonderful variety of interpretations. Alston²⁷ outlines at least three of these, of which I agree with his favorite, namely, that the 1897 Act did constitute "the original multiple use act, for it was under it that multiple use and sustained yield began."²⁸ As a matter of practicalities, the General Land Office of the Department of the Interior lacked the trained manpower,

20. ALSTON, *supra* note 16, at 12. This may have been based on personal communication with Vaux.

21. Speech by Franklin D. Roosevelt, Lake Placid, New York, September 14, 1935, 1 FRANKLIN D. ROOSEVELT AND CONSERVATION 430 (E. NIXON ed. 1957). Of particular interest is Pinchot's demonstration based upon a Chinese painting done in the year 1510, and a photograph of the same scene 400 years later.

22. H. CLEPPER, ORIGINS OF AMERICAN CONSERVATION 43 (1966). [hereinafter cited as CLEPPER.] Clepper also has an interesting discussion of "pressure groups" as a phenomenon noted in American life by de Tocqueville in 1831, which shows that times have not really changed very much, at 10-11.

23. G. PINCHOT, BREAKING NEW GROUND (1947); CLEPPER, *supra* note 22, at 44-50.

24. GRAHAM, *supra* note 13, at 109. "The idea, was so new," Pinchot recalled later, "that it did not even have a name. Of course it had to have a name. Our little inside group discussed it a great deal. Finally Overton Price suggested that we should call it 'conservation', and the President said 'o.k.' So we called at the conservation movement."

25. Act of June 4, 1897, 16 U.S.C. §§ 475 et seq. (1970). See 16 U.S.C. § 551 (1970) as to the Secretary's powers to preserve and protect.

26. GATES, *supra* note 4, at ch. 20.

27. ALSTON, *supra* note 16, at 13-14.

28. *Id.* at 14.

appropriations, and enthusiasm to buck the intense pressures generated among potential miners and settlers by the large scale closings of the public domain to entry in order to protect the forest reserves in the waning days of the Cleveland administration.²⁹

No such lack of enthusiasm for forest protection prevailed in the Division of Forestry, Department of Agriculture, where Gifford Pinchot was appointed Chief by Secretary of Agriculture "Tama Jim" Wilson in 1898 (an appointment likened by Frank Graham to "being appointed Admiral of the Fleet of the Swiss Navy,"³⁰ since the GLO still controlled the forests).

However, by 1898, Theodore Roosevelt and Pinchot had met, held their famous boxing match, and discovered their mutual passion for "conservation."³¹ Pinchot, having alienated John Muir the year before by certain of his expressions on preservation, began one classic rift in the American conservation movement, and certain basic directions it would take could already be discerned.³²

C. The Transfer Act of 1905,³³ besides containing certain controversial language relating to "decentralizing and reliance on local authority" (which, according to Alston, still remains very much at issue),³⁴ transferred the jurisdiction of the forest reserves to the Department of Agriculture, where they became the national forests. I cannot hope to improve upon the language or sentiments of Frank Graham, Jr., in his comments to this Act:

Pinchot won his battle in 1905. With Roosevelt stifling opposition and even Interior Secretary Ethan Allen Hitchcock giving his blessing to the transfer, Congress voted to withdraw the reserves from the General Land Office. The Act renamed Pinchot's bureau the U. S. Forest Service, and turned it over to the administration of the reserves. The principle of "multiple use" was established in a letter from Secre-

29. GRAHAM, *supra* note 13, at 123-124.

30. *Id.* at 99.

31. *Id.* at 99.

32. *Id.* at 86-00, *see* 98, "I want nothing more to do with you." (Muir).

33. Feb. 1, 1905, 33 Stat. 628; 16 U.S.C. §§ 472, 524, 554. (1970).

34. ALSTON, *supra* note 16, at 17, 14.

tary of Agriculture James Wilson to Pinchot (a letter written for Wilson's signature by, not surprisingly, Pinchot himself):

“In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people and not for the temporary benefit of individuals or companies.”

The reserves became “national forests,” a description in keeping with Pinchot's views of their utility. His victory was complete. An inventory of the nation's standing timber dramatically proved the necessity for a sustained-yield approach to forest management; of the total 2500 billion board feet of timber, 40 billion were cut annually, to be replaced by a growth on only 10 billion. But his reforms extended far beyond technique. Like Roosevelt, Pinchot did not feel the need to approach Congress for further legislation on the matters that were not explicitly prohibited in the existing law; in other words, he believed in a strong executive branch of government. To cries of anguish from west of the Mississippi, Pinchot began to establish regulations for using the national forests.³⁵

This first “Golden Age” of forest conservation continued during the balance of Theodore Roosevelt's two administrations, with meetings of “The Baked Apple Club” at the Pinchots' gracious Washington residence on Rhode Island Avenue;³⁶ and the zeal generated by Pinchot during this period carried over into the “Copeland Report” Era of the 1930's³⁷ (in fact, an aura of it can still be faintly detected today). Perhaps this is why I find “counseling” (or, as one of my best Forest Service friends says, “meditating with”) these foresters such a rewarding occupation.

Roosevelt's departure, the famous Pinchot-Ballinger controversy, and the “last minute” enlargement of the national forests from 42 million to 172 million acres by presidential withdrawal proclamations, while fascinating in their

35. GRAHAM, *supra* note 13, at 124.

36. *Id.* at 127.

37. GATES, *supra* note 4, at 597-598.

own right, need not be explored in further detail for the purposes of this article. Let it suffice to say that many eastern "conservationists" had begun to feel that if 172 million acres of public forests were required as a valuable asset for flood control and future assured timber supplies in the West, certainly the ravages left by "cut-and-run" timber operations, marginal hillside agriculture and mine acid pollutions and depredations in the states east of the 100th meridian called for some equivalent form of federal protection in the form of acquired national forests in the East.

II. NATIONAL FORESTS IN THE EAST:

A. *Genesis*

As noted above, the 154 forests in the United States aggregated almost 187 million acres of land by the year 1972. According to the *Report* of the United States Public Land Law Review Commission,³⁸ 160 million acres of public domain land are administered by the Forest Service in the West while 22 million acres of acquired national forest lands primarily in the eastern United States and approximately 3.5 million acres of other acquired lands are also administered by the Forest Service. The unfortunate nature of forestry practices, wherein large tracts of land were bought by companies having both timber and mining subsidiaries, clear-cut of timber, either mined out or made subject to perpetual mining reservations, or both, and then resold for what little value the interests that remained might bring, had continued throughout substantially all of the 19th century.³⁹ Certain of the states began to see the effect of these depredations upon their future resource conditions and, mostly at the behest of concerned citizens groups, began to attempt curative steps.⁴⁰ It became obvious, however, that private organizations, or purely local or state governmental efforts would not be enough to overcome the depredations that had resulted from more than 200 years of adverse use.

There were some serious constitutional questions at the beginning of the 20th century on the authority of the federal

38. REPORT (PLLRC 1970), *supra* note 12, at 19-21.

39. GRAHAM, *supra* note 13, at 139-150.

40. CLEPPER, *supra* note 22, at ch. 1, 2, 3.

government to purchase forest lands solely for their restoration and protection. Authority for such purposes was finally founded on the Commerce Power of the United States Constitution, Article I, Section 8, Clauses 3 and 18, based upon the theory that acquisition and restoration of cut-over or denuded lands within the watersheds of navigable streams would ultimately improve navigable streams and aid in flood prevention. There was far from complete agreement on the validity of this theory, but Congress was seemingly satisfied and accordingly adopted the Weeks Act⁴¹ in 1911, which formed the basis for the formation of national forests and purchase of national forest lands at the headwaters of navigable streams. The Act was further broadened by the Clarke-McNary Act of June 7, 1924,⁴² which authorized the acquisition of lands chiefly valuable for the growth of timber. This combination of Acts, commonly known as the "Weeks Act Authority," with amendments thereto and other authorities listed in Alston and Gates,⁴³ permitted the federal government to enter into the creation and management of national forests under two major priorities—protection of watersheds of navigable streams and timber production.⁴⁴ When it came to managing and administering the lands acquired under these two acts with their various amendments, the basic law required that they be "managed and administered . . . under the same policies as all other national forests."⁴⁵

The constitutionality of the acquisition of national forest lands under the Weeks Act and its amendments was tested in the following cases (among others): *U.S. v. Graham & Irvine*, 250 F. 499 (D. Va. 1917); *U.S. v. Griffin*, 58 F.2d 674 (D. Va. 1932); *Coggeshall v. U.S.*, 95 F.2d 986 (4th Cir., 1938); and *Young v. Anderson*, 160 F.2d 225 (D.C. Cir.), *cert. denied*, 331 U.S. 824 (1947).

41. Act of March 1, 1911, ch. 186, 36 Stat. 961; (as codified at 16 U.S.C. §§ 480, 500, 513, 519, 521, 522 and 563 (1970)).

42. Act of June 7, 1924, ch. 348, 42 Stat. 653.

43. ALSTON, *supra* note 16, at 23-28; GATES, *supra* note 4, at 563-606. Such Acts included the McSweeney-McNary Act of May 22, 1928, the Knutson-Vandenberg Act of June 9, 1930, and the complexes of items listed regularly by the Congress in the Appropriations Acts (*see* ALSTON, *supra* note 16, at 21).

44. ALSTON, *supra* note 16, at 22-23.

45. *Id.* at 23.

Alston makes an interesting (and I think quite valid) distinction between the authority of the United States to acquire lands and the breadth of its authority to issue regulations on such lands once it has lawfully acquired them under valid and constitutional authority.

For the reasons he has outlined on his page 17, I am also inclined to follow Alston's view that there is a distinction between authority to establish and authority to regulate. The major consideration in issuing regulations is whether they profess to protect and preserve the forests. If they expressly or impliedly fall within this primary intent, such regulations should be construed as valid regardless of the authority under which the United States acquired the land.

After the Weeks law had passed through the tempering fires of constitutional tests, the United States Forest Service proceeded to use it to acquire substantial amounts of national forest lands east of the 100th meridian through the 1920's and 1930's.⁴⁶ However, Congress was not too free with Weeks law funds during the early acquisition days and the offers made to landowners, when compared with today's "fair market values," were not particularly attractive. The first year after the passage of the Weeks law, prices ranged from \$1.16 per acre for culled land to \$15.00 per acre for virgin timber land. The average price was \$5.95,⁴⁷ which was not a bad figure in the depressed real estate market of the 1930's.

B. *Large Plans*

Some 23 years after Gifford Pinchot left the Taft administration, his influence was still being felt through contributions to a "National Plan for American Forestry"—the so-called Copeland Report introduced by Senator Royal Copeland at the behest of Henry Wallace, then Secretary of Agriculture, on March 27, 1933.⁴⁸ This two-volume study, comprising 1,650 pages with index, called, among other things, for the acquisition of 177 million acres of federal land in the East under the Weeks law and 47 million acres in the West.⁴⁹

46. GATES, *supra* note 4, at 595 et seq.

47. *Id.* at 595-596.

48. *Id.* at 597-598.

49. *Id.* at 598.

This vast amount of acreage was to be in addition to the retirement and disposition of sub-marginal farm lands under what came to be known as the Bankhead-Jones Act.⁵⁰ It was to be a long-range program extending over a possible 20-year period and calling for appropriations of \$30 million each year for the first five years for land acquisition alone. It was, of course, introduced in the heart of the Great Depression and was tied to the Civilian Conservation Corps, the Bankhead-Jones, and other "New Deal" programs. I will discuss below in some detail the application of these programs to three national forests within the present Eastern Region. These forests were not singled out at random, but because they clearly illustrate some particular point with which I am very much concerned in today's national forest acquisition and administration circumstances.

C. *Modest Accomplishments*

The authorities are certainly in universal agreement that the CCC program not only acted as a safety valve in preventing social upheavals, but provided a salutary experience for the young men involved, gave many a lasting career boost in unbelievably difficult times, and went far toward beautifying the face of the nation and affording the public much-needed outdoor recreational facilities.

However, the broad conservation efforts outlined in the Copeland Report, particularly as to land acquisition, fell far short of realization; and the gradual alleviation of the Great Depression, together with the vast social disruptions accompanying America's entry into World War II, shortly thereafter, completely altered the course set by the planners of 1933. By 1950, it is estimated that 21,582,584 acres of land had been acquired in the East through Weeks law purchase and exchange authorities—far short of the initially planned 177 million acres.⁵¹

D. *Painful Epochs*

World War II! The baby boom! The building boom! The Korean episode! During these years the country was

50. Act of July 22, 1937, ch. 517, 50 Stat. 522 (codified at 7 U.S.C. § 1010-1012 (1970)).

51. GATES, *supra* note 4, at 595.

using wood as a substitute for a great many things from aluminum to affection. There was a brief resurgence of land acquisition during part of the Truman administration; but essentially, it can be said with a fair degree of conservatism that timber sales meant progress—but no one was quite sure what we were progressing toward. Wood is a renewable resource—original untouched natural beauty is generally considered not to be a renewable resource. Beauty, however, is in the eye of the beholder—which is why the Wilderness Act definition and the concept of “wilderness” *per se* has caused some disagreement in the eastern areas of the United States (land in this area being almost entirely second growth timber, even though it may have a distinctive beauty of its own).

E. Recreation

No history comparing East and West would be complete without a short discussion of recreation. To “re-create” oneself does not necessarily require a “woody” atmosphere, but because of the neo-Darwinians (Californians now officially excepted) it appears that to properly refresh mind, body, and spirit one must return to the Great Out-of-Doors. If one squats without benefit of government-subsidized toilets, one can qualify as a “preservationist.” If one prefers more amenities, even though at scattered intervals, one is a proponent of “multiple use.” If one prefers flush toilets, let him be relegated to the effete realms of the more highly developed state and federal recreation areas. (To borrow shamelessly from, and crib mercilessly from, Harry Golden’s concept of “vertical integration”—my apologies, Harry.)

Because everyone needs to re-create oneself by returning to the bosom of Mother Nature, the Congress in its wisdom enacted, shortly after the election of 1960,⁵² the Land and Water Conservation Fund Act of 1965,⁵³ allowing the Forest Service to make use of its sparkling new Multiple Use Act of 1960⁵⁴ (which everyone agreed wasn’t needed anyhow because the Forest Service had been doing it for years) to buy land for recreation purposes, if it otherwise qualified under

52. REPORT (PLLRC 1970), *supra* note 12, at 197, 215-216, 268, 271.

53. 16 U.S.C. § 4601-9 (1970).

54. Act of June 12, 1960, Pub. L. 86-517, 74 Stat. 215, (1960) (codified at 16 U.S.C. §§ 528-531 (1970)).

the Weeks law requirements! The L&WCF Act⁵⁵ didn't give anybody any actual authority to buy land but it authorized appropriations on a 60 to 40% basis (the federal government being on the short end of the %) to the state and federal governments to buy land chiefly valuable for recreation purposes. This was quite a shot in the arm for the Forest Service, as anyone who has studied the Weeks law appropriations for fiscal years 1952 through 1962 can plainly see, but it meant that the basic land acquisition authority of the Weeks Law (in most but not all instances) would have to be used. Thus it imported into every such recreation purchase under L&WCF all the weird idiosyncrasies that plagued Week's Law acquisition for the last 60 years! Fortunately, once the land is acquired, the administration of it falls within the beneficent and liberal provisions of the Organic Act of 1897 (as amended)—the lion lies down with the lamb, and any regulations issued are equally applicable to *all* national forest lands.

To bolster law enforcement on national forest lands, particularly as to offenses not involving resource depredations, Congress enacted P.L. 92-82, the so-called Sisk-Johnson Act.⁵⁶ This Act permits expenditures of national forest funds to aid state and local law enforcement officers in a cooperative effort to safeguard the lives, personal safety, and property, particularly of recreation visitors on national lands. At times it is found most appropriate and efficient to make use of state law enforcement machinery, and at other times, use of the federal regulations best suits the situation. Since national forest lands are held in a proprietary capacity, the forest officer is given choice and flexibility in law enforcement.

SOME ANOMALIES—EAST AND WEST

Having presented the above greatly capsuled summary of the history and development of the national forest system both East and West, it is time to demonstrate by a few prac-

55. L.W.C.F. Act, *supra* note 53; R. COOLEY, and S. WANDESFORDE, CONGRESS AND THE ENVIRONMENT (1970), Analysis by D. BEARD 96-111.

56. Act of Aug. 11, 1971, Pub. L. 92-82, 85 Stat. 303 amending 16 U.S.C. § 551 (1970) (codified at 16 U.S.C. § 551(a)) (1970), enforceable through 18 U.S.C. § 3401 (1970).

tical examples some involving litigation, others threatened litigation, and others simply daily frictions why:

1. There *is* a very real logical basis for distinguishing between *public domain* and *acquired* lands, contrary to the views expressed in the PLLRC Report.⁵⁷

2. While “*solid* ownership of a large area is not, in most cases, essential to the effective use and management of components parts of it,”⁵⁸ failure to own substantial or key blocks, and failure to effectively control the use of severed subsurface rights can lead to endless and unnecessary complications; *control* both of surface and subsurface rights in the East is critical; population pressures and open-space needs are vastly increasing; and prices for both lands and interests in lands are skyrocketing.

3. While the Forest Service may have to control six times as much land area west of the 100th meridian, it must meet the needs of more than half the American population in just the 20 states comprising the Eastern Region—without even taking into consideration the further need to acquire and control inholdings south of the “grit line” (Southern Region) where population pressures are also heavy.

RECONCILING ANOMALIES

1. *Thompson v. U.S.*, *supra*,⁵⁹ very explicitly lays the foundation for the distinction discussed throughout this Article. The court states:

A study of the applicable legislation leads us to the conclusion that, from a standpoint of status and origin, lands which are subject to administration by the Forest Service within National Forests should be classified, for most purposes, in two groups: (1) that group reserved from the public domain for National Forest purposes or acquired through exchange for such reserved land or timber; and (2) that group *re-acquired* by the United States from private, state or local government ownership through purchase, exchange, donation or settlement. A large area

57. REPORT (PLLRC 1970), *supra* note 12, at 5.

58. *Id.* at 269.

59. *Thompson v. United States*, 308 F.2d 628 (9th Cir. 1962).

of the lands in group (2) was acquired under the authority of the Weeks Act of March 1, 1911 (36 Stat. 961), as amended, 16 U.S.C. §§ 480, 500, 513-519, 521, 552, 563, which provides for the purchase of lands to promote the production of timber or regulation of stream flow. The lands acquired by this Act are subject to specific laws authorizing exchange classification of small tracts of agricultural land, development of mineral resources, and are specifically reserved as National Forest lands. Located within the boundaries of the National Forest is a substantial area acquired under statutes other than the Weeks Act or acquired in exchange for reserved public domain land. (Emphasis supplied.)

2. Section 9 of the Weeks Law, Act of March 1, 1911 (36 Stat. 961-963), as amended by the Act of March 4, 1913 (37 Stat. 855), codified as 16 U.S.C. § 518, reads as follows—relating to acquisition of land under the Act of March 1, 1911:

Such acquisition by the United States shall in no case be defeated because of located or defined rights-of-way, easements, and *reservations*, which, from their nature, will in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture in no manner interfere with the use of the lands so encumbered, for the purposes of sections 480, 500, 513 to 519, and 521 of this title. Such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and such rules and regulations shall be expressed in and made part of the written instruments conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed. (Emphasis added.)

Pursuant to 16 U.S.C. § 518, as outlined above, there were issued by James Wilson, Secretary of Agriculture, and approved on July 8, 1911, ten standard general rules and regulations for the mining and removal of minerals to be in-

serted in conveyances to the United States of land purchased under the Act of March 1, 1911 (37 Stat. 961), when mineral rights are reserved.⁶⁰ (These are set forth in Forest Service Mandal (FSM) 2832.13 being at pages 65 and 66 of the FSM, as issued September 1958.)

It has been my experience, in dealing with deeds containing the Secretary's rules and regulations prior to 1937, to find that quite often standard forms were issued which did not conform with those outlined in 2832.13 of the FSM as noted above. Frequently a standard form would be issued which omitted certain of the terms and provisions and entered others which today would be totally unacceptable, including the rights to certain free use permits of the surface by the mineral operator. It can be assumed that these forms were issued to make the best of a bad situation and to exercise some sort of control over surface usage through the use of free permits in areas where state law gave dominant usage to the owner of the mineral rights over the owner of the surface rights, particularly in states such as Kentucky with the broad form mineral deed, Pennsylvania, West Virginia, and Ohio (especially the southeastern coal mining regions of Ohio). Some explanation of this phenomenon may be found in FSM 2831 which differentiates mineral reservations and mineral rights outstanding. First the distinction is made between outstanding and reserved rights. Then there is a discussion concerning the 1911 Regulations through the later regulations. The following quotation is of some interest in this regard:

The terms and conditions of mineral reservations may vary widely depending upon the period of acquisition; however, standard reservation clauses have been developed and included *in most deeds* since 1944. These provide for specific identity of the minerals to be reserved, the length of reservation, and the conditions under which the reservation may be extended. (Emphasis added.)

Please note, however, that this language from the manual refers to the terms of the mineral *reservation language* and not to any *variation* thought to exist in the 1911 Secretary's Rules and Regulations. I do not believe that the compilers

60. See Appendix II.

of the FSM were aware of the fact that there existed in the various regions throughout the United States *variations*, both omissions and additions, in the James Wilson Rules and Regulations of 1911, and that in addition to the *variation in standard printed forms* it was not uncommon to *type in certain additional rights* such as the right to strip mine under certain conditions. If there was any awareness of this practice, it is not apparent from the FSM. It is, however, apparent to anyone having wide experience with the various conveyances going back to the period prior to 1937 which are now becoming a source of considerable concern in view of the environmental awareness of the present. FSM 2831 continues after discussing the standard reservation clauses included in most deeds since 1944:

However, in each case the exercise of the mineral rights must conform to the terms of the deed. Conditions for exercise of these rights have been defined in the Secretary's "Rules and Regulations to Govern Exercise of Mineral Rights Reserved in Conveyances to the United States" attached to and made a part of deeds reserving mineral rights. Conditions to govern the exercise of mineral reservation were first adopted in 1911, another set of rules and regulations were adopted in 1937. These were reserved again in 1947. In earlier conveyances the Secretary's Rules and Regulations may have been incorporated in the deed by reference or there may have been no reference to any regulations. The Attorney in Charge should be consulted.

Copies of the 1911, 1937, 1947, and 1963 regulations are attached as Appendices II, III, IV, and V.

a. Assuming ideal conditions in the older deeds, *i.e.*, that the administrative officer, although desperate to buy land (for reasons more fully discussed hereafter), did not tamper with the standard Secretary's Rules and Regulations and improvise additional complications, the Rules and Regulations prior to 1937 were not very stringent (see Appendix II), although they have the built-in potential (if properly used in the light of modified public attitudes) to be much more effective than thought possible in the past.

b. The 1937 through 1963 Secretary's Rules and Regulations lean expressly and much more heavily upon cooperation with state resource enforcement officials. (Note clause underlined in Appendices III, IV, and V.)

On a given tract of acquired national forest lands on a typical eastern forest, the following situations might be encountered by a coal operator who wished to remove bituminous coal by either deep mining or strip mining methods:

(1) He might be advised that the United States had acquired full fee title to the land in question including all minerals, so that if he desired to explore for, mine, and operate the coal he would have to secure a lease from the Bureau of Land Management (BLM), Department of the Interior, pursuant to The Mineral Leasing Act for Acquired Lands (30 U.S.C. §§ 351-359 (1970)). Having received the application, BLM would be required to secure the consent of the Forest Service, both by statute and regulation (30 U.S.C. § 352 (1970); 43 CFR 3501.1 et seq.). Acreage limitations are outlined in 43 CFR 3501.2-5. The procedure is not unlike that set forth under the General Leasing Act of 1920, *supra*, except for the virtual veto power of the Forest Service.

Questions are presented under NEPA as to whether BLM or the Forest Service is the "lead agency" within the meaning of NEPA and the guidelines for the purpose of statements or analyses.⁶¹ The Forest Service appears to have undertaken this responsibility.⁶² Questions are also presented as to which agency prosecutes in the event an operator proceeds without the requisite permission. One such case in the Eastern Region will be briefly described below. Statistically, as of June 30, 1972, the total authorized area of the Eastern Region was 21,073,885 acres, of which a net acreage of 11,302,875 acres (roughly 53%) had been acquired. However, of the 11,302,875 acres acquired, only 5,327,000 acres (roughly) were acquired free of mineral reservations or outstanding rights. In other words, the United States could only consider the disposition of

61. National Policy Act of 1969, 42 U.S.C. § 4332 (1970); CEG Guidelines, 36 Fed. Reg. 7724 (1970); Executive Order 11514.

62. Letter from Thomas C. Nelson, Acting Chief of U.S.F.S. to Mr. Burton O. Silcock, Director, Bureau of Land Management, Department of the Interior, April 20, 1972, with copies to Director, U.S.G.S.

approximately 47% of its acquired acreage under the Mineral Leasing Act for Acquired Lands, *supra*.⁶³

(2) Assume that the coal operator approaches the owner of reserved mineral rights who either sold, or whose predecessor in interest sold, the land to the United States, but who reserved the minerals, including coal, in perpetuity. Perpetual mineral reservations are not uncommon, but usually such reservations are for a term of years, say 25, 50, 99, or some like number, with the right to renew if the mineral is produced in paying quantities or "to commercial advantage" during the last year of the term or an "average" of a certain number of days for the last 2 years, 3 years, 5 years, etc., of the term.

Such reservations may be subject to the 1911, 1937, 1947, or 1963 regulations⁶⁴ depending upon when the land purchase option and contract was accepted, or title passed to the United States through condemnation proceedings. The Department of the Interior is not concerned in this transaction until the final expiration of the term and the vesting of title to the minerals in the United States. The extent to which the Forest Service can exercise control depends a great deal upon the terms of the reservation and the particular Secretary's Rules and Regulations. The term has generally been construed to be held by the mineral owner on a condition precedent so that the right is extinguished by failure to meet the terms.⁶⁵ The chief question under NEPA and the guidelines is whether the ownership of the surface and the Secretary's regulations provide sufficient authority to demand a NEPA statement in view of the severed ownerships. A specific case will be described below involving this issue. Current directions and guidelines are to the effect that such statements or at least environmental analyses are not only permissible but legally required. Of the 11, 302, 875 acres in the Eastern Region as of June 30, 1972, 3, 330,000 acres or about 30% were in this status.

63. Act of Aug. 7, 1947, 30 U.S.C. §§ 181-263, 281-287 (1970).

64. See Appendices II, III, IV and V.

65. Regional Solicitor's Opinion USDA to Regional Forester, R-7, March, 5, 1943, relying upon principles enumerated in Thompson on Real Property.

(3) The third situation is where the United States purchased the land subject to mineral rights outstanding of record in a third party other than the government's grantor, waiving the risk to surface administration under 16 U.S.C. 518. Perhaps the prize example is the one involving several counties and thousands of acres in the Cranberry Back Country portion of the Monongahela National Forest reading as follows:

There is excepted and reserved all coal and other minerals, together with the right to enter upon and under said lands and to mine, excavate and remove all of said coal and other minerals, and to remove over, upon, through and under said lands the coal and other minerals from and under adjacent and neighboring lands, and also the right to enter upon and under said granted lands and make and construct all necessary structures, railroads, roads, ways, excavations, air shafts, drains, and openings necessary or convenient for mining and removal of the said coal and other minerals from adjacent and neighboring lands without being liable for any injury or damage done thereby to the overlying surface or to anything therein or thereon, or to any water course therein or thereon. There is also in like manner excepted and reserved the right to take and use so much of the surface at and around each mine or opening, or at convenient places, which said companies may need for the mining of coal and other minerals as may be necessary or convenient for such purposes, including land upon which to construct tipples, tracks, coke ovens, miner's houses and all other structures necessary for the mining and removal of said coal and minerals.⁶⁶

What can be done to effectively administer surface land if the rights outlined above could be fully enforced under the doctrine of "first in time—first in right"? Under the law prevalent in the principal coal mining states of the East, such "exceptions" create a separate estate in the land (see, *e.g.*, the Three Estates Doctrine in Pennsylvania).⁶⁷ By what right can the surface owner view not exploring for or removing the

66. Div. of Lands Eastern Region M. S and W, Coal Mining The Situation and Its Management, Historical Library Inventory Item 41.

67. See *Smith v. Glen Alden Coal Co.*, 347 Pa. 290, 32 A.2d 227 (1943).

coal as a viable alternative in preparing a NEPA statement or analysis unless the government is prepared to buy the coal or pay dearly for subordination rights.

Of the 11,302,875 acres of acquired lands in the Eastern Region as of June 30, 1972, 2,642,000 acres or 23% were subject to these uncontrolled outstanding rights.

c. More Grim Statistics. To translate the raw region-wide ratios between total land ownership and severely restricted land ownership, consider not only the problems of severed mineral rights but the expense of:

(1) Boundary lines—when isolated forties are scattered at random in shotgun fashion in rectangular survey states, and in virtually indecipherable (for the current generation) locations in true metes and bounds of states such as West Virginia.

(2) Intermingled ownership patterns—which, in order to take on some measure of legitimacy, require the issuance of large numbers of special use permits to legitimize the “woods colts” that of necessity are born out of the conditions described above.

(3) Trespass cases—the expense of investigation, the potential danger to the lives and safety of enforcing personnel, and the general orderliness of the community cry out for tighter consolidation.

(4) Wildlife and fire protection.

(5) Greater efficiency in taxing revenues by more careful blocking in and consolidations, and efficient payment in lieu of taxes arrangements.

These are only a few of the factors that were not given the weight in heavily populated eastern areas that I feel are more than justified.

d. Getting Down to Cases:

Environmental Cases Generally

This office first entered the arena of what later came to be a mass of environmental cases in *Gandt v. Hardin*.⁶⁸ This

68. *Gandt v. Hardin*, Civil No. 1334 (D. Mich. 1973).

was one of our few cases not involving mineral rights, since the bulk of the Sylvania Tract on the Ottawa National Forest in the upper peninsula of Michigan had been purchased in fee by the United States for the price of \$5,740,000.

The basic issue of the case was whether the 14,890,056 acres lying within the Sylvania Tract on the Ottawa qualified for inclusion under the Wilderness Act of 1964.⁶⁹ (There were several ancillary issues.)

A management plan had been drawn up which allowed for certain primitive areas to be retained in virtually a wilderness status, provided certain amenities in the form of roads and other construction facilities, and allowed limited logging on a zoned basis. A preservationist group, SOSAC (later incorporated as Wilderness Watch), sued the United States in the District Court for the Western District of Michigan for the purpose of having the Sylvania Tract set apart as a wilderness. Several basic propositions were established by this case. The most important included:

(1) The preservationist group was held to have standing to sue. (This was the most pressing issue at the time.)

(2) The language of the Multiple Use-Sustained Yield Act,⁷⁰ particularly the use of the word "shall," required the Forest Service to look at each of the five principal purposes outlined in that Act and give due consideration to the relative values of *each* of the various resources. The Justice Department had argued that the language of the Multiple-Use Sustained Yield Act was discretionary and not mandatory.

(3) After full trial of the issues, Judge Kent issued an order on December 15, 1969, holding that the Forest Service had not acted in an arbitrary and capricious manner under the tests outlined above, and that the multiple use studies of the area complied with the requirements of the Multiple Use-Sustained Yield Act.

Shortly thereafter (sometime in January 1970), a group of eastern financiers, including George St. Clair and others,

69. Wilderness Act of 1964, 16 U.S.C. §§ 1181-86 (1970).

70. Multiple Use-Sustained Yield Act, 16 U.S.C. §§ 528-531 (1970).

after a long series of correspondence with the Forest Supervisor, determined to enter the Boundary Waters Canoe Area in Minnesota, a part of the wilderness system created under the Wilderness Act of 1964.⁷¹ The Forest Service concluded that it was in no position to legally bar prospecting activities if the proposed mining operator (lessee) could demonstrate through appropriate title evidence the legal right to prospect for and develop minerals (in this case, iron ore, taconite, or copper-nickel). The Forest Supervisor advised Mr. St. Clair in writing that he felt prospecting and mining would be incompatible with the wilderness character of the BWCA, and that the Forest Service would do everything legally permissible to prevent such prospecting and mining. The mine operator was warned that in prospecting he must comply with the special rules and regulations⁷² required of visitors to the BWCA, and would be permitted no special privileges. The operator had explored under substantially these terms in the summer of 1969, but now expressed an intent to employ equipment forbidden by forest service regulations.

The Izaak Walton League of America sued St. Clair and the owners of the mineral rights, the United States acting through the Forest Service, and various Forest Service officers individually, and the state of Minnesota, alleging, among other things, that the creation of the BWCA under the Wilderness Act had effectively zoned out mining, except in the case of a national emergency.⁷³ After three years of procedural sparring, wherein such issues as standing, sovereign immunity, the rights to compensation of mineral owners, and factual stipulations as to the conditions under which St. Clair actually entered, were argued,⁷⁴ District Judge Phillip Neville, on January 4, 1973, entered an order, finding facts and setting some remarkable precedents,⁷⁵ if ultimately upheld. A

71. Wilderness Act of 1964, 16 U.S.C. § 1133(a) (5) (1970). The "Quetico—Superior Roadless Area" dated back to 1926, and the special provisions of the Wilderness Act of 1964 take into account its unusual origin in including it as a part of the Wilderness System.

72. 36 C.F.R. 251.85 (1973). Use of a "zoning" technique as to logging, mechanized use, etc., is adopted.

73. *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312 (D.C. Minn. 1970).

74. *Id.* See pleadings, briefs, and other papers filed in Civil No. 5-69 Civ. 70, (D.C. Minn. 1970).

75. These include: (1) There is such a thing as a combined state-federal police power. *Compare with* Netherton, *Implementation of Land Use Policy Police*

summary of Judge Neville's order may be found in Note 75. The defendants have moved to strike the order under the provisions of Rule 52A. This motion was denied on April 10, 1973, and notice of appeal was filed on June 11, 1973. The case is indeed a precedent-setting one in holding that reserved mineral rights are incompatible with the concepts of the Wilderness Act and, therefore, prospecting and development of the minerals must be enjoined.

Problems on Three Selected Forests

(1) *Monongahela National Forest*. The total area of the Monongahela National Forest, lying in nine counties in central and eastern West Virginia, is 1,647,146 gross acres. Of this authorized acreage boundary, 825,605 acres, or roughly 50%, have now been acquired.⁷⁶ The United States owns 447,000 acres of minerals under the surface thus acquired, or roughly 58%. There are reserved under various Secretary's regulations (mostly the 1911 version (see appendix II)) 142,000 acres, or roughly 17% of the acquired acreage. There are outstanding mineral rights involving 206,000 acres, or roughly 25% of the acquired acreage. Many of these outstanding rights are reserved under broad form deeds, such as those described on pages 31 and 32 of this article.

In addition to the acreage within the forest itself, the Monongahela also administers the Spruce Knob-Seneca Rocks National Recreation Area⁷⁷ under Public Law 89-207, dated December 28, 1965. This authorizes the acquisition of certain unique lands and interests in lands for recreational purposes.⁷⁸

At least two recent environmental cases involving mining on the Monongahela National Forest are of interest. These are *West Virginia Highlands Conservancy v. Island Creek Coal Co.*,⁷⁹ and *West Virginia v. United States Department*

Power vs. Eminent Domain, 3 LAND & WATER L. REV. 33-57 (1968). (2) Wilderness and prospecting of mining are incompatible. Congress clearly intended the wilderness aspect to predominate. (3) Any issue of a "taking" under the Tucker Act had not been raised as of the date of the decree, and would not be considered by the District Court.

76. Report from Lands Division Status Branch Chief Eastern Region. Based upon June 30, 1972, statistical summary National Forest System with certain updatings and correction down to January 1973.

77. 16 U.S.C. §§ 460 et seq. (1970).

78. 16 U.S.C. §§ 460p-3 (1970).

79. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232 (4th Cir. 1971).

of *Agriculture*.⁸⁰ A third case involving the construction of roads, and having implications on wildlife administration through claimed harm to the black bear population, was *Kisner v. Butz*.⁸¹ This case sought to enjoin construction of a 4.3-mile road extension. The court found the government's decision to extend the road not arbitrary nor capricious and dismissed the case. Judge Maxwell ruled that the environmental *analysis* prepared by the Forest Service was sufficient and that no environmental *statement* need be prepared. On January 9, 1973, it was announced that no appeal of this action would be taken to the fourth circuit.

West Virginia Highlands Conservancy v. Island Creek Coal Co., *supra*, has not yet come to trial on the merits. The suit involves a proposal by a coal company to construct access roads to explore for reserved minerals under the 1911 regulations (see Appendix II). The court entered a preliminary injunction restraining the Forest Supervisor from permitting any activity disturbing the natural conditions of the area. The West Virginia Highlands Conservancy, a preservationist group, seeks to have the Otter Creek basin declared a wilderness area or otherwise afforded wilderness treatment. The Forest Service has argued that once the area has been cut over it does not qualify under the terms of the Wilderness Act.⁸² One of the unique orders of the court was that exploration be carried out by horses or pack mules. (Another suggested alternative was exploration by helicopter but the horseback exploration was finally agreed to by all parties, including the United States.) The suit has been dismissed as to Island Creek Coal Company and the United States is now seeking a lifting of the injunction.

In the case of *West Virginia v. United States Department of Agriculture*,⁸³ Mower Lumber Company, as successor

80. *West Virginia v. United States Dept. Agriculture*, Civil No. 72-156-E (N.D. W.Va. (1973)).

81. *Kisner v. Butz*, Civil No. 72-127-E (N.D. W.Va. (1973)).

82. This issue has never been decided by the court. Standing and sovereign immunity have been the principal issues to date. There has been a parallel administrative appeal carried to the Secretarial level on transforming Otter Creek Basin into a "primitive" area, and legislation has been proposed in both the House and Senate to have it declared some form of wilderness or wild area.

83. *West Virginia v. United States Dept. of Agriculture*, *supra* note 80. The initial defendants in this action were Mower Lumber Company and its

in interest, held 59,000 acres of reserved minerals under national forest lands. Some of this acreage lay within the Shavers Fork Drainage (tributary of the Cheat River). Shavers Fork is one of the few remaining pure trout streams in the state of West Virginia. The Forest Service had required Mower Lumber Company's lessee to secure water permits and a bond and also to prepare a careful operating plan before carrying out any shaft mining activities within the Shavers Fork Basin. No stripping operations on national forest land were involved. The reservation in question required Mowers Lumber Company to work an average of at least fifty days a year for the last five years of their reservation, which would terminate on August 16, 1975. The period in question was between August 15, 1970, and August 16, 1975. An underlying question—whether a requirement for an environmental statement and other studies which would of necessity suspend commercial activities in large parts of the reserved areas by Mower would constitute grounds for granting an extension of the mineral reservation—is involved. Pursuant to a decision rendered by GAO, negotiations are being conducted with Mower Lumber Company whereby the environmental statement study could be carried out, and a sufficient extension was given Mower to cover the period involved in making the NEPA study and other studies ordered by the Congress. As to certain of their mines, Mower's lessee secured the requisite water permit and provided the required bond. As to another of their mines lying outside of the Shavers Fork drainage area, the United States did not require an environmental statement, although an environmental analysis was completed. The state of West Virginia, alleging that the United States had violated NEPA, sued the United States and various officials of the Department of Agriculture and the Forest Service. A stipulation of dismissal was executed by all parties on May 29, 1973, based upon the solution outlined above.

There are, as of this time, no strip mining operations involving bituminous coal on national forest lands within the Monongahela National Forest. All operations are deep or

lessees, but the United States was also joined as party defendant for allegedly not meeting environmental statement obligations under NEPA.

shaft mining. The courts of West Virginia have taken a very strict view toward the rights of strip miners where the right to strip or surface mine is not expressly included in the deed.⁸⁴

(2) *Wayne National Forest*. The Wayne National Forest lies within 14 counties in southeastern Ohio, across the Ohio River from West Virginia and Kentucky. It is the youngest national forest in terms of proclamation, existing as a forest only since 1951, although purchase units within the same area had been building since the early 1930's. The growth of the forest was stymied by a rule in 1936, wherein the National Forest Reservation Commission proclaimed that in forests having less than 20% of their authorized acreage required, funds would be suspended and assigned to other national forest areas.⁸⁵ The authorized total boundary area of the Wayne National Forest is 833,350 acres, and the net acreage thus acquired is 154,173. Accordingly, less than 18% of the total authorized acreage is now under national forest control, leading to many administrative problems of the type disclosed on pages 33 and 34 above. Of the total acreage acquired thus far, the United States owns the minerals on 49,000 acres, or approximately 32%. 66,000 acres are subject to reserved mineral rights, most of which are governed by the 1937 or later Secretary's Rules and Regulations; but a number are governed by the 1911 regulations because options were taken in the purchase units before the forest was formally proclaimed. 39,000 acres, or approximately 25%, are subject to outstanding mineral rights.

During recent years, a company applied to the BLM for strip mining rights on a section within the Wayne National Forest wherein the United States owned the minerals under substantially all of the land. The Forest Service vetoed the request on the grounds that an adjoining privately-owned recreation area and lake might suffer adverse effects, even though stripping permits had been allowed this company on lands considerably to the west of those being applied for. In

84. *United States v. Polino*, 131 F. Supp. 772 (N.D. W.Va. 1955); *West Virginia-Pittsburgh Coal Co. v. Strong*, 42 S.E.2d (W.Va. 1947); *Arresto v. Romano Bros.*, 73 S.E.2d 622 (W.Va. 1952).

85. *Land Adjustment and Classification, Historical Summary, Wayne N.F.*, Div. of M.S. and W. Historical Library Inventory No. 46, at 4; see Ex. VII.

the course of its subsequent operations, the company removed a considerable amount of coal from that area before the trespass was discovered. The BLM was notified and the Office of the Inspector General, U.S. Department of Agriculture, investigated the case. A grand jury returned a three-count indictment for three separate violations of the Secretary's Rules and Regulations against the company, and a plea of *nolo contendere* was entered by the company. Complete restoration of the area was made by the company and negotiations resulted in the payment of damages to the government. A fine was paid by the company for the violation of the regulations.

We are presently involved in proceedings against another operator whose activities within portions of five sections of national forest land involve the Secretary's Regulations of 1911 and the Secretary's Regulations of 1963 (due to different acquisition dates). They also involve certain portions where the operator claims outstanding mineral rights. This is one of a number of such instances stemming from the early acquisition days when the Forest Service did not always use the standard 1911 Secretary's Regulations but devised and included certain variations, including ones which gave the express right to strip mine provided the overburden was not in excess of 50 feet. This case is now in the hands of the Department of Justice.

Several other cases of this nature involving strip mining regulations are arising with regularity on the Wayne National Forest. Attorneys for strip miners have taken the position that, due to a decision by the Attorney General of Ohio on March 1, 1951, strip mining on national forest lands in Ohio cannot be regulated by state laws. We are contesting this position based upon, among other things, a later opinion of the Attorney General of Ohio dated September 28, 1951 (No. 790), and also upon federal laws and regulations enacted since the 1951 opinion clearly showing, in our view, an intent that state and federal officials should cooperate in affording the greatest resource protection possible where strip mining is concerned. Ohio, in its new strip mine law made effective

April 10, 1972,⁸⁶ has provided some of the most rigorous restrictions on strip mining and the severest requirements for restoration of any state in the nation. The Forest Service and Ohio Department of Natural Resources in July of 1973 entered into a cooperative agreement outlining their mutual obligations and duties under state and federal law involving strip mining and reclamation where there are outstanding and reserved mineral rights exercised on national forest lands.

It is clearly not the policy of the Forest Service to allow national forest lands to become islands of refuge where less strict requirements than those called for on state and private lands are involved.

(3) *Shawnee National Forest*. The Shawnee National Forest lies within nine counties at the extreme southern tip of Illinois, bordered by the Ohio and Mississippi Rivers. It has had an interesting and varied history.

Of a total authorized area of 836,820 acres, a net acquisition of 247,572 acres have been actually acquired, or approximately 30%. Of the lands acquired, the United States owns approximately 25,000 acres of minerals, or approximately 11%. Approximately 136,000 acres, or 55%, are subject to reservations governed by the Secretary's Rules and Regulations of 1911 through 1963, (see Appendices II, III, IV, and V). Minerals outstanding not subject to any form of reservation aggregate 86,000 acres, or approximately 34%.

The United States has recently been named in a most unusual law suit arising from its efforts to perform through the Forest Service the task of a good Samaritan. As an experiment in restoration of strip mined lands, the Forest Service bought a tract of land in Saline County, Illinois, which had already been strip mined by Peabody Coal Company. Since there was a tremendous problem of disposing of sewage waste from the Chicago metropolitan area, an experiment was undertaken whereby the sewage sludge was to be spread over portions of the Palzo Tract in an effort to restore it to a productive condition. Certain problems arose as to the need for

86. OHIO REV. CODE § 1513.01 (1971).

completing an environmental statement before undertaking the experiments on a large scale and, in the meantime, the Forest Service made every effort to prevent the further seepage of mine acid wastes from the already stripped Palzo Tract, while strip mining operations continued upstream on private land by the Peabody Coal Company. The Environmental Protection Agency of Illinois sued the coal company under the Illinois Environmental Protection Act,⁸⁷ and Peabody Coal Company has now attempted to join the United States as a party defendant because the continued escape of acid mine wastes from the Palzo Tract is alleged to be contributing to the damage to the watersheds involved. The United States may seek dismissal from this suit, but there are many interesting legal implications involved in the necessary delays in carrying out programs necessitated by the terms of NEPA and the guidelines.⁸⁸ As of September 1973, the case had been continued.

These are a few examples of the types of environmental suits that are involved in national forest administration within the Eastern Region.

3. Population and Proximity to Megalopolises. The Division of Research and Statistics, Ohio Bureau of Employment Services, in connection with its review of the U.S. Census as of April 1970, compared the land area appearance of the United States with its appearance as outlined in terms of population. The same organization prepared what may be called a "People Map" showing each state in size proportionate to its population. Another interesting map, Figure 3, prepared by the same organization, showed the United States in proportion to public land allocation. These maps demonstrate more clearly than mere words the importance and needs of the national forests in the east in terms of proximity to people and "open spaces."^{89,90} They have been included as

87. ILL. REV. STAT. 111 1/2 § 1012a (1971).

88. *Env. Protec. Agency (Ill.) v. Peabody Coal Co. (Will Scarlet Mine); Peabody Coal Co., Respondent—Third Party Complaint v. County of Williamson, et al.* . . . (including "U.S. Forest Service"). PCB 72-328 (Pollution Control Board Administrative Hearing).

89. R. DUBOS, *SO HUMAN AN ANIMAL* 184, 193 (1968); J. SHOMON, *OPEN LAND FOR URBAN AMERICA*, 34 et seq. 76-77 (1971).

90. Gwen, *An Ecological Approach*, NATURAL RESOURCES CONSERVATION (1971); NATIONAL ACADEMY OF SCIENCE STUDY, *Resource and Man* (1969); Dubos,

appendices to this article, with courteous acknowledgement to the Division of Research and Statistics of the State of Ohio.

CONCLUSION

I do not have complete solutions to all of the problems outlined above, but I think a quotation from Alston⁹¹ gets at the root of some of our difficulties:

Chairman Proxmire: We might as well be as blunt and comprehensive as we can on this. The problem is, we are not just dealing with sheer economic theory. We are dealing with some hard, tough political facts. The people who really determine whether we go ahead with many of these projects are the members of the Senate and House Interior Committees and the Secretary of the Interior. The President and Members of Congress have many, many other obligations and we tend to delegate to these gentlemen our decisions to a considerable extent in this area. Look at the Interior Committee of the Senate and you will see that its members come from the following States: Washington, New Mexico, Nevada, Idaho, Alaska, Utah, North Dakota, Arizona, South Dakota, Wisconsin—I am happy to see there is one member from Wisconsin—Montana, California, Colorado, Idaho again, Arizona again, Wyoming, Oregon. Practically all Western States. It is hard to find anyone from east of the Mississippi who ever serves on the Interior Committee.

Representative Moorhead: I might say to the Chairman the same pattern holds in the other body.

Chairman Proxmire: Exactly.

So we have, you see, an atmosphere of bias, understandable bias, an atmosphere of political force here which I think we have to recognize.

Perhaps more consolidation through acquisition and blocking-in of national forest lands in the East is not the total answer to better quality in environmental control, but it would certainly help.

Replenish the Earth, and Subdue It—Human Touch Often Improves the Land, SMITHSONIAN, Dec. 1972 at 18-28.

91. ALSTON, *supra* note 16, at 65-66 and "Literature Cited" section.

L'ENVOI

In the midst of the word he was
trying to say,
In the midst of his laughter
and glee,
He had softly and suddenly
vanished away—
For the Snark *was* a
Boojum, you see.⁹²

92. *Supra*, note 1.

Appendix II

2832.13

TITLE 2800—MINERALS MANAGEMENT

2832.13—Mineral Reservations Prior to Secretary's Rules and Regulations of 1937. Mineral reservations not specifically subject to operation under the Secretary's "Rules and Regulations" of 1937 or later revisions may be subject to earlier rules and regulations under which no permit is required. They are also regulated by the reservation appearing in the instrument of conveyance, State laws, and legal opinion concerning rights withheld or conveyed. In general, the ownership of minerals carries no right to operate by means not anticipated or provided for in the reservation or exception document, namely the deed or other instrument by which the mineral rights or parts of them were separated from the surface. Both State laws and court decisions have supported public recognition of the widespread damage and far-reaching effects of some mechanized types of surface mining not visualized at the time of land acquisition. Following are the rules and regulations approved July 8, 1911:

DEPARTMENT OF AGRICULTURE

GENERAL RULES AND REGULATIONS FOR THE MINING AND REMOVAL OF MINERALS, TO BE INSERTED IN CONVEYANCES TO THE UNITED STATES OF LAND PURCHASED UNDER THE ACT OF MARCH 1, 1911 (37 Stat., 961) WHEN MINERAL RIGHTS ARE RESERVED.

"1. Anyone claiming the right to mine or search for minerals in or upon lands acquired by the United States under the provisions of the Act of March 1, 1911 (Public No. 435) with a reservation of mineral rights to the grantor, must, on demand, exhibit to the Forest Officer in charge, satisfactory written evidence of right or authority derived from, through, or under the said grantor. Mining or searching for minerals except by those producing such evidence of right or authority is forbidden.

"2. In carrying on mining operations and in searching for minerals only so much of the surface shall be occupied or disturbed as is reasonably necessary for the purpose.

“3. In underground mining all reasonable and usual provision shall be made for the support of the surface, and to that end the tunnels, shafts, and other workings shall at all reasonable times be open to inspection and examination by the Forest Officers and mining experts or inspectors of the United States.

“4. All miners or mining operators shall make provision to the satisfaction of the Forest officer in charge for preventing the obstruction, pollution, or deterioration of streams, lakes, ponds, or springs, by tailings, dumpage, or otherwise or the escape of any harmful or deleterious material or substance from their mine or works.

“5. In searching or excavating for minerals, in the dumping of ores or waste material, and in the location and construction of buildings or works of any kind to be used in connection with mining or searching for minerals or with the milling or reduction of ores, no timber, undergrowth or reproduction shall be unnecessarily out, destroyed, or damaged. For all timber, undergrowth, and reproduction unnecessarily cut, destroyed, injured, or damaged, payment shall be made to the United States, on demand of the proper Forest officer, as follows:

“For timber cut or destroyed at rates to be prescribed by the Forest officer in charge, which rates shall be the usual stumpage price charged in the locality in sales of National Forest timber of the same kind of species; for injury to timber, undergrowth, and reproduction, the amount of the actual damage as ascertained by the proper Forest officers according to the rules or principles of forestry applicable in such cases.

“6. No timber shall be cut or used for or in connection with any mining use or purposes except with the permission of the proper officer first obtained and upon payment therefor at the price or prices fixed for timber of similar kinds.

“7. Buildings, camps, roads, bridges and other structures of improvements necessary in carrying on mining operations shall be located as approved by the Forest

officer in charge. When a building, camp or other structure is removed from one location to another, all debris resulting from such removal shall be burned or otherwise disposed of as directed by the Forest officer in charge.

“8. All buildings, camps, and other structures shall be removed within 6 months after the completion of mining operations; otherwise they shall become the property of the United States.

“9. All destructible refuse, waste material and other debris caused by the mining operations hereunder which interfere with the administration of the forest or endangers forest growth, shall within six months after the completion of said operations, be disposed as directed by the Forest officer in charge.

“10. While mining operations are in progress the mining operators and all employees, contractors, subcontractors, and employees of contractors and subcontractors at work on the tract upon which said minerals are reserved, shall use due diligence in preventing and suppressing forest fires upon or threatening said tract, and shall be held rigidly responsible for any fires of which they are directly or indirectly the cause.

“Approved July 8, 1911.

“(Signed) JAMES WILSON,

“Secretary.”

Appendix III

M-15118

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICERULES AND REGULATIONS TO GOVERN EXERCISE OF MINERAL RIGHTS RESERVED
IN CONVEYANCES TO THE UNITED STATES

In conformity with the provisions of section 9 of the act approved March 1, 1911 (36 Stat. 961), I, Henry A. Wallace, Secretary of Agriculture, do hereby establish the following regulations to govern the extraction of minerals, oil, gas, and other inorganic resources from lands purchased by the United States under authority of said act of March 1, 1911, as amended, in cases where the right to extract such mineral resources is to be reserved by the vendor by stipulation in the deed of conveyance to the United States.

Whoever begins such operations must, on demand, exhibit to the Forest Officer in charge satisfactory evidence of authority from the grantor so to do, and must comply with the following requirements:

1. Only so much of the surface of the land shall be used or disturbed as is necessary in the bona fide prospecting, mining, drilling, or manufacturing of the minerals; but no right to so occupy, use, or disturb such land shall be recognized unless the recorded owner of the reserved mineral, or his legally authorized representative, shall have applied for and received from the Forest Supervisor a permit authorizing such use or occupancy, for which permit advance payment shall be made annually at the rate of \$6 per acre or fraction thereof.

All buildings, camps, equipment, and other structures shall be removed from the land within 1 year from date of completion or abandonment of the operation, which shall be construed as being the date when payment of the permit charges for the land terminates. Otherwise such buildings, camps, equipment, and other structures shall become the property of the United States.

2. If the exercise of the rights herein reserved will result in the stripping, collapse, or other damage of the land or any improvements thereon, the recorded owner of the reserved rights, or his legally authorized representative, shall, upon written notification by the Forest Supervisor, pay to the designated fiscal officer of the United States, for deposit in a cooperative fund, the amount determined by the Forest Officer in charge of the area to be necessary to restore the land to a serviceable or safe condition or to repair or replace the improvements damaged or destroyed; such cooperative deposits to be available for expenditure by the United States for the purposes for which deposited.

3. All marketable timber and other timber products cut, destroyed, or damaged in prospecting, mining, drilling, or removing minerals, coal, oil, and gas, or in manufacturing products therefrom, and in the location and construction of buildings or works of any kind for use in connection therewith, shall be paid for at the usual rates charged in the locality for sales of similar National Forest timber and timber products.

All slash resulting from such cutting or destruction shall be disposed of as directed by the Forest Officer. No timber or reproduction shall be unnecessarily cut, destroyed, or damaged.

4. All mining operators shall in all developments and operations make all reasonable provisions for the disposal of tailings, dumpage, and other deleterious materials or substances in such manner as to prevent obstruction, pollution, or deterioration of the land, streams, ponds, lakes, or springs.

5. Nothing herein contained shall be construed to exempt the operator or the mining operations from any requirements of the laws of the State in which situated; nor from compliance with or conformity to any requirements of any law or regulation which later may be enacted or promulgated, and which otherwise would be applicable.

6. While operations are in progress the operators, contractors, subcontractors, and employees of contractors and subcontractors at work on the National Forest shall use due diligence in the prevention and suppression of fire, and shall be available for service in the extinguishment and suppression of all fires within 2 miles of said operation. Provided that if such fire does not originate through any negligence on the part of the operators, contractors, subcontractors, or their employees and does not threaten their structures, improvements, or property they shall be paid for their services at the current rate of pay of fire fighters employed by the United States.

All regulations hitherto issued by the Secretary of Agriculture to govern the exercise of mineral rights reserved in conveyances to the United States are hereby superseded as to mineral rights hereafter reserved.

In testimony thereof I have hereunto set my hand and official seal at the city of Washington this 23d day of January 1937.

[SEAL]

H. A. WALLACE,
Secretary of Agriculture.

U. S. DEPARTMENT OF AGRICULTURE 8-10847

Appendix IV

M-8913
(Revised August 1947)

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

**RULES AND REGULATIONS TO GOVERN EXERCISE OF MINERAL RIGHTS
RESERVED IN CONVEYANCES TO THE UNITED STATES**

Pursuant to the provisions of the act of March 1, 1911 (36 Stat. 961), as amended, particularly by the act of March 4, 1913 (37 Stat. 855), and of the act of March 20, 1922 (42 Stat. 465), as amended, I, N. E. Dodd, Acting Secretary of Agriculture, do hereby order that conveyance to the United States of title to lands under the provisions of the acts above cited, or of any acts of similar character heretofore or hereafter enacted, which reserve the right to enter upon the conveyed lands and to prospect for, to mine and remove minerals, oil, gas, or other inorganic substances, hereafter shall embody or be made subject to the following conditions, rules, and regulations:

(a) Whoever undertakes to exercise the reserved rights shall give prior notice to the Forest Supervisor in charge of the lands and shall submit to him satisfactory evidence of authority to exercise such rights. Only so much of the surface of the lands shall be occupied, used, or disturbed as is necessary in bona fide prospecting for, drilling, mining (including the milling or concentration of ores), and removal of the reserved minerals, oil, gas, or other inorganic substances. No permit, as provided for in paragraph (b) of this section, will be required for preliminary examination or exploration to determine the existence of the reserved minerals, oil, gas, or other inorganic substances which will involve only transient and nonexclusive occupancy and only small excavations, test pits or borings, but such activities shall be subject to the general national forest rules and regulations.

(b) None of the lands in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for national forest purposes until the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall have applied for and received from the Forest Supervisor having jurisdiction a permit authorizing such use, occupancy, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the reserved rights. Said permit shall be issued by the Forest Supervisor upon agreement as to the lands to be covered thereby and conditions necessary to protect national forest interests, and upon initial payment of the annual fee, which shall be at the rate of \$2 per acre, or fraction of acre included in the permit. Failure to comply with the terms and conditions of the aforesaid permit shall terminate all rights to use, occupy, or disturb the surface of the lands covered thereby, but in event of such termination a new permit shall be issued upon application when the causes for termination of the preceding permit have been satisfactorily remedied and the United States reimbursed for any resultant damage to it.

(c) All structures, other improvements, and materials shall be removed from the lands within 1 year after date of termination of the aforementioned permit, or of an alternative permit, if any, issued under regulations applicable to national forest lands, and all such structures, improvements, or materials not so removed shall become the property of the United States.

(d) Timber or young growth necessarily removed or utilized in connection with exercise of reserved rights shall be paid for (1) if merchantable at the rates charged in the locality for comparable national forest timber or (2) otherwise at the rates currently assigned by the Forest Supervisor to comparable growth in appraisals of lands to be acquired for national forest purposes. Other timber shall be cut or removed only pursuant to sale agreements or permits issued in accordance with national forest rules and regulations. All slash resulting from cutting or destruction of timber or young growth shall be disposed of as required by the Forest Supervisor.

(e) If exercise of the reserved rights results in stripping, collapse, or other damage to the land or to improvements thereon, the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall repair or replace the improvements damaged or destroyed, and/or restore the land to a condition safe and reasonably serviceable for usual national forest purposes, and prior to

(OVER)

commencement of the work which will cause such result shall so notify the Forest Supervisor and provide such bond or cash deposit as will in the opinion of the Forest Supervisor guarantee such repair, replacement, or restoration; or, the record owner of the reserved rights, or the successors, assigns, or lessees thereof, may deposit in a cooperative fund such amounts as are estimated by the Forest Supervisor to be necessary to accomplish the aforesaid repair or replacement of improvements or restoration of the land, which cooperative deposits shall be available for expenditure by the United States for said purposes with refund to the depositor of the amount, if any, in excess of the cost of such repair, replacement, or restoration, and related supervision. Where reserved minerals will be extracted by means of shafts, tunnels, pits, or wells, provisions for fencing, covering, filling, or plugging thereof upon termination of the mining activities may be required by the Forest Supervisor, together with delivery of acceptable bond, or such requirement may be met through payment into a cooperative fund of the amounts estimated by the Forest Supervisor to be necessary to fulfill said requirement, which deposits shall be available for expenditure by the United States for the purposes for which deposited, with refund to the depositor of the amount, if any, in excess of the cost of the required work.

(f) In the prospecting for, mining, and removal of reserved minerals, oil, gas, or other inorganic substances all reasonable provisions shall be made for the disposal of tailings, dumpage, and other deleterious materials or substances in such manner as to prevent obstruction, pollution, or deterioration of springs, stream, ponds, or lakes.

(g) Nothing herein contained shall be construed to exempt operators or the mining operations from any requirements of applicable State laws nor from compliance with or conformity to any requirements of any law which later may be enacted and which otherwise would be applicable.

(h) While any activities and/or operations incident to the exercise of the reserved rights are in progress the operators, contractors, subcontractors, and any employees thereof who work on the national forest shall use due diligence in the prevention and suppression of fires, shall comply with all national forest rules and regulations, and shall be available for service in the suppression of fires within a reasonable distance of said operations: *Provided*, That if such fires do not originate from the operations incident to exercise of the reserved rights, and do not threaten structures, improvements, or property employed in or related to such operations, services in fire suppression so rendered shall be paid for at the current rates of fire fighters employed by the United States.

All regulations heretofore issued by the Secretary of Agriculture to govern the exercise of mineral rights reserved in conveyances to the United States shall continue to be effective in the cases to which they are applicable, but are hereby superseded as to mineral rights hereafter reserved.

In testimony thereof I have hereunto set my hand and official seal at the City of Washington this 3d day of July 1947.

(S) N. E. DODD,
Acting Secretary of Agriculture.

[SEAL]

Appendix V

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICECONDITIONS, RULES AND REGULATIONS TO GOVERN EXERCISE OF MINERAL RIGHTS
RESERVED IN CONVEYANCES TO THE UNITED STATES

Code of Federal Regulations - Title 36 - Chapter II - Section 251.15

(a) Except as otherwise provided in paragraphs (b) and (c) of this section, in conveyances of lands to the United States under authorized programs of the Forest Service, where owners reserve the right to enter upon the conveyed lands and to prospect for, mine and remove minerals, oil, gas, or other inorganic substances, said reservations shall be subject to the following conditions, rules and regulations which shall be expressed in and made a part of the deed of conveyance to the United States and such reservations shall be exercised thereunder and in obedience thereto:

(1) Whoever undertakes to exercise the reserved rights shall give prior written notice to the Forest Service and shall submit satisfactory evidence of authority to exercise such rights. Only so much of the surface of the lands shall be occupied, used, or disturbed as is necessary in bona fide prospecting for, drilling, mining (including the milling or concentration of ores), and removal of the reserved minerals, oil, gas, or other inorganic substances.

(2)(i) None of the lands in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for authorized programs of the Forest Service until the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall have applied for and received a permit authorizing such use, occupancy, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the reserved rights.

(ii) Said permit shall be issued upon agreement as to conditions necessary to protect the interest of the United States including such conditions deemed necessary to provide for the safety of the public and other users of the land, and upon initial payment of the annual fee, which shall be at the rate of \$2 per acre or fraction of acre included in the permit.

(iii) The permit shall also provide that the record owner of the reserved right or the successors, assigns, or lessees thereof, will repair or replace any improvements damaged or destroyed by the mining operations and restore the land to a condition safe and reasonably serviceable for authorized programs of the Forest Service, and shall provide for a bond in sufficient amount as determined necessary by the Forest Service to guarantee such repair, replacement or restoration.

(iv) Failure to comply with the terms and conditions of the aforesaid permit shall be cause for termination of all rights to use, occupy, or disturb the surface of the lands covered thereby, but in event of such termination a new permit shall be issued upon application when the causes for termination of the preceding permit have been satisfactorily remedied and the United States reimbursed for any resultant damage to it.

(3) All structures, other improvements, and materials shall be removed from the lands within one year after date of termination of the aforementioned permit. Should the holder of the permit fail to do so within the specified time, the Forest Service may remove, destroy or otherwise dispose of said structures, other improvements, and materials at the permittee's expense, or in lieu thereof, may upon written notice to the permittee, assume title thereto in the name of the United States.

(4) Timber and/or young growth cut or destroyed in connection with exercise of the reserved right shall be paid for at rates determined by the Forest

Service to be fair and equitable for comparable timber and/or young growth in the locality. All slash resulting from cutting or destruction of timber or young growth shall be disposed of as required by the Forest Service.

(5) In the prospecting for, mining, and removal of reserved minerals, oil, gas, or other inorganic substances all reasonable provisions shall be made for the disposal of tailings, dumpage, and other deleterious materials or substances in such manner as to prevent obstruction, pollution, or deterioration of water resources.

(6) Nothing herein contained shall be construed to exempt operators or the mining operations from any requirements of applicable State laws nor from compliance with or conformity to any requirements of any law which later may be enacted and which otherwise would be applicable.

(7) While any activities and/or operations incident to the exercise of the reserved rights are in progress, the operators, contractors, subcontractors, and any employees thereof shall use due diligence in the prevention and suppression of fires, and shall comply with all rules and regulations applicable to the land.

(8) The conditions, rules and regulations set forth in subparagraphs (1) through (7) of paragraph (a) of this section shall not apply to reservations contained in conveyances of lands to the United States under the Act of March 3, 1925, as amended (43 Stat. 1133, 64 Stat. 82; 16 U.S.C. 555).

(c) In cases where a State, or an agency, or a political subdivision thereof, reserves minerals, oil, gas, or other inorganic substances, in the conveyance of land to the United States under authorized programs of the Forest Service and there are provisions in the laws of such State or in conditions, rules and regulations promulgated by such State, agency or political subdivision thereof, which the Chief, Forest Service, determines are adequate to protect the interest of the United States in the event of the exercise of such reservation, the Chief, Forest Service, is hereby authorized, in his discretion, to subject the exercise of the reservation to such statutory provisions or such conditions, rules and regulations in lieu of the conditions, rules and regulations set forth in subparagraphs (1) through (7) of paragraph (a) of this section. In that event, such statutory provisions or such conditions, rules and regulations shall be expressed in and made a part of the deed of conveyance to the United States and the reservation shall be exercised thereunder and in obedience thereto.

All regulations heretofore issued by the Secretary of Agriculture to govern the exercise of mineral rights reserved in conveyances of lands to the United States under authorized programs of the Forest Service shall continue to be effective in the cases to which they are applicable, but are hereby superseded as to mineral rights hereafter reserved in conveyances under such programs.

(30 Stat. 35, as amended, 16 U.S.C. 551. Interprets or applies 36 Stat. 961, as amended, 16 U.S.C. 513-519, 42 Stat. 465, as amended, 16 U.S.C. 485, 486, and 50 Stat. 525, as amended, 7 U.S.C. 1011)

Signed at Washington, D.C., on April 30, 1963.

(S) ORVILLE L. FREEMAN,
Secretary.

Appendix VII

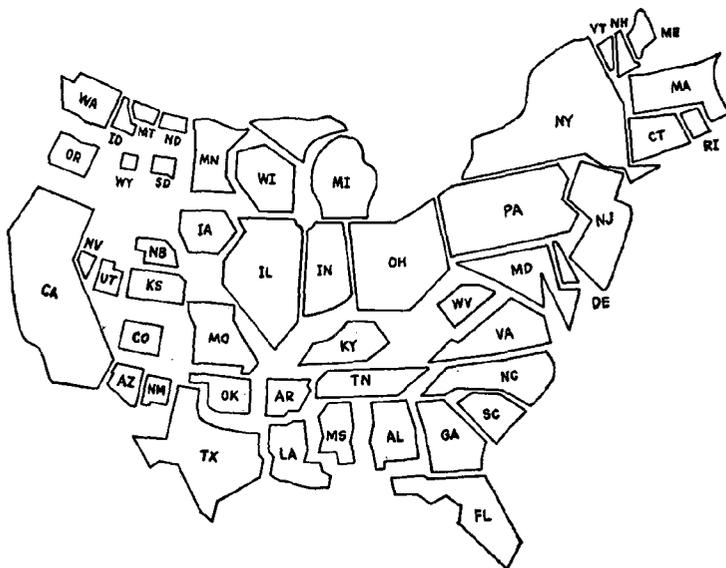


Fig. 1—"People map," showing each state in proportion to its population.

Fig. 2—The United States in proportion to public land allocation.

