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Forest Service Manual 5409.13 – Land Acquisition Handbook

60 – Reservations and Outstanding Rights

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Approved by: F. Dale Robertson, Chief

Date approved:

Responsible Staff:

Explanation of changes: Following is an explanation of the changes throughout the directive by section.

This amendment is a reissuance of FSH 5409.13 to conform the format and structure of the Handbook to the requirements of electronic directive issuance.

This amendment makes no substantive changes to the text. The only changes made are those necessary to meet new format requirements or to correct spelling, punctuation, or unit names.

This Handbook is now available electronically in the National Information Center in the same format as the paper copy. Henceforth, amendments to this Handbook will be issued to Forest Service units electronically on a document basis.

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The development of reservations is based on negotiations between the grantor and grantee. The recommendation and approval process documents the acceptability of the reservations.

61 - General

The Chief must approve any proposal to accept conveyance with reservations subject to conditions other than the applicable Secretary's regulations. When requesting a waiver the Regional Foresters shall submit a report providing a situation statement, risk and alternative analysis, a justification statement for the proposed course of action, and a recommendation.

Address the potential effect of any outstanding rights or reservations on Forest Service land and resource management objectives in the analysis. Include consideration of their effect on the ability of the Forest Service to meet the requirements of laws, regulations, and Executive Orders pertaining to endangered species, floodplains and wetlands, and cultural resources.

Some regulations contain language limiting them to specific authorities. Do not incorporate these regulations in conveyance documents under other authorities, but use them as guides in developing appropriate options, exchange agreements, and deed conditions to protect the public interest.

The intention of the Secretary's regulations is to control the exercise of reservations to limit interference with the use of the land for the purposes for which it is being acquired. This principle, guided by interdisciplinary coordination and existing regulation and policies, is the basis for the developing deed conditions that limit the exercise of reservations.

62 - Reservations in Conveyance to the United States

62.1 - Mineral Reservations

Mineral reservations, probably the most common type of reservation, vary widely in scope, limitations of use, and duration. A mineral reservation severs all or part of the mineral estate and the surface estate of the property. Use the following conditions as guides in negotiations:

1. Try to limit the types of minerals reserved to those common to the locality to avoid encumbering the land with reservations of speculative nature. Specifically identify reserved minerals, naming each mineral substance to be reserved. Naming only those minerals not reserved requires the Chief's review and approval.

Specify a primary or exploratory period during which the location and extent of valuable mineral deposits may be determined. If such minerals are discovered, the reservations may be extended according to the terms of the instrument of conveyance for as long as

the discovered minerals continue to be produced. Normally, an extension may be provided when the reserved minerals are being commercially produced in paying quantities within one year of and up to the expiration date of the reservation.

2. Hold reservations to the shortest time possible. They should expire on a specific date.

3. Before agreeing to the reservation of minerals, carefully weigh the effect the reservation could have on the use of the land for National Forest purposes. Consider the management guidelines and objectives for the area (wilderness and other special interest areas, and so forth), State and Federal mining regulations, and the potential onsite and off-site effects of any operations under the reservation. There are no standard guidelines to cover mineral reservations because of the many possible combinations of minerals, mining conditions, Forest Service management objectives, and environmental considerations. Base the decision to proceed with the acquisition subject to the reserved mineral estate on a careful analysis that indicates that the encumbered acquisition is in the public interest and is consistent with National Forest objectives. Consider the potential Federal government need for the reserved minerals as well as the potential effects of any mining operations. Base the analysis on a minerals report indicating the nature, extent, and probability of minerals and mining operations.

4. Subject mineral reservations to the rules and regulations in 36 CFR 251.15 and FSM 1013.4. Incorporate the Secretary's Rules and Regulations in offer forms, options, contracts, and deeds of conveyance. The Forest Supervisor shall incorporate in the appropriate documents any additional deed conditions necessary to protect the Federal government's rights.

5. The reservation of geothermal resources under the Weeks Law, as amended, is subject to 36 CFR 251.15. Develop additional deed conditions to limit adverse effects that could result from development associated with the specific geothermal reservation.

Geothermal reservations in conveyances under other authorities are subject to appropriate deed conditions (FSM 5470.3). Develop these conditions for inclusion in options, land exchange agreements, and conveyance documents.

6. Do not accept speculative reservations based on possible future changes or revocations of a special area designation; for example, a proposed mineral reservation in which the grantor's reserved rights would be subordinate to the surface interests of the United States for as long as the area retains its special designation. If the designation or mining restrictions were temporarily or permanently lifted, the mineral owner could then recover the minerals.

7. Use reservation clauses limiting the method of mineral recovery or the amount of surface disturbance to control the potential adverse effects of long-term, general mineral reservations that may make otherwise undesirable reservations acceptable (FSM 5471.12, items 3 and 4).

62.11 - Sample Mineral Reservations

Write complete, concise clauses giving the specific minerals to be reserved, the specific period of the reservation, and the specific lands included in the reservation. Exhibit 01 gives sample clauses, including an example of a reservation for geothermal resources, that shows the similarities in the exploration and development methods.

62.11 - Exhibit 01

Sample Clauses

1. Reservation for Fixed Term Without Extension

Reserving to the grantor, the grantor's heirs, or assigns for the period ending (date), the right to enter upon the above described lands^{1/} and to prospect for, mine, and remove (specify minerals actually reserved) therefrom, subject to the regulations of the Secretary of Agriculture (36 CFR 251.15) attached hereto and made a part hereof.

2. When Reservation Is To Be Subject To Extension If Minerals Are Developed In Paying Quantities

Reserving to the grantor, the grantor's heirs, or assigns until (date), and so long thereafter as any of the reserved minerals are produced in paying quantities, the right to enter upon the above described lands^{1/} and to prospect for, mine, and remove (specify minerals actually reserved) therefrom, subject to the regulations of the Secretary of Agriculture (36 CFR 251.15) attached hereto and made apart hereof; but failure to operate a mine on more than an incidental basis for a period of 1 year during the extension period, unless excused from operation by provisions of law or by the Secretary of Agriculture, shall cause the right to expire.

3. Reservation Of Oil, Gas, Or Minerals Removable By Wells, With Provisions For Extension If Producing

Reserving to the grantor, the grantor's heirs, or assigns until (date), and so long thereafter as oil, gas, or other minerals removable only by wells are produced in paying quantities, the right to enter upon the above described land^{1/} and to prospect for, drill, produce, and remove oil, gas, or other minerals removable only by wells, subject to the regulations of the Secretary of Agriculture, attached hereto and made a part hereof; but failure for a period of 1 year during the extension period to either operate a well or extend drilling operations into the proven but undeveloped portion of said lands, unless excused from operation by provisions of law, or by the Secretary of Agriculture, shall cause the right to expire.

62.11 - Exhibit 01--Continued

4. Reservation Of Minerals, With Sample Provisions To Limit Surface Impacts

Reserving to the grantor, the grantor's heirs, or assigns for the period ending (date), the right to enter upon the above described land^{1/} and to prospect for, mine, and remove (specify minerals actually reserved) therefrom, provided that (1) the total surface disturbance caused by the exercise of this reservation be limited to (number) acres, and (2) the change in the chemical and biological characteristics of the affected watersheds be within the following limits:

(Describe appropriate parameters and evaluation procedures) and being further subject to the regulations of the Secretary of Agriculture (36 CFR 251.15), attached hereto and made a part hereof.

5. Reservation Of Geothermal Steam And Associated Resources, With Provisions For Extension With Production

Reserving to the grantor, the grantor's heirs, or assigns for the period ending (date), the right to enter upon the above described land^{1/} and to prospect for, drill, develop, and produce geothermal energy (and the (name specific resources such as water, dissolved minerals, natural gas associated with the geothermal resource)^{2/}) subject to the conditions described in exhibit A, attached hereto and made a part hereof; provided, that if at the expiration of said reservation on (date), it is shown by the grantor to the satisfaction of the Secretary of Agriculture or a designated representative that energy (and the reserved associated valuable byproducts) is (are) being recovered in commercial quantities on said lands, the right to recover such energy (and/or valuable byproducts) shall continue for such further period as these geothermal resources are being produced in commercial quantities; but failure to operate a geothermal well or facility for a period of 3 years after the initial reservation term, unless excused from operation either by provisions of law or by the Secretary of Agriculture, shall constitute an abandonment and the reserved rights expire.

6. Reservation Of Rentals And Royalties From Outstanding Lease

When lands are sold subject to the provisions of an outstanding mineral lease (oil and gas leases are the most common), the buyer succeeds to the right of the lessor to collect any royalties or delay rentals that may be due from the lessee, unless such rentals and royalties are specifically reserved to the vendor in the instrument of conveyance. When lands are offered subject to an outstanding lease, clearly state the disposition of the royalties and rentals. If oil and gas are to be reserved by the vendor, include the following statement in the option or land exchange agreement:

62.11 - Exhibit 01--Continued

Reserving to the vendor all rentals and royalties accruing from an oil and gas lease expiring (date) or (for a period of __ years from (date) and so long thereafter as oil and gas are actually produced from said lands) outstanding in (name of lessee) and recorded in Book _____, page _____, records.

7. Outstanding Lease Where Subsequent Rentals And Royalties Will Be Payable To The United States

Subject to an oil and gas lease expiring (date) or (for a period of ____ years from (date) and so long thereafter as oil and gas are actually produced from said lands) outstanding in (name of lessee) and recorded in Book _____, page _____, _____, county records with all subsequent rentals and royalties accruing thereunder to be payable to the United States. (Use similar language to reference the lease as contained in the original reservation.)

1/ Where the reservation applies to only a part of the lands conveyed by the deed, replace the words "above described lands" with "lands hereinafter described." Immediately following that clause insert a specific description of the lands subject to reservation, by legal subdivisions in areas covered by public land survey, otherwise by definite and readily determinable natural or cultural features; the described area to be the smallest acceptable to the vendor, non-Federal owner, or donor.

2/ The geothermal steam from which the energy is recovered may contain a variety of potentially valuable byproducts, such as natural gas, minerals, and water. Keep associated resources reserved by the landowner to a minimum and describe them as specifically as possible. Use of geothermal energy generally requires substantial onsite development. In addition to wells and pipelines, potential facilities include powerplants, greenhouses, and industrial developments. Carefully evaluate these facilities in drafting deed conditions to limit impacts associated with the reservation.

62.12 - Oil and Gas Leases

Under commercial oil and gas leases the lessee usually drills one or more wells within a restricted period of time after the date of the lease. If the lessee fails to comply with this requirement, the lessee pays the lessor a rental for the land at a stipulated rate per acre until operations are actually begun. This is known as delay rental.

As applied to oil and gas wells, a royalty is a share (usually one-eighth) of the oil, gas, or other minerals produced, that is given to the lessor in payment for the lease. Royalties are payable at the well in kind, but leases usually provide that the operator or lessee will sell the royalty oil or other products and turn the proceeds over to the lessor.

62.2 - Timber Reservations

Timber reservations retain for the seller the right to cut and remove the described timber after conveyance of the land. Use the following conditions to guide negotiations:

1. Describe the reserved timber by areas, species, diameter limits, and any other appropriate identifying specifications. Set diameter limits as of the date of reservation. However, if the reservation is to extend over enough time to allow measurable ingrowth, take this factor into consideration. If the ingrowth is to accrue to the grantee, it may be appropriate to increase the minimum diameter limits effective at appropriate intervals so that the increment on trees below the original diameter limit at the time of acquisition accrues to the grantee instead of to the owner of the reserved right.

2. If the area to be acquired is large, provide for (1) the completion of cutting and automatic surrender of a fixed minimum area each year; and (2) a specified time limit within which each minor watershed or other natural subdivision shall be cutover and surrendered. Provide for orderly cutting over the area. Adjust periods of operation to meet the needs of the owner and the capacity of the owner's plant. Make the minimum acreage for annual release low enough to permit a reasonable degree of fluctuation in annual cut because of market change.

3. Ensure that the vendor who reserves the right to cut and remove timber understands that right must be subject to appropriate rules and regulations of the Secretary of Agriculture, supplemented by specific additional requirements as necessary for protecting the Government's interest. Require the same timber harvest guidelines as for National Forest timber harvest in adjacent areas. Consult the Regional Attorney for long-term cutting agreements or those involving unusual features.

62.21 - Sample Timber Reservations

Clearly identify the timber, the specific period of reservation, and the specific areas the reservation covers. There is no standard form to use because of the wide diversity of conditions. An example follows:

Reserving to the grantor, itself, its successors, and assigns until (date) the right to cut and remove from the above described lands all dead or down timber, all standing sugar maple, beech, and yellow birch timber 14 inches and over in diameter and all pine and hemlock 12 inches and over in diameter, diameters to be measured outside the bark at a point 4-1/2 feet above the ground.

When the reservation covers part of the tract, delete the words "above described lands" and insert a description of the land covered by the reservation.

When the option or land exchange agreement provides for the periodic release of a stated minimum acreage per year, add the following to the reservation clause:

The grantor agrees to release to the United States annually from the above reservation not less than ___ acres of land to be described and designated in writing to the Forest Supervisor, the first area to be released to the United States on or before (date) and similar areas annually thereafter during the term of the reservation. The vendor further agrees that in case of his failure to release not less than ___ acres at the expiration of any yearly period as above provided, the Forest Supervisor may select the area to be released and upon written notification by the Forest Supervisor of the area selected, it shall be deemed to be released from the above reservation.

62.3 - Occupancy and Use Reservations

Occupancy and use reservations provide for the continued personal use by the grantor(s) of residential, agricultural, commercial, or industrial sites and improvements. Use the following as guidance for negotiations:

1. Minimize duration of occupancy reservations. Elderly residents may receive lifetime reservations.
2. Restrict the land area and all supporting facilities, such as roads and utility lines, and describe the area by a metes and bounds survey.
3. Except for conveyances under the Act of March 3, 1925 (43 Stat. 1133), ensure that occupancy reservations are subject to the Department of Agriculture reregulations.

Whenever the regulations in 36 CFR 251.17 do not provide the degree of public safety and environmental protection necessary to meet the management direction for the tract, add specific conditions.

4. Consider issuing a special-use authorization when evaluating proposed occupancy and use reservations. Use special-use authorizations when the proposed purchase is conditioned on a tenant having a right of occupancy.

62.31 - Sample Occupancy Reservation

In deeds of conveyance, use clear, simple language to describe occupancy reservations. For example:

We, (insert grantor's name), the grantors herein, being now (number) and (number) years of age, respectively, reserve the right to occupy and use, for (residence - cultivation, and so forth), for the remainder of our lives, jointly and individually, subject to the rules and regulations of the Secretary of Agriculture, the following described premises: (description of the improvements and area affected).

62.4 - Easement and Right-of-Way Reservations

Easements and right-of-way reservations provide for continued or planned use by grantors for roads, utilities, or other rights-of-way across the conveyed land. Use the following conditions to guide negotiations:

1. The landowner may reserve uses normally covered by permits, easements, or leases under Title V of the Federal Land Policy and Management Act of 1976 (P.L. 94-579), or other uses compatible with the interests of the United States; provided, the exercise of the reserved rights does not unduly interfere with efficient and economical administration of the acquired lands.

2. All rights-of-way must be located or defined so as to be determinable on the ground. Consult FSM 7154 and FSM 7155 for right-of-way survey guidelines. Rights reserved across land granted to the United States are nonexclusive and should be limited to a specific use.

When the non-Federal owner is a cooperator in a cost-share agreement which includes the land being conveyed, use appropriate language to preserve the relationship of the parties (sec. 63).

3. If additional specific clauses or stipulations are needed, use the guidance in 36 CFR 251.18 and consult with the Office of the General Counsel.

62.5 - Water Reservations

Water reservations provide for the landowner's continued use of the conveyed land for water for domestic, municipal, or commercial use; for power production; for waterlines; or for irrigation. Use the following conditions as guidance in the negotiations:

1. Reject any proposed perpetual reservations for dam, power, and reservoir sites. However, when a careful analysis indicates that public benefits of the acquisition clearly outweigh the disadvantages of the reservations, they may be considered if:

- a. The owner defines the boundaries of the reserved areas with sufficient accuracy so that they may be surveyed.
- b. The interests of the Government are safeguarded by grants of the necessary rights to allow the United States to fully perform its administrative responsibilities on the property to be acquired.

2. Flowage rights are often reserved or outstanding upto a certain contour and generally cover only a portion of the lands to be acquired. In many cases, exercise of the flowage rights enhances wildlife habitat or recreational benefits. There may be individual cases that should be acquired subject to flowage right reservations; however, the land should be acquired with the reservations, subject to the rules and regulations of the Secretary of Agriculture.

3. Include appropriate provisions to minimize any adverse effects of the reservation and allow for administrative control. All water right reservations on tracts being acquired under the Weeks Act are subject to 36 CFR 251.19. Use these regulations as guides for writing stipulations covering conveyances under other authorities. However, these standard regulations are general and may not adequately address the specific land management concerns associated with some commonly proposed reservations such as the right to use a spring or a well for a residential water supply. Adopt special stipulations as necessary for each case and incorporate them in the option, agreement, and deed. Some clauses in FSH 2709.11 may provide guidance in developing appropriate stipulations.

62.6 - Grazing Reservations

Grazing or haying reservations provide for the grantor's continued use of the forage resource on the conveyed land.

If the language in the authorizing legislation indicates the form in which grazing rights are reserved, make the option or land exchange agreement and the deed of conveyance consistent with the law under which the particular case is handled. For example, haying or grazing rights can be reserved on lands acquired by purchase or donation. Because the form of the reservation may vary by statutory authority, consult the Regional Attorney about the appropriate wording to use in each case.

Acquisition of suitable grazing lands with reserved forage rights limits public use of the land. Acquisition of unsuitable grazing lands with reserved forage rights is incompatible with National Forest purposes. Therefore, a decision to acquire land with reserved forage rights must have strong justification. However, give favorable consideration to reservations to complete a current grazing season.

Apply the following policies to negotiations:

1. If possible obtain fee simple title, particularly where there is a clear need for additional forage for public purposes.

2. Consider grazing reservations only in areas where land is suitable for grazing domestic livestock, and where grazing would be permissible if the land were part of the National Forest System.

3. Limit the forage use and utilization to the carrying capacity of the land acquired and to a definitely established grazing season. Specify these terms in the option or land exchange agreement and in the deed of conveyance.

4. Include in the option or land exchange agreement and in the deed of conveyance any terms and conditions applicable to the specific reservation; for example, a term or temporary grazing permit to be issued upon completion and approval of an allotment management plan establishing the season of livestock use, carrying capacity, and other resource coordination needs.

62.7 - Reservation of Improvements

Encourage landowners to remove improvements of no historical significance, value, or utility to the Government before conveyance of the property to the United States. Where the owner cannot remove the improvements prior to conveyance, the landowner may reserve the right to remove the improvement within a specified period. Make the time period short, generally no more than 1 year from the date of conveyance. Options, land exchange agreements, and deeds should include provisions for the improvements to revert to the United States if the landowner does not remove them within the specified period.

63 - Outstanding Rights

Outstanding rights are the same types as discussed under reservations (sec. 62). However, rather than the grantor reserving them in a conveyance to the United States, a third party already owns the rights by virtue of a previous reservation or deed of conveyance. Identify outstanding rights by reference to the document creating the right.

Where acquisition is recommended for lands subject to outstanding rights, the Forest Supervisor must certify on Form FS-5400-29, Certificate of Use and Consent--For Purchase, Donation, and Land Exchange, that the specific encumbrances do not interfere with the use and management of the lands for National Forest System purposes. Place copies of documents creating the outstanding rights in the title file. Request the Regional Attorney's assistance when evaluating the potential effect of outstanding rights with unusual language.

64 - Reservations by the United States

Reservations occasionally may serve as a means for ensuring equitable treatment to all parties affected by a land exchange. The following guidelines apply:

1. Generally timber is not reserved on United States land to equalize exchange values. Exceptions are warranted only when there is no other way to acquire offered land (other than condemnation), and the exchange, with the timber reservation, promotes the public interest. Make sure the proposed reservation is consistent with sound silvicultural practices and is approved by the Regional Forester.

The terms and conditions of timber reservations must be as clearly defined as those affecting offered tracts (sec. 62.2).

2. When there is no other alternative and it is in the public interest, the United States may make reservations to allow continuance of previously existing or permitted uses. The environmental assessment for the exchange must document and support the public need for the reservation and show that there are no other alternatives. Consider the long-term administrative costs and obligations associated with such reservations when evaluating the public benefits of the proposed exchange.

Include in the reservation provisions for termination and reversion to the landowner of record.

3. Unless specifically prohibited, scenic easements, public access rights, or similar less-than-fee interests may be reserved or excepted when in the public interest. However, justify such reservations in the environmental assessment and show why it is in the public interest to retain only limited rights rather than fee title.

4. Reserve rights-of-way for trails or roads on the Forest development road system, whether existing or planned for construction in the foreseeable future. Describe the right-of-way location in the deed or patent (FSM 7154 and FSM 7155).

5. Preserve the existing relationship of the parties in the reservations if land in an exchange lies within a cost-share agreement area (FSM 5467) in which the non-Federal owner is a cooperator.

Do not propose that each party in an exchange hold easements in escrow rather than reserve them in a deed or patent.

The instruments conveying the lands being exchanged are subject to the rights of both the United States and the cooperators as set forth in the appropriate easement deeds. See section 64.1 (item 2) for language to use in the deed or patent.

If easements in the approved form have not been exchanged or if the easement from the cooperator to the United States is not satisfactory, cover the roads in a supplement

and the easement, under a cost-share agreement before conveyance of the lands in the exchange.

64.1 - Sample Reservations by the United States

1. Example of Right-of-Way Reserved to United States.

Reserving to the United States and its assigns, a right-of-way (and all right, title, and interest in) for (road, trail, pipeline) over and across Section __, T. __, R. __, the easement being __ feet in width, lying equally on each side of the centerline. The centerline of the __ lies approximately (describe -- see FSM 7154 and FSM 7155).

Include the following termination clause for all rights-of-way reserved for use in administration of the National Forests.

Provided, that if the Regional Forester determines that the road, or any segment thereof, is no longer needed for the purposes reserved, the easement shall terminate. The termination shall be evidenced by a statement in recordable form furnished by the appropriate Regional Forester to the patentees/grantees or their successors or assigns in interest.

2. Example of Reservation for Rights-of-Way in Cost-Shared Roads.

This grant is made subject to the interests, rights, and privileges of both the United States and _____, as set forth in that certain easement dated _____, and recorded in Book __, page __, County, (State), records, which interests, rights, and privileges together with the right to construct, reconstruct, and maintain the road(s) are herein reserved, except the United States does not reserve in this patent the title to any timber within the easement, but only the right to cut and deck for use of the landowner such timber as may be necessary to accommodate the construction and maintenance of the road(s) on the reserved right-of-way.

3. Example of Reservations Under Act of June 10, 1920.

Reserving to the United States, its permittees or licensees, to enter upon, occupy, and use any part or all of said land for the purposes set forth in and subject to the conditions and limitations of section 24 of the Federal Power Act of June 10, 1920 (16 U.S.C. 818).

If only a part of the land described in the patent is included within the Federal Energy Regulatory Commission withdrawal, then describe only affected lands in this reservation.

4. Examples of Outstanding Rights for Right-of-Way Established by Law.

_____ Section _____, T. _____, R. _____, is subject to an easement for a right-of-way for railway purposes granted to _____ Railway Company by the Department of the Interior under authority of the Act of March 3, 1875 (18 Stat. 482), as amended by the Act of March 3, 1899 (30 Stat. 1233).

Use the above language when the Department of the Interior issues patents. Include a more specific description of the right-of-way location in exchange deeds for acquired lands.

_____ Section _____, T. _____, R. _____, is subject to an easement for an electric power transmission line granted to _____ Company by the Department of Agriculture under authority of the Act of March 4, 1911 (36 Stat. 1235), being _____ feet in width on each side of the centerline of said transmission line as constructed on, over, and across the said tract.

5. Example of Reservation for Ditches or Canals (43 U.S.C. 945).

Reserving to the United States a right-of-way thereon for ditches or canals constructed by the authority of the United States (Act of August 30, 1890, 26 Stat. 391; 43 U.S.C. 945).

Use the above language for proposed reservations in patents. Exchange deed reservations should provide more specific language.

6. Example of Reservation for Minerals Under Act of February 28, 1925 (43 Stat. 1090; 16 U.S.C. 486).

Reserving to the United States all (specify minerals) in the land above described, with the right to mine and remove the same in accordance with the provisions of said Act of February 28, 1925 (43 Stat. 1090).

7. Example of Reservation for Minerals Under Acquired Lands.

Reserving in perpetuity to the United States of America and its assigns, (name specific minerals) together with the usual mining rights, powers, and privileges, including the right at any and all times to enter upon the lands and use such parts of the surface as may be necessary in prospecting for, mining, and removing said minerals.