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Comments:

Comments on Advanced Notice of Proposed Rulemaking FS-2018-0052 - 36 CFR 228

Comment on (8) Procedures for Minerals or Materials that May be Salable Mineral Materials, Not Locatable Minerals:

The Forest Service and Secretary of Agriculture must recognize in any change to regulation and definition of common varieties of mineral materials that there is no statutory basis for the Secretary of the Interior or the Bureau of Land Management to make that determination on lands managed by the Secretary of Agriculture. The decision rests alone within the Secretary of Agriculture's statutory authority. The Act of July 31, 1947, An Act to provide for the disposal of materials on the public lands of the United States, specifies that, Nothing in this Act shall be construed to apply to lands in any national forest.

Similarly, the Act of July 23, 1955 (PL-167) states in Section 1, The Secretary, under such rules and regulations as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, pumicite, cinders, and clay).

Who is the Secretary? Section 1 of the Act makes it clear: As used in this ACT the word Secretary means the Secretary of the Interior except that it means the Secretary of Agriculture where the lands involved are administered by him for national forest purposes of the the purposed of title III of the Bankhead-Jones Farm Tenant Act. The statute does not say as used in this section, subsection, part, etc. It clearly states as used in this ACT.

The statutory language of PL-167 is consistent with that of the 1947 Act in that the Secretary of the Interior is excluded from mineral material/common variety determinations on lands managed by the Secretary of Agriculture.

Many cite the language of 30 U.S.C as dispositive notwithstanding the clear statutory language. This is not correct. As explained by the Office of Law Revision Counsel of the House of Representatives, 30 U.S.C. has not been enacted into Positive Law. Although non-positive US Code titles may be cited as prima facie evidence of the law, the underlying statute is proof of the words in the underlying statute. And in the case of PL-167 the statutory words are crystal clear regarding the fundamental authorities of the Secretary of Agriculture.

Absent further Congressional statutory action, the Secretary of Agriculture, alone, has the authority for defining and disposal of common varieties mineral materials on national forest system lands. Any changes to 36 CFR must recognize this limitation on the Secretary of the Interior. The 10th Circuit in *Copar v. Tidwell* (2010) specifically recognized 36 CFR 228 Subpart C as the regulations governing definition and disposal of common varieties of mineral materials on lands managed by the Forest Service.

The purpose of the existing 36 CFR 228 Subpart C common variety classification definitions was to add clarity to both forest officers and the public on materials that would either be disposed of by sale or by Mining Law disposition, and to reduce the time needed for the common/uncommon determinations. Use of the contest procedure is time-consuming and wasteful for both the operator and government. The regulation also made clear that those materials which were subject to Mining Law abuses in the past are identified as common variety - building stone, landscaping, fireplace/patio stone, etc. In addition, as the above authority makes clear, the Department of the Interior Office of Hearings and Appeals has no statutory authority to make those determinations on national forest lands or other lands under the management of the Secretary of Agriculture. Should the Secretary of Agriculture opt to change how the determination of common/uncommon variety is made, he has the authority to do that. For example, the Secretary could determine that materials used in the chemical, industrial, manufacturing process is an uncommon variety of mineral material. The Secretary could

also state specifically that limestone and other mineral materials used in the manufacture of cement are uncommon varieties.