



United States
Department of
Agriculture

Forest
Service

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Marienville Ranger District

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File Code: 2830

Date: December 6, 2007

Arthur Stewart
Duhring Resource Company
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Dear Mr. Stewart,

I am in receipt of your November 20 and November 30 letters. I appreciate the research you have done, and the thought you have put into your requests. You raise some intriguing questions, and I will attempt to respond with an equal attention to detail.

Regarding your reference to the October 31, 1983 decision by then Assistant Secretary John B. Crowell, Jr. on the "administrative appeal by Shawnee Clinger Oil Company concerning the exercise of mineral rights within the Allegheny National Forest," I don't believe this decision comes to bear on your proposal to develop a new stone pit within Warrant 3672 in quite the manner you presented in your letter.

To paraphrase the Crowell decision, please note that I do not question your right to utilize and enjoy the subsurface estate which you own. Nor have I sought to impede your access through an "outright refusal to act or unwarranted delay." I have made every effort, both personally and working through my staff, to process your proposed development in a timely and responsive manner. My staff and I have met with you in the field, we have offered the use of stone from an approved Forest Service source, and we have provided updates on the status of your case; and I have offered to provide assistance in your efforts to work with Pennsylvania Department of Environmental Protection (PA DEP) to extend your deadline for plugging existing wells. You, in turn, have been willing to discuss well and road locations with my staff, and have donated remnant equipment from the previous oil and gas development on your Warrant to the Forest Service. Our correspondence is consistent with the normal communication and negotiation between this agency and an oil and gas operator with a proposal for subsurface development involving National Forest surface. There is one notable exception, and that is your request to develop a new stone pit on Warrant 3672.

I read the Crowell letter with great interest, thinking perhaps that it would provide me with some information or direction that would identify the development of common variety mineral source on National Forest System lands as something other than a federal action. To the contrary, I found the letter to state that the issuance of a permit by the Forest Service, in the Shawnee Clinger case, was as a document "usable in defining limits between rights vested in the surface and subsurface owners." Crowell notes that a permit is not the only means by which such limits may be ascertained; but his letter does not dispute that the purpose of such a permit is to establish the "nature of the requirements and conditions" by which the subsurface owner may access their estate.



The Crowell letter further states that, in this instance, an Environmental Impact Statement (EIS) is not required; but the "preparation of an Environmental Assessment which canvassed the nature and extent of Federal action and its effects in responding to the Applicant's request was adequate." In other words, Crowell issued a decision only on the level of environmental analysis and documentation; he did not dispute that some level of environmental analysis and documentation was necessary.

The legislation that establishes the requirements for environmental analysis and documentation of federal actions is the National Environmental Policy Act of 1969 (NEPA). For reference purposes, I direct you to the implementing regulations for NEPA, found in Forest Service Handbook 1909.15. (I can provide you a copy of this reference, if you would like.) FSH 1909.15 states the purpose of an environmental assessment is to "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or finding of no significant impact (FONSI)." Over the past three and half decades of implementing land management decisions in accordance with NEPA, the Forest Service has identified a number of actions of limited scope that, through repeated analysis of effects, it has determined can be "categorically excluded" from environmental documentation. Even actions falling within these categories must have some level of analysis to determine whether there are any "extraordinary circumstances" present that might require more in-depth analysis. This includes a look at possible impacts to Threatened and Endangered Species (TES) and archaeological resources.

NEPA requires that I conduct some level of environmental analysis and documentation when considering the development of a new stone pit location. It does give me some discretion to determine the level of documentation, subject to interpretation by a federal court. The timeline that I described to you for conducting such an analysis of your proposal to develop a stone pit on Warrant 3672 is that which is necessary for an action that may be categorically excluded from environmental documentation. As I have stated to you in my previous letters, a prior proposal to develop a stone pit in this same location of the National Forest was analyzed in an Environmental Impact Statement and rejected. I have expressed my willingness to reconsider a stone pit in this location, at your request. At the same time, I have offered you the use of material from an existing Forest Service stone pit, which has already been approved through a previous NEPA decision.

In reference to a proposal you made in your November 20 letter, I am willing to consider development of a stone pit at the site of Well 3672-25; but, again, I am able to do so only with an appropriate level of environmental analysis and documentation, as previously described.

The construction of roads, and the placement of surfacing material on those roads, is reasonable and necessary for you to access your subsurface. You must necessarily place those roads on the surface you need to traverse in order to drill wells to access the subsurface oil and gas.

However, the source of the surfacing material needed to construct your roads can be from any location. If the source you propose to use is on National Forest System lands, and that surfacing material is the common variety sandstone, then you may access that material only with the permission of the Forest Service. That permission can only be given if the appropriate level of environmental analysis and documentation has been completed, a decision with the proper authority has been made to develop the proposed source as a stone pit, and the deciding official

agrees to make that material available for your proposed development. You still have the option to use a privately owned source for that same surfacing material.

In summary, I acknowledge the arguments made in your letters of November 20 and 30, and I appreciate the effort you have made in putting them forth; however, my position remains as stated in my November 9 letter to you:

- You may have ready access to suitable material in the FR 403 pit, and I will make an engineer available, at your request, to work with your excavator operator to dig test holes to determine the location of this material in the pit.
- I am willing to consider your request for development of a stone source on Warrant 3672, but only with the appropriate environmental documentation (the analysis to date is sufficient to propose this action for public comment and initiate the NEPA process). I will add the caveat that there may be some expense to you for conducting this documentation process, and I will be happy to discuss this with you should you choose this option. And I reiterate that there is no guarantee of the outcome of this process.
- We cannot prepare your Commercial Road Use Permit for hauling on National Forest roads until you indicate which stone source you intend to pursue and which haul routes you propose to use.
- We are still awaiting your decision regarding the timber sale contract that was forwarded to you on November 2, 2007.
- I am also awaiting notification from you regarding your discussions with PA DEP on your December deadline for plugging old wells on Warrant 3672. You had indicated that this would have bearing on how you would proceed with your proposed development. As before, if I can be any assistance in these discussions, please do not hesitate to ask.

I am hopeful we can resolve these issues quickly. My staff has other pending oil and gas development proposals that require our attention; and we would like, as I am sure you would, to complete our review of Case 595.

Sincerely,

/s/ Robert T. Fallon
ROBERT T. FALLON
District Ranger