



WESTERN RESOURCE ADVOCATES

Memorandum

To: Hannah Holm, Western Colorado Congress
From: Bob Randall, Staff Attorney
Chris Fry, Legal Extern
Date: June 15, 2007
Re: Municipal liability resulting from restrictions on oil and gas development in watersheds as result of local watershed protection ordinance

Western Colorado Congress seeks clarification regarding a municipality's potential liability associated with application of a local ordinance designed to protect drinking water sources that may restrict oil and gas drilling activities in sensitive watershed locations managed by the United States Forest Service (USFS). The USFS maintains that it not only has discretionary authority over the issuance of all permits, but that local regulations that restrict other uses will require, in addition to special use permit fees, compensation for lost royalties that the federal government would otherwise gather from oil and gas extraction.

QUESTIONS PRESENTED

What steps can a municipality take to protect the quality of its water and municipal watershed? If a town passes a local ordinance to protect water quality by placing restrictions on oil and gas drilling methods in its watershed, does the USFS have legal authority to require a "special use permit"? What other steps can a municipality take to protect its watershed from impacts of drilling activities, and what is its financial liability for those other options?

BRIEF ANSWER

A municipality has at least two options to protect its municipal watershed. First, it has authority under existing law to pass a narrowly tailored ordinance that would require an oil and gas operator to obtain a municipal permit before performing drilling activities in its watershed. The municipality would not need to request a special use permit from the USFS in order to enforce its permit requirement. Also, since the ordinance would not result in a complete ban on drilling, there is no legal precedent suggesting that a municipality would be responsible for "lost revenues," including lost royalties, which might result from the application of a permissible municipal ordinance. Second, a municipality desiring a complete ban on drilling in a watershed can work with the USFS either to obtain a special use permit pursuant to 36 C.F.R. § 251.9, or to enter into a memorandum of agreement which would place a moratorium on all lease sales in the watershed for a defined term. The acceptable cost of the special use permit would be informed by the market value of a comparable surface limitation on private land, such as a conservation easement, or at most the bonus bid price of existing leases. Under existing regulations and laws, the cost of a special use permit would not include 'lost revenue' figures for royalties, despite USFS claims that

Advancing Solutions for the Western Environment

Colorado Office • 2260 BASELINE ROAD, SUITE 200 • BOULDER, CO 80302 • 303-444-1188 • FAX: 303-786-8054 • E-MAIL: INFO@WESTERNRESOURCES.ORG
Utah Office • 1473 SOUTH 1100 EAST, SUITE F • SALT LAKE CITY, UT 84105 • 801-487-9911 • FAX: 801-486-4233 • E-MAIL: UTAH@WESTERNRESOURCES.ORG

FSM 2542 requires lost revenue consideration.¹ Furthermore, it appears that municipalities seeking a special use permit for non-commercial, public interest reasons could be exempt from fees altogether.

DISCUSSION

There appear to be two options that a municipality may pursue if it desires to protect its watershed from oil and gas drilling impacts. First, it may pass a narrowly tailored watershed protection ordinance, which could require an operator to obtain a local permit and comply with reasonable restrictions on lease-holder drilling methods in order to protect health, welfare, and public safety. The Town may adopt and enforce this permit requirement without any outside approval, since a reasonable ordinance would apply only to lessees' operations and not interfere with the USFS's land management responsibilities. Second, the municipality may choose to work with the Forest Service to ban all drilling activities by applying for a 'special use' watershed protection permit, or it may negotiate a memorandum of understanding with the USFS which would place a term of years moratorium on all lease sales in the watershed.

It appears that the USFS is conflating several legal issues in its correspondence with local-government representatives concerning special use permits: royalty reimbursement liability and special use fees. Assuming that the local government adopts reasonable and permissible restrictions on the method of oil & gas development in watersheds through local ordinances, it is unlikely that compensation to the USFS for 'lost uses' would be required under a takings or damages theory.² If the Town instead seeks a watershed special use permit from the USFS to ban all drilling activity on watershed leases, then the price of the permit would be based on "fair market value," which is determined based upon standard federal resource market valuation formulas and the fee itself is subject to public interest considerations. It appears that 'lost royalty revenues' would not be an allowable consideration when determining the cost of a special use permit. Moreover, the USFS would not 'lose' royalties if drilling was temporarily banned, since the mineral commodity would remain in the ground, subject to future drilling and extraction.

A. Option 1: Regulate Effects of Drilling Through Adoption and Enforcement of Municipal Watershed Ordinance.

To protect its watersheds, a municipality may choose to act independently by passing an ordinance imposing reasonable restrictions on drilling activities. Generally, a state retains jurisdiction over federal lands within its boundaries, and states are free to enforce their criminal and civil laws on that land.³ This state police power extends to activities on federal lands, unless it is preempted by federal legislation enacted pursuant to the Property Clause of the U.S. Constitution. Likewise, municipalities have the power to enact ordinances not inconsistent with state law that are necessary and proper to provide for the health, safety, prosperity, comfort, and convenience of their inhabitants.⁴

A municipality is thus well within its legal rights to pass a well-tailored ordinance meant to limit environmentally harmful drilling methods or practices. If it seeks to do so, the Town should draft the ordinance so as to avoid a complete facial or implicit ban on oil and gas drilling. An ordinance that seeks

¹ See Forest Service Manual, 2500 -- Watershed and Air Management, Chapter 2540 -- Water Uses and Development. Sec. 2542 Municipal Supply Watersheds, *available at*: <http://www.fs.fed.us/im/directives/fsm/2500/2540.txt>.

² See *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

³ *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976).

⁴ *Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 761 (Colo. App. 2002).

to regulate potentially harmful ‘fracturing fluids’ or requires disclosure of chemicals used in the drilling process may be appropriate to protect the watershed.

Case law supports a municipality’s ability to regulate the extent of mining or drilling activities on federal lands. In California Coastal Comm’n v. Granite Rock Co. the Supreme Court provided guidance on the limit of acceptable local ordinances. See 480 U.S. 572 (1987). The Court was not willing to allow municipalities to restrict types of uses on federal lands, but held that local environmental and health concerns could limit the acceptable impacts from a type of use:

The line between environmental regulation and land-use planning will not always be bright . . . However, the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.

Id. at 587.

Regulations that run afoul of this test are said to be preempted. The purpose of the preemption doctrine is to establish a priority among potentially conflicting laws enacted by various levels of government -- federal, state, and local. The Mineral Leasing Act expressly preserves state and local authority over oil and gas operations. See 30 U.S.C. §§ 187 (lease terms shall not be in conflict with state laws) and 189 (“Nothing in this chapter shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have. . . .”). The Tenth Circuit Court of Appeals has rejected the argument that the federal government has asserted exclusive jurisdiction to regulate oil and gas exploration, development, and conservation on federal lands. Texas Oil and Gas v. Phillips Petroleum Co., 406 F.2d 1303, 1304 (10th Cir. 1969), *cert. denied* 396 U.S. 829 (1969). In their recent adoption of a final rule revising the 1983 Onshore Oil and Gas Order Number 1, the USFS and BLM made clear that they were not nullifying or preempting state laws related to drilling operations. 72 Fed. Reg. 10,308 (March 7, 2007). The agencies specifically wrote that “[t]he Order would only impact state law or private agreements to the extent they conflict with Federal obligations. . . . [and] does not negate or preempt other Federal, state, or local laws and/or ordinances.” Id. at 10,311.

Colorado law gives municipalities and counties the authority to enact ordinances not inconsistent with state law that are necessary and proper to provide for the health, safety, prosperity, order, comfort, and convenience of the municipality. CRS 31-15-103. Likewise, the Local Government Land Use Control Enabling Act, grants local governments broad authority to plan for and regulate the use of land within their respective jurisdictions. See CRS 29-20-101 *et seq.* More specifically, municipalities have the authority under existing law to take actions to “maintain[] and protect[]” municipal waterworks and municipal water from pollution. CRS 31-15-707(1)(b). To this end, state law grants municipalities jurisdiction over the municipal waterworks -- including all reservoirs, streams, trenches, pipes or drains associated with it -- as well as “the stream or source” from which the water in their municipal waterworks is taken “for five miles above the point from which it is taken.” Id. Municipalities may enact ordinances and regulations necessary to carry out this power and to maintain and protect municipal water supplies. In Mt. Emmons Mining Company v. Town of Crested Butte, the Colorado Supreme Court first recognized a town’s authority to enact a watershed district permit ordinance under this statutory provision. 690 P.2d 231 (Colo. 1984). The Court’s opinion largely deals with jurisdictional and procedural issues, but it also stands for the larger proposition that a town is not precluded from requiring those proposing destructive activities in their watershed to first obtain a permit. Id. at 241.

The exercise of the powers described above, however, is subject to both federal and state preemption doctrines and must operate within these limitations. Colorado's preemption test is similar to the federal test from the Supreme Court's Granite Rock case discussed above. Where both state and local concerns are present, a local ordinance and a state statute may coexist, with both remaining effective and enforceable, so long as they do not contain express or implied conditions that are irreconcilably in conflict with each other. See Town of Carbondale v. GSS Prop., LLC, 140 P.3d 53, (Colo. App. 2005). The Colorado courts apply a three-part analysis to determine whether a local ordinance is preempted by state law.

[F]irst, the express language of the statute may indicate state preemption of all local authority over the subject matter; second, preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest; and third, a local law may be partially preempted where its operational effect would conflict with the application of the state statute.

Board of County Comm'rs, La Plata Cty v. Bowen/Edwards Assoc., Inc., 830 P.2d 1045, 1056-57 (Colo. 1992) (internal citations omitted).

Therefore, a local ordinance that goes so far as to totally ban drilling activities in a municipal watershed found on USFS lands is likely to be stricken by the courts as a facially invalid land-use restriction. However, an ordinance that requires the drilling company to acquire a local permit and conform to reasonable limitations in place to protect watershed health is likely to stand, so long as the permit conditions are not so unreasonable as to be an implicit ban on drilling and so long as they do not encroach on matters regulated pursuant to state oil and gas law.⁵

We have found no precedent for a federal agency -- either a surface-managing agency such as the USFS or a mineral-managing agency such as the BLM -- to charge a local municipality fees for its imposition of a reasonable regulation requiring compliance with permit conditions on drilling. In the correspondence between the USFS and the City of Grand Junction and the Town of Cedaredge that you supplied us, we have seen nothing that would support such an assertion of fees in such a situation. In our research, we have found no caselaw to support the imposition of fees by a federal agency on a municipality that is enforcing an allowable watershed protection ordinance.

B. Option 2: Obtain a USFS Special Use Permit or Enter into Memorandum of Agreement.

Instead of passing a watershed protection ordinance, a municipality may choose to work directly with the USFS to limit drilling activities within its watershed. There appear to be two methods that a town may employ in this regard: a formal agreement with the Forest Administrator or a special use permit for watershed protection. If the Town seeks to make a formal agreement, then the agreement will be guided by FSM 2542.4, which directs the Forest Administrator to develop a formal agreement "when needed to protect water supplies." As a condition of the agreement, the Forest Administrator is directed to include: "the kind of land uses allowed in the watershed," "necessary restrictions and protective

⁵ See, e.g., Board of County Comm'rs v. Bowen/Edwards Ass., Inc., 830 P.2d 1045, 1055 (Colo. 1992), Town of Frederick v. North American Resource Co., 60 P.3d 758 (Colo. App. 2002). For a detailed examination of local authority to implement ordinances for health and welfare in Colorado, see Robert W. Randall, "Mineral Development Versus Watersheds: Protecting Drinking Water Supplies from Impacts of Federal Oil and Gas Development," available from original author (email: bob@westernresources.org).

measures in the watershed,” “needed assistance in the enforcement of restrictions,” and “the nature of payments to compensate the United States for revenue losses resulting from restrictions.”⁶ As a result, a formal agreement may require payments for compensation, and Forest Administrators may be bound to negotiate any agreement according to the FSM requirements.

The Town may also choose to apply for a special use permit. According to regulations, the USFS may recognize and honor a local watershed protection request if a municipality applies for a special use permit. The applicable regulation, “Management of Municipal Watersheds,” provides:

The Forest Service shall manage National Forest watersheds that supply municipal water under multiple use prescriptions in forest plans (36 CFR Part 219). When a municipality desires protective actions... the municipality must apply to the Forest Service for consideration of these needs.

A special use authorization (36 CFR 251.54) is required if the municipality is to... control resource uses within the watershed. Special use authorizations issued pursuant to this section are subject to the same fee waivers, conditions, and procedures applicable to all other special uses as set forth in Subpart B of this part.

See 36 C.F.R. § 251.9(a), (d). The USFS will consider the watershed protection permit application according to the factors that would apply for any special use request.

1. Criteria for Approval of Special use Permit

Special use permits are generally issued to private parties for a particular type of activity not already regulated by categorical regulations, such as grazing or oil drilling. Concern that a use may conflict with the general public health or welfare is a specific factor in permit issuance decision-making. In particular, special use permit regulations require the Forest Service to consider local and state health laws when examining activity requests. The Forest Service rules regarding requests for special use permits expressly prohibit issuance of a permit to an activity that would violate “state and local public health laws and regulations as applied to the proposed site.” 36 C.F.R. § 251.54(g)(3)(ii)(E). Recognized issues that may be addressed by the local public health provisions include “[t]he availability of sufficient potable drinking water,” as well as “[t]he risk of contamination of the water supply.” *Id.* at § 251.54(g)(3)(ii)(E)(3), (5).

Furthermore, during the pre-application process, threshold standards for the agency’s consideration of the proposed special use include whether it will “pose a serious or substantial risk to public health or safety” and whether “the proposed use is consistent with applicable State and local health and sanitation laws.” 36 C.F.R. § 251.54(e)(1)(i), (iii). The Forest Service rules for special use permits thus express a contextual regulatory preference for protecting local health concerns.

A USFS administrator is to reject any proposal where “the proposed use would not be in the public interest.” 36 C.F.R. §251.54(e)(5)(ii). In order to rationalize a finding that the watershed protection is not in the public interest, the USFS would have to determine that the benefits of energy development outweigh the risk of harm that drilling activities present to the public interest. Given the

⁶ Forest Service Manual 2452.4, available at <http://www.fs.fed.us/im/directives/fsm/2500/2540.txt>.

current lack of scientific understanding of the toxicity implications of drilling activities; the proprietary, non-disclosed methods that industry enjoys; and court deference to agency scientific determinations, it may be difficult to directly attack an agency finding of “not in the public interest.” However, as discussed below, the enactment of a regulation meant to improve health through a special use permit would seemingly require special consideration in any “public interest” evaluation.

Applications for special use permits are also considered for approval based upon the type of use requested: a non-commercial group use or commercial group use. Because no watershed protection special use permits have been issued to our knowledge, it is unclear if conservation-type activity by a municipality would constitute commercial or non-commercial activity. A finding that the activity represents a non-commercial group use would have the advantage of fewer application steps, fewer proposal contents, and reduced approval criteria. See 36 C.F.R. §251.51(g)(1)-(3). In addition, the wording of the regulations states that a permit administrator “shall” approve a permit upon finding that the non-commercial activity does not violate existing rules, overly harm the environment, or otherwise violate the criteria listed in 36 C.F.R. §251.51(g)(3)(ii)(A)-(H).

In applicable USFS regulations, non-commercial group use is defined in the negative, as “any use or activity that does not involve a commercial use or activity as defined in this subsection.” 36 C.F.R. § 251.51. Commercial use is defined as “any use or activity on NF lands (a) where an entry or participation fee is charged, or (b) where the primary purpose is the sale of a good or service, and in either case, regardless of whether the use or activity is intended to produce a profit.” Id.

It appears that the application of a municipal ordinance meant to protect drinking water supplies would constitute a non-commercial group use, since the purpose would not be the sale of a good or service, but rather a non-activity (conservation). It should be noted, however, that the USFS would still be able to deny a non-commercial use if it interferes with an administrative use of an area or “other scheduled or existing uses or activities on National Forest System lands.” 36 C.F.R. §251.54(g)(3)(ii)(D).

The USFS may argue that water, a commodity, is being sold by the municipality, and thus constitutes a ‘commercial’ use. However, given federal deference to states in water issues, and the notion that “water is different,” courts are likely to defer to state or local determinations on safety and quality of water related issues. Documentation and proof of detrimental effects upon water quality by drilling operations (i.e. fracturing liquids or drilling muds being discharged into the aquifer) would go toward supporting state and local authority in promulgating regulations intended to protect drinking water quality and health.⁷

Any USFS agency mandate or political directive aimed at streamlining domestic energy production efforts must be evaluated in light of existing USFS regulatory language. A town could therefore argue that its application which expressly seeks to protect local health concerns should be preferentially viewed by the USFS in any special use permit issuance decision.

2. Determination of Fees for Special Use Permit

The USFS adheres to policies governing the establishment of fees that have been prescribed since 1952. Authority to establish fees for leases and special uses derives from the Independent Offices Appropriation Act of 1952 (IOAA -- 31 U.S.C. 9701) and is further clarified by Executive Orders No.

⁷ For more information on toxicity associated with chemicals released during the extraction process, see “Colorado Oil and Gas Health and Toxics Issues,” <http://www.earthworksaction.org/ColoIncidents.cfm>.

8248 and 11,541.⁸ When determining the extent of fees for special use permits, the USFS is directed to examine the “fair market value of rights and privileges that are authorized, as determined by appraisal, or other sound business management principles.”⁹ See 36 C.F.R. § 251.57(a)(1). In this situation, the lost use would be oil and gas extraction, and the proper measure of the maximum value would be what lease holders actually paid for the leases.¹⁰ Another fair market value examination might include the value of conservation easements on similar parcels of private land. In Colorado, conservation easement values are calculated for tax credit purposes based upon the market value of the land if it were developed, as compared to the land in an unaltered state.¹¹ However, in this case, the comparable valuation of the easement would have to be further discounted, because in the watershed protection situation, the only restriction on the land would be against oil and gas development, rather than an overall usage ban. Traditional grazing, logging and other activity would presumably not be impaired or limited.

However, it is questionable if a special use fee may even be charged for protection of a watershed, which could be found to be a “non-commercial group use,” as discussed above.¹² Forest Service regulations provide, “No fee shall be charged when the authorization is for a non-commercial group use as defined in s. 251.51 of this subpart.” 36 C.F.R. § 251.57(d). The non-commercial permit is also exempt from processing and monitoring fees. See 36 C.F.R. § 251.58(g)(i). Furthermore, 36 CFR 251.9(d) states that watershed special use permits are to enjoy the same fee waivers as all other special use permits.

It should also be noted that assuming permit fees are required, the authorizing USFS officer has the statutory power to waive a part or whole of a fee to “State or local government” when “equitable and in the public interest.” 36 C.F.R. § 251.57(b)(1). Municipalities would have the opportunity to argue that watershed protection is in the public interest, and any special use permit fee should accordingly be waived. Further executive guidance is provided by the Office of Management and Budget Circular No. A-25 Revised, which articulates general policies that agencies are to follow when determining special fees.¹³ Of particular note, section 6(a)(4) on special benefits states:

No charge should be made for a service when the identification of the specific beneficiary is obscure, and the service can be considered primarily as benefiting broadly the general public.

⁸ See U.S. General Accounting Office, Report to the Chairman, Subcommittee on Oversight of Government Management and the District of Columbia, Committee on Governmental Affairs, U.S. Senate, “U.S. Forest Service: Fees for Recreation Special Use Permits Do Not Reflect Fair Market Value”, Dec. 1996, available at <http://www.gao.gov/archive/1997/rc97016.pdf>, hereinafter GAO.

⁹ See Office of Management and Budget, Circular A-25 Revised, “Memorandum for Heads of Executive Departments and Establishments,” available at <http://www.whitehouse.gov/omb/circulars/index.html> (last visited Apr. 26, 2007), hereinafter OMB.

¹⁰ Although an argument could be made that fair market valuation would also include an additional inflation factor since the time of purchase in the case of already-leased watershed areas, it is our opinion that this not be considered, since the federal government has been holding and earning interest on the purchase money since the date of lease sale.

¹¹ For a background on conservation easement valuation for tax credit purposes, see Ann Imse, “Colorado Stumped on Land Credits,” ROCKY MOUNTAIN NEWS, Dec. 19, 2006, available at http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_5223707,00.html.

¹² Of course, the USFS is entitled to charge a fee sufficient to recoup administrative costs associated with the permit issuance. Also of note, cabin rental fees (non-commercial) are explicitly dealt with separately.

¹³ *Supra* OMB, note 9.

Note as well that this waiver where “equitable and in the public interest” is in addition to the general Forest Service authority to waive fees for watershed special use permits. 36 CFR 251.9(d).

3. Lost Revenue Considerations

The USFS apparently intends to argue that it should be compensated for the loss of royalties, grazing fees, and timber receipts from any municipality that seeks to limit the uses of its land. To support its position, the USFS cites to FSM 2452.4(4), which requires any formal agreement or special use permit to outline “the nature of payments for revenue losses resulting from restrictions.”¹⁴ We are uncertain to what degree this provision in the Forest Service Manual rises to the level of enforceable law because we do not know whether it was the subject of public notice and comment. Regulations, however, which do have the force of law, limit special permit fees to the factors discussed above. Those factors do not include ‘lost revenue,’ so it is unclear where the USFS derives authority to consider ‘lost revenues’ in the language of any special use permit.

The USFS might argue that the Federal Government, as landowner, is entitled to just compensation for local restrictions of land use, apparently under a regulatory takings theory. Any regulatory taking, assuming that a takings argument is valid between state and federal authorities, would be governed by Penn Central Transp. Co. v. New York City. See 438 U.S. 104 (1978). The value of prohibited uses would be determined by the reasonable investment backed expectations of the United States Forest Service. The economic impact of regulation is measured by the fair market value of property before the regulation and fair market value of property after the regulation. Bowles v. U.S., 31 Fed. Cl. 37, at 46 (Fed. Cl. 1994). Even if a watershed special use permit was so restrictive as to prohibit all oil and gas extraction because of demonstrable impacts on water quality, a municipality would not be subject to a takings argument or compensation demands if it could be shown that the prohibited uses would otherwise constitute a nuisance under state common law. Id. at 45. Under takings law, it appears that the “bundle” of mineral rights does not include a compensable right to nuisance level water contamination. Should oil developers impact the watershed to the point of significantly diminishing the value or quality of the Town’s water and water rights, they may be subject to state nuisance law and subject to tort damages under negligence theories. However, under these theories a clear harm must be demonstrated and the success of the case depends upon difficult to acquire proof that a particular drilling operation was the clear cause of any harm to health or water quality.

Case law further suggests that private actors that cause harm to U.S. Forest resources may be held liable for damages in civil action. In Feather River Lumber Co. v. U.S., a negligent timber operator was found liable for damages resulting from a forest fire he caused and that resulted in a loss of USFS timber. See 30 F.2d 642 (1929). However, the current situation must be distinguished because a reasonable restriction on oil and gas activities does no “harm” to Forest Service resources -- the resource remains in the ground untouched. Moreover, since oil is a non-renewable resource, and any delays or impediments resulting from local ordinances would not serve as a permanent taking, but rather a moratorium until safe extraction techniques were developed and proven. Unlike the loss of timber (whose growth rate implies a time value), the oil commodity at issue in this case remains in the ground, available for later use, and will likely appreciate in value given worldwide decreases in oil supply. Thus, application of a municipal watershed protection ordinance would not “harm” federal oil and gas resources.

In civil actions between private actors, the measure of damages that result from an impairment to property is measured by the difference between the market value of the land prior to and after the

¹⁴ Forest Service Manual 2542.4(4) available at <http://www.fs.fed.us/im/directives/fsm/2500/2540.txt>.

impairment. See Frankfort Oil Co. v. Abrams, 413 P.2d 190 (Colo. 1966). This theory is not completely analogous to the situation at hand, however, since the watershed special use permit would not impair land, but rather encumber the underlying mineral resource with restrictions on the means of development. The impaired property right is the access and ability to extract oil and gas. The pre-impairment market value of unfettered access to and control of the oil and gas is expressed in the lease sale price. The post-impairment value of access would be something less than that, due to the restriction. So at most, under a damage theory, a town might be liable for the winning bid price of any impaired leases. However, as discussed above, this amount would likely be expressed in the special use permit fee calculation.

Whether the USFS mission includes revenue generation is another issue that might be examined. It appears that the mission of the USFS does not consider revenue generation as a core responsibility.¹⁵ As well, it is mandated only to charge fees, whenever possible, to sufficiently cover “full cost to the Federal Government of providing the service, resource, or good when the Government is acting in its capacity of sovereign.”¹⁶ When the Federal Government is leasing or selling goods or resources, as stated previously, it is required to charge user fees based on “market prices.”¹⁷

CONCLUSION

The USFS states that it will only issue a special use permit upon finding that it was “actually in the public interest.”¹⁸ Therefore, by issuing the permit, the USFS would have to agree that the restricted use of the lands was actually in the public interest. An issuance would imply that absent a special use permit, existing leases authorizing oil and gas drilling activities may lack sufficient health and environmental protection stipulations. It seems unlikely that the USFS would issue a special use permit that would serve to undermine the sufficiency of the original lease stipulations. An agency tasked with streamlining permitting for oil and gas drilling operations might be hesitant to suggest that groundwater contamination concerns may accompany drilling and necessitate further detailed environmental review prior to leasing decisions or application for permit to drill (APD) approvals in municipal watershed areas.

In addition, a complete loss of drilling rights as a result of a municipal ordinance or the special use permit might result in a claim of private damages or takings by the lease purchasers against the local government and/or the USFS. However, given an intelligently tailored ordinance by a local government that limits, rather than completely bans drilling activities on leased parcels, these concerns should be mitigated. Moreover, the lessee should be presumed to be aware of the local ordinance and its implications. In a recent lease sale, for example, the Forest Service issued a supplement to its initial Lease Notice stating that as to specific leases, “The lessee is hereby notified that this lease contains privately owned surface of the Town of Palisade that is within the Town’s designated Watershed and is covered by a Watershed Protection Ordinance.”¹⁹ Such notice would likely cut against a lessee’s claim of undue restriction as a result of application of the municipal ordinance.

¹⁵ See USDA Forest Service – Caring for the land and serving people, <http://www.fs.fed.us/aboutus/mission.shtml> (last viewed Apr. 26, 2007).

¹⁶ See OMB at 6(a)(2)(a).

¹⁷ See OMB at 6(a)(2)(b).

¹⁸ Email from Linda K. Bledsoe, Reality Specialist, Grand Valley Ranger District, 4.7.2007 (in possession of author).

¹⁹ See Bureau of Land Management, Notice of Addendum 2, at 5 (Exhibit GJ-LN-17), http://www.co.blm.gov/oilandgas/documents/06Feb9_A2.pdf (last viewed May 3, 2007).

The above discussion leads us to conclude that the adoption and application of a municipal ordinance containing reasonable and permissible measures for the protection of drinking water supplies is unlikely to expose a municipality to significant liability. The Forest Service's recent statements that the Town would be liable for lost royalty revenues in the event that the ordinance results in restrictions on development of federal oil and gas resources appears to be without merit. While the Forest Service may require a special use authorization if the municipality wishes to completely restrict the use of federal resources in a watershed, Forest Service regulations would favor the waiver of fees for such a permit because protection of drinking water supplies is in the public interest. A town may thus wish to consider foregoing the passage of a watershed ordinance and simply request a special use permit and an accompanying public interest fee waiver – as outlined above – to protect the integrity of its watershed.

It would be in the interest of a town to acquire the Forest Management Plan for the areas in dispute, and determine if the area of concern is already designated as a municipal watershed.²⁰ If so, the area may already have been identified as inappropriate for drilling and may afford the municipality additional support for existing or new legal arguments. If it has not been designated, then the town may wish to urge the USFS to reconsider the designation of the watershed based upon additional hydrological information. Further understanding of any existing leases in the area, or planned lease sales, would also be relevant to understand the factual basis for potentially conflicting rights.

Finally, a municipality may wish to approach state lawmakers with a request to pass legislation to further protect watersheds and increase understanding of the potential harms from drilling activities. Legislation requiring full disclosure of drilling chemicals, for example, might allow a better understanding of whether chemicals are actually transported through the watershed to municipal drinking supplies. Funding for university research on the impact of drilling in watersheds would also create a much needed factual basis upon which to determine the merits of resource extraction relative to watershed protection measures.

We hope this memo is helpful in your consideration of options to protect municipal watersheds. Please do not hesitate to contact us if you have further questions.

²⁰ See Forest Service Manual 2542.04d (requires the Forest Supervisor to maintain an inventory of municipal supply watersheds); see generally Forest Service Manual 2542.1-4 for USFS administrative responsibilities over watersheds, available at <http://www.fs.fed.us/im/directives/fsm/2500/2540.txt>.