United States Department of the Interior

OFFICE OF THE SOLICITOR

M-37020

JAN 16 2009

Memorandum

To: Director
Bureau of Land Management

From: Solicitor

Subject: The Bureau of Land Management's Authority to Issue Prospecting Permits for Energy Minerals on Bankhead-Jones Farm Tenant Act Lands

In October 2007, the Bureau of Land Management ("BLM") gave the Solicitor's Office a copy of a memorandum dated August 10, 2007, from the BLM Wyoming State Director entitled "Request for Policy Guidance Concerning the Leasing of Hardrock Minerals on Acquired Bankhead-Jones Farm Tenant Act Land." We were informed that BLM State Offices in Montana and Colorado have requested similar guidance. BLM officials asked for our legal analysis of BLM's authority to issue prospecting permits and leases for uranium development on lands administered under the Bankhead-Jones Farm Tenant Act of 1937, Pub. L. No. 75-210, 50 Stat. 522 (codified as amended at 7 U.S.C. §§ 1010-1013a (2006)) ("Bankhead-Jones Act").

The question posed by BLM arises from a footnote in a 2000 Assistant Solicitor memorandum that questioned the reach of certain prohibitory language in the Bankhead-Jones Act. For the reasons below, we conclude that on lands administered under the Bankhead-Jones Act, the prohibitory language at 7 U.S.C. § 1010 does not bar BLM from issuing prospecting permits and leases on such lands for uranium and other minerals that will be used for energy development as long as the energy development operations are not funded through Bankhead-Jones Act programs. This memorandum does not examine whether issuing any particular prospecting permit or lease would be consistent with the primary purposes for which the land was acquired. Such a determination is a prerequisite to mineral development on lands administered under the Bankhead-Jones Act. That inquiry falls to the Secretary of Agriculture, whose consent is required before BLM may issue prospecting permits or leases on Bankhead-Jones Act lands. See 43 C.F.R. § 3503.13 (2008).

We provide below a short response to each of the Wyoming State Director's four questions, followed by a discussion of the background of this issue, the history of land administration under the Bankhead-Jones Act, and our legal analysis, including a discussion of land status.

I. Response to Questions

The memorandum from the Wyoming State Director posed the following four questions.

1. Is there a conflict between accomplishing the purpose of developing energy resources and violating the prohibition against establishing private commercial enterprises? We ask this question first, because if the answer to this question is that no private industrial or commercial enterprises may be authorized on Bankhead-Jones Lands, then Question 2 below need not be addressed.

Answer: There is no conflict between accomplishing the purpose of developing energy resources and the prohibition against establishing private commercial enterprises as long as the energy development operations are not funded through Bankhead-Jones Act programs, for the reasons discussed in our analysis, below.

2. If the answer to Question 1 is that private industrial and commercial enterprises may be authorized under the Bankhead-Jones Act, would we be correct in making a determination that the uranium prospecting permits (and subsequent preference right lease applications) would probably promote one of the purposes of the Act, i.e., developing energy resources? Would specific agency guidance (regulation change, manual guidance, or Instruction Memorandum) be required to make a determination that the uranium prospecting permits would promote the development of energy resources?

Answer: No specific agency guidance or BLM determination is necessary. A statement from the applicant that the purpose is energy development, if such is the case, would be sufficient for BLM to accept applications for prospecting permits or leases in compliance with the restrictions of the Bankhead-Jones Act.

3. Is a change in the regulation at 43 C.F.R. § 3503.13 required before we may issue or reject the uranium prospecting permit applications?

Answer: No regulatory change is required before BLM may issue or reject uranium or other energy-related prospecting permit or lease applications on Bankhead-Jones Act lands. However, we advise BLM to initiate a revision to 43 C.F.R. § 3503.13 to clarify that BLM may issue hardrock permits and leases on Bankhead-Jones Act lands only when the proposed permit or lease will help accomplish one or more of the purposes of that Act.

4. In light of the answers to the three previous questions, does BLM have the authority to issue the subject uranium prospecting permit applications on Bankhead-Jones Act lands?

Answer: BLM may issue uranium prospecting permits on Bankhead-Jones Act lands if the energy development operations are not funded through Bankhead-Jones Act programs; if BLM determines, based on a written statement from the applicant, that the uranium to be mined will be used for energy development; and if BLM obtains the consent of the Secretary of Agriculture.

II. Background

In 2000, the Assistant Solicitor for the Branch of Onshore Minerals issued a memorandum addressing hardrock mineral leasing on Bankhead-Jones Act lands. "BLM's Authority to Issue a Hardrock Mineral Lease to Florida Rock Industries on Acquired Bankhead-Jones Act Land," Memorandum from Assistant Solicitor, Onshore Minerals, to BLM State Director, Eastern States Office (Jan. 6, 2000) ("2000 Memorandum") (see attachment). The 2000 Memorandum discussed the 1946 Reorganization Plan No. 3, 60 Stat. 1097, 1099, which transferred certain functions of the Secretary of Agriculture to the Secretary of the Interior with respect to the disposition of mineral deposits in lands administered under several acts, including the Bankhead-Jones Act. Reorganization Plan No. 3 gave the Secretary of the Interior only the authority that the Secretary of Agriculture had previously had under those acts.

As discussed in the 2000 Memorandum, subsequent statutes limited the Department of the Interior's authority with respect to the uses of mineral deposits under Reorganization Plan No. 3 to hardrock minerals:

> In 1947, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, provided a new statutory scheme for leasing most minerals on acquired lands and thus left the authority conferred by Reorganization Plan No. 3 to apply only to mineral materials and hardrock minerals. In 1960, the Transfer of Functions Act, Pub. Law 86-509, 74 Stat. 205, returned to the Secretary of Agriculture the authority to dispose of mineral materials on these lands. As a result, the Department of the Interior's authority over mineral deposits under Reorganization Plan No. 3 is now limited to hardrock minerals.

2000 Memorandum, at 2. Uranium is classified as a hardrock mineral. Therefore, on lands administered under the Bankhead-Jones Act, BLM's authority to lease uranium under Reorganization Plan No. 3 is limited to whatever authority was provided to the Secretary of Agriculture by the Bankhead-Jones Act. The 2000 Memorandum concluded that "[i]f a lease will not accomplish, or will interfere with, any of [the] purposes [of the Bankhead-Jones Act], the act does not authorize the Secretary to issue it." Id.

Reorganization Plan No. 3 gives the Secretary of Agriculture the responsibility to decide whether a mineral lease will interfere with the purposes for which the land was acquired:

> [M]ineral development on such lands shall be authorized by the Secretary of the Interior only when he is advised by the Secretary of Agriculture that such development will 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 of Agriculture in order to protect such purposes.

Reorganization Plan No. 3, 60 Stat. 1099. For this reason, after accepting an application for a hardrock mineral prospecting permit or lease, BLM refers the application to the Forest Service to obtain the consent of the Secretary of Agriculture.

However, the Secretary of the Interior also has a concurrent obligation under sections 31 and 32 of the Bankhead-Jones Act to disallow leasing of hardrock minerals on lands administered under that Act if such leasing would interfere with the purposes of the Act. 7 U.S.C. §§ 1010, 1011 (2006). If, therefore, it is clear on the face of the Bankhead-Jones Act that issuance of a mineral lease or prospecting permit would interfere with those purposes, BLM would be prohibited from processing the application.

The purposes of the Bankhead-Jones Act are set out in section 31, 7 U.S.C. § 1010 (2006). Among the eleven listed purposes is "assist[ing] in . . . developing energy resources," which is pertinent to applications for prospecting permits or leases for uranium, an energy resource. However, the final clause of § 1010 casts doubt on what would otherwise be a straightforward analysis, by adding this prohibition: "but not to build industrial parks or establish private industrial or commercial enterprises."[1] As the 2000 Memorandum noted:

> It is possible that a lease application could present a conflict between accomplishing one of the purposes listed in 7 U.S.C. § 1010 (e.g., a proposed mining operation to develop energy resources) and violating that section's final prohibition against establishing private commercial enterprises. Such a conflict might call for an analysis of the Congressional intent behind the private enterprise prohibition. However, this conflict is not presented in this lease application, and we do not address it.

2000 Memorandum, at 3 n.2. BLM's question now presents the potential conflict predicted by the 2000 Memorandum, which we analyze in section III, below.

III. History and Context of Land Administration under the Bankhead-Jones Act

The Bankhead-Jones Act was the culmination of a series of New Deal lands acts in the 1930s that addressed severe agricultural problems across the country resulting from over-cultivation of unsuitable land, poor farming practices, and prolonged drought. H.H. WOOTEN, U.S. DEP'T OF AGRIC., AGRICULTURAL ECONOMIC REPORT NO. 85, THE LAND UTILIZATION PROGRAM 1934 TO 1964: ORIGIN, DEVELOPMENT, AND PRESENT STATUS 1 (1965). Between 1933 and 1937, the Federal government established programs to purchase submarginal farmland (i.e., land that could not profitably grow crops) and develop it for uses to which it was better suited, along with related programs to relocate and provide financial assistance to farm families. Id. at 1, 4-12, 20-23; Terry West, USDA Forest Service Management of the National Grasslands, 64 AGRIC. HISTORY 87 & n.4 (1990). Planned uses for the land varied depending on the part of the country, e.g., grazing in the Plains States (the largest acreage purchased); forests, game refuges, and recreational areas in the Northeast; and restoration of soil fertility, timber, and game in the South.

[1] The full current text of 7 U.S.C. § 1010 (2006) is quoted infra at page 12.

WOOTEN, at 6. The purchased lands were called land utilization ("LU") projects. Id. at 4-5; West, at 87. Enactment of the Bankhead-Jones Act in 1937 provided a more permanent status for the LU program.[2] WOOTEN, at 12.

The Conference Report for the Bankhead-Jones Act stated that the Act was intended "to encourage and promote the ownership of farm homes and to make the possession of such homes more secure, to provide for the general welfare of the United States, to provide additional credit facilities for agricultural development, and for other purposes." H.R. REP. NO. 75-1198, at 1 (1937) (Conf. Rep.). To achieve these goals, Congress divided the Act into four titles. The House Report summarized them as follows:

> The first ["Farm Tenant Provisions"] relates to loans to enable persons to acquire farms, the second ["Rehabilitation Loans"] [relates] to rehabilitation loans and the voluntary adjustment of indebtedness between farm debtors and their creditors. The third title ["Retirement of Submarginal Land"] relates to the retirement of submarginal lands. The fourth title ["General Provisions"] contains general provisions applicable in accordance with their terms to titles I, II, and III.

H.R. REP. NO. 75-1065, at 3 (1937). Because only Title III addresses administration of lands, this summary will focus on that title. The language of Title III was first proposed in the House bill, and the Senate did not change the House language; the Conference Report noted that the Senate amendment contained "no express provision relating to retirement of submarginal land." H.R. REP. NO. 75-1198, at 14.

As indicated by the House and Conference reports, Congress's main intent in Title III of the Bankhead-Jones Act was removing submarginal lands from cultivation. Title III essentially continued and revised the LU program begun in the early 1930s. WOOTEN, at 13. At the time of its enactment in 1937, section 31, which describes the purposes of the Act, provided:

> The Secretary [of Agriculture] is authorized and directed to develop a program of land conservation and land utilization, including the retirement of lands which are submarginal or not primarily suitable for cultivation, in order thereby to correct maladjustments in land use, and thus assist in controlling soil erosion, reforestation, preserving natural resources, 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.

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[2] By executive order, LU lands acquired under previous statutes were later made subject to Title III of the Bankhead-Jones Act. See, e.g., Exec. Order No. 10,046, 14 Fed. Reg. 1375 (Mar. 26, 1949), amended by Exec. Order No. 10,175, 15 Fed. Reg. 7201 (Oct. 27, 1950); Exec. Order No. 7908, 3 Fed. Reg. 1389 (June 11, 1938), amended by Exec. Order No. 8531, 5 Fed. Reg. 3539 (Sept. 5, 1940); see discussion infra note 3.

7 U.S.C. § 1010 (1940).

The specific authorities given to the Secretary to accomplish the purposes of section 31 were itemized in section 32 of Title III:

> To effectuate the program provided for in section 1010 of this title, the Secretary [of Agriculture] is authorized -
> (a) To acquire . . . submarginal land and land not primarily suitable for cultivation, and interests in and options on such land. . . .
> (b) To protect, improve, develop, and administer any property so acquired and to construct such structures thereon as may be necessary to adapt it to its most beneficial use.
> (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. . . .
> (d) With respect to [such] land . . . to make dedications or grants . . . for any public purpose, and to grant licenses and easements . . . .
> (e) To cooperate with Federal, State, Territorial, and other public agencies in developing plans for a program of land conservation and land utilization, to conduct surveys and investigations . . . and to disseminate information . . . .
> (f) To make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of [such land] . . . in order to conserve and utilize it or advance the purposes of sections 1010-1013 of this title. . . .

Id. § 1011 (1940).

Under the land acquisition authority in section 32(a), the United States acquired approximately 2.6 million acres of submarginal land between 1938 and 1943, at a cost to the Federal government of $11.1 million. Nearly 8.7 million acres of submarginal lands had been acquired under preceding LU authority at a cost of approximately $36.4 million. By 1943 land acquisition had virtually ceased (except for small areas already optioned that took longer for title clearance). WOOTEN, at 14, 17-18.

As seen above, Title III as originally enacted not only authorized a program of land conservation and land utilization, but made the retirement of submarginal lands the defining characteristic of that program. The title heading – "Retirement of Submarginal Land" – sums up Congress's focus. Of the six authorizations provided in section 32 to implement Title III (quoted above, in part), the first, at 7 U.S.C. § 1011(a), authorized the acquisition of submarginal land and four of the remaining five were specific to the land so acquired: § 1011(b) authorized its development; § 1011(c) authorized its disposal; § 1011(d) authorized grants of such land or easements upon it;

and § 1011(f) authorized regulations related to it. The remaining subparagraph, § 1011(e), authorized the Secretary to cooperate with other public agencies in developing plans for a program of land conservation and land utilization and to conduct surveys and investigations, among other things.

Following its introductory phrases, section 31 expanded on Congress's vision for the "land conservation and land utilization" program it was authorizing. Congress gave the Secretary of Agriculture authority to develop the program, including the retirement of submarginal lands, "in order thereby to correct maladjustments in land use." 7 U.S.C. § 1010 (1940) (emphasis added). These "maladjustments" were the myriad problems that gave rise to LU programs in the 1930s, such as "damage to natural soil and water resources from continued cultivation of unproductive farms, . . . for example . . . serious erosion, stoppage of stream channels by sedimentation, damage to reservoirs, low crop yields, and depletion of large areas of land" and in the Great Plains, dust storms that "covered and destroyed the crops and sod on nearby land." WOOTEN, at 1-2. While it is not clear grammatically whether "in order thereby" refers back to developing the program or to retiring submarginal lands, it hardly mattered because the program itself revolved around submarginal lands.

The list that follows in section 31 catalogues Congress's goals for the submarginal land program. The program, through the Secretary's actions in acquiring, developing, disposing of, and granting land or easements, plus cooperating with other public agencies (the authorizations in section 32), would "thus assist in" achieving Congress's goals of "controlling soil erosion, reforestation, preserving natural resources, 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." 7 U.S.C. § 1010 (1940).

In 1937, the words "thus assist in" did not imply financial assistance to non-Federal entities. The authorizations in section 32 did not provide for any type of loans or financial aid to state or local government agencies or other entities. Funding for Title III was provided at section 34, which authorized the appropriation of $10 million for the first year, and $20 million for each of the following two years to "carry out the provisions of this title." 50 Stat. at 526. (In fact, while $10 million was appropriated the first year, the appropriation in each of the following two years was only $5 million. WOOTEN, at 12.)

All projects developed under Title III prior to the amendments of 1962 were Federal projects. However, the "program of land conservation and land utilization" authorized by section 31 was not developed as a comprehensive program, but apparently consisted of a mixture of policies and directives over a number of years, mostly in the 1930s and 1940s.

In addition to land acquisition under section 32(a), the LU program included a wide range of federally funded land improvement projects related to the submarginal lands acquired:

> Land improvement and development included general land treatment, structural improvements, provision of transportation facilities, control of erosion, flood control, water storage, and development for forestry, recreation, and wildlife. Buildings and fences were removed; old

> roads no longer needed were blocked up; new roads were built where needed; suitable areas were seeded to grass or planted in trees; forest stands were improved and protected from fire; gullies were stopped; terraces, stock ponds, and dams were built; and stream channels were widened and cleaned. All of this work required much labor and equipment.
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> Virtually all of the development work was accomplished with labor from the vicinity of each project; a large number of workers were furnished by the Works Progress Administration. . . . Employment was provided in the first few years for 50,000 or more workers on relief, and for 13,000 men whose farms had been purchased. By June 1939, $67 million had been spent from relief allotments for land improvement and development, plus about $5 million from public works funds.
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> Projects managed by the Soil Conservation Service [to which the Secretary of Agriculture assigned administration of the LU program in 1938; Secretary of Agriculture Memorandum 785, Oct. 16, 1938] from 1938 to 1953 under authority of the Bankhead-Jones Farm Tenant Act were used mainly for grazing, forests, hay, recreation, wildlife, and watershed and water supply protection. During the period after World War II, especially, additional improvement and development work was carried out over large areas, including building stock-water ponds, reservoirs, fire towers, and erosion control works; seeding grasslands; planting trees and forest thinning; and construction of fire-control lanes and access roads. A big job of rehabilitation was done from 1946 to 1953.

WOOTEN, at 18, 26 (internal citations omitted); West, at 87-88. The Soil Conservation Service ("SCS") had been established by the Soil Conservation Act of 1935, Pub. L. No. 74-46, § 5, 49 Stat. 163, 164, "which declared soil erosion to be a national menace." Wayne D. Rasmussen, Symposium: The New Deal and Its Legacy: New Deal Agricultural Policies After Fifty Years, 68 MINN. L. REV. 353, 368-69 (1983); WOOTEN, at 13. In addition to the SCS projects listed above, the SCS conducted research and experiments to determine the best grass varieties for reseeding the land and worked directly to persuade farmers to adopt soil conservation practices. Rasmussen, at 369; R. Douglas Hurt, The National Grasslands: Origin and Development in the Dust Bowl, 59 AGRIC. HISTORY 253-54 (1985).

As of January 2, 1954, administration of the LU program under Title III of the Bankhead-Jones Act was transferred from the SCS to the Forest Service. Secretary of Agriculture Administrative Order, 19 Fed. Reg. 74, 75 (Dec. 24, 1953). In 1960, the Secretary of Agriculture designated 3.8

million acres[3] of the LU lands (virtually all the LU lands remaining under Department of Agriculture management at that time) as National Grasslands, administered by the Forest Service. Secretary of Agriculture Administrative Order, 25 Fed. Reg. 5845 (June 20, 1960); West at 89. Beginning in 1954, the Forest Service "continued and expanded the improvement of [LU] project lands in their custody," making surveys, creating and developing campsites and other recreational amenities, and managing wildlife and game. WOOTEN, at 29-30.

In 1961, Congress repealed Titles I (farm acquisition loans), II (rehabilitation loans), and IV (general provisions) of the Bankhead-Jones Act, leaving only Title III (retirement of submarginal land). Agricultural Act of 1961, Pub. L. No. 87-128, § 341, 75 Stat. 294.

In 1962, nearly two decades after the last land acquisition under Title III, Congress repealed the authority under section 32(a) to acquire submarginal lands. Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 102(b), 76 Stat. 605, 607 (repealing 7 U.S.C. § 1011(a)) ("1962 amendments"). Accordingly, the 1962 amendments also struck from the recitation of purposes in section 31 the phrase "including the retirement of lands which are submarginal or not primarily suitable for cultivation." § 102(a), 76 Stat. 607 (repealing portions of 7 U.S.C. § 1010). Congress also added "protecting fish and wildlife" to the enumerated purposes of that section, and included the restriction "but not to build industrial parks or establish private industrial or commercial enterprises," leaving section 31 to read:

> The Secretary [of Agriculture] 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.

§ 102(a), 76 Stat. 607 (codified as amended at 7 U.S.C. § 1010 (1964)). The 1962 amendments also added lending authority to Title III, amending section 32(e) to authorize the Secretary to make loans to appropriate State and local public agencies "to assist in carrying out [plans for a program of land conservation and land utilization]." § 102(c), 76 Stat. 607-08 (amending 7 U.S.C. § 1011(e)). According to the Senate Report, the loan authorization was intended to

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[3] As noted above, between 1938 and 1943, the United States acquired approximately 2.6 million acres of submarginal land under the authority of the Bankhead-Jones Act, and had previously acquired nearly 8.7 million acres of submarginal lands under preceding LU authorities. WOOTEN, at 17. That previously acquired land was made subject to Title III of the Bankhead-Jones Act by executive orders. See supra note 2. Over the years, a large number of acres were transferred, chiefly to other Federal agencies outside the Department of Agriculture. WOOTEN, at 25. When the Forest Service took over management of the LU lands from the SCS in 1954, the program consisted of approximately 8.8 million acres, of which between 1.3 and 1.8 million acres were managed under long-term agreements with States or other agencies. Id. From 1954 to 1961, an additional 3.3 million acres of this land were transferred, granted, exchanged, or sold, with a large part going to the Bureau of Land Management and other Department of the Interior agencies. Id. at 25-26.

> facilitat[e] the shift of land resources out of unsuitable uses or out of the unneeded production of surplus crops into new and better uses. It would also provide an opportunity for rural renewal development by authorizing the Secretary of Agriculture to help develop plans for improvements and to assist in carrying out such plans by means of loans to State and local public agencies.

S. REP. NO. 87-1787, at 26 (1962), reprinted in 1962 U.S.C.C.A.N. 2662, 2673.

Congress viewed the 1962 amendments as creating two new programs under section 32(e):[4] (1) a program to plan and carry out projects for resource conservation and development, to be administered by the SCS; and (2) a program to provide technical assistance and loans for "rural renewal" activity, to be administered by the Farmers Home Administration.[5] H.R. REP. NO. 88-355, at 21, 38 (1963). In addition to these two new programs, the LU program continued to be administered by the Forest Service.[6] (After the 1962 amendments repealed the section 32(a) land

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[4] In fact, the only new language that was added to section 32(e) in the 1962 amendments dealt with loans. Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 102(c), 76 Stat. 605, 607-08 (codified as amended at 7 U.S.C. § 1011(e)). After the 1962 amendments the first sentence of the section read as follows (language added in 1962 is underlined; all other language is from 1937): "[The Secretary is authorized] (e) To cooperate with Federal, State, Territorial, and other public agencies in developing plans for a program of land conservation and land utilization, to assist in carrying out such plans by means of loans to State and local public agencies designated by the State legislature or the Governor, to conduct surveys and investigations relating to conditions and factors affecting, and the methods of accomplishing most effectively the purposes of this title, and to disseminate information concerning these activities. . . ." Id. The 1962 amendments also added four additional sentences to section 32(e) describing restrictions on the loans authorized in the first sentence. Id. It appears, however, that Congress did not treat the Secretary's authority in section 32(e) to develop plans for a program of land conservation and land utilization as cause for a specific appropriation until after the 1962 amendments.

[5] Prior to the 1961 repeal of Titles I, II, and IV of the Bankhead-Jones Act, Congress appropriated moneys to the Farmers Home Administration "[t]o carry into effect the provisions of titles I, II, and the related provisions of title IV of the Bankhead-Jones Farm Tenant Act, as amended . . . ." See, e.g., Department of Agriculture and Farm Credit Administration Appropriation Act, 1961, Pub. L. No. 86-532, 74 Stat. 232, 240 (1960); Department of Agriculture Appropriation Act, 1952, Pub. L. No. 82-135, 65 Stat. 225, 240 (1951). The Farmers Home Administration also administered a number of other loan programs under various agriculture-related acts. 74 Stat. at 240; 65 Stat. at 240. The successor agency to the Farmers Home Administration is the Consolidated Farm Service Agency. 7 U.S.C. § 6932. According to the Office of the General Counsel at the Department of Agriculture, the Agriculture Department issued loans under Title III of the Bankhead-Jones Act, as amended, from the early 1960s until 1980, and any loans that may still be outstanding under section 32(e) of the Act are now administered by the Rural Utilities Service (before 1994, the Rural Electrification Administration; see id. § 6942(c)(1)(A)). All of these agencies are within the Department of Agriculture.

[6] From fiscal year 1955 (the first full fiscal year after administration of the LU program was transferred from the SCS to the Forest Service) through fiscal year 1957, the appropriation acts for the Forest Service included moneys under the heading "Forest Service – Salaries and Expenses" specifically "for the management of lands under title III of the Act of July 22, 1937 [Bankhead-Jones Act] . . . ." See, e.g., Department of Agriculture and Farm Credit Administration Appropriation Act, 1955, Pub. L. No. 83-437, 68 Stat. 304, 308 (1954); Department of the Interior and Related Agencies Appropriation Act, 1957, Pub. L. No. 84-573, 70 Stat. 257, 268 (1956). (Apparently beginning in fiscal year 1956, appropriations for the Forest Service have been included in the Department of the Interior and Related Agencies appropriation acts, although supplemental Forest Service appropriations may be included in Department of Agriculture appropriation acts.) In fiscal year 1958, Congress simplified the language of the Forest Service appropriation and, inter alia, deleted reference to the Bankhead-Jones Act. The Forest Service

acquisition authority, the LU program involved management of lands already acquired, consistent with sections 32(b), (c), (d), and (f) of Title III.) Thus, after the 1962 amendments, administration of Title III of the Bankhead-Jones Act was divided among at least three Agriculture Department agencies: the SCS, the Farmers Home Administration, and the Forest Service.[7]

The section 32(e) "resource conservation and development" program administered by the SCS was described in the House Report on the Department of Agriculture 1964 appropriation bill as a "new program . . . carried on cooperatively with other Federal agencies and departments, State and local agencies, and sponsoring organizations. . . ." H.R. REP. NO. 88-355, at 21. The general responsibilities of the SCS under Title III were to

> develop[] overall work plans for resource conservation and development projects in cooperation with local sponsors; to help develop local programs of land conservation and utilization; to assist local groups and individuals in carrying out such plans and programs; to conduct surveys and investigations relating to the conditions and factors affecting such work on private lands; and to make loans to project sponsors for conservation and development purposes and to individual operators for establishing soil and water conservation practices.

Id. at 19; see also Department of Agriculture and Related Agencies Appropriation Act, 1964, Pub. L. No. 88-250, 77 Stat. 820, 824.

The section 32(e) "rural renewal" program administered by the Farmers Home Administration was described in the same House Report as "provid[ing] technical assistance to locally initiated and sponsored demonstration projects. . . . [and making] [l]oans . . . to local public agencies or groups for rural renewal development projects specifically related to conservation and land utilization." H.R. Rep. 88-355, at 38; see also Department of Agriculture and Related Agencies Appropriation Act, 1964, 77 Stat. at 824.

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justifications submitted to the Senate Committee on Appropriations explained that "a new appropriation item 'Forest protection and utilization, Forest Service' . . . replaces language previously carried under 'Salaries and expenses, Forest Service,' . . . ." Interior Dep't and Related Agencies Appropriations for 1958: Hearings on H.R. 5189 Before a Subcomm. of the Senate Comm. on Appropriations, 85th Cong. 597, 600 (1957). In Senate hearings on the 1958 appropriation, it was explained that the simplification was "not intended to change in any way the authority for performing any activities now carried on [and] does not affect the nature and scope of the work heretofore conducted." Id. at 607. In fact, the Forest Service justification for the 1958 appropriation included an increase for LU projects (explained in the Senate hearing as "submarginal agricultural lands that were purchased under the authority of the Bankhead-Jones Act"), id. at 625, in order "to step up the rehabilitation work on 8 projects in the Dust Bowl area of the Great Plains. The work would consist of reseeding to good range grasses, construction of range improvements and doing other types of soil treatment to establish soil stability . . . ." Id. at 625-26.

[7] It is beyond the scope of this research to detail all of the agencies that at some point in time have played a role in administering parts of the Bankhead-Jones Act. It is possible that one or more other agencies also had some administrative role under Title III after the 1962 amendments.

While loans were authorized under Title III in 1962, all three of the agencies administering that title after the 1962 amendments were also authorized, and moneys were appropriated to them, to carry out federally funded activities related to acquired submarginal lands, resource conservation and development programs, and rural renewal activities. The Federal aid authorized by section 31 (which provided that the program was to "assist in" the activities listed in that section) thus included loans and several kinds of non-financial assistance.[8]

Finally, in 1981, Congress amended section 31 of the Bankhead-Jones Act to add "developing energy resources" as one of the purposes of the Act. Agriculture and Food Act of 1981, Pub. L. No. 97-98, § 1513, 95 Stat. 1213, 1333 ("1981 amendment"). Section 31 now reads:

> The Secretary [of Agriculture] 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.

7 U.S.C. § 1010 (2006). The interplay between section 31's purpose of "developing energy resources" and the prohibition on "build[ing] industrial parks or establish[ing] private industrial or commercial enterprises" is explored below.

IV. Legal Analysis

A. Analysis of Title III of the Bankhead-Jones Act

As the Assistant Solicitor's 2000 Memorandum recognized, the language of section 31 is ambiguous. The 1981 amendment authorized the Secretary of Agriculture to include in the land conservation program activities that will "assist in . . . developing energy resources," yet the 1962 amendments prohibited the Secretary from "build[ing] industrial parks or establish[ing] private industrial or commercial enterprises." The ambiguity arises from the question of whether the Secretary could be said to be establishing a "private industrial or commercial enterprise"

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[8] Subsequent congressional amendments to Title III of the Bankhead-Jones Act included: in 1966, adding "developing and protecting recreational facilities" as one of the purposes of the Act in section 31 and extending the lending authorization of section 32(e) to include "local nonprofit organizations" (Pub. L. No. 89-796, 80 Stat. 1478 (1966)); in 1970, 1972, and 1977, in section 32(e), authorizing the Secretary of Agriculture to bear certain costs of improvements, land acquisition, etc. and to provide Federal assistance for certain water and pollution issues, adding authorization for "aquaculture" plans, and increasing the limitation on appropriation for a single loan from $250,000 to $500,000 (Pub. L. No. 91-343 (1970); Pub. L. No. 92-419 (1972); Pub. L. No. 95-113 (1977)); and in 1996, revising the terms of loans authorized under section 32(e) (Pub. L. No. 104-127 (1996)). See text immediately following this note for discussion of 1981 amendment.

when issuing a lease to a private for-profit company to develop energy resources on Bankhead-Jones Act lands. Because a basic maxim of statutory construction is "to give effect, if possible, to every clause and word of a statute," United States v. Menasche, 348 U.S. 528, 538-39 (1955), the favored interpretation in this case would be one that gives effect to both the provision authorizing development of energy resources and the provision prohibiting private industrial or commercial enterprises. We will examine the legislative history of section 31 to determine whether a reasonable interpretation exists that would accomplish both of these aims.[9]

The House Report for the 1962 amendments twice mentions the prohibitory language added to section 31. In a summary at the beginning, the House Report, commenting on a member's amendment to the previously introduced language, states: "An amendment to section 102 [of the 1962 amendments], ruling out diversion of farmland to industrial parks or private industrial or commercial development, has been included." H.R. REP. NO. 87-1976, at 2 (1962). In a later section-by-section analysis, the report states: "The amendments to title III of the Bankhead-Jones Farm Tenant Act include changes in section 31 to provide for the protection of fish and wildlife, but prohibit the building of industrial parks." Id. at 26.

The Conference Report for the 1962 amendments, in a brief comparison of the House and Senate bills, states: "3. Bankhead-Jones Act amendments. (a) House excluded building of industrial parks or private industrial commercial enterprises from the purposes of the Bankhead-Jones Act . . . ." H.R. REP. NO. 87-2385, at 31 (1962) (Conf. Rep.).

The Conference Report thus characterizes the amendment to section 31 as a curb on the purposes of the Bankhead-Jones Act. The second reference in the House Report simply mentions the prohibition, without clarifying whether it was intended to apply only to the Secretary's actions or to all building of industrial parks. The first description in the House Report, however – "ruling out diversion of farmland" – suggests that the section 31 amendment was intended to prevent industrial parks or private industrial or commercial development on all Bankhead-Jones Act lands. This puts the House Report at variance with the statements of the representative who offered the amendment.

The prohibitory amendment was offered by Mr. Bass of Tennessee, who explained his reasons at some length:

> This amendment will insure that the Department of Agriculture will not acquire or enforce Federal management on already existing private commercial plantings of forests and privately owned commercial income-producing outdoor recreation enterprises in the conduct of land use improvement and adjustment projects undertaken under section 102.
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> The revision of the Bankhead-Jones Act provided in section 102 would authorize the Department of Agriculture to

[9] See, e.g., N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1281-82 (10th Cir. 2001) (where statutory language is ambiguous, courts can look to legislative history for aid in interpretation).

> undertake a program of technical service and financial and other aid to various types of local agencies and organizations to establish and carry out a series of projects for rural renewal and land use improvement and adjustment. The proposed amendments will insure that the operation of these projects shall not interfere with existing privately owned industrial, commercial, and recreational enterprises.
>
> The purpose of this amendment is also to make certain that the industrial aspects of rural renewal projects undertaken under this authorization initiated by local public authorities under this legislation will work in harmony with the rural industrialization program established under the Area Redevelopment Act—Public Law 87-27—and the Small Business Administration.
>
> The effect of the amendment would be to require local rural renewal authorities to obtain financial resources for rural industrial parks and rural industries and commercial enterprises from private, commercial, and cooperative sources or from Small Business Administration or Area Redevelopment Administration.
>
> With the rapid advances of automation and the great variation of wage scales and local tax rates, fear was expressed that local rural renewal authorities set up to benefit from the provisions of section 102 might become so enthusiastic in attempting to attract industry and commercial enterprises to their areas that the strict guidelines Congress wrote into the Area Redevelopment Act would be difficult to enforce if such activities were not subjected to the provisions of that act.
>
> It is not the purpose of the amendment to prevent or limit bona fide new growth of rural industry and commercial enterprise. Quite the contrary, it is expected that the rural renewal projects will explore and utilize the full potentialities of new industry and business growth. The amendment merely restricts the available Federal funds to those available from Small Business Administration and those authorized under the Area Redevelopment Act to make certain they are utilized in accordance with the so-called antipiracy provisions of that act.

108 Cong. Rec. 11,209 (June 20, 1962) (statement of Rep. Bass).[10]

[10] Mr. Bass introduced his amendment and made his remarks during the June 19, 1962, floor debate on H.R. 11222, an earlier version of H.R. 12391, the bill that became the Food and Agriculture Act of 1962, Pub. L. No. 87-703, 76 Stat. 607 (1962). The House Report on H.R. 12391 (July 12, 1962) provides the history of the bill: "Following recommittal by the House of H.R. 11222, the chairman introduced a bill (H.R. 12266) adopting several amendments

The amendment offered by Mr. Bass amended section 31. Mr. Bass mentioned that section 102 of the bill containing the 1962 amendments would authorize the Department of Agriculture to expend funds on technical services and financial and other aid to certain local agencies and organizations in order to establish and carry out projects for rural renewal and land use improvement and adjustment. As discussed supra at pages 9-11 and note 4, that authorization was an amendment to section 32(e), which previously had authorized the Secretary of Agriculture to cooperate with other public agencies, conduct surveys and investigations, and disseminate information, but had not authorized loans. The provision as amended in 1962 authorized the Secretary

> to cooperate with Federal, State, territorial, and other public agencies in developing plans for a program of land conservation and land utilization, to assist in carrying out such plans by means of loans to State and local public agencies designated by the State legislature or the Governor, to conduct surveys and investigations . . ., and to disseminate information . . . .

7 U.S.C. § 1011(e) (1964) (emphasis added.)[11]

Mr. Bass's remarks show that his amendment had two purposes. The first was to ensure that projects undertaken under the auspices of section 31 of the Bankhead-Jones Act, in the wake of the proposed amendments, would not interfere with already-existing private enterprises, either by the imposition of Federal management or through the operation of projects developed by local agencies or organizations. 108 Cong. Rec., at 11,209.

The second purpose was to ensure that private industrial and commercial enterprises could not obtain financial resources through "local rural renewal authorities set up to benefit from the provisions of section 102 [i.e., revised section 32(e)[12]]," but would instead have to obtain financing from private, commercial, or cooperative sources, or from the Small Business Administration or the Area Redevelopment Administration. Id. Mr. Bass's amendment addressed the concern that if financing were available to industrial and commercial enterprises through the Bankhead-Jones Act appropriation, such enterprises could avoid important

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to H.R. 11222 [including Mr. Bass's] made by the House . . . . H.R. 12266 was considered for 5 days by the committee in executive session and, after the adoption of several amendments, was approved by the committee as amended. H.R. 12391 is a 'clean bill' embodying the amendments made by the committee to H.R. 12266. . . ." H.R. REP. NO. 87-1976, at 1-2 (1962).

[11] Subsequent amendments to section 32(e), 7 U.S.C. § 1011(e), are listed at note 8, supra.

[12] All of the 1962 amendments to Title III of the Bankhead-Jones Act were included in section 102 of the Food and Agriculture Act of 1962, Pub. L. No. 87-703, § 102, 76 Stat. 605, 607-08, but the context of Mr. Bass's remarks makes clear that he was referring to the amendment to section 32(e) at section 102(c). 108 Cong. Rec., at 11,209. The other 1962 amendments to Title III were: (i) amending section 31 by striking reference to submarginal lands, adding the purpose of "protecting fish and wildlife," and adding Mr. Bass's amendment; and (ii) repealing section 32(a), which had authorized acquisition of submarginal land. § 102, 76 Stat. 607-08.

restrictions that would otherwise apply to their operations through the Area Redevelopment Act. This concern is clearly associated with the loans that would be newly available to local public agencies under the proposed amendment to section 32(e), quoted above.

Mr. Bass stated that the purpose of his amendment was not "to prevent or limit bona fide new growth of rural industry and commercial enterprise." Id. He did not intend the amendment to restrict the development of such industry or enterprises on Bankhead-Jones Act lands – in fact, Mr. Bass envisioned that "rural renewal projects will explore and utilize the full potentialities of new industry and business growth"– but rather, he intended the amendment to prevent Federal managers from exercising control over existing private industrial or commercial enterprises and to prevent funding of such enterprises in the future through programs developed under the Act. Id. The intent of the amendment as explained by its sponsor thus appears to be inconsistent with the statement in the House Report that the amendment "rul[ed] out diversion of farmland to industrial parks or private industrial or commercial development . . . .," H.R. REP. NO. 87-1976, at 2, and we must decide the relative weight to assign to each.

Committee reports are generally viewed as the most persuasive indicia of congressional intent,[13] and "[s]tatements in committee reports have been held to carry greater weight than statements of legislators in the course of debates." SUTHERLAND STATUTORY CONSTRUCTION § 48.06 (6th ed. 2000). This is because "[t]here is not necessarily a correlation between the understanding and intent of a draftsman and the understanding and intent of the legislature." Id. § 48.12. However, Sutherland notes that there are some situations where courts have given weight to the statements of a drafter of legislation. For example, views of the drafter that "were clearly and prominently communicated to the legislature when the bill was being considered for enactment," "explanatory statements by the sponsor of a bill," and "the statement of [a] member suggesting [an] amendment [during debate]" have all been accepted by courts in specific cases as a legitimate aid to determining meaning. Id. §§ 48.12, 48.13, 48.15. Given the lengthy and considered explanatory statements clearly communicated to the legislature by the member suggesting the amendment in this case,[14] and the lack of explanation for the brief statement in the House Report, we conclude, at the very least, that the legislative history of the 1962 amendment is ambiguous.

Given this 1962 history, the addition in 1981 of "developing energy resources" as one of the purposes of the Bankhead-Jones Act appears to tip the scale toward accepting Mr. Bass's explanation that the purpose of the 1962 prohibitory amendment was simply to restrict Federal funding for private commercial enterprises, rather than to prohibit such enterprises.[15] This is a

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[13] See, e.g., Hous. Auth. of Omaha v. U.S. Hous. Auth., 468 F.2d 1, 6 n.7 (8th Cir. 1972) ("[W]e adhere to the general principle that committee reports represent the most persuasive indicia of congressional intent.").

[14] The House adopted Mr. Bass's amendment to section 31 shortly after he stated his reasons for it, by a vote of 197 to 9. 108 Cong. Rec. 11,210 (June 20, 1962).

[15] We note that the 2000 Memorandum used the term "purposes" in a narrow sense, to mean the list of enumerated purposes in section 31 beginning with "controlling soil erosion" and ending with "protecting the public lands, health, safety, or welfare." 2000 Memorandum, at 3 (citing 7 U.S.C. § 1010). The Conference Report apparently used the term in a broader sense when it stated that the "House excluded building of industrial parks or private

reasonable interpretation that gives effect to every provision of section 31. In contrast, the interpretation implicit in the 1962 House Report, that private commercial enterprises are to be prohibited on all Bankhead-Jones Act lands, would make it virtually impossible to give effect to the 1981 amendment allowing the development of energy resources because such development in this country is accomplished almost exclusively by private commercial enterprises.[16]

The Office of the General Counsel ("OGC") of the Department of Agriculture has at least twice addressed the interpretation of section 31 as it relates to oil and gas development on Bankhead-Jones Act lands. In a 1973 memorandum, the OGC stated: "We do not find anything in [Pub. L. No. 87-703 (the 1962 amendments)] or its legislative history to indicate that congress intended by the language quoted above [the final clause of section 31] to prohibit the normal development of Government owned minerals . . . ." "Title III, Lands, 2710 Special Use Permits, 2820 Mineral Materials Leasing," Memorandum from Robert G. Rue, Dir., Forestry and Soil Conservation Div., to John R. McGuire, Chief, Forest Service, at 2 (Apr. 25, 1973). In 1975, the OGC wrote:

> Applying the law as set forth in the opinion of Robert G. Rue, . . . dated April 25, 1973, it appears to us that the facility proposed (a plant to process the gas being recovered into a saleable item) would be permissible under the Bankhead-Jones Act. It is our understanding that such a plant is necessary to the removal and development of Government owned oil and gas, and that without such a plant said removal and development of the oil and gas would not be permitted.

"2820 Leases and Permits, Rights granted by Oil and Gas Leases," Memorandum from Robert W. Parker, Att'y in Charge, Off. of the Gen. Counsel, Missoula, Mont., to Director of Soil, Air, Water, Minerals and Geology, at 1 (Oct. 17, 1975). Thus, the OGC has determined that the final

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industrial commercial enterprises from the purposes of the Bankhead-Jones Act . . . ." H.R. REP. NO. 87-2385, at 31 (1962) (Conf. Rep.).

While it could be said that the prohibitory amendment restricts the overall purpose of the Secretary's authorization, it does not fit grammatically as one of the purposes enumerated in section 31. Thus, it is not a "purpose" within the meaning of the sentence in the 2000 Memorandum that states: "If a lease will not accomplish, or will interfere with, any of those purposes, the act does not authorize the Secretary to issue it." 2000 Memorandum, at 2. Instead, the prohibitory amendment is a restriction on the initial clause that gave the Secretary his authority to develop a land conservation and land utilization program.

The core of the sentence, leaving aside the enumerated purposes, is: "The Secretary is authorized and directed to develop a program of land conservation and land utilization . . ., but not to build industrial parks or establish private industrial or commercial enterprises." Therefore, the restriction works grammatically as a constraint on the Secretary and on the program that he is authorized to develop, not as a prohibition on all such development on Bankhead-Jones Act lands. We note that the sentence at page 2 of the memorandum from the Wyoming State Director, stating that the restriction "provides that Bankhead-Jones Act lands may not be used" to establish private industrial or commercial enterprises, is an interpretation not supported by our analysis.

[16] Once Mr. Bass's interpretation of the 1962 amendments is applied to a reading of section 31, there is no need to look into the legislative history of the 1981 amendment, because the statutory text thereby becomes clear on its face. See, e.g., Hain v. Mullin, 436 F.3d 1168, 1171 (10th Cir. 2006).

clause of section 31 does not prohibit the development of Government-owned energy minerals or related facilities on Bankhead-Jones Act lands.

Based on the analysis above, we conclude that the last clause of section 31 – "but not to build industrial parks or establish private industrial or commercial enterprises" – prevents funding of such enterprises through programs developed under the Bankhead-Jones Act, but does not prohibit the building or establishing of such enterprises on Bankhead-Jones Act lands.

B. Land status

BLM has informed us that the uranium prospecting permit applications received by the Wyoming State Office are for lands within a National Forest,[17] while those received by the Montana and Colorado State Offices are for National Grasslands. As discussed above, in 1960, most LU lands remaining under the administration of the Department of Agriculture were designated as National Grasslands.[18] Because the National Grasslands are administered under the Bankhead-Jones Act, the conclusions of this opinion apply to any uranium prospecting permit applications BLM receives for National Grasslands.

With regard to National Forest lands, while some Bankhead-Jones Act lands were later given National Forest status,[19] in 1958, Congress made "all lands of the United States within the exterior boundaries of national forests . . . subject to the Weeks Act of March 1, 1911 (36 Stat. 961), as amended . . . ." 16 U.S.C. § 521a (2006). This provision explicitly applies, with certain exceptions not relevant here, to lands that were transferred into National Forest status, as well as to those that were acquired for National Forests. Id. Thus, lands within a National Forest are not subject to the Bankhead-Jones Act.

BLM has informed us that it believes some of the uranium prospecting permits it has received for National Grasslands may be on lands that were patented under the Stock-Raising Homestead Act of 1916, 43 U.S.C. § 291 et seq. ("SRHA"), and were then reacquired by the United States and administered under the Bankhead-Jones Act. Because SRHA lands were patented subject to a mineral reservation to the United States, 43 U.S.C. § 299, the mineral estate did not leave United States ownership. When the United States acquired SRHA lands under the LU program, it "acquired" only the surface estate, not the mineral estate.

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[17] The Department of Agriculture Office of the General Counsel notes a distinction between "National Forest" lands and "National Forest System" lands. The "National Forest System" is a broad category that includes both National Forest lands and National Grasslands, as well as other land areas. Resources Planning Act, 88 Stat. 476, 480, 16 U.S.C. § 1609(a) (2006).

[18] See supra note 3 and accompanying text; see also FOREST SERV., U.S. DEP'T OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM iii, 1 (June 2007) (listing two types of land areas administered under the Bankhead-Jones Act: Land Utilization Projects (comprising 1,876 acres) and National Grasslands (comprising 3,839,752 acres); see also supra note 17.

[19] See, e.g., Exec. Order No. 10,374 (July 15, 1952).

The leasing and other administrative authorities in section 32 of the Bankhead-Jones Act are limited to lands that were "acquire[d] by purchase, gift, or devise, or by transfer . . . ." 7 U.S.C. § 1011(a). Thus, mineral estates in lands patented under the SRHA, never having been "acquired" by the United States, are not subject to administration under the Bankhead-Jones Act, including its leasing provisions.

Instead, such mineral estates are considered part of the public domain, and are administered in the same way as other lands that have never left the possession of the United States.[20] Hardrock minerals, such as uranium, on public domain lands are not available for lease, but are open to location under the 1872 Mining Law. 30 U.S.C. § 22 (2006).

We advise BLM that it cannot lease hardrock minerals on lands that were originally conveyed out of United States ownership under the SRHA and were then reacquired. Such minerals are not administered under the Bankhead-Jones Act, but are governed by the 1872 Mining Law and applicable BLM and Forest Service regulations.

V. Conclusion

For the reasons discussed above, we conclude that on lands administered under the Bankhead-Jones Act, the prohibitory language at section 31, 7 U.S.C. § 1010, does not prevent BLM from processing applications for prospecting permits and leases on such lands for uranium and other minerals that will be used for energy development as long as the energy development operations are not funded through Bankhead-Jones Act programs. BLM may not issue such permits or leases until it obtains the consent of the Secretary of Agriculture.

This opinion supersedes all previous Solicitor's Office opinions that conflict with this opinion.

David Longly Bernhardt
Solicitor

Attachment

[20] We note that a 1957 M-Opinion makes a broad statement that "[m]inerals in lands acquired under Title III of [the Bankhead-Jones Act] are not subject to location under the mining laws, but may be leased by the Secretary . . . ." "Applicability of the General Mining and Mineral Leasing Laws to Lands Acquired for National Forests," M-36421, at 3 (Feb. 18, 1957). However, the opinion also states that "the public domain lands are not subject to leasing for uranium by the Department (though they are open to location under the mining laws for that mineral) . . . ." Id. at 2. Because Reorganization Plan No. 3 only transferred "[t]he functions of the Secretary of Agriculture . . . with respect to the uses of mineral deposits . . . pursuant to the provisions" of statutes including the Bankhead-Jones Act, 60 Stat. 1099, the Plan could not affect mineral deposits that are not subject to those provisions. We conclude that the statement in the M-Opinion assumed that the "lands acquired" to which it referred included both the surface estate and the mineral deposits.

ATTACHMENT

"BLM's Authority to Issue a Hardrock Mineral Lease to Florida Rock Industries on Acquired Bankhead-Jones Act Land," Memorandum from Assistant Solicitor, Onshore Minerals, to BLM State Director, Eastern States Office (Jan. 6, 2000)

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN - 6 2000

Memorandum

To: BLM State Director, Eastern States Office

From: Assistant Solicitor, Onshore Minerals

Subject: BLM's Authority to Issue a Hardrock Mineral Lease to Florida Rock Industries on Acquired Bankhead-Jones Act Land

You have asked our office whether the Bureau of Land Management (BLM) has authority to issue a hardrock mineral lease to Florida Rock Industries for uncommon variety limestone in the Withlacoochee State Forest in Florida. For the reasons below, we conclude that BLM does not have authority to issue this lease.

Background

The United States purchased the lands in question under several 1930's acts. In 1938, Executive Order No. 7908 transferred the lands for administration by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act, 50 Stat. 525-26, 7 U.S.C. §§ 1010-1012 (1937). In 1958, the Department of Agriculture sold the surface estate to the State of Florida for use as a state forest pursuant to a 25-year lease-purchase agreement, with a provision that the lands would revert to the United States if they were ever used for other than public purposes. The United States retained the mineral rights. In 1965, the Department of Agriculture, through the United States Forest Service (USFS), issued a lease to Florida Rock Industries' predecessor to mine common-variety limestone. The company mined common-variety limestone on the lease between 1975 and 1997, pursuant to several lease extensions granted by the USFS. On November 5, 1998, the USFS issued a decision denying Florida Rock's application for renewal of the lease. This decision was affirmed in a final Department of Agriculture decision on July 30, 1999. (Attachment 1.)

The July 30 opinion notes that Florida Rock argued that the limestone which it now proposes to mine is no longer a common variety, but an uncommon variety. The Department of Agriculture advised that if Florida Rock believed the limestone remaining on the lands was an uncommon variety, it should seek a lease from the Department of the Interior. Florida Rock has now applied to BLM for such a lease.

Analysis

In 1946, Congress enacted Reorganization Plan No. 3, 60 Stat. 1097, 1099, which transferred to the Secretary of the Interior "the functions of the Secretary of Agriculture and the Department of Agriculture with respect to the uses of mineral deposits in certain lands pursuant to the provisions of" five acts which were then listed, including the Bankhead-Jones Farm Tenant Act. It is clear from the language of the act that the only authority it gave the Secretary of the Interior was the authority that the Secretary of Agriculture and the Department of Agriculture had under the listed acts prior to the transfer.

In 1947, the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, provided a new statutory scheme for leasing most minerals on acquired lands and thus left the authority conferred by Reorganization Plan No. 3 to apply only to mineral materials and hardrock minerals. In 1960, the Transfer of Functions Act, Pub. Law 86-509, 74 Stat. 205, returned to the Secretary of Agriculture the authority to dispose of mineral materials on these lands. As a result, the Department of the Interior's authority over mineral deposits under Reorganization Plan No. 3 is now limited to hardrock minerals. Uncommon variety limestone is classified as a hardrock mineral.

The lands in question were being administered under the Bankhead-Jones Farm Tenant Act at the time the United States sold the surface to the State of Florida and retained the mineral estate; the mineral estate continues to be administered under the Bankhead-Jones Act. BLM's authority, if any, to lease hardrock minerals on these lands under Reorganization Plan No. 3 is limited to whatever authority is provided by the Bankhead-Jones Act.

Section 32 of the Bankhead-Jones Act, 7 U.S.C. § 1011, provides:

> To effectuate the program provided for in section 1010 of this title, the Secretary [of Agriculture - and subsequently, through Reorganization Plan No. 3, the Secretary of the Interior] 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 . . . .

The act thus authorizes the Secretary to lease property only to effectuate the program provided for in the previous section, 7 U.S.C. § 1010; the terms and conditions of the lease must help accomplish the purposes of the act. If a lease will not accomplish, or will interfere with, any of those purposes, the act does not authorize the Secretary to issue it.

We must therefore examine whether leasing hardrock minerals to Florida Rock would help

accomplish the purposes of the Bankhead-Jones Act. Those purposes are listed at 7 U.S.C. § 1010:

> The 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.

In its July 30 decision, the Forest Service found "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" any of the purposes of the act listed at § 1010. Forest Service decision at 7.[1] The proposed operation for mining uncommon variety limestone is no different than the proposed operation the Forest Service considered in the application to mine common variety limestone. We agree with the Forest Service that Florida Rock Industries' proposed mining operation would not help 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. The Secretary thus has no authority to issue a lease under § 1011 of the Bankhead-Jones Act because the operation would not effectuate the land conservation and land utilization program specified at § 1010.

The Forest Service also pointed out in its July 30, 1999, decision that Florida Rock Industries is a private, for-profit corporation. The Forest Service concluded that issuing a lease for mineral materials to Florida Rock would also violate the final clause of 7 U.S.C. § 1010, by establishing, for an additional period of 10 years, a private commercial enterprise on these lands. The same reasoning would apply to a lease for hardrock minerals.[2]

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[1] The Forest Service opinion leads to the conclusion that the initial lease should not have been issued to Florida Rock Industries' predecessor in 1965.

[2] It is possible that a lease application could present a conflict between accomplishing one of the purposes listed in 7 U.S.C. § 1010 (e.g., a proposed mining operation to develop energy resources) and violating that section's final prohibition against establishing private commercial enterprises. Such a conflict might call for an analysis of the Congressional intent behind the private enterprise prohibition. However, this conflict is not presented in this lease application, and we do not address it.

Conclusion

BLM does not have authority to issue a lease for hardrock minerals on lands administered under the Bankhead-Jones Farm Tenant Act, such as the mineral estate underlying the Withlacoochee State Forest, when such a lease will not help accomplish one of the purposes of that act, as listed at 7 U.S.C. § 1010.[3] The mining operation for uncommon variety limestone proposed by Florida Rock Industries would not help in accomplishing one of those purposes, and BLM is thus without authority to issue the lease.

Peter J. Schaumberg

Attachment

cc: Brenda Aird, Solid Minerals Group, Bureau of Land Management
Pamela Piech, Office of the General Counsel, Department of Agriculture

[3] We understand that BLM has some existing leases for hardrock minerals on lands administered under the Bankhead-Jones Act. BLM should consult with our office regarding treatment of those leases in light of this opinion. BLM will also need to examine current or future applications for prospecting permits or leases consistent with this opinion.