United States Department of Agriculture
Forest Service
White Mountain National Forest
719 N. Main Street
Laconia, NH 03246
Comm (603) 528-8721
TDD (603) 528-8722

File Code: 1560

Date: December 11, 2001

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D.R.E.D.

Phil Bryce
DRED
172 Pembroke Road
Concord, NH 03302

Tom - your copy
per Phil

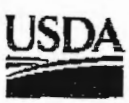
Dear Phil,

Attached is the advice from our Office of General Counsel pertaining to ATV's on Nash Stream Forest. This advice is similar to what I communicated to you over the phone.

Please feel free to contact me if you have any questions or concerns.

THOMAS G. WAGNER
Forest Supervisor

Enc.



United States
Department of
Agriculture

Office of the
General
Counsel

Southern Region-Milwaukee Office
310 W. Wisconsin Avenue, Suite200W
Milwaukee WI. 53203-2240
Telephone: (414) 297-3774
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TO: Paul Stockinger
Director, Lands and Minerals
Eastern Region, Forest Service

FILE: F&L 15 (GEN)

FROM: Gene Alan Erl
Deputy Associate Regional Attorney

SUBJECT: Nash Stream Easement

This is in response to your request for an opinion on whether the State of New Hampshire may permit the use of all terrain vehicles (ATV'S) on the Nash Stream Forest. The United States holds a conservation easement over the property by virtue of a deed from the State, dated August 4, 1989. We understand the State is in the process of revising its management plan for the area. In response to public requests, it is considering such use.

The Nash Stream Conservation Easement Deed is a so-called reserved interest deed. This means all interests in the property were conveyed, except for those expressly reserved by the grantor. As pertinent here, the State, as grantor, reserved " public recreation" uses, including trails and specifically the..."construction, operation and maintenance of...snowmobile trails...." (deed, para. II. C and II. C. 1) The mention of snowmobile trails as a subset of trails indicates that motorized use of trails is permitted. Thus, because both accommodate motorized vehicles, a reasonable interpretation would be that snowmobile trails being of the same kind, class or nature as ATV trails could be regulated by the State.

The public access provision of the deed, paragraph II. F, also gives to the State the discretion to"reasonably restrict and regulate access and use." This seems directly relevant as to whether the State may regulate ATV recreational use of trails on the easement area. Finally, the multiple use provision of the deed, paragraph II. C. 4, seems broad enough to give the State discretionary regulatory authority over determining how the public may use the trail and road system.

Accordingly, for the foregoing reasons, we are of the opinion that the State may

ban/allow/regulate public ATV use of trails and roads for recreational purposes. However, we think it would be more difficult to conclude that off-trail or off-road (i.e., dispersed) ATV use by the public has been reserved by the State.

cc: James Snow
Deputy Assistant General Counsel
Natural Resources Division, OGC

Thomas G. Wagner
Supervisor, White Mountain NF

Tom

STATE OF NEW HAMPSHIRE
DEPARTMENT of RESOURCES and ECONOMIC DEVELOPMENT
DIVISION of FORESTS and LANDS
172 Pembroke Road P.O. Box 1856 Concord, New Hampshire 03302-1856

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GEORGE M. BALD
Commissioner

PHILIP A. BRYCE
Director

September 10, 2001

Thomas Wagner
Acting Forest Supervisor
USDA Forest Service
White Mountain National Forest
719 Main Street
Laconia, New Hampshire 03246

Dear Mr. Wagner:

As a follow up to public requests for recreational use of all terrain vehicles (ATV's) in the 39,601 acre Nash Stream Forest we request a Forest Service legal interpretation of the Nash Stream Forest Conservation Easement held by the United States of America relative to this use. Since the Nash Stream Forest property is subject to the Easement and since it is administered through your office we request your assistance with this matter.

The 1995 Nash Stream Forest Management Plan currently prohibits public recreational use of ATV's. Should a decision be made to revise the current Plan to allow public ATV use, we plan to complete a 7-step plan revision process, including public comments, assessments, and final plan approval by August 2002. In order for us to complete this ambitious schedule, a timely response would be appreciated.

We intend to keep you informed of our progress and welcome oversight of the Conservation Easement terms by you and your staff. Thank you for your assistance.

Sincerely,

Philip A. Bryce
Director

Cc: Wayne Millen, Assistant Ranger, USFS, WMNF
George Bald, Commissioner, DRED
Rich McLeod, Director, Division of Parks and Recreation, DRED
Anne Edwards, Assistant Attorney General

TCM/PB

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File Code: 5440
Route To:

Date: September 25, 2001

Subject: Nash Stream Easement

To: Paul Stockinger

Enclosed is a request from the State of New Hampshire for a Forest Service legal interpretation of the Nash Stream Forest Conservation Easement relative to the recreational use of all terrain vehicles (ATV's) in the Nash Stream Forest. The State is currently looking at the possibility of revising their management plan and wants to be able to consider the possibility of this use in the update of their plan in response to public requests.

I have reviewed the easement, which was signed on August 4, 1989, and would like to have you and the Office of General Counsel review my findings prior to me providing the State with a Forest Service position on this matter. My review noted the following items, which appear to pertain to the issue of recreation use and access:

Introductory Statements (Whereas)

I found nothing in the introductory statements that indicated to me that the State's consideration of ATV use through their management plan would be inconsistent with the purposes of the easement.

II. Use of the Easement Area

Under C.1, the State has expressly reserved public recreation uses in order to construct, operate and maintain campsites, trails, internal access roads, picnic roads, boat launches, trailhead parking areas, visitors center and ranger station. The reserved right specifically highlights cross-country ski trails and snowmobile trails, but based on the way it is written it does not appear to preclude other kind of trails such as hiking and ATV trails or internal access roads.

Under C.2, the conservation easement discusses public roads and public utilities and requires prior written approval of the Forest Service for the installation, operation, and maintenance of these facilities. In the case of this instrument, "public roads" does not include internal access roads and Forest Service involvement would only be required on roads that provide "through travel." I see nothing in this provision that would preclude the State from considering internal access roads for ATV use.

Under C.4, the State is required to manage the property for multiple uses consistent with the purposes and provisions of the easement. The instrument goes on to define multiple use as the harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output. The State redeems their responsibility for this provision

through the preparation and administration of the Nash Stream Forest Management Plan and subsequent revisions of this plan.

Under Section E.1, I find no prohibited or unreserved uses that apply to the possible management of ATV's on the Nash Stream Forest relative to trail and internal road use.

Under Section F.1 and F.2, I believe the State is considering a public access and use request and has the authority under the easement to reasonably restrict and regulate access.

III. General Provisions

Under Section D, it would be my opinion as the Forest Supervisor that the State has the discretion to consider ATV use on the Nash Stream Forest during the revision of their Forest Management Plan. The decisions on use of ATV's in the plan would need to consider the purposes of the easement (public use and protection), Natural Resource Management (Section II.4) and the New Hampshire Forest Management Initiatives Act (III.E).

I would appreciate a review of my conclusions, so I can get back to Director Phil Bryce with a Forest Service position on his request for a legal interpretation. Please give me a call if you have any questions.

THOMAS G. WAGNER
Forest Supervisor

Enclosure

Cc: George Pozzuto, District Ranger