REMARKS OF COMMISSIONER JOHN A. CARVER, JR., FEDERAL POWER COMMISSION, SEMINAR ON EDUCATION IN RESOURCE LAW, COLLEGE OF LAW, UNIVERSITY OF DENVER, DENVER, COLORADO, SEPTEMBER 10, 1967.

Milton Pearl's letter has asked me to present in not more than five minutes my views as to how (1) conflicting demands can be accommodated; (2) whether certainty of continued use is desirable; and (3) how guidelines can be established to permit potential users to ascertain in advance what uses might be permitted or prohibited--all in the context of the developing controversy over mining in the proposed Glacier Peak Wilderness Area.

The questions posed by Mr. Pearl are central, and properly focus on stability and certainty of the commercial uses of resources of the public land. These characteristics have an economic dimension--instability and uncertainty raise costs, and this tends to misallocate resources.

In order to stay within the five minute limit, I must narrow the problem somewhat arbitrarily. I would lay aside those parts of the question which, in my view at least, have presently applicable guidelines:

a. Valid existing rights on public lands, if taken by public action, must be compensated for. This problem I would lay aside, although it presents important public questions.

b. I also would exclude another important area, namely such generalized "rights" as the right to prospect. Prospecting is a business, and access to the public lands for this purpose is a legislatively assured privilege. But deprivation of the right is in the nature of damnum absque injuria.

Public decision-making is the stated issue as I see it, but here, too, I would narrow the inquiry. For example:

a. Legislative decision-making is public decision-making at the highest level. But pre-legislative public decision-making, both formal and informal, is the part which more concerns us today.

b. Similarly, local government action, such as zoning, is public decision-making, but the built-in local controls assure a responsiveness of these activities to appropriate tests of reasonableness which allow this to be set aside, too.

With these parings, I would restate our problem in terms of the methodology by which a responsible federal land administrator would decide a particular problem of conflicting use, where each use is recognized as valid and socially desirable, and one of the uses is commercial. The proposed commercial use in my definition would have to be of more than speculative utility, and the conflict would have to be genuine in the sense that the non-commercial value would have general public acceptance or legislative sanction--e.g. wilderness values.

In this restated context, the decisional processes of the administrator likely will clearly resemble the advocative techniques applied to the problem by the proponents of both of the contending uses. In other words, the government administrator, the company, and the conservation organization in the last analysis are all attempting to put their respective operations in the most reasonable light.

It is the human instinct, particularly in the case of the government administrator, to prefer accommodation to conflict. Thus early in the process all avenues of compromise would be explored. These, by way of illustration related to the Glacier Peak or other conflict over surface use between commercial and non-commercial interests, could be:

Time related -- These considerations are spelled out in the Wilderness Act in one form. In other than mining situations, grazing privileges can be changed from indefinite to definite. In recreation uses which conflict with commercial uses already well established, seasonal adjustments are appropriate and common.

Space related -- Corridors for roads can be specified, zones for particular surface uses can be agreed upon, etc.

Use related -- Restoration of surface damage is the most immediate example.

But accommodation is a subjective exercise; if there are applicable objective rules, accommodation isn't an issue. Subjective standards require fair and open dealings, utmost good faith, and strong motivation to succeed. Nothing destroys these virtues as quickly as finding that accommodation negotiations are a subterfuge for delay which is a subterfuge for denial.

I've mentioned already the fact that advocative and decisional methods may operate under the same rules. In this connection, I've noticed a growing maturity and sophistication on the part of both commercial and non-commercial advocates to put their cases in the glow of reasonableness, rather than the glare of absolutism.

All of the foregoing is by way of preface to my very

brief list of guidelines, the thing Mr. Pearl asked for:

1. All relevant economic data must be assembled.

2. Real costs, not just financial costs, must be understood and as nearly as may be, measured.

3. Decisions must accord with the realities of the free enterprise system. So long as we look to private capital, not public appropriations, to develop the resources of the public lands, the rules imposed on the users must take into account the fair requirements of those who must do the investing.

4. Regional economic problems must be taken into account. It may be that a land-use decision in a public land state would and should end the particular land use, because it puts the operation below the margin. If this is the case, the fact should be recognized and admitted publicly--nothing less is fair.

5. Special circumstances are always relevant--take as an example the history of our need for uranium, and the land use decisions which this need influenced.

6. Common-sense. I was once told by an harassed bureaucrat that he hadn't "used his head" because that wasn't in the regulations; ever since, I've advocated putting it in regulations automatically.

7. This is the public's business--it ought to be carried on in public. This conforms with the spirit of the freedom of information policy, and permits citizen participation, which is always of paramount importance.

8. Some cases will have to be sent to the ultimate arbiter--the Congress. In my scale of public values, I place confidence in the integrity of the Congress at the top. In other words, I don't see it as an administrator's duty to "correct" Congressional mistakes in the resource area, either by interpreting the decisions out of existence, or by demeaning the motives of the lawmakers. It is, on the other hand, a positive duty to keep the Congress informed, and to make recommendations--and in the end to accept the decision rendered until changed in the Constitutional process.