



United States Department of the Interior



FISH AND WILDLIFE SERVICE

West Virginia Field Office
694 Beverly Pike
Elkins, West Virginia 26241

October 17, 2008

Mr. Clyde N. Thompson
Forest Supervisor
Monongahela National Forest
200 Sycamore Street
Elkins, West Virginia 26241

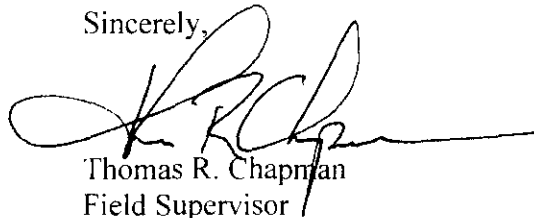
Ms. Mary Beth Adams
USDA Forest Service
Timber and Watershed Laboratory
Parsons, West Virginia 26287

Dear Mr. Thompson and Ms. Adams:

As you know, we have been in continued discussions about how to best respond to requests to develop private mineral rights within lands owned by the Government, including on National Forest lands in West Virginia. In order to facilitate these discussions, we have attached a memorandum from the Department of the Interior's Solicitor's Office that provides their opinion on the Government's discretionary authority over the development of private mineral rights, and the need to consult on these actions under the Endangered Species Act. Please note that this is a privileged and confidential Attorney-Client communication. As such, we are providing you this document in order to enhance our inter-governmental decision making only. Please do not distribute this document outside our agencies. Any requests for this document, including those pursuant to the Freedom of Information Act or other means, should be referred to our office.

We look forward to discussing this issue with you in more detail as the need arises, and appreciate your continued cooperative efforts in fulfilling our mutual responsibilities under the Endangered Species Act. If you have any questions regarding this issue, please contact Ms. Barbara Douglas of my staff at (304) 636-6586 ext. 19, or at the letterhead address.

Sincerely,



Thomas R. Chapman
Field Supervisor

Attachment



United States Department of the Interior

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February 1, 2008

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Attorney-Client Communication*

MEMORANDUM

TO: Barb Douglas, West Virginia Field Office

FROM: Kate Costenbader, Attorney-Advisor *KAC*

SUBJECT: Development of Mineral Interests Within the Monongahela National Forest

Berry Energy, Inc. has proposed a Gas Well B-800 and access road within the Monongahela National Forest. When the United States acquired the forest lands by deed dated, November 26, 1915, the sellers reserved the underlying mineral rights. The 1915 deed reserving the mineral rights provided that the mining and removal of minerals shall be done in accordance with the rules and regulations prescribed by the Department of Agriculture, which were incorporated into the deed.

The parcel of land at issue within the Monongahela National Forest is a split or severed estate, whereby the United States owns the surface of the property and another entity owns the subsurface mineral estate. It was acquired under the authority of the Weeks Act of 1911 (36 Stat. 961, which is classified to section 480, 500, 513-519, 521, 552 and 552 of Title 16 of the United States Code).

Generally, in common law, the mineral estate is the dominant estate, while the surface estate is considered subservient. The logic of this rule is that the mineral estate's value may only be realized through mineral production and the minerals contained in the estate benefit society as a whole. It is also common law that the surface owner is generally barred from interfering with the legitimate and proper use of the surface by the mineral owner. Mineral owners, however, have the right to use only as much of the surface as is reasonably necessary for exploration and development of the minerals. The mineral owner may be liable to the surface owner for damage, if excessive or negligent surface use occurs, or if the mineral owner violates an express contractual obligation.

By letter dated, November 2, 2007, the Forest Service transmitted to the Fish and Wildlife Service (FWS) a Biological Evaluation and Decision Memo for Berry Energy's proposed Gas Well B-800 and access road. In its cover letter, the Forest Service stated that the mineral owner has a reasonable right to explore for and develop their minerals and that the Forest Service does not have the authority to control the use of surface beyond the terms in the mineral reservation. The Forest Service concluded that it has a mandatory duty to allow Berry Energy to exercise its mineral rights and no discretionary involvement or control over the action, such that would trigger the requirements of NEPA or Section 7 of the Endangered Species Act.

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The Forest Service's conclusion that it has no discretionary involvement or control over Berry Energy's right to explore for and develop their mineral interests, is incorrect. Berry Energy does not have an unfettered right to use the surface lands during mineral development. When the owner of the surface estate is the United States, as in this case, the government has the authority to regulate the use of the surface and impose conditions on that use. Federal law, if it is applicable, preempts state law. See, *Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584 (8th Cir. 1995) (holding that to the extent the exercise of Forest Service's authority conflicts with state law, the state law is preempted by federal law).

In *USA v. Srnsky*, the Fourth Circuit refused to find that federal law preempted West Virginia common law with respect to implied easements on property within the Monongahela National Forest because the court concluded that federal law did not apply to the conveyance. In that case, the deed conveying the property to the United States did not include any rules or regulations that the government wished to apply to easements reserved by the grantor in the instrument of conveyance. 271 F.3d 595 (4th Cir. 2001).

Conversely, in the situation at hand, the Department of Agriculture's rules and regulations addressing the management of surface impacts from the development of the reserved mineral rights reserved are incorporated in the conveyance deed. These rules provide that the Forest Service must approve the location of any buildings, camps, roads and other structures or improvements necessary in carrying out mining operations. Thus, while the Forest Service may not preclude Berry Energy from developing the mineral estate, the Forest Service may exercise its discretion in approving the location of structures on the surface to establish reasonable conditions and mitigation measures to protect federal surface resources, including endangered species.

As a result of the Forest Service's discretionary involvement in establishing reasonable conditions and mitigation measures, the Forest Service must consult with the FWS if the action may affect listed species, pursuant to Section 7 of the Endangered Species Act.