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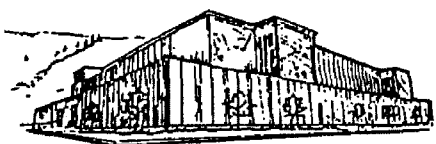
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**An Examination of Mining In Wilderness,  
Logically Incompatible Yet Legally Feasible,  
Revisiting the Cabinet Mountains Mining Controversy**

by

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presented in partial fulfillment of the requirements

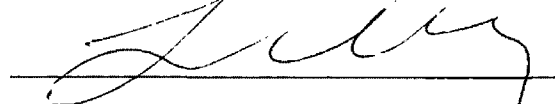
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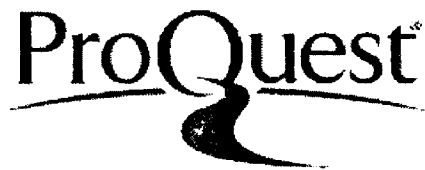


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An Examination of Mining In Wilderness, Logically Incompatible Yet Legally Feasible, Revisiting the Cabinet Mountains Mining Controversy

Advisor: Len Broberg



This paper is an examination of legal issues surrounding the existence of mining in federally designated wilderness. Couching the issue in the “logical incompatibility” of the wilderness concept, as it is set forth in law, and the impacts of mining as practiced today, this paper analyzes the legal precepts allowing for the contradictions to persist. Statutory, regulatory and judicial analysis reveals that, aside from reasonable regulation of operation and access, mining interests with valid existing rights either gained during the 1964 Wilderness Act exploration period or prior to the designation of subsequent wilderness have a strong argument supporting development of their mining claims.

The twenty-year history of the Rock Creek Mine controversy in the Cabinet Mountains Wilderness of Northwest Montana is a case study of valid rights gained during the exploration window period. Using the analysis of the Wilderness Act itself, regulations promulgated to manage and enforce the Act’s tenets, judicial decisions handed down over the past four decades, as well as the Rock Creek Mine’s progress towards full operation, various options for reforming the Wilderness Act to better protect against mining are discussed.

A promising option to resolve the issue of “valid existing rights” in wilderness, and the takings issues surrounding their elimination is through a minor amendment to the Wilderness Act allowing agencies to use eminent domain to buy out those rights. Currently, the USFS is specifically barred from use of the eminent domain power to protect wilderness. Blended into the NEPA process, eminent domain would be just one of many management tools available to the agencies, currently unavailable, that might prove most effective in dealing with controversial mining proposals in areas of high wilderness value.

## Table of Contents

Table of Contents	ii
I. Introduction	1
II. History Behind the Act	5
III. Analysis of the Wilderness Act's Internal Contradictions	9
A. Statutory Analysis	9
B. Regulatory Analysis	17
I. Forest Service	17
II. Bureau of Land Management	22
III. National Park Service	23
IV. United States Fish and Wildlife Service	24
C. Case Law Specific to Mining in Wilderness	26
IV. Cabinet Mountains Controversy	32
V. Can the Wilderness Act Stop the Rock Creek Mine Or Prevent Another Rock Creek Mine in the Future?	42
A. Judicial Reform	43
B. Administrative Reform	48
C. Legislative Reform	50
D. Valid Existing Rights and the Takings Claim	52
VI. Conclusion	57

## I. Introduction

To many of us in America, the Wilderness Act represents the penultimate in the country's conservation efforts in the 20<sup>th</sup> century. Aldo Leopold, the legendary conservationist stated:

“All ethics so far evolved rest upon a simple premise, the individual is a member of a community of interdependent parts... The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land... A land ethic of course cannot prevent the alteration, management, and use of these resources, but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state”.<sup>1</sup>

Written only a handful of years before the beginning of the “wilderness debate”, Leopold's statements represent a new justification for wilderness preservation, lowering us from our dominant status to one of co-inhabitor with the natural community.<sup>2</sup> Long before the “wilderness debate” began, Henry David Thoreau, the famous wilderness traveler and philosopher of the 19<sup>th</sup> century, wrote: “In wildness is the preservation of the World”.<sup>3</sup> Thoreau, through his works, was the embodiment of the wilderness concept. He sought to interact with the wilds on its own terms, to appreciate it for all its beauty and brutality, and to leave it as he found it.

The original purpose of the Wilderness Act was simple and pure: to establish a National Wilderness Preservation System composed of federally owned areas designated by Congress as “wilderness areas”. These areas were to be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, provide adequate

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<sup>1</sup> Aldo Leopold, *A Sand County Almanac*, p. 203-4. (1949).

<sup>2</sup> Daniel Rohlf & Douglas Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 Ecology L.Q. 249, 254 (1988).

<sup>3</sup> Henry David Thoreau, “Walking”, in *The Portable Thoreau* 609 (C. Bode ed. 1947).



protection for these areas and their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.<sup>4</sup>

This clear and concise purpose was complicated, however, by another section in the Wilderness Act, one allowing for access to valid mining and grazing claims or other valid occupancies, including access to private land surrounded by wilderness.<sup>5</sup> An argument could be made against the existence of this portion of the act. It grandfathered incompatible activities in wilderness, so its continued presence is seemingly illogical. The activities allowed by this portion of the Act seriously degrade the level of protection afforded to designated wilderness areas. Lastly, this portion of the Act is directly contradictory to the purpose behind the Act as stated, in rather unequivocal terms, in the first section of the Act.<sup>6</sup>

One must be sympathetic, however, to the political reality in which the Wilderness Act was born. The date of the Wilderness Act's enactment, 1964, predates the "green revolution" by several years, and the debate over the Act's passage really began eight years earlier, in 1956. The Wilderness Act represented, in many ways, America's first step towards a preservationist ethic. While it is disappointing to find numerous compromises made for resource extraction interests and private access within the Wilderness Act, these concessions allowed the Act to survive the contentious political process surrounding its passage and become law.

This paper, while willing to admit these concessions were necessary in order to effect passage of the Act in 1964, contends the continued existence of these concessions, and the mining concession in particular, are a time bomb waiting for the

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<sup>4</sup> 16 USC § 1131(a).

<sup>5</sup> 16 USC § 1134.

<sup>6</sup> 16 USC § 1131(a) & (c).

first legal precedent to open the door to a rush on the natural resources held within our nation's Wilderness Preservation System. It is a central tenet of this paper that the concessions made for the mining industry must be removed from the Wilderness Act through amendment at best, or, at least, effectively neutralized through agency rulemaking and action, combined with effective court challenges by those seeking to preserve the Wilderness Act's intended purpose. One caveat must be made, however, for wilderness created through the Alaska National Interest Lands Conservation Act (ANILCA). Alaskan wilderness is governed by a different set of laws pertaining to wilderness mining and Alaskan wilderness contains far too much mineral wealth for the nation to disregard its importance for strategic mineral and fuel production.<sup>7</sup>

In order to support such a proposition, this paper will point out the specifics of the Act's legislative shortcomings through an internal analysis of the Act's inherent contradictions. Further, the difficulties presented by these inconsistencies will be highlighted through the case law and administrative policy promulgated in the last 40 years intended to reconcile them and allow those charged with administering wilderness areas to do so with confidence that they are following the law. The paper will then focus in on the Cabinet Mountains Wilderness (CMW) in northwest Montana and the mining controversy there, an ongoing dispute for over twenty years now. This dispute highlights the Wilderness Act's failure to protect the wilderness characteristics of a designated wilderness area from significant degradation brought on by what will possibly be the largest silver/copper mine in U.S. history.

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<sup>7</sup> John C. Hendee & Chad P. Dawson, *Wilderness Management*, Pg. 546-47 (3<sup>rd</sup> Ed. Revised 2002); 16 USC § 3142-3150.

Utilizing the results of the analyses above, the paper will then attempt to offer theoretical solutions in favor of long-term preservation of our wilderness areas despite the ever-increasing pressure from resource extraction interests to develop them for their natural resources. While the Cabinet Mountains mining controversy represents the only immediate threat to wilderness posed by resource extraction, many valid, but currently unmarketable, wilderness mineral claims and leases loom in other wildernesses, waiting for the time when they will become profitable. Actual onsite mining use of natural forest wilderness appears rather limited at first glance, but mining claims are numerous – just how numerous is hard to tell because, only in the last five years or so, has the Forest Service required notification for claims filed on national forest land.<sup>8</sup> As of 1985, an important date as further discussion will reveal, there were at least 10,000 validly located mining claims in the National Wilderness Preservation System.<sup>9</sup> In the east, as of 1984, 103 wildernesses out of 192 contained private mineral rights covering nearly one million acres.<sup>10</sup> Further, although operating under different laws than hardrock mineral extraction, it has been determined that 2.7 million acres of wilderness, mostly in western Montana, have a high probability of containing significant oil and gas reserves.<sup>11</sup>

Mining in wilderness represents an untenable contradiction in our public lands preservation law. The impacts from mining, while rather localized in comparison to other grandfathered uses of wilderness, can be the most devastating impacts man can inflict on the land. Mines can produce acid mine drainage and siltation leading to

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<sup>8</sup> John C. Hendee, George H. Stankey & Robert C. Lucas, *Wilderness Management*, Pg. 360 (2<sup>nd</sup> Ed. Revised 1990).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at p. 113.

<sup>11</sup> *Id.* at p. 112.

reduced water quality in streams and water bodies.<sup>12</sup> The negative social and ecological impacts of mining to wilderness conditions – naturalness and wildness – are extensive.<sup>13</sup> Even old mines may continue to impact wilderness with their residual buildings, many of them eyesores and junk heaps, and roads that continue to erode while impacting access and use and which are often invitations to motorized trespass in wilderness.<sup>14</sup>

Some of the solutions posed by this paper will seem rather obvious, but the options available to resolve this problem are few. More important than the various solutions themselves is an analysis of the legal and political realities that will allow them to succeed or spell their impending doom, or worse yet, will turn an effort for positive reform upside down and cause more harm than good.

## II. History Behind the Act

The genesis of the Wilderness Act took place with Minnesota Senator Hubert Humphrey's introduction of the Act's first version in 1956.<sup>15</sup> Long before Senator Humphrey's bill reached the Senate floor for a vote, debates raged within the Interior and Insular Affairs Committee regarding numerous issues, some specific and some overarching. Senator Humphrey's pro-preservation bill stated: "no portion of any area constituting a unit of the National Wilderness Preservation System shall be devoted to...prospecting, mining or the removal of mineral deposits".<sup>16</sup> Therefore, one could say Senator Humphrey and those who championed his wilderness bill

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<sup>12</sup> *Supra* Note 7 at p. 362.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Senate Bill 4013, 84<sup>th</sup> Congress (1956).

<sup>16</sup> Senate Bill 1176, 85<sup>th</sup> Congress § 3(b) (1957).

began in 1957 with legislation containing no compromise for private or commercial interests.

It did not take long for opposition to the wilderness bill to appear. The American Mining Congress (AMC) led the charge against the bill, stating it hurt both the mining industry and the nation as a whole.<sup>17</sup> Amongst the many arguments against Senator Humphrey's wilderness bill, the AMC argued the withdrawal of land from mineral exploration and extraction contradicted historical policies of free access to public lands.<sup>18</sup> Additionally, the AMC felt the bill would abrogate their express rights under the General Mining Act of 1872 to develop located or locatable mineral deposits into a patented property right.<sup>19</sup> The Forest Service joined with the AMC in finding the wilderness bill contradictory to traditional multiple use policies for the public lands.<sup>20</sup> Finally, mining representatives effectively characterized the wilderness bill as a threat to economic development and national security, finding the bill would reduce the land available for mineral exploration/development and make the United States more dependent on imported minerals.<sup>21</sup>

As the hearings process on Senate Bill 1176 came to a close, Senator Humphrey and others in favor of wilderness legislation began to realize mining interests were going to stand in their way, preventing any legislation that might close off their interests in the public lands. Those in favor of the wilderness bill began to

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<sup>17</sup> Christopher M. Klyza, *Who Controls Public Lands? Mining, Forestry and Grazing Policies 1870-1990*, p. 38 (1996).

<sup>18</sup> *Id.*

<sup>19</sup> National Wilderness Preservation Act: Hearings on Senate Bill 1176 Before the Commission on Interior and Insular Affairs, 85<sup>th</sup> Congress (1957).

<sup>20</sup> Klyza, *supra* note 8, at 38. Donald Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 Ecology L.Q. 249, 257 (1988).

<sup>21</sup> National Wilderness Preservation Act: Hearings on Senate Bill 1176 Before the Commission on Interior and Insular Affairs, 85<sup>th</sup> Congress (1957).

talk compromise, seeking to appease the mining interests and pass the bill, instead of failing to achieve any measure of protection for the public lands. As a result, the proposed bill backed off prohibiting all mining activities, and compromised to allow for “presidential exceptions”.<sup>22</sup> The President could allow for location and mining in wilderness areas if it were determined the interests of the nation would be better served in doing so.<sup>23</sup> Mining interests characterized this “Presidential exception” as meaningless because no incentive would exist for a locator of a mineral deposit to expend moneys in prospecting when no guarantee would exist entitling said locator to actually mine the deposit for profit.<sup>24</sup> As a result, the amended, or compromised bill was also stalled in committee by the mining industry.

In 1961, Senator Clinton Anderson proposed a new wilderness bill, Senate Bill 174, an almost identical bill to the one proposed earlier by Senator Humphrey.<sup>25</sup> In July 1961, the Senate Bill 174 made it out of the Committee on Interior and Insular Affairs with a report stating: “in view of the vast unexploited land areas of the Nation that remain and the safeguards written into Senate Bill 174, the majority of the committee does not feel that the mining industry will actually be injured by the bill”.<sup>26</sup> Although the debate on the floor over Senate Bill 174 was vigorous, the bill made it out of the Senate successfully and was passed on to the House of Representatives for debate and a final vote.

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<sup>22</sup> National Wilderness Preservation Act: Hearings on Senate Bill 4028 Before the Commission on Interior and Insular Affairs, 85<sup>th</sup> Congress (1958).

<sup>23</sup> *Id.*

<sup>24</sup> Klyza, *Supra* note 8, at 40.

<sup>25</sup> Senate Bill 174, 87<sup>th</sup> Congress (1961).

<sup>26</sup> Klyza, *Supra* note 8, at 41.

The Senate's passage of Senate Bill 174 marked a switch in tactics by the mining opposition to the wilderness legislation. They began to think compromise as well, moving away from their previously entrenched position of staunch opposition to any wilderness protection at all. When it appeared wilderness legislation was inevitable, mining interests sought exemptions from the law, stating wilderness protection and mining were not incompatible.<sup>27</sup> As the bill moved through the house, the mining industry successfully influenced Congress to adopt a more friendly bill, House Bill 776, originally providing a ten-year exemption for mining within wilderness areas and then increasing the exemption to twenty-five years.<sup>28</sup> The bill also called for periodic "mineral reviews" of wilderness areas to determine if the wilderness designation was still warranted.<sup>29</sup> This prompted resistance from wilderness proponents who called the bill a "perversion of wilderness preservation".<sup>30</sup> At the conclusion of the 87<sup>th</sup> Congress, House Bill 776 failed to make it to a floor vote, making the passage of Senate Bill 174 meaningless.

Finally, in 1963, Senate Bill 4, a new wilderness bill identical to Senate Bill 174, passed a Senate floor vote by a large margin; a strong victory for wilderness advocates.<sup>31</sup> However, when the bill was presented to the House of Representatives, they passed their version of a wilderness bill, House Bill 9070. Unfortunately, House Bill 9070 differed from Senate Bill 4 in its inclusion of a twenty-year exemption for mining in wilderness areas, so the differences had to be reconciled in a joint-

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<sup>27</sup> Klyza, *Supra* note 8, at 42.

<sup>28</sup> House Bill 776, 87<sup>th</sup> Congress (1962).

<sup>29</sup> *Id.*

<sup>30</sup> Klyza, *Supra* note 8, at 45.

<sup>31</sup> Senate Bill 4, 88<sup>th</sup> Congress (1963).

committee of senators and congressmen.<sup>32</sup> The resulting hybrid version of Senate Bill 4 and House Bill 9070 was the one to finally make it across the President's desk and become law. As such, compromise provided the means for the Wilderness Act to become law. However, the compromises made crippled the Act, rendering it only marginally effective in long-term protection of wilderness against mining interests.

### **III. Analysis of the Wilderness Act's Internal Contradictions**

#### ***A. Statutory Analysis***

The Wilderness Act, as it exists on the books today, is a very simple set of laws, comprised of only six relatively straightforward and simple statutes. As simple as it may seem, despite its streamlined appearance, the Act manages to possess disparaging inconsistencies within it, giving the Act the feel of a legislative dichotomy.

The stated legislative purpose for the Act is found in 16 USC § 1131(a). It prioritizes the protection of certain federal and state lands designated by Congress as "wilderness areas". Subsection (b) of 1131 provides for the management of the National Wilderness Preservation System; the appropriate managing agency for a given wilderness area is the agency previously administering the area prior to its wilderness designation. Subsection (c) of 1131 provides the statutory definition of "wilderness".

Both subsections (a) and (c) require more analysis as they represent "purpose" and overarching language spelling out just what wilderness is and what it will be used for. Subsection (a) constitutes very specific "purpose" language:

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<sup>32</sup> House Bill 9070, 88<sup>th</sup> Congress (1963) & Klyza, *Supra* note 8, at 45.



“(a) *In order to assure that an increasing population*, accompanied by expanding settlement and growing mechanization, *does not occupy and modify all areas within the United States and its possessions*, leaving no lands designated for preservation and protection in their natural condition, *it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness*. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and *these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness*; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.”<sup>33</sup>

(Emphasis added)

This statute seems unequivocal. There is no mention of mining as a future use to be secured. In fact, the only mention of the word “resource” in this “purpose” language is to qualify wilderness as the only resource this Act was meant to protect.

Subsection (c) differs from the above quoted subsection in that it purports to actually define what wilderness is under the auspices of the Act:

(c) A wilderness, *in contrast with those areas where man and his own works dominate the landscape*, is hereby recognized as *an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain*. An area of wilderness is further defined to mean in this Act *an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions* and which (1) *generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable*; (2) *has outstanding opportunities for solitude or a primitive and unconfined type of recreation*; (3) *has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition*; and (4) *may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value*.<sup>34</sup>

The definition just given, of what wilderness is under this Act, contains no mention of mining related activities. In fact, any such mining related activities could very easily

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<sup>33</sup> 16 USC § 1131(a).

<sup>34</sup> 16 USC § 1131(c).

be construed as directly contradictory to just about every aspect of the wilderness definition given above. The only room for reconciliation might be the mention of geological features with scientific value. However, it is illogical to move from language supporting scientific research of unique and interesting geological features to claiming the language also supports large-scale resource extraction for profit in wilderness areas.

The second statute in the Wilderness Act begins by designating as “wilderness areas” all lands within the national forests previously administered as “wild”, “wilderness” or “canoe” prior to the passage of the Act.<sup>35</sup> Sub-section (a) of the statute 1132 also requires the Secretary of Agriculture to make public all records pertaining to a “wilderness area” upon its designation.<sup>36</sup> Subsection (b) of statute 1132 provides for another Forest Service category of wild lands known as “primitive areas”. Under subsection (b), Congress is supposed to review each “primitive area” to determine its suitability for designation as “wilderness areas”. Subsection (b) also requires a study to be done by the Forest Service, a report by the Secretary of Agriculture to the President, and presidential recommendation to Congress on each area.<sup>37</sup> Finally, subsection (b) provides for presidential expansion or alteration of the boundaries of such areas.<sup>38</sup> Subsection (c) of statute 1132 allows for similar analysis for areas previously classified as “primitive”, located within roadless areas and under the jurisdiction of the Secretary of the Interior. Subsection (d) of statute 1132 provides for public notice requirements when designating a “wilderness area” under

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<sup>35</sup> 16 USC § 1132(a).

<sup>36</sup> 16 USC § 1132(a)(1)&(2).

<sup>37</sup> 16 USC § 1132(b).

<sup>38</sup> *Id.*

this statute. Subsection (e) of statute 1132 requires the same public notice requirements be followed whenever an agency contemplates changing a “wilderness area” boundary.

Section 1133(a) states the Act’s purpose is within and supplemental to the purposes for which the national forests, national parks and national wildlife refuges are established and administered. Subsection (b) of statute 1133 states the managing agency of the underlying jurisdiction will be charged with preserving the wilderness character of a given wilderness area and shall administer the area accordingly. Subsection (c) of statute 1133 lists prohibited uses of “wilderness areas” including: no commercial enterprises; no permanent roads; no use of motor vehicles, motorized equipment or motor boats; no landing of aircraft; and so on. Subsection (d) of statute 1133 then sets forth several “special provisions”; this subsection represents most of the “compromise” found within the Wilderness Act.

Beginning with subsection (a), several subsections of 16 USC § 1133 warrant close scrutiny. Subsection (a) complicates the policy mandates used by the agency personnel charged with managing a wilderness area. The subsection specifically states: “(a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered....”.<sup>39</sup> The subsection then goes on to enumerate the various enabling laws for the specific management agencies to be co-mingled with the Wilderness Act. While this concept of “within and supplemental” seems confusing, it works itself out rather simply. Each agency is charged with creating plans for managing the lands under its

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<sup>39</sup> 16 U.S.C. § 1133(a).

jurisdiction. This planning often takes place on multiple levels: national planning, regional planning, and planning for individual management units, however they are delineated. The agencies are then supposed to incorporate the tenets of the Wilderness Act into these plans if there is a designated wilderness area within the jurisdiction. The Wilderness Act is the primary guide for managing within the wilderness area, not the overarching law designed to govern the actions of the agency itself. It is not always so cut and dried, but this is the general interaction between the Wilderness Act and the various agencies' enabling laws.

Subsection 1133(b) is a very important section of the Act. It goes a long way towards debunking the purpose language and definitions of wilderness found earlier in the Act. Specifically it states:

*(b) Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.*<sup>40</sup>

The “exception” language in this section of the Act paves the way for the mining, grazing and private access rights in wilderness. If it were not for this transitional, “management” oriented language, the latter subsections in the Act, allowing for these contravening uses within wilderness, would seem all the more out of place.

16 USC § 1133(c) outlines illegal activities within wilderness and gives the agencies some latitude, or discretion, in enforcing the ban on those activities. This latitude is also known as the “minimum tool” requirement. The clear intent of the Act in this subsection is to permit administrators to carry out actions otherwise considered

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<sup>40</sup> 16 U.S.C. § 1133(b).

inappropriate in wilderness if it becomes apparent these actions are necessary to manage the area as wilderness. It is significant to note the courts have, in part, used this provision of the Act to severely restrict access to valid mining claims within wilderness.<sup>41</sup>

16 USC § 1133(d)(2)&(3) are the specific provisions so vehemently fought for by the mining industry in the course of the Wilderness Act's passage into law. Despite these provisions, the Wilderness Act still places additional restrictions hard-rock mining activities within national forest wilderness areas.<sup>42</sup> Although wilderness areas remained open to exploratory mining activities until December 31, 1983, in reality, under subsection (d)(2), the location of hard-rock claims in wilderness before 1984, and, under subsection (d)(3), developing those valid claims after that date was hampered by restrictions.<sup>43</sup> Further, only if you were able to fully locate and develop your claim prior to January 1, 1984, meeting the "marketability test" set forth through case law and based off the General Mining Law of 1872, would you truly be afforded any real protection by these pro-mining subsections.

These two subsections then allow the managing agencies to impose potentially crippling restrictions on these valid claims. Subsection (d)(2) put an end to all mineral prospecting with the passing of the New Year in 1983-4, so unless you had validly located your claim by said date, all rights you might have had therein were extinguished. Subsection (d)(3) then authorized the Secretary of Agriculture to impose surface restoration requirements and regulate ingress/egress from mining

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<sup>41</sup> *Clouser v. Espy*, 42 F.3d 1522 (9<sup>th</sup> Cir. 1994).

<sup>42</sup> Kenneth Hubbard, Marilyn Nixon & Jeff Smith, *The Wilderness Act's Impact on Mining Activities: Policy Versus Practice*, 76 Den. U. L. Rev. 591, 599 (1999).

<sup>43</sup> *Id.*

claims in order to protect the “wilderness character on the land”.<sup>44</sup> Additionally, subsection (d)(3) imposes use restrictions on mining locations, limiting use of the land solely to “mining or processing operations and uses reasonably incident thereto”.<sup>45</sup> Patented mining rights within “wilderness areas” can also be altered to exclude the title to surface rights, a right typically enjoyed with a patented mining claim under the General Mining Act of 1872.<sup>46</sup> Essentially, after 1983, lands withdrawn from the operation of mining laws under the Wilderness Act were no longer subject to only those laws. Despite the mining industry’s hard-fought battle to win exemptions for mining activities within “wilderness areas”, the issue just morphed into the extent to which regulatory agencies and courts would recognize those mining rights and the restrictions they might impose on them.<sup>47</sup>

Unfortunately, as the Rock Creek mining proposal in the CMW illustrates, even with all these added protections and difficulties imposed on the mining interests, it is still possible for a mineral lode to be valuable enough to justify the added expenditures of time and money to mine in wilderness. Subsequent Wilderness Acts, each enacted to designate new wilderness areas into the NWPS, have dealt with the mining question in one of two ways based on the date the Act was made into law. All subsequent wilderness bills enacted before the original Wilderness Act’s December 31, 1983 deadline for locating a valid mineral claim defer to said deadline. All subsequent wilderness bills enacted after the original deadline contain their own

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Hubbard, Nixon & Smith, *Supra* Note 30, at 599-600.

sunset clause referring to the bill's date of enactment as the closure date for locating new mining claims.

Additional statutory exceptions were made for water resource needs (both from water consumption and hydropower) and grazing interests seeking to maintain previously established grazing rights within "wilderness areas".<sup>48</sup> Finally, recreational services were accommodated as necessary for that purpose, as well as provisions respecting state jurisdiction regarding appropriative water rights and fish/wildlife protection.<sup>49</sup>

The fourth section of the Wilderness Act deals with state and private lands located within and completely surrounded by a "wilderness area".<sup>50</sup> This statute provides for the exchange of federal lands deemed to be of approximately equal value for state/private lands surrounded by a "wilderness area".<sup>51</sup> Subsection (b) of statute 1134 provides for access to valid mining claims or other valid occupancies within a "wilderness area". Subsection (c) of statute 1134 then authorizes the federal government to purchase private property provided the private or state owner agrees and Congress approves.

Section 1135 authorizes the Secretary of Agriculture to accept both gifts and/or bequests of private land located within or adjacent to "wilderness areas", and to accept of private contributions and gifts, other than land, so long as they are used to further the purposes of the Act.<sup>52</sup> The final statute in the Wilderness Act is another reporting statute requiring the Secretaries of Agriculture and Interior to jointly report

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<sup>48</sup> 16 USC § 1133(d)(4).

<sup>49</sup> 16 USC § 1133(d)(5-7).

<sup>50</sup> 16 USC § 1134(a).

<sup>51</sup> 16 USC § 1134(a).

<sup>52</sup> 16 USC § 1135.

to the President, for transmission to Congress, on the status of the wilderness system.<sup>53</sup>

## ***B. Regulatory Analysis***

### *I. Forest Service*

Agency regulations concerning wilderness management are rather detailed and, when recounted for each agency, would take up far too much space and time compared to their relative value to the ultimate goals of the paper. Accordingly, this discussion will focus in on “mining specific” wilderness regulations, policies and agendas taken by the various agencies commissioned with managing the country’s many wilderness areas.

Most of the wilderness areas created by the 1964 Wilderness Act were located within the Forest Service jurisdiction.<sup>54</sup> To begin the discussion on Forest Service policy towards mining activities within wilderness, one should look briefly at the overarching policies the Service has regarding wilderness. Two sections, the “Objectives” and “Policy” sections, are the most illuminating:

#### **2320.2 - Objectives – (some portions deleted)<sup>55</sup>**

1. **Maintain and perpetuate** the enduring resource of **wilderness** as one of the multiple uses of National Forest System land.
2. **Maintain wilderness in such a manner** that ecosystems are **unaffected by human manipulation and influences** so that plants and animals develop and respond to natural forces.
3. **Minimize the impact** of those kinds of uses and **activities generally prohibited by the Wilderness Act, but specifically excepted by the Act** or subsequent legislation.
4. **Protect and perpetuate wilderness character** and public values including, but not limited to, opportunities for scientific study, education, solitude, physical and mental challenge and stimulation, inspiration, and primitive recreation experiences.

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<sup>53</sup> 16 USC § 1136.

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<http://www.wilderness.net/index.cfm?fuse=NWPS&sec=wildView&WID=12&tab=Public%20Laws>.

<sup>55</sup> <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=policyFS>.



5. Gather information and carry out research **in a manner compatible with preserving the wilderness** environment to increase understanding of wilderness ecology, wilderness uses, management opportunities, and visitor behavior.

### 2320.3 - Policy – (some portions deleted)<sup>56</sup>

1. **Where there are alternatives** among management decisions, **wilderness values shall dominate** over all other considerations except where limited by the Wilderness Act, subsequent legislation, or regulations.
2. Manage the use of other resources in wilderness in a manner compatible with wilderness resource management objectives.
3. In wildernesses where the establishing legislation permits resource uses and activities that are nonconforming exceptions to the definition of wilderness as described in the Wilderness Act, **manage these nonconforming uses** and activities in such a manner as **to minimize their effect on the wilderness resource**.
4. Cease uses and activities and remove existing structures not essential to the administration, protection, or management of wilderness for wilderness purposes or not provided for in the establishing legislation.
5. Because wilderness does not exist in a vacuum, **consider activities on both sides of wilderness boundaries** during planning and articulate management goals and the blending of diverse resources in forest plans. Do not maintain buffer strips of undeveloped wildland to provide an informal extension of wilderness. Do not maintain internal buffer zones that degrade wilderness values. Use the Recreation Opportunity Spectrum (FSM 2310) as a tool to plan adjacent land management.
6. Manage each wilderness as a total unit and coordinate management direction when they cross other administrative boundaries.
7. Whenever and wherever possible, **acquire non-Federal lands located within wildernesses**, as well as non-Federal lands within those areas recommended for inclusion in the system.

With the notable exception found in both sections above concerning non-conforming, but specifically exempted uses within wilderness, such as mining, these regulations take on a very noticeably pro-preservation slant towards the wilderness resource. Given the dictates of both the Wilderness Act itself and then the overarching Forest Service policies above, one has to wonder how a mining operation would ever get approved within a wilderness area. The answer, as will be revealed in this paper's discussion of the Rock Creek Mine approval in the CMW, lies within the auspices of "agency discretion". "Agency discretion" could be described as the amount of wiggle room, or leeway, an agency decision-maker has within the mandates controlling his/her actions, as they are found in statutes, regulations, and agency policies.

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<sup>56</sup> *Id.*

Having laid out the overarching regulations guiding the Forest Service's management of wilderness areas, it is now time for a closer look at the regulations guiding the Service's treatment of potential mining claims in wilderness. The Forest Service explains its authority for managing mineral extraction in wilderness in the following way:

**2323.7 - Management of Minerals and Mineral Materials<sup>57</sup>**

**2323.71 - Authority.** Section 4(d)(2) of the Wilderness Act authorizes activity for the purpose of gathering information about mineral resources. Section 4(d)(3) authorizes mineral exploration and development operations **only where there are valid existing rights**. Subsequent acts designating specific wilderness areas may provide specific direction for the management of mineral activities. Regulations at 36 CFR 228 and 293 provide direction for managing mineral activities in wilderness.

The most notable aspect of this policy is the recognition of which statute guides mineral exploration and development depending on the existence of a valid claim. The CFR regulations cited above pertain to mining in wilderness and the mining permit process itself. These regulations reiterate several points already covered in this analysis, such as: no prospecting after the date the wilderness area is removed from the general mining laws, reasonable stipulations for the protection of wilderness character shall be imposed, and no permits shall be issued for "common varieties" of minerals as stated in the Minerals Act of 1947.<sup>58</sup>

The Forest Service has specific "Policy" and "Objectives" criteria for mining and mineral prospecting in wilderness as well. Similar to the overarching policies discussed above, these are much more mining specific:

**2323.72 - Objectives<sup>59</sup>**

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<sup>57</sup> *Id.*

<sup>58</sup> 36 CFR § 293.14

<sup>59</sup> <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=policyFS>.

1. To preserve the wilderness environment while allowing activities for the purpose of gathering information about mineral resources.
2. To ensure that mineral exploration and development operations conducted in accordance with valid existing rights for federally owned, locatable, and leasable minerals (FSM 2810 and FSM 2820) and for nonfederally owned minerals (FSM 2830) while preserving the wilderness resource to the extent possible.
3. To ensure the restoration of lands disturbed during exploration and development activities as nearly as practicable promptly upon abandonment of operations.

In this “Objectives” section, one sees the dichotomy imposed on Forest Service wilderness management forcing the Service to balance wilderness preservation against continued mineral exploration and development.

#### 2323.73 - Policy<sup>60</sup>

1. Allow the gathering of information on mineral resources if the activity is conducted in a manner compatible with the preservation of the wilderness environment. Do not authorize significant surface disturbance in search of indirect evidence or indications of mineral resources, and do not allow motorized or mechanical equipment use unless it meets the conditions of section 4(c) of the Wilderness Act.
2. Verify valid mineral rights before approving exploration and development activities.
3. Approve exploration and development activities on valid mineral rights only after ensuring that mineral operations plans contain stipulations to protect the wilderness character of the land consistent with the rights of the mineral owner or operator.

This “Policy” section only serves to reiterate the wilderness and mining dichotomy once again. The problem here is the untenable nature of trying to support the concept of wilderness while allowing mining to take place at the same time and in the same place. However, the agencies will have a hard time refusing a mining operation meeting anything close to the criterion set forth above. If it is to be refused, it will have to be on other legal grounds besides the Wilderness Act. Instead, it seems the wilderness manager’s role is to recognize the legally excepted non-conforming use and ensure the impact of that use on the wilderness resource is minimized.<sup>61</sup> Mining needs to be managed in as strict and pure a method as possible if the existing

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<sup>60</sup> *Id.*

<sup>61</sup> Kovalicky, Poncin and Williams, *Management of Nonconforming Uses in Wilderness*, Proc. of Conference on Managing America’s Enduring Wilderness Resource, p. 278-81 at 280.

wilderness resource is to be as close as possible to a legislatively pure wilderness.<sup>62</sup>

The wilderness manager needs to be relentless in looking for opportunities resulting in reduced impacts to the wilderness resource.<sup>63</sup> John C. Hendee, a premier expert on wilderness management, has this to say about mining in wilderness:

“The negative impacts of mining to wilderness naturalness and wildness are extensive. Even old mines that have been “played out” may continue to impact wilderness with their residual buildings, junk heaps, mine tailings, and roads that continue to erode and invite vehicle trespass, not to mention the visual and ecological impacts of these historical remnants.”<sup>64</sup>

As Mr. Hendee would have it, even the culturally historical remnants of small mining operations continue to plague wilderness resources and values, much less to consider the impacts of a mine the size of the proposed Rock Creek Mine in the CMW, a mine purporting to extract 136 million tons of ore to acquire an estimated 2 billion pounds of copper and 227 million ounces of silver.<sup>65</sup> When one balances the effects of a mining operation of this size against the preservation of wilderness character, one has to wonder just what kind of balancing is involved.

Forest Service policies more or less spell out what kind of balancing is to take place. First, the Forest Service is to evaluate any “Proposed Operating Plan” submitted by the holder of mineral claims to determine if valid rights existed prior to mineral withdrawal and what rights are recognized.<sup>66</sup> Second, consistent with the valid existing rights, the Service is to review and only approve operating plans incorporating reasonable terms and conditions for the protection of the wilderness

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Hendee & Dawson, *Stewardship to Address the Threats to Wilderness Resources and Values*, International Journal of Wilderness, Vol. 7 - #3, p. 7 (Dec 2001).

<sup>65</sup> [http://biz.yahoo.com/bw/040308/85430\\_1.html](http://biz.yahoo.com/bw/040308/85430_1.html).

<sup>66</sup> <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=policyFS>. (FS Manual § 2323.75)

character of the area, and providing for restoration as near as practicable of the disturbed lands promptly upon abandonment of operations.<sup>67</sup> Consequently, the balancing act involved here is not to mine or not to mine in wilderness, instead, the evaluation of any proposed mining operating plans is simply to determine the validity of their claims and to ensure the operations reasonably provide for the protection of wilderness character, as well as adequate reclamation and restoration post mine closure. The debate, therefore, lies within the concepts of the “reasonableness” and “practicability” of the restrictions the Service imposes on a mining operation during its lifetime and after its demise, not the more altruistic debate of whether or not to mine in wilderness at all. With this current set of laws, regulations and policies in place, mining in wilderness is inevitable. It is just a matter of time and the right set of circumstances.

## *II. Bureau of Land Management (BLM)*

BLM wilderness management policy is only to be found in the Code of Federal Regulations. No effort has been made to expand on these regulations, or to create a similar policy manual to the Forest Service manual cited above. Consequently, there is more room, potentially, for agency discretion, as the CFR regulations do not provide management guidance as specific as the Forest Service Manual. There are really no differences worth mentioning between the policy mandates for BLM wilderness management and those mandates for the Forest Service discussed above. One aspect worth mentioning though, is the original purpose behind the BLM was to facilitate the giving away of our public lands to anyone interested in

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<sup>67</sup> *Id.* (FS Manual § 2323.75a)

developing it for some reason, including the mining interests. With the passage of the Federal Land Policy Management Act (FLPMA), BLM acquired a similar multiple use mandate to that of the Forest Service, including the management and preservation of wilderness areas.

### *III. National Park Service (NPS)*

The NPS has very different mandates when it comes to mining in wilderness areas under their watch. The NPS Policy Manual contains only one provision concerning mining in wilderness and it does not take a pro-mining stance:

#### Mineral Development

The National Park Service **will seek to eliminate valid mining claims and nonfederal mineral interests in wilderness through acquisition. In parks where Congress has authorized the leasing of federal minerals, the Park Service will take appropriate actions to preclude the leasing of lands or minerals that are included within wilderness.** Lands included within wilderness will be listed as excepted areas under applicable regulations in 43 CFR 3100 and 3500.

The first two sentences in this policy mandate are very clear. All valid mining claims within NPS managed wilderness areas are to be eliminated through acquisition, end of story. Further, any efforts to lease mineral rights, by Congress or otherwise, will be actively precluded. Finally, the policy refers to the mining application and approval regulations under the BLM's jurisdiction and specifies all NPS wilderness will be listed as excepted areas under those regulations, otherwise meaning: no mineral development, period. Authority for these uncompromising policies is derived from the National Parks and Recreation Act of 1978, which provided further incentive for the Secretary of the Interior to promulgate tough regulations on mining in National Parks.<sup>68</sup> It is fair to say, the NPS has a very different approach to mining

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<sup>68</sup> Supra Note 7 at p.197; 16 U.S.C. § 3; 36 CFR § 9a et al.

in wilderness than the Forest Service or the BLM. For the purpose of protecting the wilderness resource, it is also fair to say, the NPS policy is far superior.

#### *IV. United States Fish and Wildlife Service (USFWS)*

The USFWS is charged with managing a surprising number of wilderness areas across the continental United States and Alaska, 71 altogether.<sup>69</sup> It should be noted, without exception, all the wilderness areas managed by the USFWS are found within the administrative confines of the National Wildlife Refuge System (NWRS).<sup>70</sup> While the USFWS regulations include a specific section on wilderness management, it is very interesting to note a complete lack of mining specific regulations therein.<sup>71</sup> If one is looking for regulations controlling USFWS management of mining activities within their jurisdiction, one has to look to the regulations controlling NWRS management. Only two regulations are on point for mining activities:

##### **§ 29.31 Mineral ownerships in the United States.**<sup>72</sup>

Where mineral rights to lands in wildlife refuge areas are vested in the United States, the provisions of 43 CFR 3101.5-1 govern – (*this Dept. of the Interior provision sets forth a list of protected public lands withdrawn from leasing through a number of resource extraction related laws and regulations.*)

##### **§ 29.32 Mineral rights reserved and excepted.**<sup>73</sup>

Persons holding mineral rights in wildlife refuge lands by reservation in the conveyance to the United States and persons holding mineral rights in such lands which rights vested prior to the acquisition of the lands by the United States shall, to the greatest extent **practicable**, conduct all exploration, development, and production operations in such a manner as to prevent damage, erosion, pollution, or contamination to the lands, waters, facilities and vegetation of the area. So far as is **practicable**, such operations must also be conducted without interference with the operation of the refuge or disturbance to the wildlife thereon. Physical occupancy of the area must be kept to the minimum space compatible with the conduct of efficient mineral operations. Persons conducting mineral operations on refuge areas must comply with all applicable Federal and State laws and regulations for the protection of wildlife and the administration of the area. Oil field brine, slag, and all other waste and contaminating substances must be kept in the smallest **practicable** area, must be confined so as to prevent escape as a result of rains and high water or otherwise, and must be removed from the area as quickly as **practicable** in such a manner as to prevent contamination, pollution, damage, or injury to the lands, waters, facilities,

<sup>69</sup> <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=manageFWS>.

<sup>70</sup> *Id.*

<sup>71</sup> 50 CFR § 35.1 – 35.14.

<sup>72</sup> 50 CFR § 29.31.

<sup>73</sup> 50 CFR § 29.32.

or vegetation of the refuge or to wildlife. Structures and equipment must be removed from the area when the need for them has ended. Upon the cessation of operations the area shall be restored as nearly as possible to its condition prior to the commencement of operations. Nothing in this section shall be applied so as to contravene or nullify rights vested in holders of mineral interests on refuge lands.

While the emboldened “practicable” does appear in this regulation quite often, the language mandates much stronger support for preservation than does the Forest Service or BLM mandates. However, this policy does not equate to the ambitiously anti-mining stance of the NPS. The USFWS mining regulations seem to put a high premium on pushing the mining industry to do its best, albeit within “practicable” limits, to minimize its impact on a given refuge. On the ground, it is hard to say whether this regulation would result in tougher controls on mining than with the Forest Service or the BLM. An interesting side note: the USFWS does have ANILCA specific internal mining policies pertaining to ANWAR and other refuges on Alaska’s northern coastal plain.<sup>74</sup> Notably, this policy addresses the Congressionally mandated Alaska Mineral Resource Assessment Program and its potential impacts to NWR’s and wildernesses contained therein.<sup>75</sup>

The various policy mandates of the agencies charged with managing wilderness areas provide good insight as to how managers must deal with mining activities. However, they do not tell the whole story. Court challenges, political pressure and administrative discretion must still be examined on a case-by-case basis to further illuminate the story surrounding any individual efforts to begin mining in wilderness.

### ***C. Case Law Specific to Mining in Wilderness***

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<sup>74</sup> [http://www.wilderness.net/NWPS/documents/FWS\\_wilderness\\_policy.doc](http://www.wilderness.net/NWPS/documents/FWS_wilderness_policy.doc).

<sup>75</sup> *Id.* at § 8.8(k).



If only one thing was to be said of the Federal Judiciary's effort to reconcile the internal contradiction of mining in wilderness, it would have to be one of those issues implicitly considered a political question for Congress to resolve, not the courts. This issue has confronted the courts numerous times and in several different fashions, but no decision on the specific issue of mining in wilderness as a legislative conundrum, in need of resolution, has ever stood up to appellate review and become legal precedent.

In a case involving BLM lands in Wyoming<sup>76</sup>, the Court addressed the issue of mining in wilderness, but not the contradictions therein. Instead, the court simply revisited the Congressional and Senate committee reports where the contradiction came alive through political compromise. The Court set forth its view of the issue like this:

“Thus, Congress intended that no activity on the public lands following the Act's passage be allowed to degrade lands containing wilderness values on the date of enactment, precluding their consideration for wilderness suitability before the review process was concluded. A qualified exception to this policy decision was made for “mining and grazing uses and mineral leasing.”<sup>77</sup>

One cannot say this Court really addressed the problem caused by the Wilderness Act's internal contradictions. Instead, the court added to the problem by providing a blind interpretation of committee deliberations serving only to reinforce the contradictions.

Another case purporting to delve into this politically explosive issue dealt with an eastern wilderness known as Otter Creek.<sup>78</sup> In this case, the mining interest,

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<sup>76</sup> *Rocky Mtn. Oil & Gas Assn. v. Watt*, 696 F.2d 734 (10<sup>th</sup> Cir. 1982).

<sup>77</sup> *Id.* at 748.

<sup>78</sup> *Otter Creek Coal Co. v. U.S.*, 231 Ct.Cl. 878 (1982).

Otter Creek Coal Company, felt the workings of the Wilderness Act, the Eastern Wilderness Act and the Surface Mining Control and Reclamation Act added up to a legislative taking of their right to mine within the wilderness area.<sup>79</sup> What this case really added up to was a mining company who had no interest in actually trying to mine in this wilderness area, so it was trying to get the government to pay it for lost mining claims per the legislative takings issue mentioned above.<sup>80</sup> The mining company even refused to comply with the SMCRA requirements to determine if it had valid existing rights for fear that the determination would justify refusing to permit the mine without abrogating the company's rights, giving way to a takings claim.<sup>81</sup> Consequently, while this case deals with mining in wilderness, it offers no insight into the internal legislative contradictions of mining in wilderness.

In a seminal case involving BLM land withdrawals under Section 204e of FLPMA, Montana District Court Judge William J. Jameson, in typical fashion, authored a concise and fair decision on several issues pertaining to mining in BLM managed wilderness.<sup>82</sup> The major points are as follows: (1) section of Federal Land Policy and Management Act of 1976 did not give the House Committee on Interior and Insular Affairs the power to direct Secretary of Interior to withdraw wilderness areas from mineral exploration and leasing until January 1, 1984 and the Committee's resolution to that effect impermissibly conflicted with section of Wilderness Act of 1964 which permitted mineral exploration and leasing activities until that date; (2) the scope and duration of the withdrawal order were within sound discretion of Secretary

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Pacific Legal Foundation v. Watt*, 529 F.Supp 982 (D.C. Mont. 1981).

to be exercised in accordance with rules and procedural requirements of FLPMA, subject to judicial review; and (3) Secretary had power to revoke, after reasonable time, the withdrawal order made at request of either the House or Senate Committee on Energy and Natural Resources.<sup>83</sup>

Further, the decision also determined “applications” for the right to develop or explore mineral claims or leases constituted a “property right” and, as such, applicants are entitled to an administrative review of those applications.<sup>84</sup> While Judge Jameson’s decision touched on a number of critical points relating to Congressional attempts to tinker with wilderness administration, it did not really touch on the Wilderness Act’s own internal contradictions. Instead, by taking judicial notice of the January 1, 1984 deadline for wilderness lands’ removal from the operation of general mining laws, Judge Jameson’s decision only serves to indirectly reinforce the Act’s contradictions. It should be noted, however, Judge Jameson was known for his skillful interpretation of the law as written, not for his judicial activism, and judicial activism is exactly what was needed to effectively address this issue.

One judicial effort that came close to this level of activism was a case involving ingress/egress to mining claims in the Kalmiopsis and North Fork John Day Wilderness Areas.<sup>85</sup> The Court was asked to review an administrative decision by the Forest Service to disallow motorized access to either claim.<sup>86</sup> The Court of Appeals held that: (1) the Forest Service had statutory authority to regulate means of access to mining claims located within wilderness and other areas of national forests; (2) the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Clouser v. Espy*, 42 F3d. 1522 (9<sup>th</sup> Cir. 1994).

<sup>86</sup> *Id.*

miners failed to exhaust their administrative remedies before seeking judicial review; and (3) the Forest Service did not act arbitrarily or capriciously in determining that motorized access to mining claim in wilderness area was not essential or the historically used method.<sup>87</sup> An interesting aspect of this case reflecting the judicial activism mentioned above was the Court could have summarily dismissed this case for lack of standing as the claimants had failed to exhaust their administrative remedies. However, the Court chose to rule on the non-motorized access issue anyways, resulting in the only judicial blow of this sort ever dealt to the mining industry where wilderness is concerned.

Only once has a member of the federal judiciary ever tried to face up to the inherent contradiction of mining within wilderness. In 1973, District Court Judge Neville held that, by statute, mineral exploration and/or extraction was effectively banned in the Boundary Waters Canoe Area (BWCA), a congressionally created wilderness area, noticeably prior to the January 1, 1984 withdrawal of all wilderness lands.<sup>88</sup>

In supporting this decision, Neville cited a lengthy cadre of statutes, beginning in the late 19<sup>th</sup> century, leading up to the passage of the Wilderness Act itself. But Judge Neville did not stop there. He then proceeded through all the legal issues related to the government taking away a private entity's mineral interests.<sup>89</sup> These issues included: the power of the federal government to impose zoning restrictions on federal land; legal abandonment of a mining claim and/or laches, as it would pertain to the same abandonment issue in equity; ingress/egress issues related to accessing

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<sup>87</sup> *Id.*

<sup>88</sup> *Izaak Walton League of America v. St. Clair*, 353 F.Supp 698 (D.C. Minn. 1973).

<sup>89</sup> *Id.*

the mineral rights; the BWCA's specific treatment of mining both in statute and congressional committees; and finally, the procedural issues surrounding the purview of the court to provide injunctive relief in this situation.<sup>90</sup>

Judge Neville forcefully restated the ultimate policy of the wilderness Act and recognized the inconsistency:

“The task before this court is to divine the fundamental and prevailing intent of Congress from the various acts passed from time to time as above recited and to determine whether it is consistent with the position taken by the plaintiff and the State or that taken by the Federal defendants and/or St. Clair. It seems to the court that the various statutory acts and administrative regulations, including the most recent Wilderness Act of 1964, contain within themselves fundamental inconsistencies. A Wilderness purpose plain and simply has to be inconsistent with and antagonistic to a purpose to allow any commercial activity such as mining within the BWCA.”<sup>91</sup>

Judge Neville went on to explain the impacts of mining in the BWCA and its irreconcilable effects:

“There can be no question but that full mineral development and mining will destroy and negate the wilderness or most of it. Even any substantial exploratory operation such as core drilling will require a means of ingress and egress, a communications system of some kind, the establishment of various camp sites, the importation of food, clothing, etc., power lines and the modification to a greater or lesser extent of the environment. Should minerals be discovered in commercially productive quantities and be amenable to open pit mining as in other locations in Minnesota or as in taconite sites, the purpose and values of almost the entire BWCA is lost. The same is true, but to somewhat lesser degree, should any mining be done in the conventional underground method. In either event, access as by railroad, or highway is necessary, areas of timber must be logged off, a water supply must be obtained and other wilderness interferences effected. It is clear that wilderness and mining are incompatible. Wilderness exists because man has not yet intruded upon it. Once penetrated by civilization and manmade activities, it cannot be regained for perhaps hundreds of years. The recovery period is meaningless for generations to come. The destruction is irreversible. So with mining, logging off and other activities, they are anathema to all wilderness values.”<sup>92</sup>

Finally, Neville resolved the wilderness mining conflict in favor of wilderness. He found the mining use was unreasonable in light of the irrevocable changes to wilderness quality:

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 713.

<sup>92</sup> *Id.* at 714.

“A mineral resource developer cannot proceed without making use of the surface of the land. Any use of the surface for the exploration or extraction of minerals becomes an unreasonable use because the surface is no longer wilderness and is irreversibly and irretrievably destroyed for generations to come. Mineral development thus by its very definition cannot take place in a wilderness area; else it no longer is a wilderness area. One has to reach the conclusion that if the area is to remain true wilderness, there is no reasonable usage to which the surface can be put and still retain the area's character as wilderness. An open-pit mine for instance or an underground mine with resultant piles of slag or refuse and all equipment needed can never reasonably be undone. There is an inherent inconsistency in the Congressional Act and it falls in the lap of the court to determine which purpose Congress deemed most important and thus intended. In this court's opinion the Wilderness objectives override the contrary mineral right provision of the statute. Otherwise, the Congressional Act is a nullity.”<sup>93</sup>

This argument lays out the perfect blueprint for any subsequent judicial efforts to undo the conflicting mandates of the Wilderness Act. Unfortunately, this brilliant piece of legal craftsmanship was largely relegated into legal obscurity through the appeals process through the Eighth Circuit. The Forest Service was able to argue its administrative procedures for permitting the operational stage of the mine development process had not been completed, and therefore, the controversy was not ripe for judicial review.<sup>94</sup>

However, the Appellate Court did specify it was not rendering any opinion as to the legal veracity of Judge Neville's substantive judgment on the Wilderness Act's internal contradictions. As such, this case may be cited as persuasive precedent, overruled on other grounds, to support any future argument against mining in wilderness as contravening the intended purpose of the Wilderness Act. However, recognizing it only constitutes persuasive support, one should realize any court hearing such an argument could simply choose to ignore this Neville opinion and decide the issue in favor of mining in wilderness. As mentioned above, several cases tacitly recognize the mining exception as valid and so there would be case law to cite

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<sup>93</sup> *Id.* at 715.

<sup>94</sup> *Izaak Walton League of America v. St. Clair*, 497 F.2d 849, at 853 (8<sup>th</sup> Cir. 1974).

to the contrary of Judge Neville's opinion.<sup>95</sup> However, there are always risks involved with using precedent like this in court to foster a difficult, politicized legal argument on such a charged issue as mining in wilderness. It is as likely to backfire on whoever uses it, as it is likely to succeed.

#### **IV. Cabinet Mountains Controversy: Sterling Mining Co. Set to Open First Wilderness Mine in Continental U.S. since 1984 Deadline**

Congress designated the CMW in 1964, and it now has 94,272 acres within its borders.<sup>96</sup> Offering prime habitat for several large ungulates (elk, moose, mountain goat, and predator species (grizzly and black bear, mountain lion, and even the elusive wolverine is suspected of inhabiting the range), the CMW measures only seven miles across at its widest and less than one mile across in several locations.<sup>97</sup> As such, the current proposal to open a large-scale copper/silver mine in and adjacent to the southwest corner of the CMW threatens significant impacts to the wilderness character of this small northwest-southeast corridor of alpine splendor.

Historically, the Cabinet Mountains have seen quite a bit of mining activity. Since the 1860's, miners have extracted copper, silver, gold, lead, and zinc from geologic formations in the range.<sup>98</sup> Placer mining of gold began in the 1860's and lode mining soon followed.<sup>99</sup> Numerous adits still remain in the wilderness area from lode mining of gold-bearing quartz veins in the 1920's and 30's.<sup>100</sup>

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<sup>95</sup> *Clouser v. Espy*, 42 F.3d 1522 (9<sup>th</sup> Cir. 1994).; *Pacific Legal Foundation v. Watt*, 529 F. Supp. 982 (D. Mont. 1981).

<sup>96</sup> <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=wildView&WID=91>.

<sup>97</sup> *Id.*

<sup>98</sup> Donna J. Loop, *Claiming the Cabinets: The Right to Mine in Wilderness*, p. 26 (Published Thesis, U. of Montana 1986).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (Citing the Forest Service's "U.S. Borax-Rock Lake Mineral Report", p. 10 (Feb. 27, 1985)).

The current Rock Creek mining proposal has its origin in the mid-1960's when Bear Creek Mining Co. (a subsidiary of Kennecott Copper Corp.) discovered and explored the stratabound copper-silver deposits of the Revett Formation in the Cabinet range.<sup>101</sup> In 1965, the Bear Creek Mining Co. staked out its desired mining claims within the newly proclaimed boundary of the CMW.<sup>102</sup> In the mid-1970's, Bear Creek sold out its interests in the Cabinets to ASARCO, who continued the process of staking out claims in and around the wilderness.<sup>103</sup> In 1979, ASARCO submitted a plan of operations for mineral exploration in the Chicago Peak area of the wilderness.<sup>104</sup> The Forest Service concluded the plan of operations complied with all applicable laws, including the Wilderness Act, and approved the plan accordingly.<sup>105</sup>

With permit in hand, ASARCO drilled two holes within the wilderness boundary and three holes immediately outside the boundary.<sup>106</sup> Encouraged by the results from the exploratory drilling, ASARCO proposed a comprehensive four-year operating plan in 1980 to determine the extent and value of the deposit.<sup>107</sup> This proposed plan was designed to meet the requirements of the Wilderness Act for establishing valid rights on or before December 31, 1983.<sup>108</sup> Due to compliance issues with the Endangered Species Act (ESA), not the Wilderness Act, numerous restrictions and stipulations were placed on the plan before it was approved.<sup>109</sup> While the ESA provided the regulatory hammer, many of the restrictions and stipulations

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<sup>101</sup> *Id.* at p.27 (Citing the Forest Service's "U.S. Borax-Rock Lake Mineral Report", p. 9-11 (Feb. 27, 1985)).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (Citing the Forest Service's "ASARCO-Rock Creek Mineral Report", p. 52 (Oct. 25, 1985)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at p. 27-28.

<sup>106</sup> *Id.* at p. 28.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at p. 28-29.



benefited the preservation of wilderness character as well. These restrictions included: a shortened drilling season; strict helicopter use limitations; drill site operation and recovery requirements; water, soil, and vegetative protection measures; posting of a reclamation bond; measures to reduce air, noise, and visual pollution; and wildlife and water monitoring programs.<sup>110</sup>

In the early stages of ASARCO's first attempt at opening the mine for development, a concurrent "validity" examination took place to determine the extent of the company's valid existing rights on claims within the wilderness. The BLM issued its Mineral Report for ASARCO's Rock Creek claims in 1985, documenting 101 out of 133 claims situated partly or entirely within the wilderness to be valid under both the Wilderness Act and the 1872 Mining Act.<sup>111</sup> However, the section of the report concerning the marketability test required for discovery of a valuable mineral deposit noted the markets for both copper and silver were currently depressed, with an "uncertain" outlook for silver and a "not very promising" outlook for copper, circa 1985.<sup>112</sup>

Nevertheless, ASARCO pursued a permit to commence mining operations soon after resolving the validity status of their many claims in the Rock Creek area. This resulted in the Forest Service issuing its first draft EIS (DEIS) on ASARCO's complete operational plan for the Rock Creek Mine in 1987.<sup>113</sup> However, fierce opposition to the mine's opening came from a number of fronts, some most unexpected, such a highly organized business community in Sand Point, ID, a small

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<sup>110</sup> *Id.* at p. 29.

<sup>111</sup> *Id.* at p. 31 (Citing the Forest Service's "ASARCO-Rock Creek Mineral Report" (Oct. 25, 1985)).

<sup>112</sup> *Id.*

<sup>113</sup> <http://www.missoulanews.com/News/News.asp?no=2180>.

resort community on the shores of Lake Pend Oreille, fearing their precious lake would be polluted by toxic mining waste. Failing commodity values for both copper and silver compounded the fierce opposition to the mine. As a result, ASARCO not only chose to abandon the Rock Creek Mine project, but also closed the doors on their fully operational Troy Mine after thirteen years of production from 1981-1993.<sup>114</sup>

Very little was heard of the Rock Creek mine during the early and mid-1990's, but the issue re-emerged in full when ASARCO, and its parent company Kennecott Copper Corp. mentioned briefly above, announced the sale of their interest in both Rock Creek and the Troy Mine to Sterling Mining Company in 1999.<sup>115</sup> An interesting aspect of this transaction was the form of compensation taken by ASARCO and Kennecott, as ASARCO's parent company: as partial compensation, they took a 20% ownership interest in Sterling Mining Company.<sup>116</sup> While not a controlling interest, leading to definite conflicts of interest, it is still a major interest in Sterling, making the deal very questionable indeed.

In any event, upon acquisition of the Rock Creek Project, Sterling began an immediate push to finalize the Forest Service's decision to approve the mine before the end of 2000. In September 2001, the Forest Service released its final EIS (FEIS) on the proposed operational plan. Wilderness and wilderness related values received relatively nominal treatment given the enormity of the entire document. Of the well over one thousand pages in the document, only ten or so pages of discussion were dedicated to wilderness related issues. Although, one may read wilderness issues into

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<sup>114</sup> <http://www.missoulian.com/specials/troy/troy02.html>.

<sup>115</sup> <http://www.clarkfork.org/sterlingreport.pdf>.

<sup>116</sup> [http://www.mcic.org/Sterling\\_Rock\\_Creek.html](http://www.mcic.org/Sterling_Rock_Creek.html).

many other aspects of the FEIS, including sections on: habitat degradation and resulting effects on all native wildlife, negative affects on water quality, air quality, and many others.

Specifically, wilderness is first addressed in Volume 1, Chapter 3 of the FEIS. This chapter's focus was describing the affected environment of the proposed operating plan submitted by Sterling Mining Company. The "Affected Environment" section pertaining to wilderness first described the CMW briefly and then described two separate "opportunity classes" within the wilderness as defining management characteristics for the area.<sup>117</sup> Opportunity Class 1 areas are pristine and without recreation trails of any sort.<sup>118</sup> These areas may have light-use and un-maintained backpacking trails but no stock use.<sup>119</sup> Opportunity Class 2 areas are found along heavily used trail corridors and lake basins.<sup>120</sup> Heavy use patterns have resulted in varied, but at times heavy, impacts, and it has been a management priority to mitigate those impacts.<sup>121</sup> Opportunity Class 2 areas comprise about 15% of the CMW; the other 85% being class 1.<sup>122</sup> This discussion of the affected wilderness environment takes up all of one page in the FEIS document.

The significant treatment the wilderness issue receives is in Volume 1, Chapter 4, dealing with the environmental consequences to the CMW from the five proposed alternatives in the FEIS. The administrative guidelines for this discussion

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<sup>117</sup> Final Environmental Impact Statement, Rock Creek Project, Volume 1, Chapter 3, Page 136–137 (September 2001). [http://www.fs.fed.us/r1/kootenai/projects/projects/rock\\_creek/docs/Volume\\_1.pdf](http://www.fs.fed.us/r1/kootenai/projects/projects/rock_creek/docs/Volume_1.pdf)

<sup>118</sup> *Id.* at p.137.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

are rather straightforward. The wilderness management mandates are set forth as follows:

“The Wilderness Act directs the Forest Service to protect the natural character of wilderness and to provide for recreational, scenic, scientific, educational, cultural, and historical uses of wilderness areas. The four requisite attributes of wilderness are:

1. **Natural Integrity:** the extent to which human influences alter natural processes by comparing the condition of the area to its probable condition without human contact.
2. **Apparent Naturalness:** closely related to natural integrity. Both qualities may be altered by the same activities. Apparent naturalness focuses on how the activities are perceived by the general public. They include impacts that are seen, heard, or smelled.
3. **Solitude:** isolation from the evidence and presence of other humans. Features that contribute to solitude include size of area and distance from perimeter to center. Vegetation and topographic screening are also related to solitude.
4. **Primitive Recreation:** provides opportunities for isolation from the evidence of humans. Visitors feel they are a part of the natural environment. They may enjoy a high degree of challenge, risk, and use of outdoor skills.

The Forest Service also describes additional wilderness attributes of outstanding ecological, geological, scenic and historical features. Ecological features include endangered or threatened species of animals, plants and old growth vegetation. Geological features include landforms representing significant examples of geological processes. Scenic values are based on significant scenic qualities of the natural landscape in the wilderness. The quality of these features depends on how unusual, outstanding, and uncommon the natural features are in the landscape of the geographic region. Cultural and historical features comprise all evidence of historic and prehistoric human use of an area.”<sup>123</sup>

Using this framework, and the “four requisite attributes of wilderness”, the FEIS wilderness analysis proceeds through the five proposed alternatives, though the vast majority of the analysis is on alternative II. The alternatives, one being no mine at all, each contain different ideas for the size and location of the surface attributes of the mine, how close the mine can come to the surface, what roads can be built and what roads should be closed, habitat requirements for the endangered species affected, and many other less notable differences. Accordingly, each alternative is given slightly different treatment with regard to this wilderness aspect of the analysis.

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<sup>123</sup> *Id.* Chapter 4, p. 255-256.

Alternative I, the “no action” alternative was given short shrift, as it would leave everything as normal. Alternative II, proposed by Sterling Mining Company as their preferred alternative, is given an in depth analysis.<sup>124</sup>

With respect to “natural integrity” as discussed above, the Forest Service makes the following comments: the only surface structure within the wilderness would be a ventilation adit on a 60°, north aspect slope and its construction would take place during the goat summer/transition range disturbing about 3000ft<sup>2</sup> of surface area.<sup>125</sup> Further, air pollution from the tailings impoundments outside the wilderness, as well as the proposed mill site, could contaminate the wilderness’s class 1 airshed, but the Forest Service figures the contaminate levels to be well below federal and state standards.<sup>126</sup> There is a “remote” possibility mine subsidence could occur, causing extreme changes in topography and/or lake water levels in the area, including the subsidence of an entire lake.<sup>127</sup> There is a possibility that post-closure ground water seepage from the underground mine reservoir could exit in outcrop zones within the wilderness, creating new, potentially contaminated, unnatural water sources.<sup>128</sup> Displacement of some wildlife species from areas disturbed by mining activities could increase wildlife populations within the wilderness area, causing isolated areas of habitat within the wilderness to become altered or stressed.<sup>129</sup> Finally, certain natural processes within the wilderness may be altered by the mining

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<sup>124</sup> Only the analysis for Alternative II is included in this text, to revisit the same analysis for each alternative would be unproductive. It is worth noting there are small discrepancies between each of the four proposed alternatives where the mine is opened, but no difference so big as to eliminate the substantial effects the mine would have on the CMW.

<sup>125</sup> *Id.* at p. 256.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

operation, including impacts on grizzly bears and mountain goats such as displacement and degradation of habitat, but the wilderness area would largely retain its existing character “provided subsidence did not occur”.<sup>130</sup> All of these impacts come solely under the effect on the wilderness’s “natural integrity” attribute. With analysis this thorough, one cannot see how this proposed mine could possibly pass muster with such impacts.

The analysis then moves on to this alternative’s effects on “apparent naturalness”. First, the Forest Service addresses the ventilation adit: the adit and its construction would be visible from the East Fork Bull River drainage, but not from any popular trails, so for most wilderness visitors, no change in “apparent naturalness” would occur, and after the mine closes the adit will be sealed with cement, further reducing its effects.<sup>131</sup> Some visitors, however, will consider the knowledge of the adit’s existence an emotional affront to the wilderness’s “apparent naturalness”.<sup>132</sup> Certain portions of the mine’s surface structures can be seen from within the wilderness, affecting the “apparent naturalness” of non-designated lands next to the wilderness.<sup>133</sup> Mine related noises from the mine construction, ventilation adit, blasting underground, blasting the exploration adit, activity at the mill site itself, and operation of large motor vehicles will disturb the auditory naturalness mostly in the Chicago Peak vicinity of the CMW.<sup>134</sup> Lastly, short term and intermittent air

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<sup>130</sup> *Id.* at p. 257.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

pollution should be expected to affect some wilderness visitors depending on conditions.<sup>135</sup>

The analysis for “solitude and primitive recreation” begins with a similar point to “apparent naturalness”: to the extent people using the wilderness directly or indirectly perceive the existence of this mine, their sense of solitude and opportunity for primitive recreation will be degraded.<sup>136</sup> The analysis then goes on to mention the 900 or so new residents the mine will bring to the immediate area, some looking to recreate in the wilderness, as also degrading the possibility for solitude and primitive recreation, although the estimated impact should be negligible.<sup>137</sup>

The impacts on ecological, geographical, scenic and historical features are either wholly discounted (historical features only), or the discussion of the impacts is suggested to be elsewhere (Geology, Hydrology, Aquatics/Fisheries, Scenic Resources, Biodiversity, and Threatened and Endangered Species sections).<sup>138</sup>

The final analysis for Sterling’s preferred alternative involves an interpretation of the mining specific provisions of the Wilderness Act.

“Section 4(b) of the Wilderness Act states: “Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historic uses.” *The CMW would continue to serve these purposes. Therefore, alternative II would be consistent with the Wilderness Act.*

Section 4(d)(3) of the Act states holders of unpatented mining claims, validly established before midnight December 31, 1983, shall be accorded the rights under the 1872 Mining Act on those NFS lands designated by the Act as wilderness areas... Reasonable stipulations may be prescribed for the protection of wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. This section indicates mineral operations as proposed can occur within the wilderness but may be subject to management requirements above and beyond those normally imposed on operations outside

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at p. 258.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

a wilderness, *so long as such management requirements do not prevent the operator from exercising due rights under the U.S. mining laws.*

The ventilation adit portal and underground mining within the CMW are considered necessary for the proposed mining operation. Noise from the ventilation portal could degrade the wilderness character. However, this is not inconsistent with the Wilderness Act since it is necessary for the mine workers' health and safety."<sup>139</sup>

Given the highlighted sections of this final analysis, the Forest Service obviously feels its hands are tied when it comes to the Wilderness Act. The end of the second paragraph quoted gives the distinct impression the Service feels it cannot impose restrictions or stipulations, under the guise of "preserving wilderness character", preventing the operator from exercising due rights under the mining laws. One has to wonder how far the Forest Service is able to go before it is deemed to have crossed the line from reasonable restrictions and stipulations to abrogating rights under the mining laws. Nevertheless, with this sort of interpretation, it is no wonder the Wilderness Act is overlooked, time and time again, as a potential stopping block for a proposed mine. When other laws, like the Endangered Species Act (ESA) and the Clean Water Act (CWA), have no such provisions, the Forest Service is not prevented from using them to impose harsh restrictions resulting in a potential abrogation of rights under the mining laws, so why bother with the Wilderness Act.

Consequently, upon the publishing of the FEIS many challenges to the plan ensued, but these challenges were not based on the tenets of the Wilderness Act. Instead, the challenges were based on the ESA and the CWA and its Montana counterpart. Granted, these laws allow the challengers to point to specific aspects of the FEIS not in compliance with specific aspects of these laws, thereby making the challenges much more concrete and discernable than a challenge under the

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<sup>139</sup> *Id.* at p. 258-259.



Wilderness Act would be. It is a truly unfortunate state of affairs when a “landmark” conservation/preservation law like the Wilderness Act can provide no ground upon which to challenge a potentially devastating public lands project like the Rock Creek Mine.

### **V. Can the Wilderness Act stop the Rock Creek Mine or prevent another Rock Creek Mine in the Future?**

The Rock Creek Mine in the CMW illustrates a very frustrating aspect of the Wilderness Act. Barring certain time-related provisions within the Act resolved one way or the other over twenty years ago, a holder of a valid mining claim within a wilderness area can mine that claim subject only to reasonable restrictions and stipulations. Is there any way to change this? It seems ridiculous that this small, but precious, percentage of our public lands contained within the National Wilderness Preservation System, an age-old icon for public lands preservation, should be so exposed to the potentially horrific degradation mining can bring to an area.

Upon reflection, one can see opportunities for change in the Wilderness Act within all three branches of the federal government. Each branch (judicial, executive, and legislative) has had opportunities in the past to rectify the situation but chosen not to, and each branch could be given those opportunities again in the future. Given the right set of circumstances, the “mining in wilderness” loophole could be closed. However, as further discussion will reveal, the path to such closure is a difficult one, riddled with the possibility of doing more harm than good. One must think carefully about the possible ramifications of revising or interpreting the Wilderness Act, for any attempts could serve to solidify the mining industries toehold in wilderness

instead. Given the ever-rising demand for the minerals hidden behind the wilderness shield, one has to remember the mining industry would relish the opportunity to win this debate every bit as much as the pro-wilderness community would.

### ***A. Judicial Reform***

To date, all efforts at reforming the Wilderness Act through judicial decree have failed. The overriding reason has been a general resistance on the part of the judiciary to truly address the Act's internal dichotomies. Only Judge Neville's district court decision discussed above can be said to truly address the conflicts between the Wilderness Act's purpose and the existence of a mining exception.

Therefore, to make an argument in support of judicial reform to the Wilderness Act, one must stand entirely on persuasive rhetoric and legal precedent. For that matter, only Judge Neville's opinion can be used as persuasive legal precedent, so one must stand largely on persuasive rhetoric. While this can be done, and some of the most inspiring instances of the judiciary making right great wrongs in our society have happened in just this way, it is a steep, uphill battle, rife with the possibility of failure.

Delving further into potential judicial reform, a very important issue for the advocate of change is to make sure the court hearing the case cannot dismiss or decide the case on some inconsequential technicality. There is a volume of cases decided or dismissed on issues such as ripeness, mootness, standing, etc., thereby relegating those decisions ineffectual because they failed to resolve the central issue

of the Wilderness Act's contradictions.<sup>140</sup> It is likely future courts hearing this issue will attempt to move the proceedings away from such final resolution because of the political implications of such a decision. Simply avoiding the many technical pitfalls of this type of reform litigation should prove challenging even for the most seasoned attorneys.

If one is able to avoid these complications and force a ruling on whether the mining provisions are inherently contradictory to the Wilderness Act, the argument in support of such a proposition will be most unconventional. Instead of relying on traditional legal precedent, binding the court to make a decision in one's favor, the argument will derive from creative legislative interpretation, reconciling and explaining age-old political special interests and their inappropriate interplay with making good law, as well as, persuasive argument for the overriding purpose of the Act as written to trump the mining exception said to be in direct contradiction.

Finding legal precedent to support the above mentioned arguments will be very difficult and will involve an exhaustive, and creative, survey of the entire body of federal law. To support an argument for reform, it is not important that one finds wilderness specific law. Such a task is not possible, only Judge Neville's opinion supplies such precedent, and his opinion can only be submitted as persuasive, not mandatory precedent. Further, Judge Neville's opinion can be distinguished, and rendered rather incompatible to mining activities in wilderness outside of Minnesota because the section of the Wilderness Act permitting mineral extraction is

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<sup>140</sup> *Clouser v. Espy*, 42 F3d, 1522 (9<sup>th</sup> Cir. 1994); *Izaak Walton League of America v. St. Clair*, 497 F.2d 849, at 853 (8<sup>th</sup> Cir. 1974); *Pacific Legal Foundation v. Watt*, 529 F.Supp 982 (D.C. Mont. 1981).

inapplicable to the BWCA.<sup>141</sup> At the time of Neville's decision, the general mining laws were inapplicable to land in Minnesota.<sup>142</sup> Instead, lands in Minnesota were specifically exempted from the general mining laws by statute.<sup>143</sup>

One must look for United States Supreme Court decisions supporting one's claims in order to truly bind the entire federal judiciary. As a result, one must look to the entire body of law, from anti-trust, to bankruptcy, to criminal law, seeking a similar set of circumstances where the legislative purpose of a law was undermined by subsidiary clauses within the law. The other important characteristic to look for is a situation where the "true" legislative purpose of the law was corrupted by the political process in order to conform to the desires of the powerful political forces at play during enactment.

In conducting a rather thorough survey of United States Supreme Court cases giving treatment to these issues of internal contradiction within a statute or subsidiary clauses contravening a statute's over-arching purpose, it is my conclusion that an attempt to make such a case for the Wilderness Act and its mining exception would likely fail. While my survey of Supreme Court decisions was not comprehensive, I came across a strong body of case law supporting the continued existence of the mining exception in the Wilderness Act.<sup>144</sup>

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<sup>141</sup> Dennis H. Elliot & L. Craig Metcalf, *Closing the Mining Loophole in the 1964 Wilderness Act*, 6 *Environmental Law* 469, 483 (1975).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (see 30 USC § 48 (1970)).

<sup>144</sup> It is necessary to qualify these cases as ones dealing with statutory interpretation and rules binding the courts in doing so. Accordingly, they set forth rules for interpreting the Wilderness Act, but they do not dictate a certain resolution for the issue of mining in wilderness. *U.S. v. Oregon*, 81 S.Ct. 1278 (1961). (Resort to legislative history is unnecessary when statute is clear and unequivocal on its face.); *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S.Ct. 708 (2002). (Vague notions of statute's basic purpose are inadequate to overcome words of its text regarding the specific issue under consideration.); *National Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 122 S.Ct. 782

However, Supreme Court case law supporting methods of statutory interpretation supporting the re-evaluation, or possibly the elimination, of the mining exception exists as well. One may be able to breath life into an interpretation of the Act where the court could be convinced to read the mining exception as the direct result of political compromise and in unacceptable conflict with the Act's purpose.<sup>145</sup>

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(2002). (Specific statutory language should control more general language when there is conflict between them.); *Burlington Northern R. Co. v. Oklahoma Tax Com'n*, 107 S.Ct. 1855 (1987). (Though legislative history can be legitimate guide to statutory purpose obscured by ambiguity, language of statute itself must ordinarily be regarded as conclusive, absent any clearly expressed legislative intention to contrary.); *Blum v. Stenson*, 104 S.Ct. 1541 (1984). (Where resolution of question of federal law turns on statute and intention of Congress, court looks first to statutory language and then to legislative history if statutory language is unclear.); *Alaska Dept. of Environmental Conservation v. E.P.A.*, 124 S.Ct. 983 (2004). (It is a cardinal principle of statutory construction that statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.); *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003). (Absent a statutory text or structure that requires a court to depart from normal rules of construction, the court should not construe a statute in a manner that is strained and, at the same time, would render a statutory term superfluous.); *TRW Inc. v. Andrews*, 122 S.Ct. 441 (2001). (It is cardinal principle of statutory construction that statute should, upon the whole, be construed so that, if possible, no clause, sentence or word is rendered superfluous, void or insignificant.); *Townsend v. Little*, 3 S.Ct. 357 (1883). (General and specific provisions in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, can subsist together, the specific qualifying and supplying exceptions to the general.); *U.S. v. Moore*, 5 Otto 760 (1877). (In case of seeming conflict in the provisions of a statute, the construction should be such that both provisions if possible may stand.); *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001). (Court ought not attribute to Congress official purpose based on motives of particular group that lobbied for or against certain proposal, even assuming that precise intent of group can be determined.); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S.Ct. 2223 (1994). (Most relevant time for determining statutory term's meaning is when statute became law.); *U. S. v. Wise*, 82 S.Ct. 1354 (1962). (Statutes are construed with reference to circumstances existing at time of passage, and interpretation placed upon an existing statute by a subsequent group promoting legislation has no persuasive significance.); *Helvering v. Griffiths*, 63 S.Ct. 636 (1943). (Speculation upon political factors which may have motivated choice of language has no place in construction of acts of Congress.); *Western Air Lines, Inc. v. Board of Equalization of State of S.D.*, 107 S.Ct. 1038 (1987). (Party could not create legislative history for statute through post hoc statements of interested onlookers.); *U.S. v. Gonzales*, 117 S.Ct. 1032 (1997). (Where statutory command is straightforward, there is no reason to resort to legislative history.); *First Nat. Bank of Logan, Utah v. Walker Bank & Trust Co.*, 87 S.Ct. 492 (1966). (It is not for court to construe acts as to frustrate clear-cut purpose forcibly expressed by both friend and foe of legislation at time of its adoption.); *City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 122 S.Ct. 2226 (2002). (Congressional decision to enact both a general policy that furthers particular goal and specific exception that might tend against that goal does not invariably call for narrowest possible construction of the exception.).

<sup>145</sup> It is necessary to qualify these cases as ones dealing with statutory interpretation and rules binding the courts in doing so. Accordingly, they set forth rules for interpreting the Wilderness Act, but they do not dictate a certain resolution for the issue of mining in wilderness. *U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 113 S.Ct. 2173 (1993). (In expounding statute, court must not be guided by single sentence or member of sentence, but must look to provisions of law as whole

Unfortunately, as mentioned above, the case law supporting the continued existence of the mining exception is strong and unequivocal. Since the language providing for the mining exception is not ambiguous under its own terms, it is unlikely the court will be willing to read beyond the plain language of the Act to reach a decision. Instead, as the Act makes for a clear exception, several times throughout the statute, for all the uses set forth in Section 1133(d), it seems most likely a court will find the exception to be valid, despite being contradictory to the preservationist purpose behind the Act.<sup>146</sup>

Given the current state of the law, mounting a legal challenge against the mining exception in the Wilderness Act will be a daunting task. Any effort to do so

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and to its object and policy.); *Crandon v. U.S.*, 110 S.Ct. 997 (1990). (In determining the meaning of a statute, court looks not only to the particular statutory language but to the design of the statute as a whole and to its object and policy.); *C.I.R. v. Engle*, 104 S.Ct. 597 (1984). (Supreme Court's duty in interpreting statutory language is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with general purposes that Congress manifested.); *New York Life Ins. Co. v. Bowers*, 34 F.2d 60 (1929). (Fair interpretation of statute often requires that one provision be read broadly enough to conflict with and override another.); *Dickerson v. New Banner Institute, Inc.*, 103 S.Ct. 986 (1983). (In case of statutory construction, task is to interpret words of statute in light of purposes Congress sought to serve.); *U. S. v. Wise*, 82 S.Ct. 1354 (1962). (Legislative history may be examined to ascertain intent of Congress as to ultimate purpose of a statute.); *Flora v. U.S.*, 80 S.Ct. 630 (1960). (Frequently, the legislative history of a statute is the most fruitful source of instruction as to the proper interpretation of the statute.); *U.S. v. Public Utilities Commission of Cal.*, 73 S.Ct. 706 (1953). (Where language and purpose of questioned statute is clear, courts follow legislative direction in interpretation, but where words are ambiguous or would bring about an end completely at variance with purpose of statute if literally construed, judiciary may properly use legislative history to reach conclusion.); *Trailmobile Co. v. Whirls*, 67 S.Ct. 982 (1947). (The interpretation of statutes cannot safely rest upon changes made in Congressional committee without explanation.); *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 88 S.Ct. 643 (1968). (Congressional labor *and public lands* legislation is often product of conflict and compromise between strongly held and opposed views. and its proper construction frequently requires consideration of its wording against the background of its legislative history and in light of general objectives Congress sought to achieve (emphasis added)); *Shell Oil Co. v. Iowa Dept. of Revenue*, 109 S.Ct. 278 (1988). (In construing meaning of statute, court does not usually accord much weight to statements of bill's opponents contained in legislative history.); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 99 S.Ct. 2721 (1979). (A thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.)

<sup>146</sup> 16 USC § 1131(a) & 16 USC § 1133(b) & (c).

must be measured and sure, for the cost of failure could be an even more secure foothold for mining in wilderness.

### ***B. Administrative Reform***

Another avenue for Wilderness Act reform could be through administrative, or executive, action. Only three options really exist in this forum: first, enact new management regulations further restricting mining in wilderness, but falling short of contravening the current interpretation of Congress's intent to allow mining; second, enact new regulations governing the mining industry as a whole, such as reasonable royalty payments, stricter reclamation requirements, etc.; and third, unilateral action by the President to circumnavigate the difficulties presented by wilderness designation and the shortcomings of the Wilderness Act (e.g., use the Antiquities Act of 1906 to create National Monuments where mining is not allowed at all). However, none of these administrative efforts to curtail mining offer a bulletproof solution to the current Rock Creek Mine situation or the conundrum presented by "valid existing rights" to mining claims all across the country. However, each offers opportunities to eliminate, or severely restrict, new exploration for minerals on our public lands, and stricter regulations on mining in wilderness, or in general, could have a chilling effect on existing mineral claim development.

It should be mentioned though the political realities surrounding these options are somewhat troublesome. First and foremost, the permanence of administrative action can be fleeting at times. An action by a pro-preservation administration can be undone by a subsequent pro-mining administration only a few short years later.

Specific efforts for the reforms mentioned above can be found in the near past, and while most have survived the years since, some have been subsequently undone.

To highlight this problem of permanence, when President Clinton, using his powers under the Antiquities Act, created the Grand Staircase-Escalante National Monument, his unilateral preservation efforts raised such an uproar that Congress tried, in vain fortunately, to restrict or eliminate the President's powers under the Antiquities Act.<sup>147</sup> Further, efforts by Interior Secretary Babbitt in 2000 to substantively reform mining laws through changes to the BLM's mining regulations<sup>148</sup> were subsequently *re-amended* in 2001, and rendered largely ineffective, by the subsequent, pro-mining Interior Secretary, Gale Norton.<sup>149</sup> The only examples of permanence in administrative or executive action to preserve wilderness qualities are found in the alternative designation efforts by the President and agencies. To date, no effort to undo a Presidential declaration of a National Monument has succeeded, going all the way back to Teddy Roosevelt's designations a hundred years ago.

Similarly, designations such as National Conservation or Recreation Areas have also proven themselves to stand up to the test of time. Typically, however, National Monuments have failed to provide any additional protections against encroachment by mining interests with valid pre-existing rights. Considering these are the mining interests currently jeopardizing the CMW and are also the only mining interests currently able to mine in wilderness anywhere, one has to wonder how

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<sup>147</sup> James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. of Col. L. Rev. 483, 530-34 (Spring 1999).

<sup>148</sup> 65 Federal Register 69998-01 (11/21/2000).

<sup>149</sup> 66 Federal Register 54834-01 (10/30/2001).



effective any of these alternative designations have really been when they are all made “subject to valid existing rights”.

### *C. Legislative Reform*

The most permanent reforms to the Wilderness Act will come out of legislative actions either amending the original Act itself or designating new wilderness with language readdressing congressional intent on the mining issue. The first of these two options will be the most difficult politically. Once a bill is proposed to amend the Wilderness Act, it is like opening Pandora’s Box. After the amendment leaves the hands of the Congressman who proposed it, it is totally out of his/her control as to how the bill will be reshaped by the time it makes it to a floor vote. Actually, the bill needs to survive two floor votes and, if the House of Representatives and Senate pass two different versions of the same bill, a Conference Committee will further amend the proposed bill to reconcile differences between the two versions.<sup>150</sup>

The likelihood of a bill as controversial as one amending Wilderness Act to the disfavor of the mining lobby making it through the legislative process without being largely undone is highly unlikely. A more realistic possibility might be to legislate new wilderness in due course and provide for the elimination of all mining claims within that designated area, including valid existing claims, and either through

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<sup>150</sup> Elliot & Metcalf, *Supra* Note 132 at p. 486. Citing - 119 Cong. Rec. H1381 (daily edition March 5, 1973)(Remarks of Rep. Burton); 119 Cong. Rec. S3245 (daily ed. Feb. 26, 1973) (Remarks of Sen. Jackson); 119 Cong. Rec. s15677 (daily ed. Aug. 3, 1973) (Remarks of Sen. Metcalf); 121 Cong. Rec. H133 (daily ed. Jan. 14, 1975) (Remarks of Rep. Heckler); 117 Cong. Rec. 15512 (May 1971) Remarks of Sen. Packwood); 121 Cong. Rec. E1137 (daily ed. Mar. 13, 1975) (Remarks of Re. Dingell). (*All remarks commented on numerous proposed bills to eliminate the mining exception in wilderness*).

committee reports or the language of the bill itself, effectively amend the Wilderness Act's exemptions for mining in wilderness.

An example of this *ex post facto* amendment of the Wilderness Act occurred in 1980. In enacting the Colorado Wilderness Act, Congress finalized formal congressional intent through a House Report referring to mandatory grazing guidelines for managing livestock grazing in wilderness.<sup>151</sup> However, it should be noted, Congress's intent on certain issues pertaining to wilderness grazing was rather unclear, so there was a reason for the indirect amendment. Also, the Colorado Wilderness Act's reform of grazing guidelines within wilderness was no surprise to interested parties engaged in the debate. One would be hard pressed to sneak a new wilderness bill through Congress with the intent of eliminating valid mining claims in wilderness with no opposition.

Another possibility would be for a senator to attach a Wilderness Act amendment as a rider to a law of critical importance to the current administration. Introduced as a congressional rider, a Wilderness Act reform bill might be able to largely avoid floor debate and the damaging amendment process, but there are still no guarantees it will survive the lawmaking process.<sup>152</sup>

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<sup>151</sup> Mitchel P. McClaran, *Livestock in Wilderness: A Review and Forecast*, 20 *Environmental Law* 857, 871 (1990).

<sup>152</sup> <http://clubs.arizona.edu/~elfforum/Articles/sp9710.htm>. "A rider is an addendum to a bill or an act of Congress, attached to that bill for different reasons. Generally the bill or act is so important that for political reasons the President cannot veto it, and the act is signed into law, prior to which there is no debate as to the legality or validity of the specific effects of the rider itself. For example, in 1995 Clinton was forced to sign the Budget Rescissions Act after the government was shut down for the second time for lack of a feasible national budget. The President, at that time, was under intense pressure from the public to pass the Appropriations Act. Because of that political pressure, he was forced to sign the bill without modification or opportunity to veto. Unfortunately, attached to that bill was a rider allowing logging to begin in National Forests. Although this rider had nothing to do with the actual issue of the national budget, it went into effect with that new budget and in the process, exempted the logging from a multitude of environmental laws. Without any debate on either floor of

In any event, an attempt to amend the Wilderness Act, directly or indirectly, would create an instantaneous firestorm likely to destroy even the most earnest attempts. Furthermore, even if a measure did pass through Congress, on a rider for instance, Congress would still have to appropriate additional funds to the managing agencies to deal with a law creating regulatory takings claims for a large number of private property interests holding mining claims within wilderness. Consequently, the whole process could be stopped even before it got off the ground due to appropriations issues related to the purchase of all those valid mining claims.

#### ***D. Valid Existing Rights and the Takings Claim***

A long-standing legal history would bolster any takings claims made by a patented or unpatented holder of valid mining claims in wilderness. If the federal government was to do anything to eliminate the “reasonable investment backed expectations” of mining claimholders through judicial, administrative, or legislative action, the government must be ready, willing, and able to compensate those possessing said private property interests.<sup>153</sup> Without going into the specifics of takings law, all one needs to know is when a patented private property interest in previously public land has been created, the government cannot take it away without just compensation to the injured party.<sup>154</sup>

Unfortunately, the amount the government must pay is not what the private party paid to the government for the property but the amount the private party expects

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Congress, private business interests and their lobbying groups thwarted environmental and tribal protection laws in order to plunder our national forests and public lands 'for profit.'

<sup>153</sup> *Penn Cent. Transp. Co. v. City of New York*, 98 S.Ct. 2646 (1978).

<sup>154</sup> *Id.*

to profit from the public land.<sup>155</sup> Typically, mining interests have been able to patent their mining claims for very little money. In fact, mineral interests have only had to pay the government five dollars per acre for patents, a ridiculously small amount dating back to 1872 with the passage of the General Mining Law.<sup>156</sup>

Nevertheless, the government must pay the mining interest what it expects to make in profits from mining its claims. In the case of the Rock Creek Mine, Sterling Mining Co. projects the mine to produce 300 million ounces of silver and two billion pounds of copper, resulting in significant gross profit.<sup>157</sup> What the net profit would be is much harder to determine, but factors such as mine development and reclamation costs must be included to offset gross profit projections. In any event, it will cost the federal government a lot of money to buy out the Rock Creek Mine claims from Sterling Mining Company. But more importantly, neither the Forest Service nor the BLM has the funds or the mandate to pursue such a buyout. This is not to say it has never been done. In 1996, President Clinton authorized 65 million dollars to buyout the Crown Butte gold mine along the Yellowstone National Park border.<sup>158</sup>

Seeing the problems presented by this situation, one possible route for mining reform in wilderness is to change the mandates and appropriations schemes for the Forest Service and BLM in managing wilderness to mimic those for the NPS. The NPS has already bought out several mining claims within its jurisdiction during its

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<sup>155</sup> *Id.*

<sup>156</sup> John D. Leshy, *The Babbit Legacy at the Dept. of the Interior: A Preliminary View*, 31 *Environmental Law* 199, 223 (2001).

<sup>157</sup> <http://www.sterlingminingcompany.com/index.cfm?page=rockcreek.cfm>.

<sup>158</sup> [http://www2.nature.nps.gov/YearInReview/yr\\_rvw97/chapter01/to\\_chapter01\\_a01.html](http://www2.nature.nps.gov/YearInReview/yr_rvw97/chapter01/to_chapter01_a01.html).

history of wilderness management.<sup>159</sup> The only issues stopping the Forest Service and BLM from doing so are: specific mandates preventing either agency from exercising the power of condemnation;<sup>160</sup> and the lack of funding for such purchases short of specific congressional approval to do so with appropriations included.<sup>161</sup> Consequently, if the agencies were given the power of condemnation, with a public review process included, as an additional tool in making management decisions, it is possible the Rock Creek Mine would not open. Although, it should be mentioned, there is a controversial case history behind the legal precept of the agencies affecting a regulatory taking without specific statutory authority.<sup>162</sup>

These agencies currently manage their jurisdictions using an “integrated resource” analysis to catalog resource extraction and recreational opportunities available on all their inventoried lands.<sup>163</sup> It would not seem an unreasonable change in policy to include the power of condemnation, or eminent domain, to preclude development of mining claims in areas with high wilderness value through forced land exchanges or buyouts, thereby returning said claims to the public domain. Unfortunately, if these changes are brought about at the administrative level, they can always be amended and undone by subsequent, pro-mining administrations, not to mention a lack of Congressional mandate for doing so.

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<sup>159</sup> John C. Hendee & Chad P. Dawson, *Wilderness Management: Stewardship and Protection of Resources and Values*, 3<sup>rd</sup> Edition. Page 114 (Fulcrum Publishing 2002).

<sup>160</sup> (Forest Service) 16 USC § 1134(c) & (BLM) 43 CFR 6305.11.

<sup>161</sup> *Id.*

<sup>162</sup> For more information on the constitutional issues surrounding the use of regulatory takings for wilderness management, please see: Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 Environmental Law 881 (Winter 1999).

<sup>163</sup> <http://www.fs.fed.us/im/directives/fsm/1900/1920.txt>.; 43 CFR § 2420.1.

Legislative amendments to the Wilderness Act and FLPMA would be the only way to ensure permanence for such a change. Currently, section 1134(c) of the Wilderness Act expressly forbids the Forest Service from using condemnation in dealing with private holders of valid existing property rights. FLPMA, the BLM's statutory authority for wilderness preservation, does not authorize the use of eminent domain except for maintaining adequate access over private land to its public land holdings.<sup>164</sup> Both of these statutes present opportunities to create the power of eminent domain for use in extinguishing mining claims specifically in wilderness.

A corollary issue likely to arise is how the agencies are to reach a decision exercising eminent domain powers to condemn a mining claim. Currently, buyout options are often considered in the NEPA process when actions by either agency to allow development of mining claims, hand out grazing permits, or proceed with the sale of logging leases occur in ecologically sensitive areas likely to give rise to public opposition.<sup>165</sup> The Kootenai National Forest considered a buyout option more than once for the Rock Creek Mine, but the mining interests refused.<sup>166</sup>

How exactly this eminent domain power proposal would work for the Rock Creek Mine in the CBW brings up an interesting question since only 101 out of 133 of Sterling Mining Company's claims are located inside of the wilderness

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<sup>164</sup> 43 USC § 1715.

<sup>165</sup> [http://www.publiclandsranching.org/htmlres/buyout\\_legis\\_annotated.htm](http://www.publiclandsranching.org/htmlres/buyout_legis_annotated.htm). (Detailing legislation authorizing a voluntary buyout program for grazing permit holders on both BLM and Forest Service land.); <http://www.utahtrustlands.com/pdfs/policies/9701.pdf> (Describing Utah School Trust Land Exchanges with the BLM, per voluntary agreement with the Utah School's Board of Trustees, after the creation of the Grand Staircase-Escalante National Monument); <http://www.heartland.org/Article.cfm?artId=14170> (Detailing numerous legislative and administrative efforts to buyout private property rights of all kinds through numerous management agencies.)

<sup>166</sup> John McKay, personal conversation with author on April 28, 2004.

boundary.<sup>167</sup> Currently, the Forest Service and BLM manage wilderness within the context of larger areas, but the agencies are not allowed to manage for wilderness buffer zones. This creates a conundrum of attempting to utilize an amendment to the Wilderness Act granting eminent domain power to condemn patented property rights outside of a wilderness boundary.

From a legal standpoint, my proposed amendment to the Wilderness Act would not confer eminent domain powers to the agencies for lands outside of the wilderness boundary, so one of two things could happen: 1. The effect of a managing agencies use of eminent domain inside the wilderness boundary could render a mining operation no longer profitable and either a voluntary buyout ensues for the remaining claims outside the boundary or the mining interest chooses to hold onto the remaining claims outside the boundary until they become profitable to extract; or 2. The remaining claims outside the wilderness boundary are still profitable for extraction and the mine opens anyways.

Technical issues aside, considerations of cost and availability of funds would have to be a major part of any agency decision to exercise eminent domain. The funding aspect of this proposal is its weakest link, but also gives it a reasonable flavor by allowing for a balancing of all considerations and interests involved. The problem with the current situation is the inability, should the claimholder refuse, of the managing agencies to buyout a mining claim if they choose buyout as the best option. Therefore, granting the agencies the power of eminent domain in the interest of preservation, along with making its use accountable to the public and Congress as

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<sup>167</sup> Supra Note 89 at p. 31.

with most agency actions, seems the most reasonable and effective way to resolve the mining in wilderness debate.

## **Conclusion**

While there are many opportunities to reform the Wilderness Act's internal contradictions pertaining to mining in wilderness, they are all fraught with danger and difficulty. The issue seems a big hornets' nest waiting to be stirred up into the largest public lands debate in our time. Historically, even the weakest reforms to further protect any public lands from mining have been met with fierce resistance, so something as symbolic as totally shutting out the mining interests from any public lands designation is likely to bring the full wrath of the mining lobby's influence in Washington.

The important question is where does this leave us; is there any way to eliminate mining in wilderness? The short answer would seem to be "no". But, upon reflection, a deeper look into the nuances of the progress made in protecting the public lands from resource extraction, timing has always been a big factor in breeding success versus failure. In timing one's efforts for public lands reform, one is able to combine the influences of public support, political sympathy, and the momentum necessary to effect such a sweeping change as eliminating valid mining claims in wilderness.

The public support could come from the Rock Creek Mine's failure to keep its promise to not pollute the Clark Fork River and Lake Pend Oreilles. The political sympathy could come from the Kerry administration, should he be elected, and better yet, a democrat controlled Congress, although even with such a political situation



there are still no guarantees. If both the political support and sympathy are found, the momentum will surely follow. In timing lies the ever-changing combination of factors that, throughout history, in many different ways, have served to bring the winds of change into our otherwise stagnant political process and effect real reforms when they seem most badly needed.

People care about preserving what little untouched nature still exists out there, they just need to be reminded of the fact every now and then. Unfortunately, to build this momentum sacrifices must be made; and the Rock Creek Mine may be one of those sacrifices; efforts for reform may be too late for the CMW. But if wilderness elsewhere can be better protected elsewhere in the future, perhaps it is worth the loss. If nothing good comes of it, then shame on us.