

Decision by  
Assistant Secretary of Agriculture for  
Natural Resources and Environment on  
Review of Administrative Decision by  
Chief of the Forest Service

This review of a decision by the Chief of the Forest Service dated August 23, 1983, on an administrative appeal by Shawnee Clinger Oil Company is made pursuant to the authority conferred by 7 CFR 2.19(d) (18) - and 36 CFR 211.19(j) (2).

Shawnee Clinger Oil Company (hereinafter called "Applicant") is the owner of mineral rights underlying certain lands owned by the United States and administered by the U.S. Forest Service as part of the Allegheny National Forest in Pennsylvania. On June 9, 1982, Applicant, pursuant to its reservation of mineral rights incorporating the Secretary of Agriculture's 1937 rules and regulations, applied for a permit to make necessary and reasonable use of the surface for oil and gas operations<sup>1</sup> on approximately 200 acres of the lands in which Applicant owns the mineral rights.

The Forest Supervisor caused an Environmental Assessment to be performed and on January 12, 1983, recommended to the Regional Forester that no Environmental Impact Statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321 et seq.) be prepared in connection with processing Applicant's request for permit. Thus the Forest Supervisor had determined that issuing the permit was not a "major Federal action significantly affecting the quality of the human environment," and the preparation of an Environmental Impact Statement was not required. On March 3, 1983, however, the Regional Forester decided that an Environmental Impact Statement would need to be prepared before a decision on the permit requested by Applicant could be made. Applicant appealed the Regional Forester's decision to the Chief of the Forest Service.

<sup>1</sup> Applicant requested the permit even though the deed reservation specifically excludes oil and gas operations from the permit requirement.

By its request for permit, applicant is presumed to have indicated its willingness to be subject to and to comply with permitting procedures of the Secretary of Agriculture appropriate to Applicant's circumstances.

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By his decision of August 23, 1983, the Chief affirmed the decision of the Regional Forester.

The decisions by both the Regional Forester and the Chief rest upon a conclusion that issuance of the requested permit possibly would result in a use of the 200 acres which could preclude future consideration for wilderness designation of the Allegheny Front Further Planning Area, consisting of 8,696 acres, of which the 200-acre parcel subject to the request for permit is a part. They concluded if that could be the result, it would be a "major Federal action significantly affecting the quality of the human environment" and that an Environmental Impact Statement was required. Review of this case has been undertaken out of concern that the decisions by the Regional Forester and the Chief may misconstrue the nature and extent to the Federal action required to act upon Applicant's request for permit, and consequently may impermissibly interfere with and reduce Applicant's vested property right.

As owner of the underlying mineral rights, Applicant is legally entitled to make use of the surface to a degree and in a manner reasonably necessary for enjoyment of its ownership of the mineral rights.<sup>2</sup> In making use of the surface, the owner of the mineral rights must conduct his activities so that no undue or avoidable damage is caused to the surface or to property values on the surface.<sup>3</sup> While the law thus protects the surface estate to this degree from harmful acts which the subsurface owner might commit, the surface owner has no power to exclude entry by the mineral owner either permanently or for an unreasonable time.<sup>4</sup>

<sup>2</sup> Chartiers Block Coal Co. v. Mellon, 152 Pa. 286, 25 A 597 (1893); Kinney-Coastal oil Co. v. Kieffer, 227 U.S. 489.

<sup>3</sup> Babcock Lumber Co. v. Faust, 156 Pa. Super. 19, 39 A.2d 298 (1944); Kinney-Coastal Oil Co. v. Kieffer, 227 U.S. 489.

<sup>4</sup> Benenson v. United States, 212 Ct. Cl. 375, 548 F.2d 939 (1977); Pennsylvania Coal Company v. Mahon, 260 U.S. 393.

Issuance of a permit by the Forest Service in the circumstances presented here is not the grant of a right; Applicant already has a right based on its ownership of a mineral estate. Rather, a permit in this case is a document usable in defining limits between rights vested in the surface and subsurface owners.<sup>5</sup> A permit from the Forest Service is not the only means by which such limits may be ascertained. Outright refusal to act or unwarranted delay in acting upon Applicant's request for a permit under the circumstances in this case would provide a lawful basis for Applicant to enter and to make use of the surface without having a permit, so long as Applicant's use of the surface was reasonably calculated to assure no more than the enjoyment of Applicant's existing subsurface ownership rights, and minimized affects on the surface estate. Thus, the question raised by Applicant's request-for a special use permit is not whether Applicant can or should be permitted to use the surface at all; Applicant already has an estate it is entitled to enjoy. The existence of that estate possibly could preclude designation of part or all of the Allegheny Front as wilderness, but that possibility is not created by Applicant's request for permit. The question created by the Applicant's request for a permit is the nature of the requirements and conditions which can be lawfully imposed to limit Applicant's use of the surface during Applicant's utilization and enjoyment of the subsurface mineral estate which it owns. Since the issue presented by Applicant's request for a special use permit is so confined, its resolution does not call for major Federal action "significantly affecting the quality of the human environment." An Environmental Impact Statement is, therefore, not required. The preparation of an Environmental Assessment which canvassed the nature and extent of Federal action and its effects in responding to Applicant's request was adequate.

Applicant's vested property right in the subsurface and its correlative right to use the surface for access to its minerals are protected by the Fifth Amendment to the Constitution, which prohibits a taking or denial without compensation. That the owner of the surface may desire eventually to use the property in a manner incompatible with Applicant's present or possible future exercise of its right to use the surface cannot

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<sup>5</sup>CF., Sierra Club v. Peterson, No. 82-1695 (D.C. Cir., Sept. 13, 1983).

diminish Applicant's vested rights, even though the owner of the surface happens to be the United States. The major foreseeable reason for the United States to consider acquisition of Applicant's existing property rights would be because the area under which they lay might be designated as a wilderness. If the Forest Service, which Administers the land for the United States, were to consider that possibility, then an Environmental Impact Statement presumably would be called for in making that decision<sup>6</sup> since the ultimate recommendation by the Forest Service might be that Congress designate the area as wilderness.

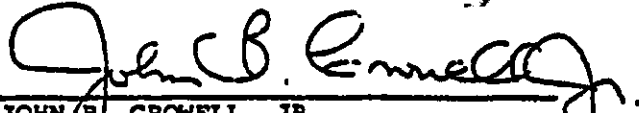
There is no basis for concluding that the National Environmental Policy Act was intended by Congress to be an exercise of the police power which could justify interference with vested property rights. In the time period during which an Environmental Impact Statement on a wilderness proposal is being prepared, with a wilderness recommendation under consideration by an incumbent Administration, and while the possible resulting recommendation is before Congress, no legal basis would exist for preventing Applicant from exercising its vested right to make reasonable use of the surface to reach its mineral estate.<sup>7</sup> Thus, consideration of the Applicant's permit request is not the appropriate time for initiating examination of whether or not the area subject to Applicant's property rights might be recommended for wilderness designation, if such an examination would prevent Applicant, even temporarily, from exercising its vested property rights. Consideration of a wilderness recommendation must anticipate the likelihood of Applicant's exercise of its property rights.

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<sup>6</sup> California v. Block, 690 F.2d 753 (9th Cir. 1982).

<sup>7</sup> Possibly a court of equity might be justified in exercising its powers to prevent Applicant's reasonable exercise of Applicant's right if confirming Congressional action on the recommendation were imminent, but that is a very special situation not presented here.

The Forest Supervisor is directed promptly to issue the requested permit to Applicant, subject only to such terms and conditions as are reasonably calculated to protect surface rights and values not necessarily affected by Applicant's right to utilize and to enjoy the mineral rights underlying the surface.

  
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JOHN B. CROWELL, JR.  
Assistant Secretary for  
Natural Resources and Environment