United States Department of Agriculture **Forest Service** **Washington Office** **14th & Independence SW P. O. Box 96090 Washington, DC 20090-6090**

File Code: 1570-1
89-13-00-0138

Date: May 3, 1999

Mr. Richard Emmet, Esquire
Conservation Law Foundation
2 Joy Street
Boston, Massachusetts 02108

Dear Mr. Emmet:

This is in response to your July 17, 1989, appeal of Regional Forester Floyd J. Marita's June 1, 1989, decision consenting to issuance of certain prospecting permits for lands within the White Mountain National Forest (WMNF). The appeal was filed on behalf of the Conservation Law Foundation of New England, and the Audubon Society of New Hampshire. Mr. David L. Harrigan intervened on behalf of the Society for the Protection of New Hampshire Forests. The appeal was processed under regulations at 36 CFR 217 (as of 1989) issues.

Your appeal contained numerous arguments relating to two basic issues.

1. You assert that the Forest Service is misinterpreting the statutory framework for managing the WMNF. You note that the WMNF was acquired for specific purposes under the Weeks Act of 1911 (36 Stat. 961) and that hardrock mineral development on such lands must comply with Section 402 of Reorganization Plan Numbered 3 of 1946, 60 Stat. 1097, 1099. You contend that under Section 402 the Forest Service may not authorize mineral development which will interfere with the primary purposes for which the lands were acquired and the five multiple uses listed in the Multiple-Use Sustained-Yield Act. You then argue that allowing mining on the lands in question would be inconsistent with Section 402 based upon your belief that mining operations would interfere with those primary purposes and multiple uses. Finally, based upon your belief that the prospecting permits in question would grant the permittees the right to mine any valuable mineral deposits which the permittees find, you contend that Section 402 also prohibits the issuance of prospecting permits for the lands in question.

2. You also assert that prospecting and mining are "connected actions" for purpose of NEPA's implementing regulations and that, therefore, an environmental impact statement (EIS) analyzing the impacts of mining must be prepared before the prospecting permits are issued.

Discussion:

The Secretary of Agriculture was initially given authority to dispose of hardrock minerals on National Forest System lands acquired under the Weeks Law by 16 U.S.C. 520, which provides for "the (Weeks Law). . . ." That authority was later transferred to the Secretary of the Interior by Section 402 of

Reorganization Plan Number 3 of 1946, 60 Stat. 1097, 1099. However, the Secretary of Agriculture continues to have a large measure of control in that Section 402 of Reorganization Plan Numbered 3 specifies that the Secretary of the Interior can only authorize mineral development when advised by the Secretary of Agriculture that mineral development would not interfere with the primary purposes for which the land was acquired and only in accordance with such conditions as may be specified by the Secretary ofAgriculture to protect such purposes.

The only purposes for which lands could be acquired under the Weeks Law were the regulation of the flow of navigable streams and the production of timber. Thus, it is only these two purposes, not the five uses listed in the Multiple-Use Sustained-Yield Act, which the Forest Service must consider, at some point, in determining the permissibility of mineral development under Section 402 of Reorganization Plan Numbered 3. Moreover, the point at which the determination must be made depends on when a commitment is being made to allow mineral development, rather than prospecting for or utilization of mineral resources. This is true because Section 402 only requires the Forest Service to make a determination concerning the permissibility of "mineral development," one of the three activities authorized in 16 U.S.C. 520.

The prospecting permits in question were to be issued with a stipulation reserving the right to deny issuance of preference right leases. The stipulation was to be used because meaningful analyses of mining are not possible until more is known about the type of minerals present and how they might be mined. Although use of the stipulation creates great risk to a permittee, it is necessary to protect the public interest. Thus, while issuance of the prospecting permits in question would have permitted the permittees to conduct prospecting operations, their issuance would not have authorized operations properly described as mineral development. I consequently do not agree that the Forest Service was required to make a determination as to whether mineral development would interfere with the purposes for which the lands in question were acquired in deciding whether to issue the prospecting permits. The determination clearly would have to be made prior to issuance of any preference right lease.

I am not suggesting that the Regional Forester is barred from considering whether mineral development would interfere with the purposes for which the lands were acquired in deciding whether to issue a prospecting permit. It is conceivable that a prospecting permit application could be filed for lands possessing characteristics which would make it likely that any mineral development would necessarily interfere with the regulation of the flow of navigable streams or the production of timber. In such a case, consideration should be given to refusing to consent to issuance of the prospecting permit.

With respect to whether prospecting and mining are connected actions requiring preparation of an EIS prior to issuance of the prospecting permits, I disagree. The prospecting permits in question would include a stipulation which would reserve the government's right to deny a permittee's application for a preference right lease, and this stipulation would be controlling even if the permittee had discovered valuable hardrock minerals. Consequently, this stipulation eliminates the need to comprehensively analyze the environmental consequences of mining prior to issuance of the prospecting permits.

This is not to say that the stipulation which would have been included in the prospecting permits in question, or any other stipulation reserving the right to deny mining, necessarily eliminates the need for

an EIS. The stipulation simply eliminates the need to address mining in detail and the possibility that the environmental consequences of mining operations would require preparation of an EIS. However, the reasonably foreseeable environmental consequences of all activities which issuing the prospecting permits would irretrievably commit the government to allow must be addressed before the prospecting permits can be issued. Depending on the nature and scale of the activities which the prospecting permits would authorize, and the extent to which stipulations would limit or control the amount, type, timing and location of those activities, an EIS may be required prior to issuance of prospecting permits which do not require the government to permit mining.

With respect to the prospecting permits in question, even though wetlands, riparian areas, historic sites, and special areas would be protected, the permit applications involve over 44,000 acres, and extensive surface disturbance from prospecting itself is still reasonably foreseeable and possible. I do not find that these potential impacts were adequately analyzed in any of the documents referenced in the decision documents.

Decision:

Based on the above, I am reversing the Regional Forester's decision consenting to issuance of the prospecting permits involved in this appeal, and directing that a new decision be rendered consistent with the foregoing discussion.

This decision is the final administrative decision of the Department of Agriculture unless the Secretary of Agriculture elects to review it within 15 days of receipt (36 CFR 217.17(e)(3) (1989). The Secretary of Agriculture will not accept a notice of appeal or a petition for review of this decision (36 CFR 217.17(a)).

Sincerely,

Paul Brouha
PAUL BROUHA
Associate Deputy Chief
National Forest System