

RON COLEMAN MINING, INC.

IBLA 2003-267

Decided March 30, 2006

Appeal from a decision of the Bureau of Land Management, rejecting a 1998 proposed mining plan of operations for a crystal quartz lease. ARES 36588.

Set aside and remanded.

1. Mineral Lands: Leases–Mining Claims: Plan of Operations

When BLM receives a proposed mining plan of operations for a quartz crystal lease located on lands within a National Forest, under 43 CFR 3592.1 BLM must consult with the Forest Service and promptly approve the plan or advise the lessee of what is necessary to conform to governing requirements. If the Forest Service objects to the plan, BLM must reach an independent judgment regarding rights granted by the lease and its obligations to manage the lease under applicable authority.

APPEARANCES: Kevin Coleman, Hot Springs, Arkansas, for Ron Coleman Mining, Inc.; Barbara B. Fugate, Esq., and Peter J. Schaumberg, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Ron Coleman Mining, Inc. (RCM), appeals from an April 10, 2003, decision of the Jackson, Mississippi, Field Office, Bureau of Land Management (BLM), rejecting an August 4, 1998, proposed mining plan of operations for crystal quartz lease ARES 36588 located in the Ouachita National Forest (NF) in Arkansas. The decision asserted that the plan was not in compliance with the “1990 Forestwide Standards and Guidelines of the Amended Land and Resource Management Plan of the Ouachita National Forest” (ALRMP or Forest Plan) and stipulations of the lease itself.

The Ouachita NF is a unit of the National Forest System managed by the United States Forest Service (Forest Service or FS), of the United States Department of Agriculture. The NF is administered consistently with the 1990 ALRMP.

Prior to 1988, quartz crystal deposits on public domain lands of the United States were subject to location under the Mining Law of 1872, 30 U.S.C. §§ 21-47 (2000). See ALRMP at IV-57. Such deposits found on “acquired land,” however, or land acquired by the Secretary of Agriculture under the Weeks Act of March 1, 1911, 36 Stat. 961-963, as amended, 16 U.S.C. §§ 480, 500, 513-519, 521, 552 and 563 (2000), were subject to leasing under the Act of March 4, 1917, 39 Stat. 1134, as amended, 16 U.S.C. § 520 (1982), under terms and conditions the Secretary of Agriculture deemed appropriate. See Northern Nevada Natural Mining, 161 IBLA 318, 321 (2004). In 1946, section 402 of Reorganization Plan No. 3, 60 Stat. 1099, 5 U.S.C. Appendix (1982), transferred to the Secretary of the Interior the functions of the Secretary of Agriculture with respect to leasing of deposits on acquired or Weeks Act lands under the Act of March 4, 1917. Leasing of such lands could be authorized by the Secretary of the Interior with the concurrence of, and on such conditions as may be specified by, the Secretary of Agriculture in order to protect the primary purposes for which the land was acquired. Under the authority of Reorganization Plan No. 3, BLM issued regulations at 43 CFR Subpart 3501 authorizing leases for hardrock minerals such as quartz crystal on acquired national forest land. 43 CFR 3501.1(b)(1)(i); Equity AU, Inc., 134 IBLA 319, 320 (1996); United States Gypsum Co., 121 IBLA 174, 175 n.2 (1991); Lee Roy Newsom, 117 IBLA 386, 388 (1991).

Treatment of hardrock minerals changed with the passage of section 323 of Public Law 100-446 on September 27, 1988. After that date, neither mineral entry for nor leasing of quartz deposits on either public domain or acquired lands in the Ouachita NF was allowed. Section 323(a) established that, “subject to valid existing rights,” quartz deposits in the Ouachita NF in the State of Arkansas “shall no longer be subject to location and entry under the General Mining Law of 1872” and “all such deposits shall hereafter be disposed of under the same conditions as are applicable to common varieties of mineral materials on such lands under the Materials Act of 1947 (61 Stat. 681), as amended.” See 30 U.S.C. §§ 601-603 (2000). Arkansas Senator Dale Bumpers, sponsor of amendment 2106 to H.R. 4867, which was adopted as section 323, explained:

[M]y informal discussions with mining experts at the BLM and the Forest Service have led me to consider the simpler approach of making quartz a salable mineral. * * * The advantage of salable versus leasable disposition is that the Secretary of Agriculture exercises authority for mineral material disposals on national forest lands, whether public domain or acquired, thus streamlining the process because no Department of Interior involvement is required. * * * Existing mining claims and existing leases would be grandfathered under applicable law.

134 Cong. Rec. S9516 (daily ed. July 13, 1988). Section 323(a) contained the following proviso: “That fifty percent of the moneys received pursuant to this section

shall be paid by the Secretary of the Treasury to the State of Arkansas * * *.” By contrast, Arkansas received 25 percent of Federal royalties from hardrock mineral leases. (ALRMP at IV-59.)

Pre-existing mining claims and leases are maintained as valid existing rights and administered under existing law even after 1988. Lee Roy Newsom, 117 IBLA at 389; ALRMP at K-3 (explaining leasing). BLM manages grandfathered quartz crystal leases under hardrock mining regulations at 43 CFR Part 3500. BLM regulations at Subpart 3590 govern hardrock mining exploration and operations, and authorize BLM to approve plans and plan modifications for such operations. 43 CFR 3590.2(a). The purposes of the rules are to promote production “without waste or avoidable loss of minerals or damage to deposits; to encourage maximum recovery and use of all known mineral resources”; to avoid damage to the environment and public health and safety; and to account for minerals produced. 43 CFR 3590.0-1.

Prior to beginning any operation on a solid mineral lease, an operator must submit a detailed mining plan of operations to BLM. 43 CFR 3592.1(a). BLM must consult with the agency having jurisdiction over the lands on which leases are located “with respect to the surface protection and reclamation aspects of such plan.” 43 CFR 3590.2(a). Mine operators must “conduct operations in compliance with established requirements, including” inter alia, “the law, regulations, the terms and conditions of the lease, license or permit,” and “special stipulations.” 43 CFR 3590.2(e). After consultation with other agencies involved, the authorized BLM officer “shall promptly approve the plans or indicate what additional information is necessary to conform” to governing requirements. 43 CFR 3592.1(a).

Section 323(b) of Public Law 100-446 required the Secretary of Agriculture to “prescribe rules and regulations for the disposal of quartz mineral from the Ouachita National Forest.” Agriculture Department rules at 36 CFR Part 228 Subpart C govern disposal by mineral materials sales, while Subpart A governs locatable minerals subject to lease and mining claim. In addition, rules at 36 CFR Part 219 implement the planning mandate of the Forest and Rangeland Renewable Resources Planning Act as amended by the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (2000), which requires development of forest management plans for units of the National Forest System. 16 U.S.C. § 1604 (2000). For the Ouachita NF, FS issued the March 1990 ALRMP. With respect to plan implementation, “the Forest Supervisor shall ensure that, subject to valid existing rights, all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan.” 36 CFR 219.10(e). When consulted by BLM about approval of a plan of operations for a lease in a NF for which there is a governing forest plan, FS must advise BLM whether the mining plan is consistent with the forest plan while honoring valid existing rights.

The 1990 Forest Plan establishes standards and guidelines for administering and managing land uses within the Ouachita NF. It establishes goals and objectives, including those for mineral development in the forest. It “encourages valid and appropriate exploration and development of resources” (ALRMP at III-4), and the orderly development of resources “to maintain a viable, healthy minerals industry,” to ensure integration of mineral development with other uses, and to require reclamation of mined areas. *Id.* at IV-4 (No. 15(a)-(c)). The Forest Plan requires managing saleable quartz as a “revenue generating program.” *Id.* at IV-57. It establishes standards and guidelines for hardrock leasable minerals, which require logical mining progression from prospecting through development and reclamation, and mining that “reduce[s] the visibility of the operation.” *Id.* at IV-18 and IV-16. For areas designated as the foreground of sensitivity level I and II roads and trails (defined as a 200-foot minimum corridor on either side of a road not to exceed one-fourth mile), mining related activities must “reasonably reduce visibility of the operation and meet visual quality objectives to the extent possible.” *Id.* at IV-160, IV-163.

According to the Forest Plan, “quartz crystal mining is by far the most prevalent mining related activity on the Ouachita [NF]” which contains

major quartz crystal bearing veins in several geologic formations within a significant crystal bearing belt or zone approximately 30 to 40 miles wide by 70 to 90 miles long through the eastern and southern portions of the Forest. This zone encompasses the * * * Womble [and other] ranger districts through * * * Montgomery count[y]. The principal quartz crystal producing formations are the Crystal Mountain Sandstone and Blakeley Sandstone Formations. * * * [T]he crystal typically occurs in pockets that vary from inches to many feet in diameter. The quartz crystals produced from this zone are reputed to be among the best in the world.

(ALRMP at Appendix K, K-3.) The ALRMP describes the history of crystal production in the Ouachita NF and identifies these formations and lease ARES 36588, *id.* at K-4 to K-16, K-17, in the Womble Ranger District where the minerals potential for quartz is “high.” *Id.* at sections 3 and 4; K-20, K-21; see also K-23 (discussing Crystal Mountain and Blakeley Sandstone formations in the “Mount Ida” area). The ALRMP describes a “rush” for crystal quartz beginning in 1986, resulting in a 600 percent increase in mining from 1986-1990. *Id.* at K-3.

The Forest Plan asserts that “[p]resent day quartz crystal operations are surface operations.” *Id.* at K-5. The ALRMP describes most operations as small ones with 1-3 operators, disturbing less than an acre, but asserts that they range to large operations, on private lands adjacent to the Forest in 1990, which employ from 5-20

operators. Id.; id. at K-38. The Plan describes a “moderate” operation as one typically disturbing from 1-5 acres. Id. “[F]ull site reclamation is required when any mining related operation is completed,” id. at K-38, but reclamation “should keep pace with mining progression” and the “[t]otal unreclaimed surface impact from a single permitted hardrock mining related activity should be limited to approximately five acres before further progression of operations occur[s].” Id. at IV-17.

Lease ARES 36588 was sold in 1986 at “the first competitive quartz crystal lease sale in the country.” (ALRMP at K-3.)^{1/} The subject 80 acres were considered for competitive leasing due to their high potential for crystal quartz development as documented in two mineral reports. The first report evaluated the 20-acre S $\frac{1}{2}$ of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 4. The report described the Crystal Mountain Sandstone vein as 550 feet thick traveling “along the northern flank of Fisher Mountain.” (July 25, 1985, Mineral Report, Mineral Resource Evaluation for Quartz Crystal Competitive Sale on Lands Nominated by ESO, S $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 4, T. 3 S., R. 24 W., 5th Prime Meridian, Montgomery County, Arkansas (1985 Mineral Report), at Part 5.b.) The report stated that historical mining had established “economic, workable deposits on the lands” and estimated that “156 tons of quartz crystals may still occur” there with a certainty factor of +/- 50 percent. Id. at Part 10, Conclusions and Recommendation. The report noted that the crystals went to a depth of 120 feet, and that mining “will require movement of 248,000 cubic yards of mine spoil that was pushed back into previous mine excavations.” Id. The report recommended competitive leasing of the land if road access problems could be resolved. Id. On August 5, 1985, BLM recommended a competitive lease sale.

On March 19, 1986, BLM recommended a modification of the competitively nominated lands to include the 20-acre N $\frac{1}{2}$ of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 4, which was then included in two prospecting permits. (Mar. 19, 1986, Memorandum.)^{2/} The entire N $\frac{1}{2}$ of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ could have as many as 369 tons of crystals remaining, valued at \$867,500 in 1986 dollars. (Appendix II, and Part VI, Map; A-027767, Feb. 1, 1966.)

On April 28, 1986, BLM finalized a “Minerals Evaluation for Prospecting Permit for the 40 acres comprising the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 4, T. 3 S., R. 24 W” (1986 Mineral Report). This report notes quartz production from the lands “immediately to the east of the subject land,” presumably including those in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 4 mined previously, and that “veins from the adjacent land extend onto the subject land.” (1986 Mineral Report at Part 6.) Based on conservative estimates of 19.3 tons of quartz, the report concluded that “the land contains a known, workable deposit of

^{1/} Apparently, only six more leases were issued before FS issued the first salable quartz crystal contracts in 1989. (ALRMP at IV-59 (discussing seven leases), IV-57.)

^{2/} A telephone conversation memorandum of this same date indicates that FS had concerns with offering the land due to its steepness.

quartz crystals. * * * [I]f the land were added to the adjacent competitive tract, mining could be accomplished more efficiently.” Id. at Part 7. Accordingly, the report recommended that a “prospecting permit be rejected and the land be leased competitively. The existing 40 acre competitive tract should be extended to include the subject 40 acres.” Id. BLM recommended modification of the lands to be offered for competitive leasing on April 29, 1986. On July 2, 1986, FS consented to a lease combining “both parcels, the SESE and SWSE of Section 4, T3S, R24W, 5th Principal Meridian,” subject to a special stipulation that the lease is subject to FS rules. See also Aug. 6, 1986, “Specifications Update on Lands Nominated for Competitive Leasing”; Aug. 7, 1986, “Minimum Acceptable Bid, Competitive Quartz Lease Sale, Sept. 30, 1986.”

BLM offered for competitive leasing 80 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 4, T. 3 S., R. 24 W., 5th Principal Meridian, in the Ouachita NF near Mt. Ida in Montgomery County, Arkansas, at a lease sale held on September 30, 1986. The winning bid was submitted by Don Burrow, President of Crystal City, Inc. Crystal quartz lease ARES 36588 was issued effective March 1, 1987, with these stipulations:

1. Any surface disturbing operation under this lease shall be subject to prior approval of such operations and to such reasonable conditions not inconsistent with the purpose for which the lease is issued, as may be required to assure proper protection of the surface, the natural resources, the environment, existing improvements and to assure timely reclamation of disturbed lands.

2. Entry upon the land or disturbance of the surface will be allowed only after approval of an operating plan to be submitted by the lessee. The operating plan shall include, as a minimum, a map and explanation of the nature of the anticipated activity and surface disturbance. Subsequent revisions to operating plans shall require similar approval.

* * * * *

4. Vehicular access to the lease area will be limited to existing roads. The leaseholder will be responsible for negotiating with adjacent leaseholder and owner of the private right-of-way for access to the lease area. No additional road construction will be allowed due to the steep terrain and potential for severe erosion.

(Lease ARES 36588, Attachment A, Special Stipulations.) The Lessee must “carry on all operations * * * in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, minerals, and other resources, and to other land uses or users,” and show “due regard for the prevention of injury to life, health or

property, and of waste or damage to any water or mineral deposits.” Id. at section 6. In addition, the lease is subject to FS requirements:

The * * * lessee must comply with all the rules and regulations of the Secretary of Agriculture set forth at Title 36 [CFR] Chapter II, governing the use and management of the National Forest System (NFS) when not inconsistent with the rights granted by the Secretary of the Interior in the * * * lease.

(Lease ARES 36588, Attachment B, Stipulation.) The lessee was granted the right and privilege to “explore for, drill for, mine, extract, remove, beneficiate, concentrate or otherwise process and dispose of the Quartz Crystal deposits.” Id. at section 2.

Burrow submitted a mining plan of operations. (Nov. 14, 1986, proposed plan.) In a memorandum to BLM, dated March 9, 1987, John C. Nichols of FS recommended approval of the proposed plan, which would govern for “many years.” Either FS or BLM prepared a set of “operating conditions” and an “Erosion Control and Reclamation Plan,” which Burrow signed on March 20, 1987. A document dated April 12, 1987, indicates that BLM “approved Mr. Burrow’s plan of operations” for start-up in May, but no approved plan appears in the record beyond the documents signed by Burrow on March 20, 1987. Thus, it appears that the approved plan is the November 1986 plan of operations submitted by Burrow.

Within 3 months FS indicated problems with the lease. BLM disagreed.

[At a July 15, 1987, inspection] Mr. Nichols stated that the north spoil area was outside the allowed mine area. Mr. Finzer expressed concern that the visual impact to Lake Ouachita and U.S. Route 270 (6 miles and 4 miles to the north) was unacceptable. All FS employees added negative comments on the visual impact of the operation (Nichols made an attempt to explain pre-mining site approval, but was silenced.)

* * * * *

Upon return to the office, the inspector closely examined Mr. Burrow’s approved plan and agrees with Mr. Burrow. The operation essentially conforms with the approved plan.

(July 23, 1987, Memorandum of BLM inspector Richard Wallace to the file.)

FS employees returned to the lease 2 weeks later and repeated complaints regarding visual impacts. By contrast, the BLM inspector believed the operations had

been fully approved. The source of FS's complaints, according to Wallace, was assurances made by FS to the United States Congress about Lake Ouachita.^{3/}

Mr. Burrow was informed that the concern was due to guarantees made to Congress regarding the visual quality of Lake Ouachita. Mr. Burrow agreed to contact [FS] and work out something. Mr. Burrow was informed that we also represent the lessee and if the Forest Service suggested unreasonable mitigation measures then we would act as mediator in this matter.

(Aug. 5, 1987, Wallace (BLM) Memorandum to the file at 2.) Wallace proposed, inter alia, that "the Forest Service be informed that the mining operation be allowed to proceed, unimpeded within the limits of the mine plan." Id.

By September 1987, all mining had ceased. Wallace (BLM) stated that a solution had not been reached. It must be noted that a large scar on McGraw Mountain may be seen from U.S. Highway 270. This scar is about one mile east of the subject lease and is on private land. The writer believes that the McGraw Mountain scar may be what provoked the visual quality complaint by the Forest Service. * * * No violations have occurred since the July inspection.

(Oct. 6, 1987, Wallace (BLM) Memorandum to the file at 2.) An October inspection revealed that Burrow had resumed mining, and that FS and BLM continued to disagree as to what was permitted on the lease. (Nov. 6, 1987, Wallace (BLM) Memorandum to the file at 2.)

In the summer of 1988, FS demanded that BLM require Burrow to begin reclamation of the north-facing tailings slope.^{4/} (July 1988 letter from FS to BLM.) After a November 15, 1988, inspection, Nichols (FS) "re-stated the FS concerns with

^{3/} Nothing in the ALRMP's discussion of the 79,705-acre Lake Ouachita area prohibits visual impacts on it from a lease six miles away. (ALRMP at IV-146-152 (prescription for Management Area 16 - Lake Ouachita); IV-147 (standards and guidelines of Management Area 18 (sensitivity level I and II roads) apply); IV-160 (Management Area 18 (foreground management area "will not exceed a distance of one-fourth mile")); IV-151 (governing leasable and salable minerals within "Lake Ouachita" area outside seen area (for hardrock mining activities, maximum two acres surface impact unreclaimed)).)

^{4/} The record repeatedly refers to north facing, south, and west slopes, and enumerated benches and pits. We cannot determine from the record relative locations of described areas, or picture pits or benches relative to cardinal direction.

the visual impact of this site on Lake Ouachita with the [BLM] inspector.” Wallace (BLM) recommended a meeting among FS, BLM, and Burrow, but “no violations were noted.” (Nov. 22, 1988, Wallace (BLM) Memorandum to the file at 2.) At a March 14, 1989, inspection, Burrow agreed to begin re-seeding the north facing slope. Again, “no violations were noted.” (Apr. 10, 1989, Wallace (BLM) Memorandum to the file at 2.)

On August 23, 1993, Kenneth Manley submitted a plan of operations for the lease, followed by an August 27, 1993, lease assignment from Burrow. By letter dated September 24, 1993, Sid Vogelpohl of BLM authorized Manley to “operate in the existing pit” under “the existing approved plan of operations,” presumably the one approved for Burrow in 1987.

FS approved Manley’s “amended mining plan” by Decision Memo, Amended Plan of Operations, Quartz Crystal Lease ES-36588, October 7, 1993 (1993 Decision Memo), and accompanying evaluation under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000). FS required a 50-foot buffer around an old adit on the leased land as an historic tunnel important for cave-dwelling species. The 1993 Decision Memo expressed concerns regarding visual impacts:

The expansion area is located approximately 2000 feet north from FS 177. The Visual Quality Objective in this area is modification (refer to Appendix C). ^{5/} This objective allows human activity to dominate the characteristic landscape, yet adhere to naturally established form, line, color and texture. Operations will appear as a natural occurrence when viewed in foreground or middleground. The visual objective will be addressed in the Plan of Operation.

(1993 Decision Memo at 2 (emphasis added).) By following “14 Standards and Guides,” in the “ALMRP, 1990,” the mining-related activities that involve “vegetative manipulation of tree cover comply with the seven requirements found at 36 CFR 219.27b.” Id. FS prepared an “Operating Conditions Agreement,” which Manley signed on October 19, 1993. A November 29, 1993, FS letter to Manley reiterated concerns regarding protection of the historic “tunnel.”

By letter dated December 3, 1993, BLM approved Manley’s plan of operations as a modification of the existing plan. On January 11, 1994, BLM approved the assignment of the lease to Manley. No approved plan appears in the record; the approved plan is likely the one submitted by Manley on August 23, 1993.

^{5/} No Appendix C is attached to the 1993 Decision Memo in the record.

The next documents that appear in the record relating to operations (as opposed to bonding requirements) date from 1995. The record indicates that Manley submitted a modification of his approved plan on March 13, 1995, though no such submittal appears in the record. According to a conversation record dated May 17, 1995, FS geologist Bob Raines indicated that the modification could not be approved “until FS archeologist clears old adit” and also expressed concern about a need to “start reclaiming most recent pit.” By letter dated March 20, 1995, BLM “partially” approved the plan submitted on March 13, 1995, to allow operations to continue, subject to a “cultural survey of the old adit (shaft) on the south slope.”

On May 2, 1995, Manley submitted another proposed plan of operations, apparently as a result of and during a site inspection by BLM and FS. (May 2, 1995, notes.) This 1995 plan proposed the excavation of a series of benches and pits along a slope, possibly on the south side of the mountain. In a letter to BLM, FS complained about various aspects of Manley’s operation, including safety, visual impacts, and its compliance record. (June 5, 1995, letter from FS to BLM.) FS requested, before plan approval, that Pit #1 be completely reclaimed; that the proposed operation be re-evaluated to incorporate a “proper slope gradient”; and that individual extraction actions by the lessee be subject to close monitoring, review, and approval. Id.

On June 6, 1995, BLM sent a letter to FS, identifying amendments to Manley’s proposed operation which would require mining along a series of benches and pits. The spoil created by Pit #2 would backfill Pit #1, and then Pit #3 could be dug to fill Pit #2. BLM attached to this letter a two-page document entitled “Amended Operating Plan (Submitted May 2, 1995) Stipulations and Controls.” BLM referred to a series of map attachments A-1 through A-6, though maps with such symbols appear only randomly in the record.

On June 8, 1995, BLM issued a letter stating that the “amended plan of operations on lease ARES 36588, dated May 5, 1995, as supplemented by maps and telephone statements, is completed and approved.” (June 8, 1995, letter from Vogelpohl (BLM) to Manley (emphasis added).) The sequence of telefaxes among BLM, FS, and Manley makes it impossible to determine exactly what was approved. The approval letter attaches “Stipulations and Conditions” which Manley signed on June 8, 1995, and copies of documents identified as A-1, A-2, A-4, A-5, and A-6 (twice). A June 8 telefax cover sheet to Manley, attaching eight pages, states “here’s what was worked out. If you agree provide a signed/dated copy of conditions and signed/dated copies of maps.” Also on June 8, 1995, FS provided to BLM by telefax “suggestions” to amend the mining plan which would prohibit “excavating bench #1” until the east half of Pit #1 is reclaimed. It is unclear whether FS’s “suggestions” were adopted or even included in the eight pages sent to Manley. Given the ambiguous terms of the approval letter and the telefax cover sheets, we cannot

ascertain the terms of the approved 1995 mining plan which has governed the lease ever since, or whether the parties had a meeting of the minds about those terms.

By certified letter, return receipt requested, dated October 11, 1995, FS sent a letter to Manley asserting that inspection had revealed that a highwall on the present bench exceeded the approved height and base by a factor of two. The spoil material which was to be backfilled into Pit #1 had been pushed downslope. (Oct. 11, 1995, Letter from Raines (FS) to Manley.) Raines (FS) informed Manley that unspecified visual quality objectives were exceeded by the failure to reclaim. Id.

Manley called Wallace (BLM) to object to FS's response. BLM conducted a site visit on October 31, during which Manley claimed that he was "following his submitted plan, rather than his approved plan." (Nov. 2, 1995, Wallace (BLM) Memorandum to the file.) Wallace asserted that Manley was following the operating plan in backfilling Pit #1, but found two other violations. The "B2" (which we take to mean Bench 2) highwall exceeded 20-25 feet, and Manley had begun "B3" without authorization. Id.; see also Oct. 31, 1995, notes. In a November 11, 1995, FS memorandum regarding this inspection, Nichols (FS) first suggested that the lease must be managed consistent with sites subject to mineral material sale. He asserted that Manley had been the subject of complaints by other miners "who felt the FS is favoring one operator over another because of the perception that the impacts from this operation are greater than those allowed at other operations. Given the fact that this particular site is under some public scrutiny, possibly more so than other mines, I recommend" inspection on a 10-day cycle.^{6/}

In a letter to Manley dated November 3, 1995, Wallace (BLM) advised Manley of violations BLM found, and set forth the following mining/reclamation sequence:

1. Continue mining B3 to the west, 2-3 weeks.
2. Mine B4.
3. Spoil B1 bench into Pit #1.
4. Extend B2 to the east 20-30 feet, ramp-up another 20 feet.
5. Mine B1, spoil into B2.
6. Shoot down overhang in Pit #1.
7. Recontour Pit #1, revegetate in Spring of 1996.
8. Move to Pit #3. Spoil into Pit #2.

(Nov. 3, 1995, letter from Wallace (BLM) to Manley at 2.)

^{6/} FS employees' belief that Lease ARES 36588 was indistinguishable from a mineral material sales contract may have derived from an ambiguous discussion of mineral materials sales and leasable hardrock minerals in the ALRMP at IV-57-59.

Despite the fact that FS had called for inspections every 10 days, the next inspection report in the record is dated June 14, 1996. Wallace (BLM) indicated that Burrow, the first lessee, Manley, and others had sent “a shipment of 45,000 pounds gross to Taiwan.” (June 14, 1996, inspection report at 2.) According to Wallace, little mining had taken place since the last inspection. Id. at 3. Wallace reported a “mass wasting” of the spoil piles placed on the north slope by “the previous lessee, Don Burrow.” Id. at 2. “The inspector asked the lessee to remove the remaining four spoil piles from the edge of the slope, construct a berm from the east diagonally down to the southwest to an existing berm about 75 feet south of the slope. The berm should move rainwater away from the fresh spoil to the stabilized 50 year old spoil to the west of the problem area.” Id. Wallace further reported, id. at 3:

The lessee has completed about 90 percent back filling Pit #1. The back fill has been benched to within 25 feet of the high wall top. One additional bench will be installed and the high wall sloped from top to bottom * * * for the remaining 10 feet. The back filling material will come from bench #1. This work should be completed before the fall planting season. Bench #2 was mined 25 feet down to bench #3 in two places, following the veins as allowed by the approved plan. * * *
No significant violations.

On August 12, 1996, BLM received a Lease Assignment of lease ARES 36588 dated July 29, 1996, from Ken and Brenda Manley to RCM. See also Nov. 12, 1996, BLM Memorandum re Assignment of Record Title. BLM proceeded to deal directly with RCM or representatives Ron and Kevin Coleman as if RCM were the lessee. C.f., Aug. 30, 2001, decision, “Assignment of Record Title Approved.” From the outset, RCM wanted to expand mining operations. In response, FS expressed increasing opposition to allowing mining as an option on the lease, given FS’s preference for reclamation and protection of visual objectives.

On September 12, 1996, Wallace (BLM) and Raines (FS) joined Ron and Kevin Coleman at the lease site and found “no violations.” According to a report:

the assignee expressed his concern with the lack of spoil storage space and restriction on mine face width. (This subject was discussed over the telephone with the assignee before he bought the mine from Ken Manley.) [^{Z/}] The inspector explained the location of the scenic road and necessity to protect the visual values; but, Mr. Coleman could propose an operations plan amendment and we would consider it. Mr. Raines climbed down to spoil pile to see how much acreage could be

^{Z/} No phone conversation between BLM or FS and the Colemans is recorded in the record.

added to the spoil storage area [and] said that a triangle about 200 feet from the present toe of the spoil pile, tapering to either side of the spoil pile could be available.

(Sept. 12, 1996, inspection report.) Notes of FS employee Gretchen Hunt state:

Inspector explained need to stay with original plan until an amendment was approved. Ron Coleman was asked to provide two copies (one for Bob Raines and one for BLM). Bob Raines agreed to allow additional spoil storage at base of existing storage area. Ron Coleman stated that he had removed 32,000 pounds of crystals in the 30 days since he has been operating.

Meeting notes prepared by Nichols (FS) state: "We looked at his proposed expanded tailings disposal area" and questioned whether "it was covered under previous NEPA work. Coleman intends to amend the existing operating plan when he obtains full control of the lease." (Sept. 17, 1996, Nichols (FS) Memorandum re Inspection.)

On October 29, 1996, RCM submitted its promised Plan of Operations for Mining Activities on National Forest Lands which expanded operations, in compliance with FS specifications, and included backfilling and reseeding reclamation. (1996 RCM Plan at ¶ H.) The following describes the first 12 months of proposed mining:

Aprox 20,000 lbs per month of usable crystals could be mined. Aprox 4000 yards of tailings would be produced per month at this rate of production. Clearing and start up would consist of slashing all unusable timbers and moving it to outside of boundries to act as filtering agency for spoil piles. Settling ponds would be built only if needed. Any usable timbers would be purchased by RCMI or sold to timber companies.

Mining would consist of working with open wall in front of us at all times, always to MSHA standards, with tailing area behind (See Map 4). As we mine to the NE, if there is not ample tailing area behind us we would use Area (2) for additional spoils (see map 5).

Commencing from SE cornor of Section 4-T3S-R24W. Go west 654' then North 166' to point of begining. This is where we would start mining (already open pit) on a center line North 16 degrees East to apoint along top of the mountain (That does not show from HWY 270) that will be agreed upon by USFS and RCMI. (SEE MAP 6) [sic]

(1996 Proposed Plan at 3.) No corresponding maps are included in the record.

At a December 3, 1996, inspection the participants discussed spoil storage:

Mining has ceased due to a lack of spoil storage space. The lessee continues to be focused on acquiring additional spoil storage. Henry (?) suggested rerouting mine access road. The rerouted access would allow hauling spoil to the top of the ridge for storage, until clearance could be obtained below the mine. Storage below the mine is essentially off-lease and the lessee was briefed on how to acquire a use permit from the District Ranger.

(Dec. 6, 1996, Wallace (BLM) memorandum.) Wallace discussed approval of an amended plan which he said could not occur until a lease assignment was approved.

FS's reaction to the proposed plan to expand operations was to solicit another plan. (Dec. 4, 1996, letter from Raines (FS) to Wallace (BLM).) Raines' specific concerns were "1) Lack of benching in pit 2 and the amount of spoil material downslope, and how this will effect stability and final reclamation, 2) the completion of the assignment and 3) lack of detail in amended plan." *Id.* (sic). These problems would be solved, he suggested, if "a detailed plan [would] be submitted that will emphasize the final reclamation commensurate with mining operations as they relate to the geology of the area." *Id.* Raines stated "that the operations would continue per the approved plan during the interim of the finalized assignment."

A note on RCM letterhead indicates that discussion of the mine proposal took place on December 12, 1996, and attaches several maps. BLM sent a letter to the Colemans on that date but it does not appear in this record. *See* Jan. 14, 1997, letter from Wallace (BLM) ("[a]s outlined in our December 12, 1996 letter, your proposed plan of operations was received from the Forest Service on December 12, 1996.") In the letter dated January 14, 1997, BLM asked RCM to modify its proposed plan of operations and enumerated suggestions, under three general headings, to clarify the plan. BLM noted that, based on a plan to mine 4,000 cubic yards per month, the plan proposed an open pit mine that would create 550,000 cubic yards of spoil, while the spoilage areas planned by RCM would only allow accumulation of 123,000 cubic yards. BLM did not contend that such mining would be prohibited; rather, it objected to a lack of detail in the reclamation plan and RCM's failure to account for spoil or to document information on maps submitted. (Comments on 1996 Proposed Plan at

1-3.) BLM gave precise suggestions on specifics of a plan that could be approved.^{8/}

On February 14, 1997, BLM sent a letter to RCM, discussing a February 10 meeting at the "Fisher Mountain site" among BLM, FS, and RCM. Noting that RCM wished to resume mining while finalizing a new plan of operations, BLM advised

^{8/} Documents apparently attached to the 1996 plan are not in the record before us.

RCM how to proceed under the mining plan of operations approved for Manley. BLM advised RCM to clean up and take care of spoil piles and tension cracks left behind by Manley's operation, after which RCM could proceed with excavation in accordance with the Manley plan. (Feb. 14, 1997, letter from BLM to RCM.) This letter stated: "Once you submit the new operating plan a meeting will be scheduled to work out the details of what is generally acceptable. The plan will then be processed for Forest Plan and environmental compliance, and bond calculation."

A February 25, 1997, memorandum details a conversation in which Raines (FS) objected to the content of BLM's February 14, 1997, letter to RCM.

Raines was asking that Coleman Mining be required to start back filling the existing pit with the spoil from Bench #1. ^{2/} The undersigned [Wallace] told Mr. Raines that we are reluctant to require Coleman Mining to back fill the pit. The reason for this is that the proposed operating plan amendment outlines mining into Fisher Mountain on a level as the existing pit floor. [sic]

(Feb. 25, 1997, Wallace (BLM) Memorandum.) Wallace records Raines as stating:

[I]t was an understanding with the original lessee (Don Burrow) and the second lessee (Kenny Manley) that they would not be allowed to mine through the mountain. He stated that he has conveyed to Mr. Coleman previously that the visual impact of mining on U.S. Highway 270 was "number one" consideration. The visual impact on FS 177 is "number two" consideration.

Id. Raines (FS) explained to BLM that it was getting complaints from "contract miners" objecting to what lessees were allowed to mine on the lease.

Wallace (BLM) documented that, after talking to FS, he called Ron Coleman:

[Coleman] recanted [sic] his need for spoil storage, off-lease below the existing pit. He stated that he did not want to start back filling the existing pit because his crystal leads were on the pit floor level. * * * He says he wants to dig to the north and spoil to the south and bring the spoil pile up high and seed it to reduce visibility. He plans no impact to the north (U.S. 270). Mr. Coleman said that he was working hard to come up with a plan that satisfies both the BLM and FS. The undersigned told him that as long as he comes up with a plan that will

^{2/} The Feb. 14, 1997, letter to RCM, however, had advised RCM that the spoil area was full, that spoil had been added to Pit #1, but that tension cracks had developed.

recover the crystals safely and can reclaim the land in a usable condition, that he will satisfy the BLM. But, he does need to remember that the FS has their own management responsibilities and their priorities are [sic] necessarily the same as the BLM's.

Mr. Coleman was advised to come up with an alternative "fall-back" plan that he thinks will be a compromise between the two extremes.

Id. (emphasis added).

Wallace (BLM) memorialized a meeting at the leasehold on March 12, 1997. (Mar. 18, 1997, Wallace (BLM) Memorandum.) It appears that a prior discussion had taken place regarding fissures in a pit, and a need to bring down a high wall ("shoot the high wall") for safety reasons, based on the fact that rain and "winter slides have partially backfilled the pit with a half-cone of fallen material." The participants discussed using a hydraulic device to bring down the unstable highwall.

At this point, "draft" documents underscore that FS wanted the lease reclaimed with no further mining. A draft March 26, 1997, letter to Wallace (BLM) via fax from Gretchen Hunt (FS) states "there can be no other recourse than to limit all operations to reclamation as described by the approved plan." In a letter from Raines (FS) to Wallace (BLM) dated April 15, 1997, FS stated it would defer consideration of mining until reclamation was completed. Raines concluded: "Upon completion of acceptable reclamation, an amended plan may be considered but will be subject to NEPA analysis. It should also be noted that any unapproved future operations be considered a condition of non-compliance."

After a meeting on July 8, 1997, among BLM, FS, and RCM, BLM documented understandings among the three groups. RCM had proceeded to mine on "top of the ridge" and cut a bench beyond what was approved in the Manley plan without cleaning up spoil piles. ("ARES 36588, Meeting with Forest Service, July 8, 1997.") BLM forwarded to RCM additional notes from that meeting by letter dated July 16, 1997. The caption of the notes is "July 8, 9:30 am meeting," and their purpose was to "[c]larify the lease responsibilities of the FS and BLM and to discuss RCM's future operations":

- a. Existing operations were not in compliance with the approved operating plan, at the time RCM purchased the mining rights. [^{10/}]

^{10/} BLM had previously determined that Manley had "no violations" during inspections taking place near the time Manley assigned the lease.

- b. Over the past year, RCM has made some improvements to the operation. But, the overall compliance has not improved. Impacts to the land have increased.
- c. Mining on top of the mountain is not allowed without a plan amendment. However, if crystals are uncovered during other operations, RCM is expected to protect the crystals [by] covering up the crystals or removing them. Any site not identified for mining must be backfilled and returned to the condition it would have been in if the crystals had not been discovered.
- d. RCM needs additional spoil storage to fully develop the lease. However, until the mine is brought into compliance with the existing operations plan, no additional disturbance will be allowed.
- e. FS must be consistent in its treatment of all forest users. [^{11/}]
- f. RCM would like to clean up the site and submit a 20-acre proposal. The mining would mine into the mountain an additional 200 feet and mine to the west 400 feet. The mountain would not be “cut-through.”
- g. Further, any new disturbance will be subject to review under NEPA. Scheduling NEPA review of any new operating plan or amendments to the existing operating plan could be delayed by other work [by] one year or more. RCM could, at their option, contract with a third party for the field studies and assessments required by NEPA.
- h. The location of the mine, between scenic roads U.S. 270 (and Lake Ouachita) and F.S. 177, dictates lower visual impacts from mining.
- i. RCM proposes to either: reclaim the land, open some small pits on top of the mountain; or, reclaim the land, submit a limited plan on top of the mountain to provide some production, and submit a 20 acre plan for long term development. Operation proposals on existing disturbed areas, such as on top, would require less time to process than operations that disturb additional land. * * *

^{11/} Again, it appeared that FS erroneously believed that it must administer leases and mineral material sales contracts without distinction.

- j. I am reminded by the FS that **immediate work on the lease will consist of pulling the spoil area back, reshaping and benching. Further, benches in existing pit #2 will be reestablished and aligned with the benches in pit #1.**
- k. From July 15 telephone conversation, avoiding off-lease spoil storage would make operating plan processing less complicated, in that additional special use permits would not be required. This should save some time in processing.

(Emphasis in original.)

This document reveals that in July 1997, BLM conveyed to RCM that more spoil storage was necessary to develop the lease, but BLM and FS refused to approve any “additional disturbance” or an amended mining plan until RCM brought the mine, left in non-compliance by Manley, “into compliance with” the mining plan approved for Manley (which the record later suggests RCM did not have). FS expected RCM to cure reclamation problems left by Manley before it would even consider mining, but BLM believed RCM could mine in areas “approved for mining.” BLM understood that RCM planned to submit a long-term 20-acre mining plan of operation with potential off-lease spoil storage. RCM anticipated mining on top of and 200 feet into Fisher Mountain. BLM stated that mining on top of the mountain was prohibited without a plan amendment, but invited a mining plan for previously disturbed areas because processing such a proposal would take less time.

An August 1, 1997, letter from Raines (FS) to Ron Coleman documents four communications between FS and RCM in July 1997, centering on ongoing, or, in a seeming contradiction, discontinued, reclamation. A November 19, 1997, Wallace (BLM) Memorandum states that he and FS inspected the mine and that “lessee has pretty much stabilized the highwall. An additional bench needs to be cut for stability, between two and three. Otherwise, the site was in good shape, no violations.”

On April 6, 1998, FS sent a letter, copied to BLM on April 8, to RCM. It discussed undated “compliance inspections” of the lease and described ongoing operations solely as “reclamation operations,” included a “seeding schedule for spring seeding.” With respect to “future operations,” FS again deferred any commitments, stating only that “[w]hen operations are in compliance,”^{12/} any such requests must be “discussed or sent to [BLM].” FS again stated that “this mine area is on a designated

^{12/} BLM repeatedly documented that RCM had “no violations” and was in compliance, while FS consistently suggested that RCM had yet to reach a state of compliance. These contradictions stem from FS’s steadfast refusal to consider approval of any amended mining plan RCM submitted and insistence on reclamation.

‘scenic route’ which mandates low visual impacts,” citing its previous letters to RCM. (Apr. 6, 1998, letter from FS to RCM.)

A May 6, 1998, BLM letter to RCM discussed and attached notes from an April 15 meeting among BLM, RCM, and FS. The notes state that reclamation was far enough along that BLM would now consider mining prior to final reclamation.

1. Reclamation: Since the last inspection, considerable progress has been made on establishing benches on the highwall in Pit #2. * * * [Y]ou are “in effect” in compliance with the existing operations plan. “In effect” means that final reclamation may be delayed pending submission of an amended plan of operations. The Stipulations and Controls, Section B.2., requires temporary stabilization by mulching and seeding with grass each bench. Mulching and reseeding should be completed. (Reference: Forest Service letters dated August 1, 1997 and April 8, 1998, from Robert A. Raines to Ron Coleman.)

2. Plan of Operations: You repeated a request for a Forest use permit or crystal contract sale on the land immediately south of the lease, to be used as spoil storage. Any additional spoil storage will be considered as part of a detailed comprehensive operations plan. Please submit a new operations plan amendment outlining future work. Your desire to have a long-term plan which will allow the company to work without interruption is in agreement with what the Forest Service and BLM require. A five or ten-year operating plan is acceptable. Also, you discussed contracting a consulting engineer to look at the situation and develop a new mine. The actual development of a plan is your option.

You may consider re-routing the mine access road to the west along the north central ridge area to the west, clear out some of the pines in the ridge saddle area, and use that area for spoil storage. It is preferable to store spoil on top, when possible [to allow] pushing the material downhill during reclamation, rather than hauling spoil up hill to regrade the land. If additional work is anticipated on the top of the ridge, a bench needs to be constructed from the existing mine road to the pine trees on the west side of the north ridgeline.

3. Final reclamation: Though not a point of discussion, final reclamation of the site is an option. The visual impact of mining on the south slope must be remedied through final reclamation [but a] delay will be allowed pending approval of a new amended plan of operations; which shows additional disturbance is necessary on the south slope.

(May 6, 1998, BLM letter, attached Apr. 15, 1998, ARES 36588, Meeting Notes (emphasis added).) BLM demanded a long-term plan of operations within 120 days, inviting off-lease spoil storage, tree clearing, and mining on a ridge and south slope.

On August 4, 1998, RCM submitted the requisite plan of operations for an open-pit "Fisher Mountain" quartz mining project; it included all terms addressed in BLM's May 6, 1998, letter. It proposed to clear trees "from offsite and onsite tailing area first," and presumed a special use permit for off-lease usage.

We would start making a tailing area against the south border of offsite area (Page 5). As we complete one 20 foot high berm, we would then step in, North 6 foot to 10 foot and start the next berm, reseeding the first berm (seasonal.) This would continue until we completely build another arm off the main mountain (See page 9) to completely hide the mining operation from Logan Gap Road. This area would extend onto onsite tailing area (page 7). In reclaiming, the valley that is on lease now, would be moved approximately 200 feet East by our proposed tailage recommendations.

We would start mining operations at a point beginning at Southeast corner of Section 4 Township 35, Range 24, going west 850 foot then North 210 foot to start up point. (Page 4). As that plan is mined out we would go West Northwest to exploration area (page 6) and continue to mine while back filling start up area that we are leaving, then storing the rest of the tailings at the onsite storage area (Page 7).

Total number of acres to be affected 28 (Page 3). Total number of yards of tailings to be removed depends on how many crystals are being mined. While crystals are being mined only about 20 yards of tailings per day are produced. During exploration and overburden removal tailings could exceed 400 yards per day. This would be a maximum output.

All areas affected by this plan, with exception to the off and on site tailing area, have already had surface disturbance.

(Plan Summary (sic).) A series of maps 2-9 approximately 2 by 3 feet in size documents the beginning of mining which moves to the west with sequential backfilling and spoil storage on and off the lease. Whether map 1 exists is not clear.

At an October 1, 1998, inspection, the focus was on 3,000-4,000 yards of "old spoil" that would have to be moved and stored if mining was to proceed on the "west slope." RCM asked for an explanation of Forest Plan prescriptions. Wallace (BLM)

discussed attempting to resolve the “spoil storage issue” and commented, inscrutably, that the “plan amendment effort is now back to where it was in 1996.”

On October 5, 1998, Raines (FS) telefaxed a letter to Wallace (BLM) regarding the proposed plan and the “ground-meeting conducted September 29, 1998.” He asserted that “the proposal for a permanent stock-pile in the drain to the west and the creation of an unnatural drain 300' to the east [is] in essence, ‘tearing down the mountain’ * * *.” (Oct. 5, 1998, Letter from FS to BLM.) Raines objected to locating additional spoil downslope. To BLM, he stated that FS would consider only two options for future operations: first, excavating from the “‘gar lead’ to the west per phase II of the previously approved (Manley 6/95) plan”; and second, “excavation of the ridgetop.” In an October 6, 1998, letter to RCM, Raines stated: “Reclamation is continuing in Pit 2 per the approved plan (Manley 6/95) and past discussions.” As to the proposed plan of operations, Raines stated only: “[t]o facilitate you in completion of your amended plan,” he enclosed the “applicable Forest Plan.”

An October 28, 1998, Wallace (BLM) letter (unsigned but apparently sent) forwarded to RCM an FS letter to BLM, rejecting the August 4, 1998, proposed plan as “not compliant with the Forest Plan standards and guides.” No FS letter is attached. BLM asserted, for the first time, that “mining at the 1,060-foot level” was not “consistent with the Forest Plan” and stated: “We regret that valuable crystals will be left in the ground and not recovered.” (Oct. 28, 1998, Letter from BLM to RCM.) As best we can surmise, this is the level of the pit floor. BLM did not identify what Forest Plan standard and guideline compelled this outcome, but invited new proposals from RCM. The course held out to RCM was to follow FS’s options: “Resumption of mining in Phase II of the original plan, mining along the old Garfield Lewis lead,” or “[m]ining along the ridge line from west to east, maintaining a screen of trees on the north side to shield the operation from Lake Ouachita.” Id.

On November 23, 1998, RCM sent a letter to Wallace (BLM) objecting to FS’s response. RCM expressly contested FS’s reading of the Forest Plan as inconsistent with granted lease rights to mine. RCM cited documents revealing that the Government was well aware of the impacts the mining plan proposed when the land was leased. RCM identified a 1984 FS document which acknowledged that mining would result in a leveling of the crest of the mountain.^{13/} RCM objected to FS claims

^{13/} A Feb. 28, 1984, document from the Forest Supervisor (1984 Forest Supervisor Memo) recommending that a portion of the land at issue be leased states:

“[W]e agree that in most cases, any applicant for a disturbed property such as this would be reluctant to assume restoration responsibilities. Our opinion of the disturbances on this property are, however, that they would occur in any event in a new operation so that the quartz rich zones could be exposed. This property is

(continued...)

that visual effects must be prevented, noting that FS had previously identified the land under visual management objectives which “allow human activity to dominate the characteristic landscape.” See 1993 Decision Memo. It asserted that FS visual management requirements do not exceed 1/4 mile, while FS 177 and State highway 270 are further than this from the leased lands. RCM noted that FS’s positions were not those “historically maintained,” and that denying the mining plan based upon the FS’s construction of “rules and regulations” was inconsistent with rights granted in the lease. Responding to FS’s concern about creation of an unnatural drainage, Coleman argued that it had been done before.

On December 15, 1998, BLM, FS, and Kevin Coleman met to discuss the two options for mining proffered by FS. “Both options are to be conducted per BLM correspondence dated 10/28/98 and the approved amended plan dated 6/8/95.” (Dec. 15, 1998, Hunt (FS) Memorandum to the File.) The parties agreed that mining, lasting 2 months, would continue “on the top in the existing pit,” subject to a visual buffer zone, and that FS would send the 1995 mining plan to RCM. *Id.* By letter of December 16, 1998, Raines (FS) sent RCM the 1995 plan of operations.

A telefax dated February 9, 1999, from Hunt (FS) to Wallace (BLM) states regarding “ES 36588” that the “[l]ast inspection was 2/8/99 with me and Bob R. Operations are compliant and look good!” A March 25, 1999, Wallace (BLM) Memorandum indicates that lease operator “Rogers” had discovered members of the “Rainbow” people digging for crystals on site and requested approval “to dig the same location to prevent theft.” Wallace gave permission to remove the crystals so long as the operator “stays away from the south slope.” At an April 13, 1999, inspection, Wallace observed two women of the “Rainbow family” digging from spoil piles on the southern lease boundary. (Apr. 15, 1999, Wallace (BLM) Memorandum re inspections.) Rogers asked to begin mining Pit #3, and “was told if he mines in pit #3, he will have to spoil into pit #2, as the plan specifies. No violations.”

An October 15, 1999, FS letter to Coleman discussed a meeting between FS and RCM regarding RCM’s desire to mine “in the area of the pit near the shed on the ridge top.” FS stated that it would consider mining on previous disturbed lands:

^{13/} (...continued)

located on the crest of a mountain so disturbances that have already occurred and those expected to occur amount to a leveling of the crest. Spoil material is usually very stoney and not conducive to complete restoration, thus our restoration requirements do not normally include a great deal of shaping and leveling. If the entire 20 acres were already disturbed, any new lease holder would likely disturb the same 20 acres to get his minerals unless he went underground, which is not likely. We do not see this as a problem.” (Emphasis added.)

We concur that mining can continue in the existing impacted areas on the ridgetop at the eastern end of the lease * * *. Please submit to the BLM a written and signed proposal to this effect before you begin operating. Our stipulations to the BLM is [sic] that all operations can take place only in the impacted areas discussed above on the ridgetop. No work can be conducted in a way as to remove vegetation, impact either the north or south facing slopes, [^{14/}] nor increase the visibility of the mine site from highway 270 [except where] tailings are to be used to recreate the ridgeline, and are in the process of being rehabilitated smoothed, and seeded/fertilized.

* * * * *

Mr. Rogers indicated your desire to also resume operation on the impacted south slope. We recommend that you submit to the BLM a separate more detailed proposal in line with what we had discussed and recommended to you in our July meeting with you in this office.

(Oct. 15, 1999, FS Letter to Ron Coleman.) The record contains no more information regarding the referenced July 1999 meeting or what FS conveyed to Coleman. ^{15/}

As directed, on November 22, 1999, RCM telefaxed to BLM a proposed mining plan in the form of a map showing an “area to be mined” with a spoil pile. By “fax note” of November 29, 1999, BLM sent a letter to FS forwarding the map and stating:

I don't see any problem with where they want to mine. I do have a problem/question with the south slope. It seems to me that we should now require them to restore the south slope concurrently with the new mining. (Rather than storing the excavated material at the west end.) What do you think?

A February 4, 2000, BLM letter to RCM responded to the November 22 map:

We have no objection to your proposed mining on top of the ridge [^{16/}]

^{14/} We do not have enough information in the record to understand how RCM could be mining on the ridgetop but not affect the north or south facing slopes.

^{15/} A Sept. 24, 1999, BLM memorandum, discussed by the Board in a previous order, is missing from the record.

^{16/} But on Apr. 15, 1997, FS and BLM had advised RCM that mining on top of the mountain was not allowed without an approved plan amendment.

as outlined on the map. This area was considered in the original environmental assessment and plan of operations. * * *

We have allowed the suspension of south slope reclamation for approximately two and one-half years to allow you to develop a mining plan acceptable to the [FS and BLM]. To date, an acceptable south slope mining plan has not been achieved. We believe it is now time to restore the south slope to reduce public safety and environmental concerns. To continue to ignore this restoration is not good stewardship of the land and is counter to [FS] policy. That policy states that the land will be reclaimed if periods of no mining exceed three months. Reclamation must be performed as a necessary part of mining operations.

You are hereby required to commence restoration of the previously impacted areas on the south slope. Your restoration should follow previously agreed upon and approved reclamation plans.

(Feb. 4, 2000, Letter from BLM to RCM (emphasis added).) Though demanding south slope restoration, BLM attached the cited October 15, 1999, FS letter which, to the contrary, proposed that RCM submit a new plan for mining the south slope.^{17/}

A memorandum to the file indicates that Lars Johnson of BLM's Jackson Field Office took over BLM's dealings with RCM from Wallace. Johnson inspected the lease on November 1, and met with the Colemans and FS the next day.

We met with Ron Coleman the following day - Nov. 2 - at the Womble District Office. * * * We had a 1.5 hour meeting and started talking about reclamation...then alternate mining plans to mine deep into south slope (renewing [an] old topic I understand) then back to specifics of reclamation on south slope. Colemans were not pleased about reclaiming an area overlying where they believe crystals to be located. Mining is too invasive and would necessitate removal of most of mountaintop (no approved plan to do this has ever been achieved) and is visually unacceptable to FS and would require more NEPA work. I understand they have been told this before. Meeting ended with definite reclamation plan timetable established as follows:

- Week of Nov. 6, 2000 FS will develop reclamation plan.
- By Dec 1, 2000 input to Colemans on reclamation plan from FS

^{17/} The next documents in the record indicate that RCM attempted to sublease ARES 35688 to former lessee Manley, now of West Crystal Mining Co., Inc. (Aug. 31, 2000, Sublease.) RCM did not pursue the sublease.

-By Jan 1, 2001 Coleman will respond to FS & BLM on reclamation plan

-By April 10, 2001 reclamation plan well underway with “seeds on the ground”.

Ron said at the end of the meeting that he was having his lawyer look at filing suit against FS and BLM. However, he then stated “I want to get south side reclaimed because I want to do what I agreed to do.”

It is clear from the emphasized language that Johnson accepted that mining was not to be allowed because it was “unacceptable to FS” and would require NEPA work.

In its discussions with Coleman, FS did not directly refuse to consider mining. In a December 18, 2000, letter to Coleman, FS acknowledged RCM’s desire to continue to mine, but stated that “the primary operations should be devoted to resolving the unsightly, unstable, and hazardous condition of the south facing slope, and that other operations on the ridgetop should be secondary to that”:

[T]he reclamation and plans are your responsibility. However, I did agree to allow [FS] personnel to evaluate the site again and develop general approaches based on our personal observations and thoughts. On November 14, members of my staff and the Forest Geologist visited ES-36588. They pictured the south slope could in essentially at least 4 general segments [sic].

(Dec. 18, 2000, Letter at 1.) FS divided the ridge into four areas and made a proposal for fill and reclamation. Id. at 1-2. FS set “a target date of April 15,” 2001, for conclusion of restoration. A January 19, 2001, BLM memorandum to the file regarding the adequacy of the bond states that the “operator has been encouraged to begin reclamation on the ‘ridge top area’.”

A letter from FS to BLM, dated February 28, 2001, states that FS conducted an inspection on that date, that no reclamation was conducted because a “December ice storm has adversely affected access [but] it is open now and the mine is accessible. * * * We would like to see something take place soon in line with prior discussions and letters.” On March 5, 2001, Johnson (BLM) sent a telefax to RCM stating:

I understand the ice storm hit your area [and] Fisher Mt. Road was inaccessible for a time but it is now open.

In our Nov. 2, 2000 meeting, we discussed reclamation on ARES 36588 and subsequently Bob Raines of [FS] provided you with a letter dated December 18, 2000 outlining our recommendations on your

reclamation efforts. At our meeting, we all discussed and agreed upon a target date of April 15 to have south slope restoration completed.

A March 9, 2001, telefax from Johnson to the Colemans states: “thanks for calling me so promptly on your Reclamation Plan. I talked with John Nichols and he talked with Bob Raines. They have no problem with your shooting the highwall to initiate reclamation. Please fax me a short written outline of your plans and time line on the reclamation.” In an e-mail of this date, Nichols (FS) advised Johnson (BLM) that “we need to get the reclamation started and hopefully completed by the present operator. We recommend that you obtain [Coleman’s] proposed reclamation plan and his time-line in writing from him. Our main emphasis is full and permanent slope stability and productivity.” (Mar. 9, 2001, e-mail from Nichols (FS) to Johnson (BLM).)^{18/}

On March 19, 2001, BLM received a letter from Richard L. Slagle, attorney for the Colemans. Slagle asked that the “matter be put on hold until I have had an opportunity to thoroughly review the situation. As you know, they have a large investment in this Lease and wish to continue working this Lease.”

Rather than respond to Slagle’s legal issue of whether RCM could mine on the lease, BLM sought to collect RCM’s bond. By March 23, 2001, telefax Johnson (BLM) attached a copy of the February 4, 2000, letter, and asserted that this letter is “the BLM and Forest Service position” and “putting the matter on hold [is] unacceptable.” Nichols (FS) applauded Johnson (BLM) by e-mail on March 26, 2001: “Bottom line – great job, thanks for the support!!!” A May 11, 2001, BLM letter to RCM stated, based on the November 2, 2000, meeting: “you indicated you would begin reclamation of your lease by April 15, 2001.” BLM stated: “on or after June 15, 2001, your bond will be used to contract reclamation work to meet your obligation to reclaim lease ARES-36588.” It cited four documents as justification for its letter: the March 5 and March 9, 2001, telefaxes, the December 18, 2000, FS letter containing FS suggestions on reclamation; and the February 4, 2000, certified letter.

A June 12, 2001, e-mail from Nichols (FS) to Johnson (BLM) asserts:

right at this moment we’ve got the positive attention of the general mining community (re: last month’s public meeting, rockhounding and mine safety issues, etc.). When they do see visible action taking place on that lease it will help keep the emphasis placed on working correctly with us (FS/BLM) and staying safe. As you are aware, everyone knows about the condition of the south slope on the lease and we had been getting questions about a month ago that indicated Mr. Coleman was still looking to sell the mine. The sooner we can get the bond secured

^{18/} A Mar. 8, 2001, e-mail from Johnson (BLM) to Raines (FS) asserts that Ron Coleman had told Johnson he was considering reclamation or selling the lease.

(OR, get him to see BLM is serious about pulling his bond and possibly resulting in his becoming serious about actually reclaiming the site himself) the better ...”

Rockhounding is a “recreational activity” involving the occasional removal of small amounts of material by hand from surface exposures of rock and quartz veins. (ALRMP at IV-68.)

BLM discovered that it had never approved the lease assignment or required a bond transfer from Manley to RCM. On August 30, 2001, BLM’s Eastern States Field Office Deputy State Director approved the assignment, “effective” 5 years earlier, on July 26, 1996. In a cover note to this approval, Johnson (BLM) asserted: “Now bond ownership must be transferred to Coleman’s name.” On September 18, 2001, Johnson conducted inspections but, with respect to lease ARES 36588, he wrote: “Not visited. FS indicated no activity since last visit.” (Sept. 18, 2001, BLM Memo to file.) A Memorandum from the Land Law Examiner, BLM, to the Negotiable Securities Custodian, Denver Service Center, dated January 17, 2002, apparently approved the transfer of seven US Treasury bonds to RCM.

On February 15, 2002, BLM issued a decision holding RCM in default and advising RCM it would attach a portion of the bond to conduct reclamation on the south slope of the lease. RCM appealed the decision to this Board and petitioned for a stay. IBLA 2002-244. BLM opposed a stay, asserting that the site caused a matter of urgent public safety creating “high potential likelihood for serious injury or death.” (Opposition at 13.) BLM explained that a child had died and an adult had been injured at crystal mines in Montgomery County in 2000 and 2001, and attached newspaper articles describing the incidents. A comparison of the articles with leases existing and identified in the ALRMP at K-16 and K-17 in 1990, suggests the incidents occurred on lands subject to mineral material sales contracts managed by FS.

On March 6, 2002, Nichols (FS) e-mailed BLM and FS employees describing a call from Burrow who was seeking to reacquire lease ARES 36588. This conversation took place at the same time BLM advised the Board that, without urgent reclamation, the very existence of the lease conditions posed a “high potential likelihood” of death. FS and Burrow discussed underground mining on the lease.

He wanted to know if changing it from a lease to a contract would make it easier to mine. I told him that lease or contract, the process we were in now would remain the same.

* * * * *

I kept coming back to the fact that we were in a process now that involved reclaiming the south slope. He was concerned that if he

obtained the lease, he would need to be able to mine enough crystal to pay for the reclamation, and that would take awhile... I said flatly that I agreed, and that all the previous owners (he being the first ...) including the present one had indicated they had made good money from the crystals there, AND that we were finally at the point for reclamation ... He understood ...

I also stressed that it was not my intention to say anything to discourage a sale * * *.

(Mar. 6, 2002, e-mail from Nichols (FS) to FS and BLM employees (emphasis added).) Nichols stressed that he was “not saying mining could not take place.” Id.

By order dated May 22, 2002, the Board granted a stay in IBLA 2002-244. We found that BLM had not proceeded under its regulations in issuing the February 15, 2002, decision, because the record did not contain a notice of non-compliance which was the necessary predicate under 43 CFR Subpart 3598 for a decision to collect on a bond. (May 22, 2002, Order at 15-18.) In addition, we found a significant deviation between BLM’s contentions in its Opposition brief and the facts of record. The record in that case was submitted in two separate filings from the Eastern States Field Office, BLM, Springfield, Virginia, and BLM’s Jackson, Mississippi, Field Office. See Order at n.1. We found BLM’s contentions regarding a safety threat entirely without foundation in a record in which FS and BLM showed no such concern, even at the time of the incidents documented in the newspaper, until the briefing on appeal. We also highlighted the bewildering nature of BLM’s and FS’s actions towards RCM:

BLM states: “it is not possible for BLM and [FS] to permit the mining scenario that the appellant has proposed for the south slope. Thus, there is no harm to the appellant if the stay is not granted.” (Opp. at 16.) The mining scenario to which BLM counsel refers is presumably in one of the up to four mining plans submitted on RCM’s behalf. No decision, except for FS’s description of RCM’s 1998 proposal as one to “mine through the mountain,” explicitly states that no mining could ever be permitted. (Opp. at 15.) RCM challenged this conclusion and FS never responded.

Despite BLM’s stated confidence in the clarity of FS’s position, we do not find it in this record. FS’s position and BLM’s have wavered. No decision on a proposed mining plan appears before us that closes the issue. Rather, each letter permitted a further submittal by RCM or was followed by more discussion. Further, the Jackson Office record contains an e-mail discussion between BLM and a prospective purchaser, Don Burrow, for lease ARES 36588, on March 6, 2002. * * * BLM cannot have it both ways; it cannot assert to the Board that no

harm to the lessee can possibly result from reclamation that forecloses mining, at the same time the record shows that FS refuses to foreclose mining because it could disrupt a potential lease sale. This record provides insufficient basis upon which we could determine whether BLM would be creating some sort of resource waste, which is the essence of RCM's argument. * * *

We explained that to the extent a health and safety threat of the magnitude claimed by BLM may exist, BLM and FS may be justified in reclaiming the site, but not in collecting on RCM's bond.

On June 14, 2002, BLM requested a remand of the case. On June 20, 2002, the Board ordered that the decision be vacated and the case remanded. It is unclear from the record whether BLM has reclaimed the site to protect the public from the danger alleged to us in 2002.

On remand BLM issued the April 10, 2003, "Decision rejecting 1998 proposed operating plan for lease ARES 36588." It states that the proposal to engage in "extensive open pit mining on 20+ acres down to the 1,060-foot level (a topographic contour on the flank of Fisher Mountain) and associated impacts are not compliant with" the Forest Plan. (Decision at 1.) It enumerates seven reasons for which BLM rejects the 1998 plan; six reasons conclude that the 1998 mining plan is inconsistent with the Forest Plan, and the seventh asserts that the it is inconsistent with the terms of Lease ARES 36588 itself. Id.

RCM timely appealed the decision. BLM submitted a record and answer. The Board soon discovered that the record was significantly different from the two-part record submitted in IBLA 2002-244 and that documents cited in our order in that case were missing. The 1998 mining proposal was missing. After Board requests yielded various critical but missing documents and revealed that BLM or its counsel possessed information not submitted to the Board, on March 10, 2005, the Board issued an order returning the record to BLM counsel for full supplementation. We noted points at which we believed counsel's arguments were inconsistent with the record and asked for explanation. We encouraged settlement and queried whether the 1998 mining proposal submitted by RCM had been amended.

On May 16, 2005, RCM submitted a letter stating that additional information submitted after the 1998 proposed mining plan amounted to plan amendments, but "their relevancy is now moot. I wish the plan to be reviewed on its own merits." On June 6, 2005, BLM submitted another record. This record was missing critical documents which had been provided in 2003. Though the 2003 decision on appeal was available when the record was first submitted, it was not returned with or indexed in the record submitted in 2005. The Board again requested

supplementation with documents it knew existed. These documents were provided by telefax dated January 27, 2006. We proceed with the record we have.

In its appeal, RCM objects to BLM's characterization of the scope and impacts of the 1998 plan, and challenges each of BLM's seven reasons for rejection. RCM also complains about the 5-year delay in receiving BLM's formal rejection and asserts that BLM has not justified wasting the resource simply to collect on the bond. It states:

We do and have always intended to perform reclamation of this site, but feel to do so at this time would be premature in the face of wasting mineralogical and cultural resources. I point this out only because this appeal is in response to the rejection of a plan submitted in Aug, 1998 This is the first formal rejection of that plan even after I raised issues in November of that same year that went for the most part largely ignored. I am greatly concerned that after 5 years the probable reason we have received this rejection now is this is the next step in the Forest Service proceeding against our reclamation bond.

(June 5, 2003, Statement of Reasons (SOR) at 5.) RCM claims it spent \$250,000 to purchase the lease and that BLM was obligated to allow RCM to mine under its terms.

As should be apparent from the recitation above, BLM and FS administered lease ARES 36588 as if the rights it conveyed are constrained by FS's preferences for land use in the Ouachita NF rather than the multiple use decisions established in the Forest Plan. We have read the Forest Plan. Its goals and objectives include logical mineral development. We cannot find within it authorization to prohibit mining on established leases or to allow visual management objectives to trump lease rights. FS opinions about the lease, asserted first in 1987, may have derived from a mistaken notion that the legislative decision to relegate quartz crystal development in the NF to mineral material sales contracts compelled FS to manage crystal mining in the way envisioned by the 1988 legislation. That FS proceeded in this manner was ignorant of the lease rights grandfathered by section 323(a) of Public Law 100-446, which prohibited BLM from ignoring the lease rights.

BLM's Wallace initially understood that FS's reaction to the visual impact of mining on the lease did not justify prohibiting mining. During the late 1980s, Wallace stood up to FS's objections based on visual management objectives and assured Burrow that mining was allowed and that BLM would mediate disputes with FS over the issue. Even when RCM acquired the lease, BLM continued to manage the lease under BLM regulatory guidelines. When RCM submitted a 1996 mine plan, BLM returned detailed comments advising RCM of what was needed to bring the plan into compliance. (Jan. 14, 1997, letter to RCM attaching Comments on 1996 Proposed Plan.) After conveying to RCM terms it would consider, BLM advised RCM in writing, "[o]nce you submit the new operating plan a meeting will be scheduled to

work out the details of what is generally acceptable. The plan will then be processed for Forest Plan and environmental compliance, and bond calculation.” (Feb. 14, 1997, letter from BLM to RCM.) At this juncture, BLM seemed properly to implement its regulatory responsibilities regarding the lease.

But it was around this time that BLM’s efforts to manage the lease seemed to flounder as a result of FS’s unwillingness to consider the mine plan under applicable requirements. From 1996-98, FS implied it would consider another mine plan it insisted was yet to be submitted, vaguely defined as one “that will emphasize the final reclamation commensurate with mining operations as they relate to the geology of the area.” (Dec. 4, 1996, letter from Raines (FS) to Wallace (BLM).) Pending submission of this necessary but elusive mining plan, FS insisted that RCM complete reclamation to a level also never articulated. RCM did so, at least to a point acceptable to BLM such that, in its May 6, 1998, letter, BLM advised RCM that final reclamation could be delayed pending RCM’s submission of another mining plan. In that letter, BLM conveyed terms it implied it would accept.

After RCM’s submission of the demanded 1998 mine plan proposal, FS variously advised BLM that reclamation was the only option left for the lease, advised BLM that it would consider only two options for limited mining on previously disturbed areas, refused to agree to the 1998 mine plan, persisted in telling RCM that it would consider mining as an option after reclamation was completed, and insisted that RCM submit more mining plans. From 1998 until RCM hired an attorney, BLM’s and FS’s positions can only be described as evasive. The agencies issued demands for more mine plans and more reclamation, all without the most basic of terms, while impugning RCM’s mine plan, a model of clarity by comparison, for lack of detail. Refusing to agree to the mine plan because FS would not agree to it, BLM acknowledged that crystals would be left in the ground. Seemingly to avoid appearing to reject mining altogether, BLM repeatedly requested more mining plan proposals, but never explained why RCM’s submission, based on terms BLM had indicated would be acceptable in April and May 1998, was insufficient. BLM’s failure to do so made acceptable terms impossible for RCM to discern. Eventually, when Johnson took over the matter from Wallace, Johnson endorsed FS’s desires as if they were the law. Thus, his internal notes reflect his belief that a mining plan could be rejected simply because FS thought it was “unacceptable” visually, because it would require NEPA consideration, and because RCM had been told it all before.

BLM ignored the legal status of the lease and rights it conveyed. Hardly once, if ever, in the extensive communications regarding this lease did BLM or FS cite a rule, legal provision, or Forest Plan term that justified an agency’s opinion, comment or demand. Misconstruing the Forest Plan, they relied on their misunderstandings of it rather than language within it for their views. When RCM directly contended in its November 23, 1998, letter to Wallace (BLM) that FS’s interpretation of the Forest Plan was wrong and inconsistent with the terms of, and documentation surrounding

creation of, the lease, neither FS nor BLM ever responded to the legal issues RCM raised.

Devoid of a legal foundation, the agency positions were apparently motivated in part by pressure placed on the FS by contract miners and rockhounds. FS clearly believed the visual impacts from mining on the lease could serve as a basis for prohibiting mining; BLM never examined or verified the legality of this view. FS eventually went so far as to tell RCM that it would “allow [FS] personnel to evaluate the site again and develop general approaches based on our personal observations and thoughts.” (Dec. 18, 2000, Letter at 1.) Only when RCM hired a lawyer was BLM galvanized to consider its legal position, only to discover that it had never even formally approved the lease assignment or bond transfer.^{19/} BLM again missed the opportunity to consider legal implications when it plunged ahead without scrutinizing its own rules regarding bonds. BLM’s 2003 decision again appears to justify FS’s position without meaningful examination of the authorities under which BLM proceeded.

[1] We set aside the decision for two reasons. First, BLM failed to implement its own authority and obligation to meaningfully administer the lease. Under rules applicable throughout the period during which the agencies postured regarding reclamation, BLM was obliged on receipt of a mining plan proposal to “consult with any other agency involved, and * * * promptly approve the plans or indicate what additional information is necessary to conform to the provisions of the established requirements.” 43 CFR 3592.1(a). When RCM submitted the 1998 mining proposal in response to and incorporating the terms invited by BLM in its May 6, 1998, letter, BLM did not promptly approve the plan, but, critically, failed to “indicate[] what additional information [was] necessary to conform” to requirements. Instead, BLM consistently encouraged more amendments and other proposals without providing the specificity required for RCM to understand what terms would be approved.

We appreciate that BLM was in a difficult position in consulting with FS. That BLM could not respond squarely to RCM’s 1998 proposal as a result of FS’s failure to correctly interpret the Forest Plan is evident. But when the cooperative consultation failed, BLM was required to timely take up any differences it had with FS itself and reach an independent judgment regarding the rights, obligations and authority of the participants.^{20/} BLM’s placing the burden on RCM to “come up with an alternative

^{19/} BLM’s approving the lease assignment to collect the bond in 2001, after a 5-year delay, when it was fully aware it would not permit mining, is questionable. It is justified by the fact that RCM was actually allowed to mine.

^{20/} Cf. Matthew J. Brainard, 138 IBLA 232, 236 (1997) (FS opinion regarding locatability of a mineral deposit was not binding on BLM which could not abdicate its
(continued...))

‘fall-back’ plan” to “compromise” between the agencies, as it did as far back as 1997, was simply not an option for BLM in implementing its regulations. Caving to FS’s preferences was not an option. Facing FS’s refusal to approve the mine plan with terms BLM had explicitly proffered to RCM in May 1998, BLM’s assurances to RCM that approval of the mining plan was possible and reclamation could be delayed if RCM just made the “right” amendment was not an option. We see nothing RCM could have done to satisfy FS’s demands except to reclaim the area where RCM believed the crystals lay. BLM was obligated to determine what the lease required and what RCM could do to obtain a workable mining plan. There is no legal basis for a finding on this record that reclamation is all that is left to accomplish on this lease when FS continues to hold out the possibility of allowing mining as a carrot to potential lease purchasers.^{21/} (Mar. 9, 2002, e-mail from Nichols to FS and BLM employees.) BLM’s failure directly to advise RCM consistent with 43 CFR 3592.1(a) requires us to set aside the decision.

Second, we set aside the decision because we cannot endorse BLM’s conclusions that the 1998 mining plan violates the Forest Plan. Having described the land use objectives of the Forest Plan above, BLM’s view, adopted from FS’s view, that the Forest Plan compels it to prohibit mining on a crystal quartz lease for the stated reasons is baseless. Moreover, in many instances, BLM’s factual conclusions are premised on assertions directly refuted by RCM on topics we cannot adjudicate without proof in the record.^{22/}

Finally, we note that, based upon the facts of this record, we have considered whether to find that BLM is estopped from rejecting the 1998 mining plan for containing many of the same terms BLM expressly demanded RCM to submit in a mining plan in its May 6, 1998, letter. BLM has faulted RCM for proffering mining plan terms expressly invited by BLM. Further, the agencies’ indecision and imprecision led them to string out over years a failure to explicitly approve the plan or indicate what was necessary to conform to applicable requirements. 43 CFR 3592.1. To a lessee with a lease to mine, the agencies’ insistence on reclamation as a predicate even to considering a proposed mine plan was bewildering and contradictory. Because estoppel is an extraordinary remedy, especially as it relates to the public lands, and because of our independent conclusions that the decision

^{20/} (...continued)

responsibility to adjudicate the validity of a mining claim for which a patent application was pending).

^{21/} Had FS and BLM made a timely decision regarding whether Manley’s operation was compliant when he conveyed the lease to RCM, they could have issued notices of non-compliance to, and collected a lease bond from, Manley.

^{22/} The lease expires in 2007. See Leroy Pedersen, 56 IBLA 86 (1981).

should be set aside, we stop short of making the findings necessary for such a conclusion.

At this point, we turn to the seven enumerated conclusions in BLM's 2003 decision. We evaluate each conclusion in light of the Forest Plan or lease.

Reason 1. First, your plan proposes open pit mining and spoils storage that would impact 28 acres of surface at the same time. This directly conflicts with one of the Forestwide Standards and Guidelines (Geology and Minerals, p. IV-17) that provides: "total unreclaimed surface impact from a single permitted hardrock mining related activity should be limited to approximately five acres before further progression of operations occur." A proposal to impact five and a half times the acreage limitation in this provision is unacceptable. Operations on this lease have in the past been limited to less than five acres of impact. For example, a Forest Service Decision Memo dated October 7, 1993, addressing a proposed amended plan of operations, allowed surface impact on only 1.3 acres over a period of five to ten years in addition to the approximately three acres impacted by the prior plan, for a total of 4.3 acres. ([1993] Decision Memo * * *.) The current approved Plan of Operations, dated May 2, 1995, stated at page 2: "Total area to be opened will be app. 5 ac." BLM and the Forest Service have never given you any reason to believe that BLM would approve a plan that proposed to exponentially increase impacted acreage. Moreover, it does not appear that there exists any feasible surface-mining method of recovering minerals from the 1,060-foot level without opening far more acreage at one time than is allowed by the Forest Plan.

(Decision at 2 (emphasis added).)

BLM accurately cites the standard and guideline at page IV-17 of the Forest Plan. We cannot find, however, in the 1998 mining plan that RCM proposed 28 acres of disturbance at one time. RCM denies that this was its intention in its SOR at 7:

[T]he entire 28 acres was not planned or foreseen to be unreclaimed at one time but for reclamation to be commensurate with mining. Our proposed plan says "and continue to mine while backfilling startup area" and "from this point on reclaiming and stabilizing would be done each time 2 additional acres are exposed."

RCM concedes that more than five acres would be disturbed at one time. BLM is correct that the Forest Plan prevents this. But we cannot affirm BLM's conclusion that RCM did not intend to reclaim as it mined, because the record provides no basis

for us to refute RCM's "intentions." Such a debate can only be resolved by BLM's express conveyance to RCM of "information necessary to conform" as required by 43 CFR 3592.1, and approval of precise terms. This would have required, prior to 2003, a response advising RCM of this particular Forest Plan provision and requiring sequential backfilling after approximately five acres of disturbance.

BLM's comment that a "proposal to impact five and a half times the acreage limitation in this provision is unacceptable" distorts the Forest Plan. That no previously approved mine plan on this lease involves more than five acres does not make a proposal for a larger operation a violation of the Forest Plan. To the contrary, the Forest Plan discusses larger quartz mining operations that exist on private lands in the Ouachita NF. (ALRMP at K-5.) We find nothing to suggest that the standard and guideline limiting surface impacts at one time to five acres prohibits approval of a mining plan which impacts a larger disturbed area over time with appropriate sequential reclamation.

Moreover, BLM's conclusion confuses "disturbed" acres with "unreclaimed" acres. The Forest Plan sets limits only on the latter. The record confirms that a portion of the leased land was disturbed before the lease was issued; some part of it is yet unreclaimed. The 1984 Forest Supervisor Memo noted that the 20 acres it considered was already disturbed; questioning whether a lease applicant would be willing "to assume restoration responsibilities," the Supervisor commented that a new operation would disturb that same acreage. A June 14, 1996, inspection memorandum discusses "stabilized 50 year old spoil." RCM contends that of the 28 acres subject to its proposed plan, 20 have already been disturbed. (SOR at 6-7, 9-10). In its October 15, 1999, Letter to Ron Coleman, FS expressly allowed mining on "impacted areas." Thus, BLM's denial of the 1998 mining plan on the basis of the requirement that the surface disturbance must be limited to five acres is somewhat meaningless in light of these facts. It is not clear from the record how many acres have been impacted on the mountain, how many are currently unreclaimed, or even whether the reclamation BLM and FS have demanded over the last 10 years related to the Forest Plan standard and guideline.^{23/}

BLM's comment that "BLM and the Forest Service have never given you any reason to believe that BLM would approve a plan that proposed to exponentially

^{23/} In light of the Forest Plan limitation of five acres of disturbance at any one time, FS's insistence on "final reclamation" prior to further consideration of a mine plan cannot be founded on this standard and guideline. Had FS and BLM enforced that guideline during their dealings with RCM, we would expect the record to display an effort to compel RCM to submit a mine plan that reclaimed all but five acres and proceeded to sequential mining. None of the agencies' demands that RCM reclaim were tied to such a standard. We can only surmise that FS's insistence on final reclamation was in furtherance of its efforts begun in 1987 to avoid visual impacts.

increase impacted acreage” is misleading. The 1984 Forest Supervisor Memo expressly states that “any new lease holder would likely disturb the same 20 acres to get his minerals unless he went underground, which is not likely. We do not see this as a problem.” The 1985 Mineral Report anticipated that if only the 20 acres under consideration in that report were leased, mining “will require movement of 248,000 cubic yards of mine spoil that was pushed back into previous mine excavations.” *Id.* at Part 10, Conclusions. The 1986 Mineral Report proposed adding acres to the competitive tract so that, together, 80 leased acres could be mined more efficiently. BLM and FS were fully aware that RCM intended to submit a 20-acre mining proposal, yet BLM never discouraged such a plan. *See* July 8, 1997, meeting notes points “f” and “h.” On May 6, 1998, BLM wrote to RCM stating: “Your desire to have a long-term plan which will allow the company to work without interruption is in agreement with what the Forest Service and BLM require. A five or ten-year operating plan is acceptable.” In the ensuing 5 years, BLM never conveyed to RCM that it would limit approval to a plan for 5 acres of total impact or prohibit new disturbance. BLM’s silence on such topics, after memorializing RCM’s expressions of interest in a 20-acre plan, was not an option for BLM under 43 CFR 3592.1(a).

Finally, the record does not permit us to affirm BLM’s comment that “it does not appear that there exists any feasible surface-mining method of recovering minerals from the 1,060-foot level without opening far more acreage at one time than is allowed by the Forest Plan.” We are particularly reluctant to endorse such an assertion when it has never been stated, heretofore, as the basis for FS’s rejection of mining at that level. To the contrary, the February 25, 1997, memorandum prepared by Wallace (BLM) documents FS’s first objection (stated to BLM) to mining at that level. Wallace asserted that FS’s desire to prohibit mining on the pit floor was due to the fact that “Raines is concerned with being consistent with all quartz operations, whether on contract or lease.” The memorandum went on to describe that FS’s “number one” and “number two” considerations were visual impacts. That it would take too much acreage of disturbance under the Forest Plan (*i.e.*, in excess of five acres) first appears in 2003; the record plainly provides no basis for us to determine a number of acres that would necessarily be opened at one time to mine at this level.

RCM claims that its “reluctance to reclaim stems from the fact that the mineral deposits on the 1060 ft level (topographical contour of the mountain) * * * will be rendered inaccessible.” (SOR at 2.) RCM states, and stated in November 1998, that reclamation before extraction at that level would constitute resource waste. (SOR at 3.) We cannot discount this. In 1997, BLM refused to require backfilling the pit because the pit floor was the location of the “crystal leads.” (Feb. 25, 1997, Wallace (BLM) Memorandum.) In advising RCM that FS would not permit such mining, BLM expressly stated: “We regret that valuable crystals will be left in the ground and not recovered.” (Oct. 28, 1998, Letter from BLM to RCM.) BLM is to implement its authority to manage leases “without waste or avoidable loss of minerals or damage to deposits [and] to encourage maximum recovery and use of all known mineral

resources.” 43 CFR 3590.0-1. BLM has yet to square its actions with this rule and we set aside the decision until it does so.

Finally, Nichols and Burrow had a detailed discussion regarding underground mining to gather crystals. The 1985 Mineral Report discusses crystals 120 feet deep. FS had no right to relegate RCM to the role of reclamation operator while offering mining opportunities profitable enough to recoup the reclamation cost to potential lease purchasers. RCM was the lessee. If such mining was possible, BLM was obligated to so advise RCM under 43 CFR 3592.1(a).^{24/}

Reason 2. Second, your proposal would remove over 100 vertical feet of Fisher Mountain. The Forestwide Standards and Guidelines (Geology and Minerals, p. IV-16) provide that “[a]pproval of significant surface impacts will be based on reasonable and verifiable proof that the mineral values justify the proposed operation.” It is not necessary to decide what level, if any, of proven mineral values might justify the removal of most of a mountain in a National Forest, because it is only speculative that any quartz deposit exists in the heart of Fisher Mountain. You have not offered any reasonable or verifiable proof of a valuable deposit at the level you propose to mine.

(Decision at 2.) RCM objects to this finding stating that “[v]erifiable proof of the mineral is available” (SOR at 15), and “these minerals are there have been identified through visual assessment and are just waiting to be mined.” Id. at 13-14 (sic).

The record documents the various conclusions regarding the value of the mineral resource which justified a lease instead of a prospecting permit back in the mid-1980s. BLM’s response is that, while such documentation of the resource was necessary to proceed with a leasing decision, it cannot stand as evidence that the resource exists. (Supplemental Briefing at 4-6.) We find this argument to constitute the same lack of familiarity with the record that permeates the April 2003 decision.

BLM submits a Declaration of Douglas Donato stating that RCM reported gross proceeds thus far of \$186,224.75 under the lease between 1996 and 2003. The record reveals mining by Burrow and Manley and continued interest by prospective purchasers in mining the lease, as opposed to reclaiming it. Nichols’ conversation

^{24/} We cannot adjudicate the likelihood of underground mining. RCM states that it is not possible. (SOR at 15.) The 1984 Forest Supervisor Memo notes that it “is not likely.” The Forest Plan asserts that crystal quartz is mined by “surface operations.” (ALRMP at K-5.) For some years, FS had a concern with protecting with a buffer the historic and biologic significance of an existing adit, raising questions as to whether underground mining would ever be allowed. Yet, Nichols (FS) encouraged Burrow to consider it as a part of his plans to acquire the lease in 2002.

with Burrow in March 2002 regarding Burrow's potential purchase of the lease acknowledges the need to mine crystals to pay for reclamation costs. If BLM actually believed that the resource is speculative, presumably it would not have made statements "regret[ting] that valuable crystals will be left in the ground and not recovered," and discussing crystal leads at the 1,060 foot level. (Oct. 28, 1998, Letter from BLM to RCM; Feb. 25, 1997, Wallace (BLM) Memorandum.) BLM gave approval to mining operations which brought down the mountain ridge, something it would not have done if the resource is only "speculative." The Mineral Reports supporting leasing all documented valuable resources and the Crystal Mountain Sandstone quartz vein 550 feet thick "along the northern flank of Fisher Mountain." (1985 Mineral Report.)

BLM's assertion now that the resource is "speculative" appears contrived to justify reclamation at RCM's expense, without authorizing RCM to mine a resource documented extensively in this record. There has never been a question until the 2003 decision about the existence of a valuable deposit to mine. The participants in this drama have consistently discussed the issue of how to mine it, not whether it is there. That mining it was "visually unacceptable" to FS has always been the issue. Deciding under the ALRMP at IV-16 that RCM could not mine unless it could prove something more about the value of the resource than is already evident in this record is not justified. The issue of the value of the resource arose at the leasing stage. See, e.g., Hanna Mining Co., 20 IBLA 149, 151 (1975) ("hardrock preference right lease is properly rejected where the [prospecting] permittee does not demonstrate the existence of a workable deposit of the mineral"). It has consistently been verified by mining.

Further, we have no basis in this record on which to affirm BLM's conclusion that the proposal would "remove over 100 feet of the mountain." RCM states that "review of the plan will show that removing 100 vertical feet is not the intent." We cannot adjudicate this dispute on the record before us. Once again, BLM could have and should have resolved this by advising RCM what was necessary to conform and conditioning the terms of its approval.

Reason 3. Third, your proposal would irreparably damage the visual landscape of the Ouachita National Forest. We specifically reject your conclusion in the November 23, 1998 fax from Kevin Coleman that "the visual impact will be considered moderate even if the mountain is mined through." That fax appears to assume that because the proposed mine site is over one quarter mile from Forest Service Road 177 and State Highway 270, and thus does not fall within Management Area 18 regarding visually sensitive foreground areas, the visual impacts are not addressed by the Forest Plan. That assumption is false. Although not located within Management Area 18, the project site is located in the background zone of the viewshed from Highway 270 and the

middleground zone of Road 177, both “sensitivity level I” roads. The Forest Plan prescription for Management Area 14 (Ouachita Mountains, Lands Suitable for Timber Production), which covers your proposed mine site, provides that “[l]ands in this management area that have a high sensitivity because of being viewed (as foreground, middleground, background) from other management area[s] or Sensitivity I & II roads and trails will be managed in accordance with the Visual Resource Management System. (14.1)” (See ALRMP, Ch. IV. F. Management Prescriptions for Management Areas, Prescription for Management Area 14, p. IV-134.) The Visual Quality Objective in this instance is “partial retention.” [footnote omitted] Visual Management System direction for projects within partial retention areas is that the projects remain visually subordinate to the characteristic landscape: “Activities may repeat form, line, color, or texture common to the characteristic landscape but changes in their qualities of size, amount, intensity, direction, pattern, etc., remain visually subordinate to the characteristic landscape.” Forest Service, U.S. Dept. Of Agriculture, Agriculture Handbook Number 462, National Forest Landscape Management, Vol. 2, Ch. 1, “The Visual Management System,” [“Visual Management System”] p. 32. Your proposal to enlarge the current impacted area, affecting the line and form of the vegetation and ridgeline visible from Highway 270 and Road 177, would not meet these objectives and would not be consistent with Forest Plan direction.

(Decision at 2-3.) BLM concedes that the visual management classification reflected in its 1993 Decision Memo was “modification.” *Id.* at 3 n.1. BLM contends that in the Decision Memo the area was “misclassified” and that even under a “modification” classification, the plan would be “unacceptable because that objective provides that ‘activities of vegetative and land form alteration must borrow from naturally established form, line, color, or texture so completely and at such a scale that its visual characteristics are those of natural occurrences.’” *Id.*, citing “Visual Management System” at 34. BLM goes on to assert that leveling of the crest of Fisher Mountain “has already been done by past mining.” (Decision at 3.) BLM explains that the original height of the mountain was 1,260 feet, but that intermittent mining since the 1950s including under this lease, including mining by RCM, has brought the crest to 1,170 feet, or 20 feet above a 1,150 foot saddle. “[I]t has thus already been mostly leveled.” *Id.* at 4. BLM states that it does not object to leveling the crest but rather that the 1998 proposal would “remov[e] a large portion of the mountain” and “create an open pit down to a level 90 feet below the saddle.” *Id.*

We simply can make no sense of the rule BLM would have us establish. BLM’s construction of the Forest Plan as allowing BLM or FS to deny lease rights to mine if mining is visible to a Sensitivity Level I or II road is not supported by the record. The prescription for “minerals and geology” in Management Area 14 which, BLM says,

includes the lease site, is: “Forestwide standards and guidelines apply.” (ALRMP at IV-143.) The forestwide standards and guidelines require mining operations to be planned to “reduce the visibility of the operation.” *Id.* at IV-16. Not one guideline plausibly suggests either that visual effects must be prevented (or could be) or that mining that causes visual effects is precluded. *Id.* at IV-16 through IV-19.

BLM is correct to note that, in Management Area 14, Sensitivity Level I or II “roads and trails” will be managed according to the Visual Resource Management System. (ALRMP at IV-134.) This does not mean what BLM concludes from it – that other lands that are not Sensitivity Level I and II roads and trails such as this lease site – are managed under that System so as to preclude mining use. Any question whether this is true is answered by the Forest Plan’s discussion of Management Area 18 – Visually Sensitive Foreground Areas, Roads and Trails. *Id.* at IV-160. For the foreground areas, which are those within at most one-fourth mile of Sensitivity Level I and II roads, the standard and guideline applicable to minerals is that “mining related activities must be conducted in such a manner as to reasonably reduce visibility of the operation and meet visual quality objectives to the extent possible.” (ALRMP at IV-163 (emphasis added).) This is the additional management guideline applicable to foreground areas within at most one-fourth mile of visually sensitive roads. This lease is outside such area. BLM’s conclusion that mining can be prohibited on a site further away than a foreground area when visual effects within the foreground areas can only be managed “to the extent possible” plainly misconstrues the Forest Plan.

The Visual Resource Management System reinforces our conclusion. That 1973 document described visual management objectives “designed to accomplish [the] purpose” of “development of measurable standards or objectives for the visual management of” “all lands.” Nothing in the discussion of the objectives suggests that they can be used to prohibit mining on a mineral lease. Any question that the 1973 document cannot be so construed is answered by the definitions of “middleground” and “background” on which BLM’s Reason 3 is dependent. The middleground (in this case) from Sensitivity Level I and II roads “extends from the foreground zone to 3 to 5 miles from the observer.” (“Visual Management System” at 7.) The “background” zone “extends from the middleground to infinity.” *Id.* BLM’s construction of the Forest Plan, in conjunction with the Visual Management System, means that, for Management Area 14 in which the leased lands are located, in the foreground closest to Sensitivity Level I and II roads mining can be allowed with visual effects minimized to the extent possible, but in areas outside the foreground up to “infinity” mining can be prohibited. If the Forest Plan meant to preclude mining outside the foreground of sensitive managed roads but to allow it within the foreground, it likely would have said so. It did not and we will not impute to it such an irrational meaning.

We note as well that the “Visual Management System” at 34 defines the “Modification” category as allowing that “activities may visually dominate the original

characteristic landscape,” so long as they appear to be “those of natural occurrences.” With these statements, the document justifies signs, roads, and timber “clear-cutting” as “natural occurrences.” We cannot follow such logic well enough to apply it unilaterally. It is enough that BLM already did so, in a way inconsistent with the 2003 decision. In its May 6, 1998, letter which expressly demanded a new mine plan amendment from RCM, BLM stated that, while the “visual impact of mining on the south slope must be remedied,” a “final reclamation” “delay will be allowed pending approval of a new amended plan of operations[] which shows additional disturbance is necessary on the south slope.” BLM thus concluded at that time that under visual management restrictions, RCM could mine on the south slope. We will not affirm BLM’s about-face now.

BLM’s admission that it has allowed prior miners, lessees, and even RCM, to level the crest of the mountain 90 feet below its original height further confounds any effort to find consistency in BLM’s view of the requirements of the visual management system. BLM permitted a 90-foot reduction in mountain height as a result of mining under the visual management guidelines in effect at least since 1973. BLM’s distinction between the visual impact of dropping a mountain ridge by 90 feet, allowed under the visual management system, and that caused by removing a portion of the mountain, now not allowed under the same system, is too obscure for us to endorse. This is particularly true given that, when considering issuing the lease, BLM and FS were fully apprised that the valuable crystal deposit ran the 550 feet “along the northern flank of Fisher Mountain” (1985 Mineral Report), and would, when mined, level the crest. The 1984 Forest Supervisor Memo explained that “the disturbances on this property * * * would occur in any event in a new operation so that the quartz rich zones could be exposed. This property is located on the crest of a mountain so disturbances that have already occurred and those expected to occur amount to a leveling of the crest.” (Emphasis added.)

RCM contends that BLM is now reading the visual management category guidelines in a way that would prohibit mining altogether on the lease. “Absolutely no form of mining including underground * * * could or would appear ‘natural’ as even an underground mine would produce a substantial spoil pile. If no mining plan can comply with the rules and regulations set forth by the Forest Service then those same rules and regulations should be considered inconsistent with the rights granted to [lessees] in the lease.” (SOR at 9.) Likewise, RCM states: “To not expect to see tangible evidence of the mining in this area, even from Hwy 270, would appear naive and uninformed.” This comment is supported by the fact that FS was complaining about the visual image of the lease from that highway back at the very first inspection on July 15, 1987. At that time and for the ensuing 9 years, BLM allowed mining to continue on this lease despite FS complaints regarding visual impacts. In the 1993 Decision Memo, at 2, FS approved the Manley operations stating that “[o]perations will appear as a natural occurrence.”

In light of prior authorizations, BLM has not identified the source of its amorphous line-drawing. Either the visual effects were permissible after the lease was issued or they were not and the lease should not have been issued. BLM construes visual management objectives to prohibit impacts now that FS suggested in 1993 could appear to be natural occurrences.

We note that RCM submits pictures into the record of the view of Lease ARES 36855 from highway 270, for which FS asserted that visual management was the “number one” consideration. (Attachments 5A (telephoto view of lease from highway 270); 5B (non-telephoto view of same).) RCM also submits attachments 3 and 11, pictures which allegedly show visual impacts of other mining areas, including the “Crystal Vista walk-in area where mining is encouraged by the Forest Service.” BLM agrees that the Crystal Vista area is a “reclaimed former mining area now used for non-commercial family-oriented rockhounding and crystal collecting” (Answer at 10-11), and argues that “[i]t is within the Forest Service’s discretion to maintain such an area [the Crystal Vista] for public use.” *Id.* at 11. This comment is non-responsive to RCM’s photographs. The pictures prevent us from affirming that the visual effects of the lease from highway 270 are “unacceptable” when they do not seem as great as the visual effects of the public use area authorized by FS in the photographs at attachments 3 and 11. To the extent the FS’s concern with the visual impact of lease operations is that it is incrementally greater, combined with what FS subsequently authorized to contract miners or recreational miners, than FS would like to permit, this is a problem of FS’s creation. It is not remediable by denying grandfathered lease rights in favor of subsequent authorizations.

RCM apparently concedes that its mining will have further impacts on the ridge. (SOR at 7-8.) BLM argues that it is not the province of the hardrock mining lessee to attempt to reform the look of the landscape, but rather the miner may only engage in mining operations that do not conflict with management policies, notably the Forest Plan. *See, e.g.,* ALRMP, IV-16 (0.181) (“Operations will be planned and conducted in such a manner to reasonably reduce the visibility of the operation.”) Lease ARES 36588 itself specifies that the lessee must “carry on all operations * * * in a manner that minimizes adverse impacts * * * to * * * visual * * * resources, and to other land uses or users.” (Lease ARES 36588 Sec. 6.) Thus, the lessee is subject to restrictions which minimize adverse impacts, and RCM’s assertion that “[a]ny amount of material moved could be replaced and revegetated to the extent that had previously occurred naturally,” does not support the conclusion that mining impacts are at the discretion of the lessee. (SOR at 8.) But we will not find that mining causes an unnatural landscape which cannot be allowed under visual management guidelines for a lease, the justification for which was a 550 foot vein running along the ridge. We remand for BLM to sort out the nature of the rights granted in the lease and to precisely define limitations set by the visual management objectives consistent with BLM’s past practice of allowing mining to level the mountain.

Finally, RCM asserts that “this is the first [RCM has] heard of the change in visual classification...from modification, which allows man made disturbances to dominate, to partial retention and this is also the first mention of a ‘background viewshed’ from Hwy 270.” (SOR at 8.) The record, in fact, contains a number of instances in which FS and BLM discussed FS requirements with RCM without mentioning such points. BLM concedes that at the time the lease was issued, the visual classification was “Modification” but asserts that this was a misclassification. We have no basis upon which to affirm this unsupported allegation or to presume that the lease rights are affected adversely by the clarification BLM would impose.

Reason 4. Fourth, your proposal would radically alter the mass of the mountain in a manner likely to cause serious destabilization of the adjacent terrain. Based on a 1996 Soil Report “developed for input into the project planning and decision making process in land use management on National Forest System lands,” the area covered by your lease includes two ecological management units (EMU) of particular concern. These units (numbers 043632 and 073632), on the north and south slopes of the lease, consist of soils “on the steep sideslopes of mountains” with “a slope gradient of 35 to 60 percent.” The report advises that “[m]anagement concerns include steep slopes, surface stones, severe potential erosion hazard and shallow depth of Clebit soils.” See Soil Report, Ranger District Womble 1635, Watershed ID 0804010108A, Prepared by Ken Luckow and Kevin Lee, Soil Scientists (04/17/96)(emphasis added). Our evaluation of the hazards of your proposal, considering the steep terrain in the area, leads us to conclude that the proposal must be rejected for this reason, as well.

(Decision at 4.)

RCM agrees that the land covered by Lease ARES 36588 “is a steep slope,” but disagrees as to the degree of risk for potential erosion. Apparently, RCM expects to control erosion by using “trees as a filtering agent to prevent any erosion.” (1998 Plan Summary at 10.)

BLM explains the disjunct between the parties’ positions as a function of RCM’s

refus[al] to acknowledge that its proposal to remove and “put back” “a large mass of the mountain” would involve moving hundreds of thousands of tons of presently stable in-place rock. The engineering aspects of such a massive project are simply ignored in both the proposal and the appeal. The reconstruction of a mountain with loose unconsolidated material requires a high degree of engineering and technical understanding. To remove a large part of a mountain of solid rock, and then replace and attempt to reform it with loose

unconsolidated tailings would result in a different form with different slopes than the existing feature because of the change in slope angle created by the loose unconsolidated material as it achieves stability by finding its own angle of repose. The unconsolidated spoil material has completely different characteristics and behaviors than the existing mountain rock and soil. The height, shape, slopes, fauna, and flora of the natural mountain landscape would be completely and permanently altered. Appellant's plan does not even begin to address the technical realities of what it proposes. Appellant's response that "erosion is addressed in the plan" (Appeal at 10) clearly does not adequately address the issue of maintaining the integrity of the mountain.

(Answer at 3-4.)

We agree with BLM's conceptual point that if, in fact, RCM's plan presumes moving a large mass of mountain, it is woefully deficient in dealing with the return of that mass of material back to the mountain, and largely silent on erosion potential. We nonetheless set aside the decision for further consideration by BLM in light of the following points. Once again, BLM and RCM are at odds about what is to take place under the 1998 plan. BLM claims that RCM will move 12,000 yards of material per month (Decision at 1), based on the 1998 plan's paragraph C. That paragraph states, however, that RCM will remove "about 12,000 yards tailings per month when removing overburden and doing exploration. Only about 600 yards per month when mining crystals." (1998 Plan at 5 (emphasis added).) RCM states:

We are not in the business to move dirt as our primary intent is to remove crystals. During all mining phases only 10-20 yards a day would be produced for an out put of 300-400 yards per month. Mining would quickly become unprofitable and unjustified when sustained output reached 2000+ yard per month over 6 months or more.

(SOR at 6.) These intentions are verified by the 1998 Plan Summary which states: "Total number of yards of tailings to be removed depends upon how many crystals are being mined. While crystals are being mined only about 20 yards of tailings per day are produced. During exploration and overburden removal tailings could exceed 400 yards per day." (1998 Plan Summary.)

BLM's position relies on extrapolating the maximum tailings output mentioned in the plan over the life of the mining plan. Such a plan undoubtedly was never intended and we will not assume otherwise for purposes of defeating it.

This point brings us back to BLM's role in implementing its regulations. Under 43 CFR 3592.1, BLM was obligated to approve promptly or advise RCM of information needed for the plan to conform. Had BLM discharged its obligation, the

meaning and intent of the plan would have been plain and the limits of the authorization for mining operations would have been sorted out between BLM and RCM. The facts do not provide a sufficient basis for us to decide, as BLM suggests, that actual implementation of the plan by RCM will amount to a mining proposal far beyond the contours of that which RCM claims it will be.

BLM not unreasonably points out that the 1998 plan may be incomplete in addressing erosion, restoration, or reclamation. See 1998 plan at 5; Plan Summary at 10. Chapter IV of the Forest Plan states that for “[a]ll mining and minerals related operations and activities in the Ouachita National Forest,” “[e]ngineering designs for operating proposals must be submitted by a certified engineer for evaluation by the Forest Engineer.” (ALRMP at IV-16 (0.185).) Likewise, “[a] restoration and reclamation plan that details full site reclamation at operation completion will be developed for each proposed activity.” Id. at IV-17 (0.189). RCM would be compelled to submit such information were its plan to be approved.^{25/} BLM should have advised RCM, however, of the precision required some time ago. In light of BLM’s findings that RCM had properly conducted reclamation between 1996 and 2001, BLM’s asserted confusion over the terms of a mining plan that contains more detail than plans approved for Burrow and Manley, however, appears questionable.

Finally, we raise another eyebrow at BLM’s seeming surprise in 2003 that RCM would propose “moving hundreds of thousands of tons of presently stable in-place rock” to replace it with “loose unconsolidated tailings.” (Reason 4.) These dramatic comments, on closer observation, resemble the mining BLM and FS envisioned when it issued the lease.^{26/} As noted above, the 1985 Mineral Report expected, just for 20 acres of the lease, that mining “will require movement of 248,000 cubic yards of mine spoil that was pushed back into previous mine excavations.” Id. at Part 10, Conclusions. How 248,000 cubic yards of mine spoil equate to “tons of presently stable in-place rock” is unclear. This movement of previously disturbed spoil was anticipated precisely to get at the crystals deep in the mountain that would require moving “solid rock.” Further, the 1984 Forest Supervisor Memo expressly anticipated a “new operation so that the quartz rich zones could be exposed” that would result in

^{25/} BLM’s reliance on the 1996 Soil Report would have to be explained in more detail in the context of such consideration. The map attached to the soil report shows soils on the lease area in the categories of “map units” 42, 80 and 81, which have “percent slopes” ranging from 3-15, 15-35, and 35-60 percent. Only unit 81 relates to the EMU numbers cited in Reason 4. The record provides no evidence regarding the spoil storage locations in association with these soil types.

^{26/} BLM’s concern with steepness would likewise seem to have been resolved in 1986 when it issued the lease. As noted above, a Mar. 19, 1986, phone conversation record indicated that an FS employee had objections to issuing the lease because of its steepness, but those objections obviously did not prevail at FS.

“[s]poil material [that is] usually very stoney and not conducive to complete restoration.” Once again, we set aside BLM’s conclusion so that it may be squared with the rights granted in the lease and its decision may be premised on legal requirements and Forest Plan terms rather than hyperbole.

Reason 5. Fifth, your proposed plan would fill an existing ephemeral/intermittent watercourse—which your plan characterizes as a “valley”—and relocate it by 200 to 300 feet. This watercourse is a tributary of Twin Creek, a moderate-sized perennial stream. The watercourse is an ephemeral stream at the upper elevations of Fisher Mountain and becomes an intermittent stream as it crosses the lower reaches of your lease. The Forest Plan contains many provisions aimed at protecting streams in the National Forest, both perennial and ephemeral/intermittent. Tables in the Forestwide Standards and Guidelines provide that within the minimum 130- to 155- foot zone around an intermittent stream with a clearly defined stream channel and a 40 to 50 percent slope, such as the one on your leasehold, the following activities, among others, are not normally permitted: all wheel or crawler vehicles; temporary roads and skid trails...; mechanical site preparation; log loading areas; cutting of den trees...; site preparation burning; felling and cable skidding of timber within 30 feet of intermittent streams; Wildlife Stand improvement within 30 feet of intermittent streams. (See Table IV-14 “Width of Perennial and Intermittent Streamside Zone by Percent Slope” and Table IV-15 “Activities within Streamside Zones” of the ALRMP Forestwide Standards and Guidelines (Watershed Operations, p. IV-121)). The level of protection afforded to ephemeral/intermittent streams thus clearly precludes activities, such as those in your proposed plan, that would destroy the stream channel and reconstruct it elsewhere. A newly-constructed streambed such as you propose would also cause problems with increased sediment deposits that would be likely to adversely affect Twin Creek and Twin Creek Seep. In response to the statement in the November 23, 1998 fax from Kevin Coleman to the Forest Service, that a running stream has previously been rerouted inside this district, we are unaware of any such rerouting.

(Decision at 4-5 (footnote omitted).)

RCM objects to this fifth finding, asserting that “[e]phemeral streams are allowed to have crossings according to the ALRMP and the list of not normally permitted activities is precluded by ‘exceptions may be permitted on a case by case evaluation’ (9.66).” (SOR at 11.) RCM is correct to note that the Forest Plan, at

IV-120, speaks of case-by-case evaluation. Nonetheless, BLM is correct to conclude that some management action is required with respect to “perennial and intermittent streams” under the Forest Plan at IV-121, Tables.

What is more difficult for us to agree with is BLM’s discussion of the site, for which we have no supporting information. The Decision describes the Twin Creek Seep as a 20-acre wooded wetland area containing sensitive plant species, located at a lower elevation on Fisher Mountain. (Decision at 5 n.2, citing Vernon Bates, Ouachita National Forest 1988 Sensitive Plant Survey, Vol. 1, Overview of Plant Communities and an Inventory of Natural Areas, at p. 96.) This Plant Survey is not in the record before us. RCM asserts that this is “the first ever mention to [RCM] of Twin Creek Seep.” (SOR at 11.) No map in the record is detailed enough to display such a location or a contour line that would suggest it. Assuming this was a critical issue which required resolution before a mining plan could be approved, BLM would have been obligated to inform RCM of the problem. Yet, we agree with RCM that the record does not substantiate any mention of the seep before the 2003 decision. RCM correctly notes that the 1993 Decision Memo found, under reasons for categorical exclusion from the regulatory requirements of NEPA that, as to flood plains, wetlands or municipal watersheds, there were “none in area.” (1993 Decision Memo, Part 2C.) Moreover, that Decision Memo went on to require that the operating conditions “provide for the protection of all streamside zones and the prevention of any potential impacts on water quality.” It is unclear why BLM could not have imposed such conditions here. RCM’s reliance upon this 1993 Decision Memo is well founded. We cannot determine that a mining plan could not have been approved that would protect intermittent streams at the “lower reaches of the lease.” ^{27/}

Reason 6. Sixth, your proposed plan would require the use of seven acres of National Forest land that are not included in your leasehold. The additional acres involve terrain at a grade of 24% downslope from your lease on which you propose to store tailings (spoil). As explained in the October 5, 1998 letter from Robert Raines, the Forest Service recommendation for all mining operations is that spoil material should be stored either on a low relief upgrade, or on the perimeters of the pit to facilitate backfilling. In response to the assertion in Kevin Coleman’s November 23, 1998 fax that the approved plan under which you were then operating allowed for downslope storage, we note that the area approved for spoil storage in the 1995 plan of operation was on lease and, while downslope from the pit, was itself flat, being at the base of the slope. The lower perimeter of the pit was nearly level with the spoil

^{27/} BLM’s construction of Forest Plan objectives as precluding mining on the lease are again extreme. Table IV-14, on which BLM relies, states that Forest District Rangers will “determine management needs of the areas and then lay out the boundaries of the strips to satisfy those needs to the extent possible.” (ALRMP at IV-121.)

storage area by the time reclamation was required. (See Amended Operating Plan (Submitted May 2, 1995) Stipulations and Controls, B. Spoil Storage, 3. (“additional spoil storage in the existing area at the base of the slope...”) (emphasis added).) Thus, unlike your current proposal, the 1995 approved plan conformed to the Forest Service recommendation by allowing tailings storage on a flat area at the perimeter of the pit. Moreover, tailings storage in the area you propose would adversely affect the water quality in Twin Creek and Twin Creek Seep. See discussion above.

(Decision at 5.)

This portion of the decision deals with three separate issues: (1) the slope of the proposed spoil pile; (2) off-lease spoil storage; and (3) effects of off-lease spoil storage on water quality in Twin Creek and Seep. As to the first and third points, we could sustain BLM’s conclusions that spoil storage on a slope and affecting water quality would be prohibited with sufficient record evidence to support it. RCM asserts, however, that, even at a greater than 20% grade, this off-lease area was flatter than any areas on the 80 acres of lease ARES 36588, and placement of tailings there would, when revegetated, help to hide the mining operations from Forest Service Road 177. (SOR at 12.) These assertions are not resolved here.

We are even more concerned with BLM’s comments regarding off-lease storage. The grant of a special use permit (SUP) by FS is a matter of discretion. 36 CFR 251.53 (1998). FS may only issue such a permit if “such occupancy [as permitted under special use authorization] is in the best public interest.” (ALRMP at IV-20 “Special Use Administration” (0.248)); cf. County of Okanogan v. NMFS, 347 F.3d 1081, 1084 (9th Cir. 2003) cert. den’d, 124 S. Ct. 2094 (2004) (appellants had no vested right to a permit). BLM properly considers FS’s position that special use permits may not be granted for such storage on forest land.

On the other hand, the record documents years of comments by BLM that RCM should consider off-lease storage. In one of its first meetings with RCM on December 3, 1996, BLM inspector Wallace’s notes assert that the participants discussed off-lease spoil storage and that BLM recommended it. “Storage below the mine is essentially off-lease and the lessee was briefed on how to acquire a use permit from the District Ranger.” In his February 25, 1997, notes, Wallace recounts that RCM expressly discussed the need for off-lease storage. BLM did not discourage RCM: “The undersigned told him that as long as he comes up with a plan that will recover the crystals safely and can reclaim the land in a usable condition, that he will satisfy the BLM.” In the notes of the “July 8, 1997, 9:30 am meeting” written to “[c]larify the lease responsibilities of the FS and BLM and to discuss RCM’s future operations,” BLM explained that the parties had agreed, at paragraph “d,” that “RCM needs additional spoil storage to fully develop the lease.” The only documented

response to the issue, at paragraph “k,” was that in a July 15 telephone conversation, RCM was advised that avoiding off-lease spoil storage would save time and an off-lease permit would be more “complicated.” Nothing in the record suggested that BLM believed that the lack of spoil storage space, an issue to which BLM and FS were alerted no later than 1996, would prevent mining. To the contrary, in the May 6, 1998, letter to RCM, BLM stated:

You repeated a request for a Forest use permit or crystal contract sale on the land immediately south of the lease, to be used as spoil storage. Any additional spoil storage will be considered as part of a detailed comprehensive operations plan. Please submit a new operations plan amendment outlining future work.

The issue of spoil storage was raised a decade ago. BLM never once suggested to RCM that it do anything other than submit a mining plan with a request to store tailings on or off-lease with a special use permit as needed. We do not have an adequate basis to affirm a conclusion that no off-lease permitting would ever be justified, nor do we understand BLM’s failure to settle the issue with RCM after raising it with the company in this manner.

Reason 7. Seventh, your plan proposes to reopen approximately one-quarter mile of an old (closed) road on the steep north flank of Fisher Mountain. This directly conflicts with Lease Stipulation Attachment B of your lease, which states: “No additional road construction will be allowed due to the steep terrain and potential for severe erosion.”

(Decision at 5.) RCM objects to this finding, claiming that its plan to “reopen [the] old road” (1998 Plan at 2) “already on the lease” (SOR at 12), does not constitute the sort of “road construction” prohibited by the lease stipulation referred to by BLM. See Lease ARES 36588, Attachment A, paragraph 4.^{28/}

RCM is correct. The facts surrounding the inclusion of this lease stipulation reflect a concern about access to the lease. At the time the original 20-acre parcel became available for lease in 1986, FS and BLM officials asserted that the lessee would be required to make arrangements with the holder of the adjacent lease, as the access road crossed this neighboring property. Id. When more parcels were added to the original 20 acres, see, e.g., Mar. 26, 1986 Memorandum from District Manager (proposing inclusion of parcels in lease sale), FS and BLM were concerned that potential lessees would wish to construct additional access routes across this or another portion of the original 20-acre parcel, all of which are located on the steep northern slopes of Fisher Mountain. Therefore, the stipulation against construction

^{28/} BLM incorrectly cites Attachment B to the lease. The quoted language appears in Attachment A.

of additional routes was included to preclude erosion problems resulting from the construction of additional access roads to the leasehold, not from reopening existing roads within the confines of the leasehold. The entire stipulation states: "Vehicular access to the lease area will be limited to existing roads. The leaseholder will be responsible for negotiating with the adjacent leaseholder and owner of the private right-of-way for access to the lease area. No additional road construction will be allowed due to the steep terrain and potential for severe erosion."^{29/}

More importantly, BLM never suggested that road reconstruction would be prohibited. BLM indicated to RCM that rerouting the existing road located on the lease would be acceptable. *See, e.g.*, May 6, 1998, Letter from Wallace to Ron Coleman at 1 ("[y]ou may consider re-routing the mine access road to the west along the north central ridge area to the west, clear out some of the pines in the ridge saddle area, and use that area for spoil storage.") In one of the first meetings in 1996, the government "suggested rerouting mine access road. The rerouted access would allow hauling spoil to the top of the ridge for storage, until clearance could be obtained below the mine." (Dec. 6, 1996, Wallace (BLM) memorandum.) Based on these considerations, we conclude that, with respect to that element of its 1998 plan that proposes to "reopen [the] old road" that is "already on the lease," RCM is correct in its understanding that these activities are not precluded by the lease stipulation cited by BLM in its Decision.

It is unfortunate that BLM's 2003 decision so deviated from its representations to RCM that we consider the decision unsupportable in the absence of further consideration, explanation, and evaluation of lease rights and interpretation of the Forest Plan in association with those lease rights. Recognizing the considerable factual issues, and need for more informative maps and perhaps testimony to explain factual points, we considered and rejected the option of sending the matter for a hearing, because it would require an administrative law judge to undertake, as a matter of first impression, the task of lease administration BLM did not perform in the first instance.

RCM does not appear in this record as belligerent or non-responsive. Rather, the picture presented is one in which FS regretted the lease almost as soon as it was issued, and preferred that the lands subject to it, already disturbed, be reclaimed and future management of the crystal deposit there take place under mineral material sales contracts. BLM valiantly tried to merge the parties' interests, but failed to

^{29/} Although road construction and road reconstruction involve similar concerns regarding erosion and other environmental impacts, they are treated as separate activities by FS. *See, e.g., Chattooga Conservancy v. Jacobs*, 318 F. Supp. 2d 1179, 1199 (N.D. Ga. 2004); *Island Range Chapter of the Montana Wilderness v. U.S.F.S.*, 45 F. Supp. 2d 1006, 1009 (D. Mont. 1996); *Churchwell v. Robertson*, 748 F. Supp. 768, 780 (D. Idaho 1990).

undertake its delegated task of resolving what could be allowed on the lease. Instead, BLM improperly abandoned the task to RCM. This job was not properly delegated to the lessee. After BLM specifically, in its May 6, 1998, letter to RCM, demanded another plan amendment and articulated the participants' understanding of what RCM wanted, RCM submitted its August 1998 plan, consistent with that letter. Unable to reach agreement with FS after half a decade, BLM's April 2003 decision strikes us as an effort to justify collecting the bond rather than the considered administration of a lease required in the intervening years.

On remand, BLM should review the entire written record of the government's meetings and communications with the participants. It should make its own determination regarding the rights and obligations conferred by the lease considering the purposes established in 43 CFR 3590.0-1. It should meet with RCM and be prepared, as required in 43 CFR 3592.1(a), to "promptly approve the [1998 plan] or indicate what additional information is necessary to conform" to the requirements. It should be prepared to ascertain the legal basis for the requirements it imposes, and explain any discrepancies between what BLM allowed for years under the same 1990 Forest Plan and the action it proposes. RCM should be prepared to conform to legal requirements established in FS rules and applicable authority to the extent not inconsistent with rights granted and obligations imposed in the lease. (Lease ARES 36588, Attachment B.)

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside and remanded.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge