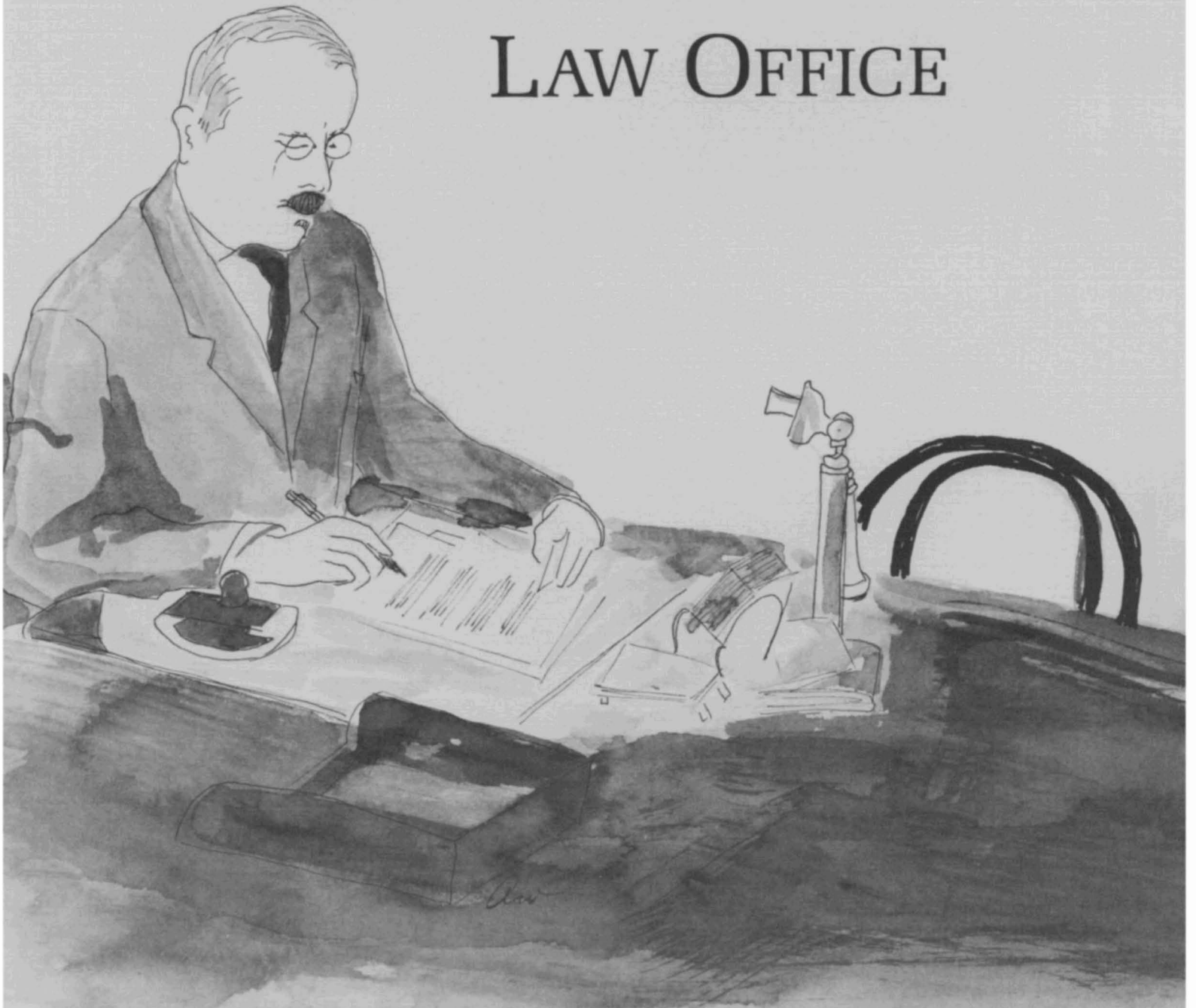


PHILIP P. WELLS
IN THE
FOREST SERVICE
LAW OFFICE



Washington, D. C., March 27 1913.

Dear Gifford:

In accordance with your request I have prepared the following account of my work in the Forest Service and in the conservation movement generally.

Pardon its crudeness and numerous textual errors, due to fatigue

Sincerely yours,

Philip P. Wells

I entered the Law Office of the Forest Service February 17, 1906. George W. Woodruff was then law officer. I succeeded him when he was appointed assistant attorney general for the Interior Department in March 1907. I resigned February 1, 1910. In the interval important legal and administrative questions affecting the conservation of natural resources were considered and answered. In very large part the national conservation policy took specific form and shape in the Forest Service in those years, and a good deal of the forming and shaping was done in the Law Office.

The national forests had been taken from the General Land Office and given to the Forest

PHILIP P. WELLS was law officer of the U. S. Forest Service from 1907 to 1910. During the years following he continued to be involved with natural resources serving as chief law officer of the U. S. Reclamation Service from 1911 to 1913 and was a member of many conservation boards and committees. He died on March 12, 1929.

After studying political and social science and history, Wells attended the Yale and Columbian (now George Washington University) Law Schools, being admitted to the Connecticut Bar in 1893. He taught history and law and was librarian of the Yale Law School before entering the Forest Service in 1906.

As Gifford Pinchot's legal advisor, Wells was in a position to both observe and influence the inner strategies of the Forest Service as it attempted to expand its influence over the management of American forests. This article is drawn from a manuscript written in 1913 at Pinchot's request. Wells' memoirs are in box 1671 of the Pinchot papers held by the Library of Congress. Minor editorial changes or additions have been silently made to improve readability. Wells' son, Lewis G. Wells, has kindly granted permission to publish these excerpts and has provided the photograph of his father.

Service to administer a year before my coming (Act of February 1, 1905), and the new policies were well under way. Power to "regulate the occupancy and use" of the national forests had been given in broad general terms by the Act of June 4, 1897, but had never been freely used by the Interior Department. The vitalizing of this power through vigorous use was the chief means whereby the Forest Service achieved results in matters of grazing, water power, and prevention of land frauds. Comparatively little conservation legislation was enacted during those years. Progress came not through getting new powers (an almost impossible task then and since) but by using those we had.

Woodruff and I had been intimate friends in college days when I had a great admiration for his vigorous mind and unerring logic, which insured his perfect mastery of any problem set before him. I later became disgusted with the intellectual method and narrowness of lawyers and judges in general and with the enormous difficulty of applying the existing legal system to social progress in any effective and comprehensive manner. It was refreshing to come again in contact with Woodruff's courageous logic, forcing its way from indisputable principles to meritable conclusions with small regard for precedents to mark the intermediate path.

Fortunately our legal problems were new, and the precedent makers had not yet made a wise solution difficult or impossible. To be sure they swarmed in the Interior Department, aching for a chance to say that everything not done before was illegal. Subsequent events have proved that

they were not lacking in the Office of the Solicitor of the Department of Agriculture either. The Transfer Act had freed us in large measure from the former, and your understanding with the secretary of agriculture protected us from the latter. The Act of June 4, 1897 had placed us almost in the legal position of the agent of a private landowner with very broad powers to manage the property for the owner's welfare. The principles of real-property law were available to us for the protection of the public interests. Woodruff at once seized upon them and applied them to the new conditions. It is certain that a smaller man holding the views of the average government law officer would have made much of our success difficult if not impossible.

GRAZING

I found the new grazing policy in process of final revision for its first enforcement that summer of 1906. Woodruff had obtained a ruling from the attorney general that the powers of the secretary of agriculture to regulate occupancy and use of the national forests extended to the exaction of a charge for such occupancy and use. Thereupon stockmen had been notified that they must pay for grazing permits in 1906 and thereafter. This notice was very distasteful to many of them, and they opened a vigorous fight on the Service in the press, in Congress, and in the courts. The legal situation was very embarrassing to good administration because of conflicting decisions as to whether breach of Forest regulations could be punished by fine and imprisonment. The Act of June 4, 1897 so expressly declared, but stockmen con-

As the law then stood the government could not and the stockmen would not appeal in such cases, but the Criminal Appeals Act of March 2, 1907 made it possible for the Service to get the question before the Supreme Court, which upheld the validity of the statute and the legality of punishing by fine and imprisonment the violation of the Forest regulations. This was a unanimous decision rendered May 3, 1911 (*U. S. v. Grimaud*, 220 U. S., 506). The case was initiated under instructions prepared by me before passage of the Criminal Appeals Act and sent in advance to all forest supervisors in districts where we had had adverse decisions. As soon as the bill passed I wired all these supervisors to carry out the instructions at the first opportunity. Shortly thereafter William B. Greeley, then supervisor of the Sierra Forest (South), had Grimaud and the other defendants under arrest with abundance of proof of the trespass.

In the meantime we had been forced to rely on the cumbersome injunction procedure to prevent unlicensed grazing in the districts where prosecutions had been dismissed or where we feared that antifederalist leanings of the judge made dismissal probable. Important injunction cases were instituted in Montana and Colorado. Both states had what is known as a "fence law" under which owners of lands who fail to fence them have no remedy for grazing trespass. The stockmen invoked these laws against the United States, thus raising a question of state rights.

The Colorado case cut deeper, for in it stockmen attacked the constitutionality of national forest policy as a whole. They denied that the federal government had any right to reserve permanently

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sidered the statute to be unconstitutional as delegating legislative power to an administrative officer.¹

Federal courts were divided. The prosecutions were successful in northern California, Arizona, Idaho, South Dakota, and ultimately in Oregon. They were dismissed on constitutional grounds in southern California, Utah, and eastern Washington. The last-mentioned decision was rendered by Judge Edward Whitson early in 1906 when the fight against the Service was hottest. It was misrepresented by the hostile press throughout the West and by our enemies in Congress, notably by Senator Charles W. Fulton of Oregon, who, in an open letter, advised a constituent named Combs to graze his stock on the Forests in defiance of the regulations.

and to lease public lands within a state. They apparently had forgotten the system of mineral leasing which had prevailed for the first half-century of our national existence and had been declared constitutional by the Supreme Court in 1840 (*U. S. v. Gratiot*, 14 Pet., 526).

On this platform a public lands convention attended by representatives of all states and territories west of the Missouri was held in Denver in June 1907. I attended that convention and agreed with representatives of the Colorado stockmen to bring a test case in that district. The Montana case had already been decided for the government by Judge William H. Hunt in the Circuit Court, which decision was later affirmed by the Circuit Court of Appeals at San Francisco. The Colorado case was decided in favor of the government by Judge Robert E. Lewis at Denver, and his decision was affirmed unanimously by the Supreme Court on May 1, 1911 (*Light v. U. S.*, 220 U. S., 523).

¹For a modern view of this charge see: Charles A. Reich, *Bureaucracy and the Forests* (Santa Barbara: Center for the Study of Democratic Institutions, 1962).

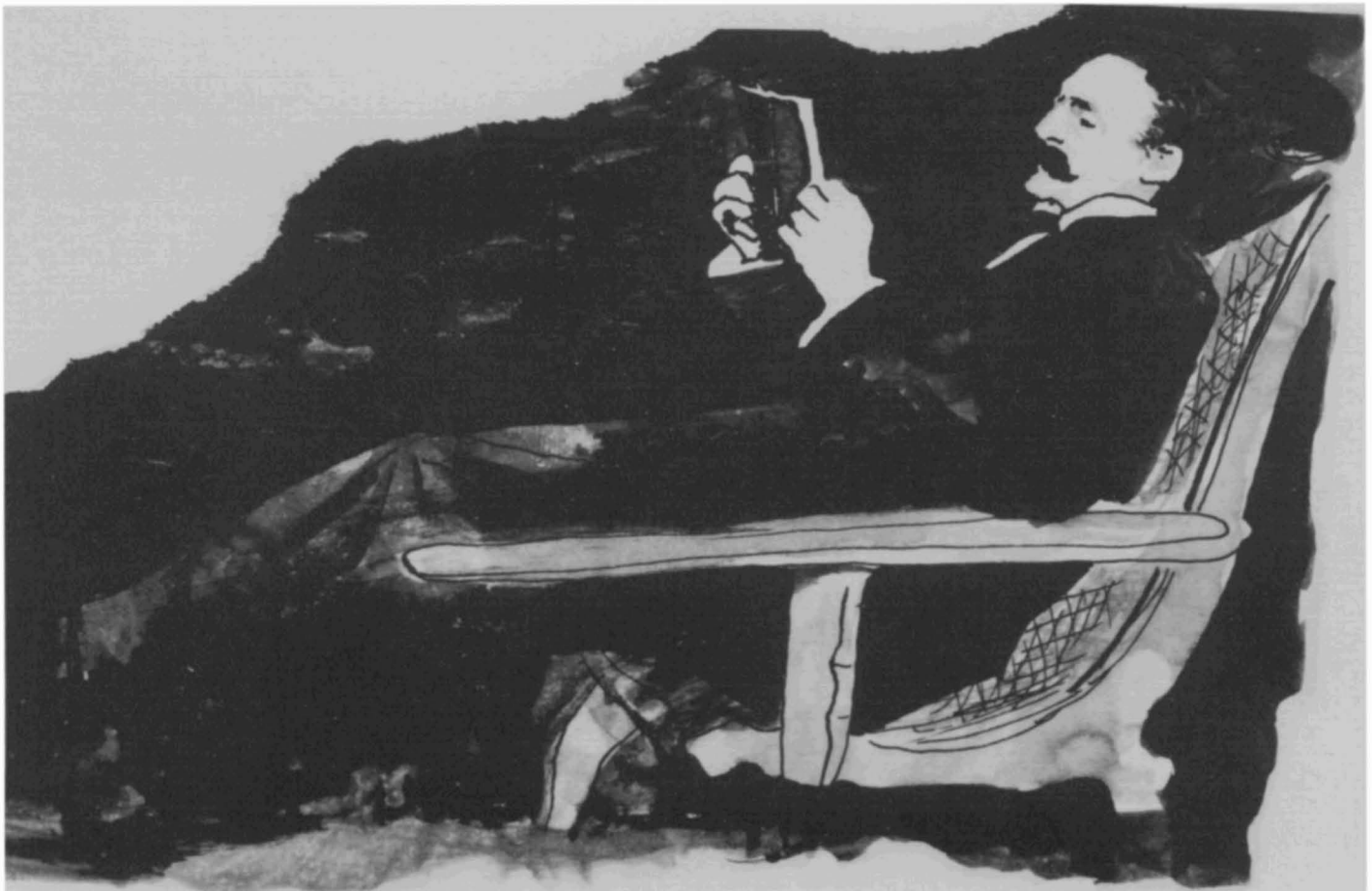
The Light and Grimaud cases settled once and for all the constitutionality of the national conservation policy in so far as it is based upon and deals with the public lands and reservations of the United States. Over them, *so long as federal ownership continues*, Congress has plenary power to sell, to reserve and lease, or to preserve without leasing, at its pleasure and can delegate to an administrative officer the duty of reserving or leasing and of defining and prohibiting trespass. Incidentally these decisions settled the legal controversy over grazing. Senator Fulton's confiding constituent was fined, enjoined, and forced to pay the costs of the injunction suit. Other recalcitrants in other districts fared as badly or worse. The organized resistance of the stockmen collapsed and thereafter the protection of the forests from grazing trespass was a mere matter of routine police duty.

Benefits of the system of public control of grazing should be extended to the public domain outside of the national forests. A bill for that purpose was drafted by Woodruff and Albert Potter in the early part of 1906, but I had no part in it. Senator Elmer J. Burkett of Nebraska introduced it in the Fifty-ninth and Sixtieth Congresses. The American Live Stock Association approved it with

slight modifications, and thus modified it was introduced in the Sixtieth and, I think, in the Sixty-first Congresses by Kansas Senator Charles C. Curtis. I believe Senator Robert LaFollette introduced it in the Sixty-second Congress. I have recently handled this subject for Secretary of the Interior W. L. Fisher, who heartily endorsed the new policy and reported favorably upon the bill to the Public Lands Committee of the Senate.

In June 1907 at Denver I was much impressed with the enthusiastic approval of the Forest Service grazing policy voiced by delegates from Arizona and New Mexico, which were then territories. To them the power of Congress to lease public lands could not be questioned as it was then questioned by the Colorado and Wyoming stockmen. I therefore advised you to have bills introduced locally for these territories in order that the system might be tried out there. I have always thought that course would have been wise and would have resulted in the spread of the leasing system throughout the West, state by state.

The Light and Grimaud decisions firmly established the authority of the Service to control



the occupancy and use of national forest land not only for grazing but for all purposes and thus freed our hands to deal with saloons occupying national forest land. These had presented a very annoying problem. They were usually on pretended mining claims and their owners thus had a color of title, which the grazing trespasser lacked. Moreover they had no direct destructive effect upon tree growth as unregulated grazing had. Nevertheless their influence was very pernicious. They debauched laborers in mines and lumber camps and were a constant cause of complaint from mining operators and lumbermen. Our regulations forbade the use of national forest land for *any* business without a permit and at the same time denied permits to all saloons, yet it was inexpedient to prosecute for violation of the regulations until their validity had been sustained in the stronger grazing trespass cases.

COOPERATION AND CONTROL

An interesting example of cooperative enterprise maintained by firm use of broad administrative powers was an experimental plant in Colorado for the preservative treatment of timber. There was a large quantity of fire-killed timber on Pikes Peak National Forest that the Service was selling. Its usefulness was in large degree dependent on preservative treatment with creosote. The Forest Service had worked out an economical process of such treatment by the open-tank method, but its commercial success had not been demonstrated and private capital was not ready to take it up. The Service was authorized by statute to conduct "cooperative investigations" and to receive contributions from cooperators in payment of all or part of the cost of the experiments.

This timber preserving plant had been built out of government appropriation and the man in charge desired to operate it commercially for treatment of the Pikes Peak fire-killed timber. I therefore devised a plan whereby the Service treated the timber logged by this lumberman (and others) for cost and 10 percent. Proceeds went into and expenses were paid out of the revolving fund for cooperative investigations. The plant was thus successfully operated for a few years, paying its own expenses until the commercial soundness of the enterprise was demonstrated. I understand that it was then sold at a fair valuation and was thereafter operated by the purchasers as a private enterprise.

This cooperative investigation fund was legal basis for the most far-reaching attempt at public control of lumbering within my knowledge. After the panic of 1907 large operators in southern pine suffered from a severe depression. From their point of view the necessary thing was curtailment of production, but each one of them was afraid to reduce his output lest the others expand, or at least maintain theirs, and thus get all the benefit of his self-sacrifice. Therefore all the expensive mills were kept working full time, while stocks were accumulating and rotting in the lumber yards. Prices were too narrow to yield any profit except from logs that could be got out cheapest. This meant that the top log of each tree was left in the woods, stumps were cut high, fire risk was greatly increased, and there was much waste of timber in other ways.

The lumbermen decided that they must form a trust after the fashion of United States Steel Corporation. They came to Washington to get assurance of immunity from prosecution under the Sherman Act and called upon President Roosevelt, conceiving their errand as one which chiefly concerned the Bureau of Corporations. But they had much to say of conservation as a reason and justification for their plans. Roosevelt referred them to you. You told me of it one day after we had been at the White House, and we went from there to the New Willard Hotel for our (or, at least, my) first conference with the lumbermen.

They were in great distress and wanted help but had no idea other than a lumber trust with "forest conservation" as sufficient excuse to guarantee their immunity. After leaving them I advised you that the power and duty of the Forest Service concerned *growing* timber, while lumbermen were only concerned in selling it; that they thought only of the market, while it was our business to think of the woods; that we should turn our backs upon and forget the market. Also we should make such arrangements with them as would insure conservative forest management of all their holdings: fire protection, careful logging, reproduction, and a gradual approximation to a sustained annual yield from the whole southern pine area so that new growth would, after a few years, balance the cut and a constant supply be produced from their holdings in perpetuity. Such a system of management would incidentally reduce the present cut somewhat and thus result in such a relief from overproduction as they were seeking. That would give them an inducement to submit to our regula-

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tions, but it was not our purpose in establishing or enforcing the regulation.

My method of bringing this about was not any trust, combination, or organization among them whatever, but a separate contract between the Forest Service and each one of them whereby each was to agree to cut and protect his holdings under our direction for the ends we had in view. Each was to contribute a certain sum per thousand board feet of timber cut (we at last settled on thirty-five cents) to pay the expense of our office and field force in administering the plan. This contribution would have yielded a greater sum each year than we were spending on the national forests.

Our right to make such contracts I based upon the cooperative investigations clause, and the money was either to be paid into the fund created by that clause or handled by a committee of the lumbermen in accordance with our instructions. I realized that after a few years when the stress of hard times had passed and our control had grown irksome some of them would revolt and that our contract possibly might not stand in the courts. But I calculated that this event, if it happened at all, would probably be postponed several years. If we could then show good reproduction on the cutover lands, near-perfect fire protection, and clean work in the woods, we could probably get authority from Congress in unequivocal terms to continue the work. (The Appalachian-White Mountain National Forest Bill then pending contained such specific authority.) At any rate we would have demonstrated the practicability of forest conservation on a large scale and under American conditions through public control. The states, if not the nation, would be likely to continue that control. It was therefore truly an experiment within our authority to make forest investigations, and the sums paid by lumbermen would have been "contributions toward cooperative work" within the meaning of the statute.

I convinced their lawyer, whose name I have forgotten (a St. Louis or Kansas City man), that the trust scheme would not work and that mine would, or at least might. He persuaded the rest of them, and we got down to details in drafting a form of contract (you, Overton Price, William T. Cox, and I for the Service). They were very much afraid to put themselves in our hands and made a fight against our proposal for a twenty-year contract. We had to concede a shorter time to keep them from bolting, but at last they departed for St. Louis to submit our scheme to their fellows. It was not accepted there and they went ahead with their trust scheme, which Attorney General Herbert S. Hadley of Missouri (later governor) promptly "busted" in the courts.

How little they knew or cared about forest conservation appeared from their trust promotion literature that set forth their holdings and expected an

annual cut in millions of feet, showing that the stand would be reduced to zero in some sixty or seventy years (they were counting on *no reproduction whatever*). The state of mind unwittingly laid bare by this prospectus after so much talk of conservation strengthened my conviction that the conservation of forest resources in the United States must come through public control. No private interest, except perhaps the small farmer with a woodlot, has enough of permanence to reckon time and profits in the units of tree life.

THE WEEKS ACT

Our negotiations with the southern pine lumbermen, if they had come to fruition, would have doubled, or more than doubled, the reach of public control of forest resources. Control had been rapidly widened by the extension of the area of public lands reserved for national forests in the West. Field examinations were in progress and proclamation after proclamation was drafted in the Service and issued by President Roosevelt.

Our enemies in the Senate in January or February of 1907 tried to stop this extension in the states of Oregon, Washington, Idaho, Montana, Wyoming, and Colorado by adding a rider to the Agricultural Appropriation Bill, prohibiting further extension of the Forests in those states without special act of Congress. Our drafting force worked night and day preparing maps for proclamations, which were issued by President Roosevelt March 1 and 2, 1907. They swept into the national forests all the extensive tracts of valuable public timberland known to us, two days before the president signed the bill containing the prohibitory rider. The same work proceeded thereafter in the other public land states, including those as far east as Minnesota, Michigan, Arkansas, and Florida, until there was no considerable body of government-owned timber open to private seizure and unregulated exploitation. In this the Office of Law had no part except to improve the form of the president's proclamation in minor particulars not necessary to explain here. There remained two sources from which increases in the forested area under national control could be drawn — the timbered lands in Indian reservations, and private lands chiefly in the East, where national control seemed imperatively necessary. As to the latter, legislation was essential.

There had long been a movement on foot for the purchase of large areas for national forests in the White Mountains of New England and in the Appalachian Mountains of the South. Advocates of national forests in those two sections, largely composed of nature lovers, mountaineering clubs, and men interested in regulating stream flow for water power use, had combined forces and secured the formal assent of Maine, New Hampshire, and most

of the southern Appalachian states. A bill for the purchase of lands for a "forest park" in the White Mountains and another in the southern Appalachians was introduced in Congress. These steps had been taken some years before I entered the Forest Service. The measure for some insufficient reason was pitched upon as a touchstone or shibboleth of radicalism. It passed the Senate, probably with an understanding that it would be blocked in the House where it was bitterly opposed by Speaker Joseph Cannon and the other champions of the old individualistic order.

In the late spring of 1906 Representative Asbury F. Lever of South Carolina called on the Forest Service for arguments in favor of the constitutionality of the bill, and Woodruff assigned the task to me. When I examined the bill I found that no such argument could be made for it as it stood and that the only sound constitutional basis for the proposed expenditure of federal revenue was the improvement of navigation in the rivers rising in these mountains.² Of this there was no hint in the bill then pending, which was also inadequate in many minor particulars. Nevertheless I made my brief and Lever made the navigation argument in the House.

When I took charge of the Law Office one of my tasks was to prepare needed legislation to be introduced in the Sixtieth Congress, and I determined to draft an Appalachian and White Mountain Forest bill that would be proof against attack on constitutional grounds. William L. Hall had been assigned to the field work and looked the ground over thoroughly during the summer and fall of 1907. We worked out together a draft of an absolutely new bill, Hall contributing helpful suggestions and detailed criticism from his knowledge of conditions on the ground and a constructive plan of great value authorizing cooperation with private landowners and states for forest conservation within the region to be protected. I was at first skeptical about the private cooperation plan, believing that nothing was to be hoped for from private initiative in forestry. But Hall's presentation of the facts convinced me, and I saw that cooperative contracts with private owners might be the most available method of extending public control.

Hall's idea was carefully worked out and put in the bill, I think, as a final section. If it had been enacted and in force when we were dealing with the southern pine lumbermen a year later,

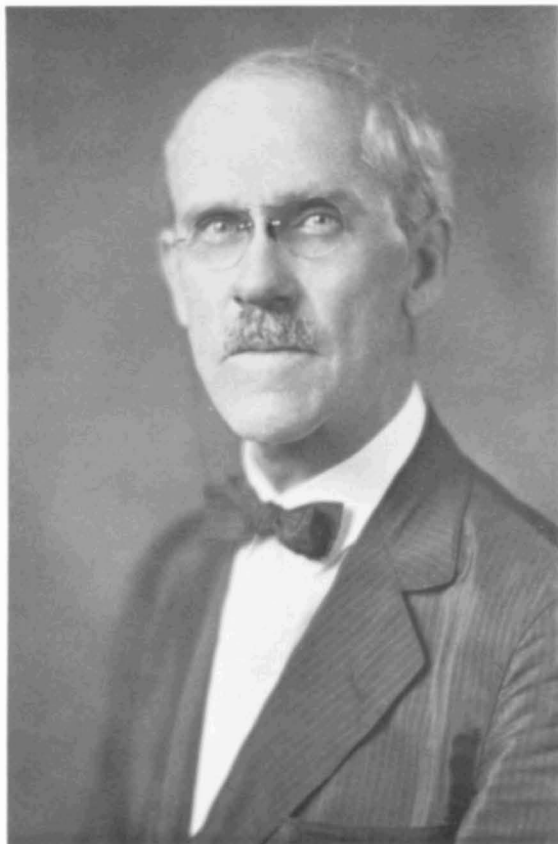
²"This was an error on my part. Power of Congress to spend money of the U. S. in the Treasury is unlimited — not so its power to raise money by taxation or loans; nor its power to legislate generally. See brief of Woodruff and Wells on my Forest Devastation Tax and Bounty Bill (Capper's), submitted at Harrisburg (1923, 1924, or 1925) to the special committee of the U. S. Senate (McNary, chairman) on forest policy, etc." [Apparently added by Wells at a later time.]

it would have given a certain instead of a debatable legal basis for that revolutionary undertaking, so far as the southern Appalachian drainage area was concerned. It would also have afforded a field for, and therefore an argument for, forest taxation reform by the states, a subject that was being investigated under my supervision.

I placed the new bill squarely on the navigation improvement basis by limiting the area within which purchase might be made to the watersheds of navigable streams and declaring in the title and body of the bill that its purpose was the maintenance and improvement of navigability. The land once purchased was to be, in general, subject to the same laws and regulations as the national forests created by reservation from the public domain in the West. But coal and iron might later be discovered on the purchased lands, and they might prove valuable for other miscellaneous uses, as to all of which the public interest could be better protected by a leasing system than by grants in perpetuity. Therefore I desired to bar beyond question the operation of the mineral and other lax public land laws which had proved so inadequate in the West. I introduced a clause authorizing the sale under the homestead laws of agricultural lands inadvertently or incidentally acquired under the act, with a proviso that no private rights to the acquired lands could be initiated in any other manner. This restriction would bar the mineral and other loose exploiting laws and would force Congress to consider the whole subject anew as need might arise in later years (and every year of delay insured a better public understanding of the issue at stake in such legislation).

Our draft was introduced by four men (a senator and representatives from New England and the South), and was vigorously pushed by its friends in Congress and by a wide popular agitation outside. Its foes recognized it as really dangerous; its passage through the Senate was over outspoken opposition during which I think it was said in debate that the old bill had passed the Senate unopposed with the understanding that it would be killed in the House or be declared unconstitutional by the courts. When the bill reached the House the leaders of the Cannon machine, who had in former Congresses derided the proposed policy as beneath contempt, realized that their flank had been turned on the constitutional issue and were thoroughly alarmed.

They adopted the device of a reference to the Judiciary Committee for a report on the constitutionality of the measure. After several public hearings and long private controversy, the majority of the committee reported that the expenditure of federal resources in forest conservation (through land purchase or otherwise) on the watersheds of navigable streams is constitutional when such conservation has a direct connection with preserving



Philip P. Wells, ca. 1928.

or improving navigation, but that the bill as introduced was defective in that it did not expressly limit the purchases to cases where such direct connection existed. John J. Jenkins of Wisconsin, chairman of the committee, filed as the majority report a tirade against the bill, which was said to be only an expression of his individual views and not to have been approved by the majority.

Nevertheless the victory was won. The bill was immediately reintroduced with the addition of the express limitation, the lack of which was the only constitutional flaw which could be alleged against it. As I remember, it passed the House in that Congress, the old guard and Cannon himself voting and speaking against it (aided and comforted therein by the Army Engineers and the Weather Bureau),³ but reached the Senate too late to have concurrence in House amendments forced through over the obstructive tactics of opposition senators.

³For views of the controversy between Gifford Pinchot and Hiram M. Chittenden of the Army Corps of Engineers see: Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890-1920* (Cambridge: Harvard University Press, 1959), chapter X, *passim*; and Ashley L. Schiff, *Fire and Water: Scientific Heresy in the Forest Service* (Cambridge: Harvard University Press, 1962), pp. 121-123.

The so-called Weeks Act was enacted, however, in the Sixty-first Congress and signed by President Taft on March 1, 1911, with few changes from my original draft.

The most substantial of these changes was the omission of Hall's scheme for cooperation with private landowners.⁴ Others were substitution of a commission in the place of the secretary of agriculture to decide on purchases, requirement of a report from the Geological Survey establishing the direct connection between forest conservation and stream flow as a prerequisite to purchase, and extension of the measure to include navigable river watersheds throughout the United States, all reference to the Appalachian and White Mountains being omitted. The Weeks Act also appropriated money to be used in cooperation with the states in the prevention and suppression of forest fires, on condition that the amount expended in each state should be matched by an equal amount appropriated by that state for the same purpose. Purchases are now under way in both these regions and we shall, as soon as good title can be certified, have national forests in operation in the East.

Since I had foreseen that condemnation suits might sometimes be necessary (and it turns out that this is often the only way to secure a good title in the South) and knew that the idea would be likely to strengthen the opposition, all reference to it was omitted from the bill. In so doing I relied upon the general statute authorizing condemnation of land for any purpose for which purchase is lawful. Enemies of the bill then alleged that this omission of provision for condemnation put the government at the mercy of greedy landowners. In due course the advice of the attorney general was sought, and he gave his opinion that the government has the power to condemn for this purpose under the general statute above mentioned.

However, our Weeks Law victory occurred after we left the Service. I resigned three weeks following your dismissal by President Taft in 1909. Shortly after I left the Service all the lawyers in the Washington office were taken away and transferred to the Solicitor's Office. Nearly all who had worked with Woodruff and me, and shared our point of view, had left, or shortly after left public service, except those who had been sent to the six district offices in December 1908. These, though nominally responsible to the solicitor and not to the district foresters, yet because of distance from the one and nearness to the other and also because our old tradition of a law-officer's duty survived, have kept up the old spirit of helpful cooperation. The transfer in Washington has, I understand, killed all the old initiative and put an end to such constructive work in legal matters as made my four years with the Service worth my while. □

⁴Included in the 1924 Clarke-McNary Act.