

BUDD-FALEN LAW OFFICES

L.L.C.

ATTORNEYS FOR THE WEST

300 EAST 18TH STREET • POST OFFICE BOX 346

CHEYENNE, WYOMING 82003-0346

TELEPHONE: 307/632-5105

TELEFAX: 307/637-3891

WWW.BUDDFALEN.COM

KAREN BUDD-FALEN³

FRANKLIN J. FALEN²

BRANDON L. JENSEN¹

¹ ALSO LICENSED IN CO

² ALSO LICENSED IN NE, SD & ND

³ ALSO LICENSED IN NM & ID

BETHANY A. GROSS⁵

TERESA SLATTERY⁴

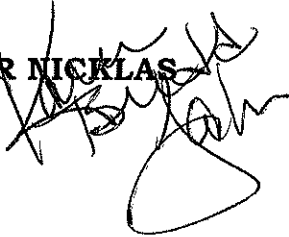
⁵ ALSO LICENSED IN MT

⁴ ONLY LICENSED IN IL

MEMORANDUM

TO: BOWMAN-SLOPE SOIL AND WATER CONSERVATION
DISTRICT LAND USE PLAN STEERING COMMITTEE

VIA: EMAIL
bowsloscd@ndsupernet.com

FROM: KAREN BUDD-FALEN AND CONNER NICKLAS
BUDD-FALEN LAW OFFICES, LLC 

THROUGH: BRENDA YOUNKIN
Y-2 CONSULTANTS

DATE: SEPTEMBER 12, 2017

RE: OVERVIEW OF THE BANKHEAD-JONES FARM TENANT
ACT AND GRAZING ON NATIONAL GRASSLANDS

I. BACKGROUND

A. Bankhead-Jones Farm Tenant Act

The Bankhead-Jones Farm Tenant Act ("BJFTA"), 7 U.S.C. § 1001, *et seq.*, authorized the Secretary of Agriculture to create a land conservation and utilization program to be used on National Forest Land in order to correct "maladjustments in land use," and ultimately assist in, among other things, control soil erosion, reforestation, preserving natural resources, protecting fish and wildlife, and protecting public lands health, safety and welfare. 7 U.S.C § 1010. However, the act does not give the Secretary the authority to use the program as a means to build an industrial park or establish private industrial or commercial enterprise. *Id.*

In order to carry out the program authorized under the BJFTA, the Secretary has the authority to sell, lease, exchange, or otherwise dispose of

Bankhead-Jones land, so long as the disposal of the land fulfills the purpose set forth in the BJFTA. 7 U.S.C. § 1011(c). The BJFTA also allows the Secretary to regulate the use and occupancy of BJFTA land in order to conserve or utilize the land, or to “advance the purposes” of the BJFTA. 7 U.S.C. § 1011(f). The ultimate guiding principal for the Secretary in carrying out the BJFTA is to protect lands acquired under the BJFTA and to adapt them to their “most beneficial use.” 7 U.S.C. § 1011(b).

B. Forest Service Regulation

In 1954, after various moves within the Department of Agriculture, the lands acquired under the BJFTA were given to the National Forest Service to administer and retain permanently. Elizabeth Howard, *Management of the National Grasslands*, 78 N.D. L. Rev. 409, 425 (2002). Those retained lands were then labeled as National Grasslands. *Id.* The Department of Agriculture further codified the creation of National Grasslands and gave the authority to National Forest Service to administer the BJFTA. 36 C.F.R. § 213.1. Under this regulation, the National Forest Service must administer the land with “sound and progressive principals of land conservation and multiple use,” and “promote development of grassland agriculture and sustain yield management” of the various uses in the area. *Id.* at 213.1(c). The Forest Service must also manage national grassland resources “so as to maintain and improve soil and vegetative cover, and to demonstrate sound and practical principles of land use for the areas in which they are located. *Id.* at § 213.1(d).

Although the Secretary originally had power to transfer or otherwise dispose of land acquired under the BJFTA, this authority has since been precluded under the National Forest Management Act (“NFMA”), which prohibits the Secretary from returning land in the National Forest System to the public domain. Thus, the only power retained by the Secretary is to lease the land, and to regulate the use and occupancy of the land.

C. Preclusion of Local Land Use Regulation on Federal Public Lands

The Eighth Circuit, when facing the issue as to whether a land use regulation allowing for open range grazing on National Grassland allows a party to graze in a National Grassland without a permit, the Eighth Circuit ruled that the BJFTA precludes such action. *Griffin v. US*, 168 F.2d 457 (8th Cir. 1948). The court stated that Congress has the exclusive power to control its lands. *Id.*

at 460. When Congress exercises its control on federal land within the borders of a state, neither the state nor its agencies have the power to interfere. *Id.* citing *Utah Power and Light Company v. US*, 243 US 389, 404 (1917). Thus, when there is a conflict between a local land use regulation and the Forest Service's regulation of the National Grasslands, the Forest Service's regulation controls.

D. Land and Resource Management Plans

Because the BJFTA gives authority to the Secretary of Agriculture to exclusively manage those lands acquired under the BJFTA, and the Secretary subsequently delegated that management to the National Forest Service, the National Forest Service is the agency who exclusively regulates the National Grasslands. In guiding its decisions, the National Forest Service must adopt regulations that protects National Grassland, as well as adapting them to their "most beneficial use." 7 U.S.C. § 1011(b). Further, through its regulations, the Forest Service has appeared to adopt a multiple use and sustainable yield approach to its management of its Grassland, but there is a preference that the land ultimately be used for grassland agriculture. 36 C.F.R. § 213.1(c).

Ultimately, these are all reflected in the Land and Resource Management Plans that the National Forest Service creates for each of its National Grasslands. Within the Land and Resource Management Plan, the Forest Service gives direction to agency action in three different zones. The first zone is "Grassland-Wide Direction," which reflects the policy of the Forest Service for the entire grassland, these policies often reflect national or regional goals for the grassland.¹ The second zone is "Geographic Area Direction," this direction is a more narrowly tailored direction and more closely reflects the best use for a localized region that would not be applicable to the grassland as a whole. *Id.* The third zone is "Management Area Direction;" management areas are parts of the grassland that are managed for a particular emphasis or theme. *Id.* Since the BJFTA gives the Secretary wide discretion in regulating the land to make it suitable for the "most beneficial use," and the regulations ultimately pass that responsibility onto the National Forest Service, the best place to look for what uses can be allowed on National Grassland would be the local Land and Resource Management Plans. Further, when creating land management plans,

¹ The National Forest Service, *Land and Resource Management Plan for the Dakota Prairie Grasslands Northern Region 2001*, 2 (2001).

“The responsible official must use a collaborative and participatory approach to land management planning... by engaging the skills and interests of... State or local governments or other interested or affected communities, groups, or persons.” 36 C.F.R. § 219.9 (2017). Further, the Forest Service must seek assistance, where appropriate, from other State and local governments to help address management issues or opportunities. *Id.* at § 219.9(a)(2). Finally, the BJFTA authorizes the Secretary to “cooperate with Federal, State, territorial, and other public agencies and local nonprofit organizations in developing plans for a program of land conservation and land utilization or plans for the conservation.” 7 U.S.C. § 1011(e). Thus, local officials and local land use plans have the ability to affect the Land and Resource Management Plan for the Little Missouri National Grassland.

II. ISSUES FOR THE BOWMAN-SLOPE LAND USE PLAN

Given this analysis, I believe that Bowman-Slope land use plan should consider including issues regarding compliance with the Bankhead-Jones Farm Tenant Act. Those issues may include:

- A.** What is the use the District considers the “most beneficial use” in a specific area?

Should you have any questions, please do not hesitate to contact us.