

Reclamation Advisory Memorandum

RAM # 159

Kentucky Energy and Environment Cabinet Department for Natural Resources

From: Steve Hohmann, Commissioner

Date: June 27, 2014

Subject: Identification of Property Ownership and Permit Review of Right of Entry on Severed Mineral Tracts

Introduction

Effective immediately, this RAM will establish guidelines for identifying property ownership within the permit application for Public Notice and the MRP map. The primary focus of this guidance addresses cotenancy (multiple owners of a single tract).

Effect of this RAM on the Permitting Process:

First, this RAM applies to Items 9.1 and 9.2 of the MPA-03 application. The Division of Mine Permits is now requiring additional information relating to property ownership described in Items 9.1 and 9.2. The additional information is necessary to ensure an accurate and complete permit application, MRP map, and newspaper advertisement.

Specifically, Items 9.1 and 9.2, the advertisement, and the MRP map must identify all surface and mineral owners of all tracts being permitted. The longstanding practice of identifying ownership as "XYZ Land Co, et al." is no longer acceptable. Henceforth, when an owner is listed with "et al.," a deficiency will be written during the administrative review directing the applicant to list all owners of record that comprise "et al." Likewise, the use of "Estate of" and/or "Heirs Of" in the listing of landowners is unacceptable except in cases where the names and addresses of the actual heirs cannot be determined from public records. The burden of proof is with the applicant to provide the owners of record as recorded by the local PVA and other publicly recorded documents.

Evaluation of Right of Entry on Severed Estates

As a result of on-going litigation in U.S. District Court, this RAM is intended to provide interim guidelines for applications to mine severed mineral estates by surface mining methods. A federal judge recently decided that a permit issued by the Cabinet is invalid because the applicant did not obtain the consent of all the cotenants of the surface to mining by surface mining methods. He ruled that state case law authorizing a permit with the consent of less than all the cotenants did not satisfy the minimum requirements of the federal statute, SMCRA. His decision is not yet final and until it is the Division of Mine Permits will be reviewing the information required by Item 9.9 in the application according to the requirements listed in 405 KAR 8:030 Section 4 (2)(a)(b) and(c).

405 KAR 8:030 Section 4 (2) applies to the documentation an applicant must submit for right of entry when the surface and subsurface estates have been severed. In cases of severed estates where the surface estate has multiple landowners (cotenancy), the DMP is suspending use of Item 9.9 until it is revised and will be applying the requirements of 405 KAR 8:030 as follows:

- If the applicant has consent or leases from all the cotenants for mining by surface mining methods then right of entry will be deemed valid under 8:030 Section 4 (2)(a).
- If the applicant has a conveyance that specifically allows for mining by surface mining methods, right of entry will be deemed valid under 8:030 Section 4 (2)(b).
- If the conveyance does not specifically allow mining by surface mining methods, the applicant must produce copies of the original severance documents and documentation to demonstrate that under Kentucky state law it has the right to mine by those methods. Pending further orders of the Court, the Cabinet intends to find 8:030 Sec. 4(2)(c) satisfied if the additional documentation consists of the consent of less than all the cotenants because state case law has so held. See *Johnson v. Environmental and Public Protection Cabinet*, Ky. App., 289 S.W.3d 216 (2009). Other documentation of this right under state law may also be sufficient and will be considered.

The Cabinet believes that the best way to deal with recent court ruling is to approve applications under Sec. 4(2)(c) and your cooperation in submitting the necessary documentation will facilitate the permitting process during this period of uncertainty. This procedure is effective until further notice.

If you have any questions or comments about this RAM, or need further information concerning right of entry, please contact the Director of the Division of Mine Permits, # 2 Hudson Hollow, Frankfort, KY 40601 or call (502) 564-2320.