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Date: July 30, 1999

Mr. Clark A. Stillwell, Esquire
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Dear Mr. Stillwell:

This is in response to your December 17, 1998 appeal of Regional Forester Elizabeth Estill's November 5, 1998, decision denying the application for renewal of a Mining Lease for Common Variety of Mineral Materials held by Florida Rock Industries, Inc. (hereinafter "the lease"). The appeal was filed on behalf of Florida Rock Industries, Inc. pursuant to 36 C.F.R. Part 251, Subpart C. The lease provides for the removal of a mineral material owned by the United States and administered by the Forest Service, specifically a common variety of limestone, on lands underlying the Withlacoochee State Forest in Citrus County, Florida.

Discussion:

Issue 1: Has the limestone in question even been subject to the Bankhead-Jones Farm Tenant Act, 50 Stat. 522 (1937), as amended?

You first argue that the Regional Forester mistakenly concluded that the lands subject to the lease (hereinafter "the lands") were acquired pursuant to the Bankhead-Jones Farm Tenant Act (hereinafter the "Bankhead-Jones Act"). You then acknowledge that Exec. Order No. 7908 (June 9, 1938) subsequently transferred the lands to this Department for administration pursuant to the Bankhead-Jones Act. However, you appear to contend that the Forest Service's administration of mineral materials on the lands is not affected by the Bankhead-Jones Act because of a proviso in that Executive Order.

We agree that documents attached to your April 23, 1999 reply to the Regional Forester's Responsive Statement (hereinafter "your reply") establish that the lands were acquired pursuant to the National Industrial Recovery Act, 48 Stat. 195 (1933), the Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (1935) and the Emergency Relief Appropriation Act of 1937, 50 Stat. 352 (1937). We also agree with your statement on page 1 of your reply that "[a]fter several Executive Orders and Amendments to Executive Orders the Property was transferred by Executive Order for administration by the Secretary of Agriculture . . . under Title III of the Bankhead-Jones Farm Tenant Act . . . ." Further, we agree that the pivotal Executive Order was Exec. Order No. 7908 (June 9, 1938). The transfer of the lands was authorized by Section 45 of the Bankhead-Jones Act, 50 Stat. 522, 530 (1937), *repealed* by Pub. L. No. 87-128, § 341(a), 75 Stat. 318 (1961). The Secretary of Agriculture subsequently assigned the Forest

Service responsibility to manage lands which are subject to the Bankhead-Jones Act. 19 Fed. Reg. 74, 75 (1954).

However, we do not agree that the Forest Service's administration of mineral materials on the lands is not affected by the Bankhead-Jones Act because of the proviso in Exec. Order No. 7908 (June 9, 1938) which states in pertinent part:

> this order shall not apply . . . to the right, title, and interest of the United States in the mineral resources of those lands which have heretofore been set apart and reserved from the public domain, and shall not restrict the disposition of such mineral resources under the public-land laws.

This proviso, by its own terms, applies to a different category of federal lands, those reserved from the public domain, not acquired lands such as the ones at issue. The term "public domain lands" "means lands claimed by the United States as part of its national sovereignty." Texas Oil & Gas Corp. v. Watt, 683 F.2d 427, 428 (D.C. Cir. 1982). "Reserved public domain lands are public domain lands, never in state or private ownership, which have been set apart and reserved for a specific purpose." Kenai Peninsula Borough v. Alaska , 612 F.2d 1210, 1211 n.2 (9th Cir. 1980), aff'd sub nom. Watt v. Alaska , 451 U.S. 259 (1981). In contrast, "[a]cquired lands are those granted or sold to the United States by a state or citizen." Id.

For these reasons, we find that although the lands were initially acquired pursuant to statutory authorities other than the Bankhead-Jones Act, they, and the mineral materials located on them, became subject to administration under that Act in 1938 in accordance with Exec. Order No. 7908 (June 9, 1938) which was authorized by Section 45 of the Bankhead-Jones Act, 50 Stat. 522, 530 (1937), *repealed* by Pub. L. No. 87-128, § 341(a), 75 Stat. 318 (1961).

Issue 2: Does the Bankhead-Jones Act continue to apply to the lands?

You argue that lands are "no longer administered pursuant to the authority under which [they were] initially acquired" because the Department of Agriculture conveyed the surface estate of the lands to the State of Florida in 1982.

It is not the Forest Service's position that the lands are administered pursuant to the authorities under which they were initially acquired. We agree with the conclusion on page 1 of your reply that the lands are administered under the Bankhead-Jones Act. Consequently, the conveyance to the State of Florida is irrelevant to the current applicability, to the lands, of the statutes under which the those lands were acquired.

If you meant to argue that the conveyance to the State of Florida renders the Bankhead-Jones Act inapplicable to the lands, we disagree. Exhibit 6 to your notice of appeal and the Regional Forester's responsive statement show that in 1958 the Department of Agriculture agreed to sell the surface estate of the lands to the State of Florida pursuant to a 25 year lease-purchase agreement. The sale was authorized by the Bankhead-Jones Act, which provides in pertinent part:

> To effectuate the program provided for in section 1010 of this title, the Secretary is authorized--

* * *

> (c) To sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of this subchapter, but any sale, exchange, or grant shall be made only to public authorities and agencies and only on condition that the property is used for public purposes . . . .

7 U.S.C. § 1011(c). Another provision of the Act required the Secretary of Agriculture, in selling the lands, to reserve at least three-fourths of the minerals occurring on such property. Bankhead-Jones Act, § 44, 50 Stat. 522, 530 (1937),*repealed* by Pub. L. No. 87-128, § 341(a), 75 Stat. 318 (1961). (Note, there were intermediate amendments to Section 44 "except insofar as they affect title III of the Bankhead-Jones Act . . . ." Farmers' Home Administration Act of 1946, § 3, 60 Stat. 1062, 1064, 1068-69 (1946).) Thus, the Bankhead-Jones Act directly contemplated the federal government's continued management of reserved minerals following a sale of lands being administered pursuant to the Act. Yet nothing in the Act provided that such reserved minerals should be administered under an alternate statutory regime. Consequently, we conclude that Congress intended for the Bankhead-Jones Act to continue to govern such reserved minerals.

In 1950, Congress again considered the management of mineral interests reserved pursuant to the Bankhead-Jones Act and rejected the notion of selling them.

> [T]he Secretary of Agriculture . . . is authorized and directed to sell . . . all mineral interests now owned by the United States, which have been reserved or acquired by it under any program . . ., except the program administered pursuant to sections 1010 to 1012 of [Title 7] . . . .

7 U.S.C. § 1033. (Note that sections 1010 to 1012 of Title 7 are portions of the Bankhead-Jones Act.) Again, Congress did not provide that minerals reserved pursuant to the Bankhead-Jones Act should be administered under an alternate statutory regime. Nor has Congress done so since.

For these reasons, we conclude that the reserved minerals on the lands remain subject to the Bankhead-Jones Act, the statute which governed administration of those lands in 1958 when the Department of Agriculture agreed to sell them to the State of Florida and which required the mineral reservation in question.

You also contend that the lands are not subject to the Bankhead-Jones Act because they are not mentioned in a list set forth at 36 C.F.R. § 213.1(e).

We disagree. The scope of the list in 36 C.F.R. § 213.1(e) is described by 36 C.F.R. § 213.1(a) in the following terms:

> [t]he land utilization projects administered by the Department of Agriculture designated in paragraph (e) of this section shall be named and referred to as *National Grasslands*.

Nothing in this language suggests that the National Grasslands listed in 36 C.F.R. § 213.1(e) include all lands administered by this Forest Service under the Bankhead-Jones Act. Moreover, another provision in Part 213 specifically states that it applies to "the National Grasslands and all other lands

administered by the Forest Service under the provisions of Title III of the Bankhead-Jones Farm Tenant Act . . . ." 36 C.F.R. § 213.3(a) (emphasis added). Thus, when 36 C.F.R. Part 213 is read as a whole it is clear that the list set forth at 36 C.F.R. § 213.1(e) does not include all lands administered by the Forest Service under the Bankhead-Jones Act.

Also note that the statutory definition of the term "National Forest System" at 16 U.S.C. § 1609(a) recognizes that the Forest Service administers lands, in addition to those in national grasslands, under the Bankhead-Jones Act.

> The "National Forest System" shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act , and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system. (Emphasis added).

Finally, you argue that the Forest Service does not administer the lands because they are not listed in 36 C.F.R. § 200.2(e).

We disagree. The scope of the list in 36 C.F.R. § 200.2(e) is described by that paragraph in the following terms:

> [t]he addresses of Regional Foresters, Station Directors, and Area Directors are given below. Under each Regional Office address isa list of National Forest Administrative Units by States with locations of Forest Supervisor headquarters. Headquarters locations for Ranger Districts, National Grasslands, and National Recreation Areas are not listed but may be obtained from Forest Supervisors or Regional Foresters.

This language makes it clear that the list is not comprehensive either in terms of the addresses set forth or in terms of the lands administered by the Forest Service. Moreover, another paragraph in 36 C.F.R. § 200.2 specifically recognizes that the Forest Service administers lands other than those in the national forests listed in paragraph 200.2(e).

> For the purpose of managing the lands administered by the Forest Service, the United States is divided into nine geographic regions of the National Forest System. Each region has a headquarters office and is supervised by a Regional Forester who is responsible to the Chief for the activities assigned to that region. Within each region are located national forests and other lands of the Forest Service.

36 C.F.R. § 200.2(a) (emphasis added). Thus, when 36 C.F.R. Part 200, Subpart A is read as a whole it is clear that list set forth at 36 C.F.R. § 200.2(e) does not include all lands administered by the Forest Service.

Also note that the statutory definition of the term "National Forest System" at 16 U.S.C. § 1609(a) recognizes that the Forest Service administers lands not included in the national forests under the Bankhead-Jones Act.

> The "National Forest System" shall include all national forest lands reserved or withdrawn from the public domain of the United States, all national forest lands acquired through purchase, exchange, donation, or other means, the national grasslands and land utilization projects administered under title III of the Bankhead-Jones Farm Tenant Act , and other lands, waters, or interests therein which are administered by the Forest Service or are designated for administration through the Forest Service as a part of the system. (Emphasis added).

Issue 3: Is it proper for the Forest Service, rather than the Bureau of Land Management, to administer the lease?

You argue that the Forest Service cannot administer the lease because there was no statute which permitted the Bureau of Land Management (hereinafter "the BLM") to transfer administration of the lease back to the Forest Service in 1998. In support of your argument, you appear to contend that the Forest Service's decision to transfer administration of the lease to the BLM was authorized because it allegedly occurred concurrently with conveyance of the surface estate of the lands to the State of Florida.

We agree that the Forest Service transferred administration of the lease to the BLM in 1992. However, the deed attached to your reply shows that the conveyance to the State of Florida was made on November 26, 1982, almost a decade earlier. This casts substantial doubt upon your suggestion that the transfer of the lease to BLM for administration was motivated by the conveyance to the State of Florida. Moreover, you point to no authority requiring, or authorizing, the Forest Service's decision to transfer administration of the lease to the BLM and we find that such authority does not exist. The Department of the Interior also has determined that "BLM has no authority to administer the Florida Rock lease." *See* Exhibit D to the Regional Forester's responsive statement. Thus, transfer of the lease to the BLM was unauthorized and there is no reason why statutory authority was required when the BLM transferred administration of the lease back to the Forest Service.

You also argue that the Forest Service lacks authority to administer the reserved minerals on the lands. Your argument rests upon your conclusions that the only "title interest the United States retains with regard to the Property is the reservation of mineral rights from its transfer to the State of Florida" and that the BLM's duties properly include administration of such reserved mineral interests.

Your understanding of the federal government's remaining interest in the lands is inaccurate. The deed attached to your reply proves that the federal government retains more than a mineral reservation in the lands. Specifically, it retains a reversionary interest in the entire surface estate. "If at any time said land ceases to be used for public purposes, the estate conveyed shall immediately revert to and become revested in the Grantor."

Further, as you know, the Department of the Interior has already resolved the question of whether it is appropriate for the BLM to manage the lease. In considering this question, the Department of the Interior was aware that

> [i]n 1958, the United States agreed to sell the surface estate of the lands at issue to the State of Florida for use as a state forest pursuant to a 25-year lease-purchase agreement. The Secretary of Agriculture conveyed title to the surface estate to the State in 1982 and reserved the mineral estate to the United States.

See Exhibit D to the Regional Forester's responsive statement. Nonetheless, the Department of the Interior found that "BLM has no authority to administer the Florida Rock lease." *Id*.

Thus, your arguments on this issue do not warrant a reversal of the Regional Forester's decision.

Issue 4: Is renewal of the lease consistent with the Bankhead-Jones Act?

You argue that 7 U.S.C. § 1011(c) directly authorizes the Secretary of Agriculture to lease mineral materials on lands administered pursuant to the Bankhead-Jones Act. To support your argument, you quote language in 7 U.S.C. § 1011(c) permitting the Secretary of Agriculture to "sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired . . . ." However, additional language in 7 U.S.C. § 1011 is relevant to evaluating the Secretary of Agriculture's authority to dispose of mineral materials on the lands. Specifically, 7 U.S.C. § 1011 provides in pertinent part:

> To effectuate the program provided for in section 1010 of this title, the Secretary is authorized--
>
> * * *
>
> (c) To sell, exchange, lease, or otherwise dispose of, with or without a consideration, any property so acquired, under such terms and conditions as he deems will best accomplish the purposes of this subchapter . . . .

(Emphasis added.) (Note that Section 1 of the Bankhead-Jones Act, 50 Stat. 522 (1937), *repealed* by Pub. L. No. 87-128, § 341(a), 75 Stat. 318 (1961), stated that the Secretary of Agriculture "is hereinafter referred to as the `Secretary.'") The highlighted language clearly does not authorize the Secretary of Agriculture to lease property administered pursuant to the Bankhead-Jones Act unless the lease will effectuate the program provided for in 7 U.S.C. § 1010 and the lease will contain provisions required to accomplish the purposes of the subchapter. Thus, the first step in deciding whether renewal of the lease is authorized by 7 U.S.C. § 1011(c) is to determine whether commercial mineral material operations are consistent with 7 U.S.C. § 1010.

In 1965, when the lease was issued, 7 U.S.C. § 1010 provided that:

> [t]he Secretary is authorized and directed to develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, mitigating floods, preventing impairment of dams and reservoirs, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises.

Since 1965, 7 U.S.C. § 1010 has been amended. The permissible purposes of the land conservation and utilization program were expanded in 1966 to include "developing and protecting recreational facilities" and again in 1981 to include "developing energy resources." Thus, 7 U.S.C. § 1010 now provides:

> [t]he Secretary is authorized and directed to develop a program of land conservation and land utilization, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, developing energy resources, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, and protecting the public lands, health, safety, and welfare, but not to build industrial parks or establish private industrial or commercial enterprises.

On page 3 of your reply, you admit that Florida Rock Industries, Inc. is a private, for profit corporation. Therefore, renewal of the lease would clearly result in the establishment, for an additional period of 10 years, of a private commercial enterprise on the lands. Consequently, renewal of the lease is not authorized by 7 U.S.C. § 1011 because it would result in the establishment, for an additional period of 10 years, of a private commercial enterprise on the lands in violation of 7 U.S.C. § 1010.

In addition, we find no basis for concluding that the commercial mineral operations which Florida Rock Industries, Inc. proposes to conduct on the lands would be consistent with, much less assist in, controlling soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, developing and protecting recreational facilities, mitigating floods, preventing impairment of dams and reservoirs, developing energy resources, conserving surface and subsurface moisture, protecting the watersheds of navigable streams, or protecting the public lands, health, safety, or welfare. Therefore, renewal of the lease would not effectuate the land conservation and utilization program set forth in 7 U.S.C. § 1010. Consequently, renewal of the lease also is not authorized by 7 U.S.C. § 1011 because it would result in mineral operations which would not effectuate the land conservation and utilization program set forth in 7 U.S.C. § 1010.

The narrowness of the purposes for which lands can be administered pursuant to 7 U.S.C. § 1010 is emphasized by the 1966 and 1981 amendments to that section. Particularly significant is the 1981 amendment which added "developing energy resources" to the permissible purposes of the land conservation and utilization program. Congress obviously understood that absent this amendment, the development of energy resources on lands subject to the Bankhead-Jones Act would be barred for one, if not both, of the same reasons as the mineral development at issue: establishing a prohibited private industrial or commercial enterprise, or otherwise being inconsistent with the land conservation and utilization program of 7 U.S.C. § 1010.

You also argue that the lease should be renewed because the public would best be served by allowing removal of scarce limestone before the lands are reclaimed. Your argument is based upon 7 U.S.C. § 1011(b), which you contend requires the Secretary to administer the lands for their "most beneficial use," and congressional policies encouraging development of the nation's mineral resources set forth at 30 U.S.C. § 21a and 43 U.S.C. § 1401(a)(12).

We disagree. 7 U.S.C. § 1011(b) does not authorize uses of the lands which are inconsistent with 7 U.S.C. § 1010 given the prefatory language in 7 U.S.C. § 1011 discussed above. As discussed above, renewal of the lease would violate 7 U.S.C. § 1010 by establishing, for an additional period of 10 years, a private commercial enterprise on the lands. As discussed above, the mineral operations which would be authorized by the lease renewal also would be inconsistent with the land conservation and utilization program set forth in 7 U.S.C. § 1010. Thus, renewal of the lease is not authorized by 7 U.S.C. § 1011(b).

Insofar as 30 U.S.C. § 21a and 43 U.S.C. § 1401(a)(12) are concerned, both provisions clearly state that they are policies. Congressional policies cannot overcome the restrictions on the permissible uses of lands which Congress set forth in 7 U.S.C. § 1010. Moreover, the United States Constitution clearly gives Congress the power to dispose of the property of the United States, including the mineral materials on the lands. U.S. Const. art IV, § 3, cl. 2. "The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 336 (1936). "No public property can therefore be disposed of without the authority of law, either by an express act of congress for that purpose, or by giving the authority to some department of the government, or subordinate agent." United States v. Nicoll, 27 F. Cas. 149, 150 (C.C.D. N.Y. 1826) (No. 15,879). Congress clearly has not given the executive branch blanket authority to permit disposal of mineral materials on the lands. Instead, Congress enacted legislation, 7 U.S.C. § 1011, which bars the Forest Service from renewing the lease because it would permit the lands to be used in a manner inconsistent with 7 U.S.C. § 1010.

In summary, renewal of the lease is not authorized by 7 U.S.C. § 1011 because the mineral operations which it would permit are not consistent with 7 U.S.C. § 1010. Nor is renewal of the lease warranted by 30 U.S.C. § 21a and 43 U.S.C. § 1401(a)(12) because those policies do not authorize the Secretary of Agriculture to dispose of the mineral materials on the lands.

We also note that the lease itself compels the denial of Florida Rock Industries, Inc.'s lease renewal application. The pertinent lease provision is the "Renewal of lease" clause which bars issuance of a lease for an ensuring period unless the Forest Service determines that such renewal would be in the public interest.

> Renewal of lease. If, upon expiration of this lease, the issuance for an ensuing period of a lease of similar character is determined to be in the public interest, the lessee shall have a preferential right to renew this lease for additional periods, not exceeding 10 years each . . . .

(Emphasis added). Permitting a disposal of mineral materials on the lands which Congress has not authorized is not in the public interest because it would usurp the power which the United States Constitution specifically reserves to Congress "to determine of how much of the property [of the United States] it shall dispose". Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 336 (1936). Moreover, renewal of the lease in clear contravention of the Bankhead-Jones Act plainly is not in the public interest.

Issue 5: Does 36 C.F.R. § 228.41(b)(4) apply to the lands?

Your first argument rests upon your contention that 36 C.F.R. § 228.41(b)(4) only applies to lands acquired under the authority of the Bankhead-Jones Act. You reason that since the lands were acquired under other statutory authorities, 36 C.F.R. § 228.41(b)(4) is inapplicable to them.

We disagree. By its own terms, 36 C.F.R. § 228.41(b)(4) specifically applies both to lands acquired pursuant to the Bankhead-Jones Act and to lands administered pursuant to that authority.

> Mineral materials on lands which were acquired under the authority of the Bankhead-Jones Farm Tenant Act of July 22, 1937 (7 U.S.C. 1010-1012), and which lie outside the exterior boundaries of National Forests, or on acquired lands which are being administered under the Act and which also lie outside the exterior boundaries of National Forests, may be disposed of under these regulations . . . .

(Emphasis added.). Thus, your argument fails because as you recognize on page 1 of your reply, the lands were transferred by Executive Order to the Department of Agriculture for administration under the Bankhead-Jones Act.

Your next argument rests upon the fact that 36 C.F.R. § 228.41(b)(4) is not applicable unless the lands also "lie outside the exterior boundaries of National Forests." Specifically, you argue that 36 C.F.R. § 228.41(b)(4) is inapplicable because the lands are within a national forest. Your argument relies upon your reading of 36 C.F.R. § 228.41(a), which refers to certain lands as "National Forest lands," as including acquired lands being administered pursuant to the Bankhead-Jones Act.

Again, we disagree. "For ease of reference and convenience to the reader" 36 C.F.R. § 228.41(a) labels specified lands as "National Forest lands." In contrast, 36 C.F.R. § 228.41(b)(4) applies to lands acquired or being administered pursuant to the Bankhead-Jones Act which lie outside the exterior boundaries of "National Forests." Even if lands acquired or being administered pursuant to the Bankhead-Jones Act fell within the scope of 36 C.F.R. § 228.41(a), it would be improper to construe the label "National Forest lands" being used as a "convenience to the reader" as nullifying a distinction drawn in 36 C.F.R. § 228.41(b)(4) as to whether lands lie within or outside the exterior boundaries of "National Forests," a different term. Your reading of 36 C.F.R. § 228.41(a) and § 228.41(b)(4) is objectionable because it would render 36 C.F.R. § 228.41(b)(4) mere surplusage. It is an elementary rule of construction that regulations should be read in a manner which gives effect to all of their provisions.

Moreover, the lands are not within the scope of 36 C.F.R. § 228.41(a) which provides:

> (a) *Lands to which this subpart applies*. This subpart applies to all National Forest System lands reserved from the public domain of the United States, including public domain lands being administered under the Bankhead-Jones Farm Tenant Act of July 22, 1937 (7 U.S.C. 1010); to all National Forest System lands acquired pursuant to the Weeks Act of March 1, 1911 (36 Stat. 961); to all National Forest System lands with Weeks Act status as provided in the Act of September 2, 1958 (16 U.S.C. 521a); and to public lands within the Copper River addition to the Chugach National Forest (16 U.S.C. 539a). For ease of reference and convenience to the reader, these lands are referred to, throughout this subpart, as *National Forest lands*.

As we discussed in response to Issue 1, the lands were not reserved from the public domain. Also, as we discussed in response to Issue 1, the lands were acquired pursuant to authorities other than the Weeks Act of March 1, 1911, 36 Stat. 961 (1911). Further, it is clear that the lands are not within the Copper River addition to the Chugach National Forest. Documents attached to your reply establish that the lands were acquired during the years 1938 and 1939. The Copper River addition to the Chugach National Forest, which is located in Alaska (see 36 C.F.R. § 200.2(e)), was not made until 1980. *See* 16

U.S.C. § 539(a). The only other lands within the ambit of 36 C.F.R. § 228.41(a) are those acquired lands within the exterior boundaries of a national forest which are given Weeks Act status by virtue of 16 U.S.C. § 521a.

The exterior boundaries of national forests are not contiguous with the extent of the land holdings managed by the Forest Service. 36 C.F.R. § 200.1(c)(2). As reflected in the Regional Forester's responsive statement to your notice of appeal, the exterior boundary of the national forest nearest to the lands is more than 35 miles away.

The President was initially empowered to set apart and reserve lands from the public domain for forest reserves. Act of March 3, 1891, § 24, 26 Stat. 1095, 1103 (1891). While that section has been repealed (*see* Pub. L. No. 94-579, § 704(a), 90 Stat. 2792 (1976)), the President retains the power to modify the boundaries of national forests established pursuant to the Act of March 3, 1891.

> The President of the United States is authorized and empowered to revoke, modify, or suspend any and all Executive orders and proclamations or any part thereof issued under [section 24 of the Act of March 3, 1891] . . . . By such modification he may reduce the area or change the boundary lines or may vacate altogether any order creating a national forest.

16 U.S.C. § 473 (emphasis added). The Secretary of Agriculture also has authority to establish national forests on lands acquired pursuant to the Weeks Act of March 1, 1911, 36 Stat. 961 (1911).

> [T]he lands acquired under [the Weeks Act] shall be permanently reserved, held, and administered as national forest lands . . . . And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes.

16 U.S.C. § 521. Nothing provides for the creation of national forests on lands acquired pursuant to other authorities.

Thus, 16 U.S.C. § 521a did not give the lands Weeks Act status because they are not within the exterior boundary of a national forest. Consequently, the lands are not among those labeled "national forest lands" by 36 C.F.R. § 228.41(a). (Note, however, that other provisions of 36 C.F.R. Part 228, Subpart C apply to the lands. This results from 36 C.F.R. § 228.41(b)(4) which specifically provides that mineral materials occurring on acquired lands which are being administered under the Bankhead-Jones Act and which also lie outside the exterior boundaries of National Forests may be disposed of under these regulations.)

Finally, you contend that this Department relied on no specific law or policy in adopting 36 C.F.R. § 228.41(b)(4).

Once again, we disagree. The authorities which the Department of Agriculture relied upon in promulgating the final rule which includes 36 C.F.R. § 228.41(b)(4) are clearly set forth in another portion of that rulemaking, 36 C.F.R. § 228.40.

For these reasons, it is clear that 36 C.F.R. § 228.41(b)(4) applies to the lands.

Issue 6: Is the limestone on the lands a mineral material over which the Forest Service has jurisdiction?

You argue that the Forest Service lacks authority over the limestone which Florida Rock Industries, Inc. proposes to remove from the lands because this limestone is not a mineral material. Your argument relies upon 36 C.F.R. § 228.41(d) which specifically provides that 36 C.F.R. Part 228, Subpart C does not apply to "[l]imestone suitable and used, without substantial admixtures, for cement manufacture, metallurgy, production of quicklime, sugar refining, whiting, fillers, paper manufacture, and desulfurization of stack gases." 36 C.F.R. § 228.41(d)(2). You assert that these are exactly the type of "materials" that Florida Rock Industries, Inc. wishes to mine if the lease is renewed.

Pursuant to the Act of June 11, 1960, § 1(l), 74 Stat. 205 (1960), the Forest Service is authorized to administer the disposal of mineral materials, including common varieties of limestone, on acquired National Forest System lands. Pursuant to Section 402 of Reorganization Plan Numbered 3 of 1946, 60 Stat. 1097, 1099 (1946), and the underlying statutes cited therein, the Department of the Interior is authorized to administer the disposal of uncommon varieties of limestone on acquired National Forest System lands. Thus, assuming that the limestone which Florida Rock Industries, Inc. wishes to mine on the lands is within the ambit of 36 C.F.R. § 228.41(d)(2), we agree that the Forest Service lacks authority to provide for its disposal even if renewal of the lease was consistent with the Bankhead-Jones Act.

Indeed, the lease itself would compel the denial of Florida Rock Industries, Inc.'s lease renewal application if the limestone which the company wishes to extract has changed in character from a common variety of limestone to an uncommon one.

> Renewal of lease. If, upon expiration of this lease, the issuance for an ensuing period of a lease of similar character is determined to be in the public interest, the lessee shall have a preferential right to renew this lease for additional periods, not exceeding 10 years each . . . .

(Emphasis added). A lease permitting the disposal of an uncommon variety of limestone plainly is not a lease of similar character to the lease in question, particularly given that the Forest Service lacks statutory authority to dispose of uncommon varieties of limestone.

Thus, if Florida Rock Industries, Inc. believes that the limestone remaining upon the lands is an uncommon variety of limestone, the company should seek a lease for this limestone from the Department of the Interior pursuant to 43 C.F.R. Part 3560. We caution that this Department expresses no opinion as to whether the Department of the Interior would find the limestone on the lands to be an uncommon variety of limestone. We also express no opinion as to whether the Department of the Interior would find issuance of a lease for an uncommon variety of limestone to be otherwise appropriate.

Issue 7: Is the Forest Service estopped from managing the lands in a manner inconsistent with the BLM regulations and a BLM plan?

You argue that the Forest Service is estopped from altering "the long standing regulation and plan Florida Rock has been operating under since 1992" when the Forest Service transferred administration of the lease to the BLM. You assert that the plan is a "Resource Recovery Plan" adopted in 1995. You contend that this plan "expressly states that 160 acres are available for active mining." You further

contend that the lands are in the area encompassed by the plan. You also allege that the plan includes "provisions that Florida Rock reclaim the Property to BLM standards concurrent with and at the conclusion of its Lease term."

Neither your notice of appeal nor your reply discusses, or even identifies, the allegedly pertinent BLM regulations upon which your estoppel argument rests. Reversal of the Regional Forester's decision is not warranted on the basis of a completely unsupported contention.

We also disagree with your estoppel argument insofar as it is based upon a BLM plan. The only portion of the purported "Resource Recovery Plan" which you have submitted is a document entitled "Appendix F, Solid Minerals." Those pages do not establish that Appendix F is a portion of a Resource Recovery Plan, the current status of any such plan, or the lands to which any such plan applies. Further, we find nothing in Appendix F which clearly refers to, or purports to govern, the operations which Florida Rock Industries, Inc. has previously conducted or now proposes to conduct on the lands. The portion of Appendix F referring to a 160 acre tract makes it clear that the document is discussing hypothetical mineral development either in Citrus County, where the lands are located, or in another county.

> **Reasonably Foreseeable Development**
>
> The analysis of the data indicates one tract that will probably be subject to exploration and development within the foreseeable future. The tract will be approximately 160 acres located within a high limestone potential area in the Withlacoochee State Forest in Citrus and/or Hernando Counties. The tract could be developed from an existing operation in the area.

Indeed, the introduction to Appendix F makes it clear that the document neither approves mineral development proposals nor makes a commitment that such proposals will be approved. "Proposals for development will be considered on a case-by-case basis with appropriate NEPA documentation." Thus, even if we assume that the BLM adopted a Resource Recovery Plan in 1995 which governs the lands and which remains in effect, nothing which you have submitted establishes that the plan requires renewal of the lease.

Moreover, under any circumstance, the provisions of the Bankhead-Jones Act and the terms of the lease will determine the propriety of renewing the lease because the BLM lacks authority to disregard the statutory provisions or to alter the lease terms. As we discussed in response to Issue 4, renewal of the lease is not authorized by 7 U.S.C. § 1011 of the Bankhead-Jones Act. As we discussed in response to Issues 4 and 6, it also would be inconsistent with the "Renewal of Lease" provision included in the lease to permit its renewal.

Thus, reversal of the Regional Forester's decision is not warranted on the basis of the BLM's regulations or Resource Recovery Plan.

Decision:

Based on the above, despite your excellent prior tenancy of the lands, I must affirm the Regional Forester's decision to deny Florida Rock Industries, Inc.'s application for the renewal of the lease.

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 § 251.87(e); 36 C.F.R. § 251.100(c)).

Sincerely,

/s/ Gloria Manning

GLORIA MANNING
Appeal Deciding Officer
for the Chief