Chapter 14

Oil and Gas Operations on Public Lands in the Marcellus Shale Region

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§ 14.01. Overview of Shale Gas Development Opportunities on Eastern and Midwestern Public Lands.

The largest U.S. natural gas discovery in the twenty-first century has occurred in the region of the first Drake Oil Well (1859) in western Pennsylvania, and the Hart Gas Well (1825) in western New York. The Marcellus Shale covers approximately 95,000 square miles in Pennsylvania, New York, West Virginia, Ohio and Maryland. These geologic formations may provide up to 25 percent, or more, of U.S. natural gas supplies for decades to come. The deeper Utica Shale and Devonian Shale cover a similar, but broader, area in the Appalachian region. They may approach the Marcellus in gas resources. The hydrocarbon resources in these vast geologic formations present enormous economic opportunities for this region, and the drilling and production now underway at thousands of new well sites promises great energy security benefits for our Nation. Despite the hysteria and misinformation from some sources, our modern environmental regulatory systems and best industry practices will ensure that our environment and natural resources, including groundwater and surface waters, are protected.

The Marcellus Shale region is mostly private land, but with significant public land acreage, as detailed below. National Forest lands are the most substantial federal-managed lands in the region, and they are almost certainly underlain by substantial shale gas resources. The eastern National Forests were typically acquired by the federal government in the early 1900s pursuant to the 1911 Weeks Act. The lands are intended by the U.S. Congress to be

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managed according to “multiple use” principles, which includes economic uses of the resources.\textsuperscript{4} National Forests have strong commercial purposes, and the U.S. Forest Service (USFS) was not created to serve as a purely preservationist agency; its purpose is to manage surface forest resources while respecting a broad range of multiple uses and users (see adjacent page).\textsuperscript{5}


In addition to federal lands, the Marcellus Shale region contains hundreds of state and municipal parks, forests and public recreation lands which may contain oil and gas resources. Through the use of horizontal drilling technologies, hydrocarbon development can occur in multiple directions underground for miles from a single, one- to two-acre well site, with minimal or no adverse surface impacts, which makes the large blocks of public lands attractive to developers.

Many states within the Marcellus Shale region already have existing oil and gas wells or leases located within state-owned public lands. Development of Marcellus Shale gas from plays underlying many state parks and forests within the region presents an opportunity for many states to consider raising revenue through drilling leases in those parks and forests, as opposed to more traditional sources, such as raising taxes. The following is a partial list of states in the Marcellus Shale region that have active oil and gas wells and leases on public lands:


\textsuperscript{5} “[N]ational forests, unlike national parks, are not wholly dedicated to recreational and environmental values.” Cronin v. U.S. Dept. of Agric., 919 F.2d 439, 448 (7th Cir. 1990); Accord United States v. New Mexico, 438 U.S. 696, 709 (1978). See also Kleissler v. U.S. Forest Service, 157 F.3d 964, 972 (3d Cir. 1998)(recognizing national forest system policy of protecting timber interests); United States v. Weiss, 642 F.2d 296 (9th Cir. 1981)(“[National Forests] are not parks set aside for nonuse, but have been established for economic reasons.”).
### Private Mineral Estates in National Forests with Protective Oil or Gas Exploration Interest

<table>
<thead>
<tr>
<th>Forest</th>
<th>Private Mineral Acres</th>
<th>Active Operations / Reserved Outstanding Mineral Estates</th>
<th>Total USFS Acreage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wayne, OH</td>
<td>182,000</td>
<td>874</td>
<td>273,774</td>
</tr>
<tr>
<td>Hoosier, IN</td>
<td>15,873</td>
<td>0</td>
<td>201,147</td>
</tr>
<tr>
<td>Huron-Manistee, MI</td>
<td>528,000</td>
<td>30</td>
<td>978,147</td>
</tr>
<tr>
<td>Monongahela, WV</td>
<td>315,000</td>
<td>2</td>
<td>900,074</td>
</tr>
<tr>
<td>Jefferson/George Washington, VA</td>
<td>187,673</td>
<td>81</td>
<td>1,788,895</td>
</tr>
<tr>
<td>Texas</td>
<td>156,219</td>
<td>97</td>
<td>675,807</td>
</tr>
<tr>
<td>Kisatchie, LA</td>
<td>211,161</td>
<td>3</td>
<td>604,373</td>
</tr>
<tr>
<td>Ozark, AR</td>
<td>64,000</td>
<td>23</td>
<td>1,140,000</td>
</tr>
<tr>
<td>Daniel Boone, KY</td>
<td>465,782</td>
<td>500</td>
<td>706,626</td>
</tr>
<tr>
<td>Cherokee, TN</td>
<td>131,755</td>
<td>0</td>
<td>866,180</td>
</tr>
<tr>
<td>Allegheny National Forest, PA</td>
<td>493,000</td>
<td>10,000 approx.</td>
<td>513,185</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>2,750,463</strong></td>
<td></td>
<td><strong>8,648,786</strong></td>
</tr>
</tbody>
</table>

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6 Land acreage statistics obtained for each National Forest from www.fs.fed.us, and personal communication with former U.S. Forest Service official, Mr. David Fredley.
Pennsylvania: 68 state parks and forests encompassing approximately 292,000 acres, with approximately 750 oil and gas wells

West Virginia: 50 state parks and forests encompassing approximately 177,000 acres, with approximately 48 oil & gas wells

New York: 203 state parks and forests, encompassing approximately 1,348,000 acres, 63,676 acres of which were under lease in 2009

Maryland: 65 state parks and forests encompassing approximately 133,000 acres, with 2 inactive oil & gas wells

Virginia: 43 state parks and forests encompassing approximately 68,000 acres, with 3 active oil & gas wells


Pennsylvania is a prime example of a state within the Marcellus Shale region which has taken the initiative to explore and develop oil and gas interests within public lands. As of 2010, the Pennsylvania Department of Conservation and Natural Resources had auctioned 74 oil and gas lease sales on 410,000 state forest acres. And a similar auction held in 2008 resulted in

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8 Telephone interview with James Martin, Chief Director at the West Virginia Office of Oil and Gas (March 11, 2011).
10 Telephone interview with Ed Laramore, Program Safety Manager of Mining for the State of Maryland (March 8, 2011).
11 Email from Blair Linford, Inspector at Virginia Division of Gas & Oil to Mary Aldridge, Robinson & McElwee PLLC (April 6, 2011).
in $160 million for development rights to 74,000 acres.\textsuperscript{12} As of January 2010, there were approximately 750 oil & gas wells on state forest land in Pennsylvania.\textsuperscript{13}

\section*{§ 14.02. Recent Federal Litigation Involving Operations on Public Lands.}

The prospect of increased oil and gas drilling activity in the Marcellus Shale region already has spawned some litigation. Notably, on federal lands in \textit{Minard Run Oil Co. v. U.S. Forest Service},\textsuperscript{14} Minard Run Oil Co. and the Pennsylvania Independent Oil & Gas Association challenged an April 9, 2009 U.S. Forest Service Settlement Agreement with the Sierra Club and a contemporaneous Forest Supervisor’s Statement requiring compliance with the National Environmental Policy Act (NEPA)\textsuperscript{15} in the form of a Forest-wide Environmental Impact Statement (EIS) before the Forest Service could process oil and gas well drilling proposals on private severed oil and gas estates within the 513,000-acre Allegheny National Forest (ANF). The Settlement Agreement challenge resulted from a November 2008 lawsuit filed by the Sierra Club and other activist groups against the U.S. Forest Service for not following NEPA in the processing of private oil and gas mineral estate notifications.\textsuperscript{16}

On December 15, 2009, following a three-day evidentiary hearing, the Honorable Sean J. Mclaughlin of the U.S. District Court for western Pennsylvania granted a preliminary injunction against the U.S. Forest Service and the Sierra Club, barring implementation of the Settlement Agreement and Forest Supervisor’s Statement, finding a strong likelihood of success that the challenged actions were contrary to law, and that the industry plaintiffs


\textsuperscript{13} Id.


\textsuperscript{15} 42 U.S.C. § 4332.

were suffering irreparable harm, and finding an injunction to be in the public interest. The court further found that notice and comment rulemaking procedures should have been employed in any attempted regulatory change. The court denied a U.S. motion for reconsideration on March 9, 2010, and the case is discussed further below in Section 14.04[1].

§ 14.03. Recent State Litigation Involving Operations on Public Lands.

[1] — Belden & Blake Corporation v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources.17

Belden & Blake Corporation (B&B) owned or leased oil and natural gas estates on three parcels in Oil Creek State Park, the surface of which is owned by the Commonwealth of Pennsylvania (Commonwealth). As required by statute, B&B notified the Commonwealth’s Department of Conservation and Natural Resources (DCNR) that it was in the preliminary stages of developing gas wells on those parcels.18 In response, DCNR sought to impose a “coordination agreement” upon B&B, which included an additional $10,000 performance bond for each well and stumpage fees equal to double the fair market value of timber to be removed, before allowing B&B to access the parcels.

Belden & Blake filed a five-count petition for review in Commonwealth Court seeking declaratory and equitable relief that B&B had an implied easement to enter the parcels and to use the surface area as reasonably necessary to extract natural gas.19 In opposition, DCNR maintained that it was authorized to condition B&B’s use of the surface of a state park as

18 As further required by statute, B&B’s notification was accompanied by copies of draft well drilling permit applications, maps of the proposed access routes and well sites and B&B posted a bond with the DEP to secure well closure, well site reclamation, and pollution mediation costs.
19 B&B also included counts alleging that DCNR unlawfully attempted to regulate oil and gas operations, failed to follow state law and engaged in an unlawful taking. However, only the counts for declaratory and equitable relief were before the court on appeal.
trustee for the Commonwealth’s public resources under Article I, Section 27 of the Pennsylvania Constitution. The Commonwealth Court granted partial summary judgment in favor of B&B, holding that Pennsylvania law recognizes B&B’s right to enter upon land to exercise its oil and gas rights and, consequently, DCNR has no power to condition B&B’s exercise of those rights by requiring it to enter into a coordination agreement.

The Supreme Court of Pennsylvania affirmed the lower court’s decision and, in so doing, proclaimed that Chartiers Block Coal Co. v. Mellon remains the seminal case in Pennsylvania setting forth a subsurface owner’s rights with respect to the surface owner’s rights. The court confirmed that Chartiers “clearly places the burden on the surface owner to seek legal redress to prevent or restrain the subsurface owner’s exercise of its rights . . . not the converse.”

Lessons from Belden & Blake:

• A surface owner may “seek” conditions in negotiations with a mineral owner, but cannot “impose” them.

• Determining what constitutes “reasonable use” of the surface is for a court, not the surface owner, to decide.

• The mineral estate is the dominant estate. If the surface owner disagrees, it has the procedural burden of challenging that exercise in a “judicial forum,” not vice versa.

• A government agency that owns the surface has no greater authority to impose conditions on mineral owners.


In 1960, Lawson Heirs, Inc. (Lawson Heirs) conveyed 3,271 acres of surface land and coal to the Logan Civic Association, expressly reserving the

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21 Belden & Blake, 969 A.2d at 532.
22 Id. at 533 (emphasis in original).
23 Id.
24 Id.
25 Id. at 532-33.
26 Cabot Oil & Gas Corp. v. Huffman, 705 S.E.2d 806 (W. Va. 2010)(per curiam).
property’s oil and gas rights and the ability to drill wells for the extraction and production of oil and gas. The deed memorializing the conveyance also recognized that the property was intended to be used as a West Virginia state park. Following this conveyance, the Logan Civic Association conveyed the entire parcel to the State of West Virginia for the benefit of the West Virginia Conservation Commission (predecessor entity to the West Virginia Division of Natural Resources (DNR)).

Chief Logan Recreation Area opened to the public in 1961.

Also in 1961 and after the initial conveyance from Lawson Heirs to the Logan Civic Association, the West Virginia Legislature passed a law which became effective July 1, 1961 and which provided that the director of the West Virginia Conservation Commission [now DNR] shall not permit the exploitation of the minerals in state parks and other properties in the public recreation system.

There were three operating gas wells within the park prior to 1961, and Lawson Heirs leased their oil and gas rights to the property to Cabot Oil & Gas Corporation (Cabot). In 2007, Cabot filed five well work permit applications with the DEP Office of Oil and Gas as required by statute seeking to drill wells and to develop the oil and gas reserves underlying Chief Logan State Park. The DNR objected to the permit applications and the DEP denied the applications based upon the prohibitions contained in W. Va. Code Section 20-5-2-(b)(8). Cabot appealed the decision to the Circuit Court of Logan County, West Virginia which reversed the DEP’s decision and directed the DEP to issue the requested permits to Cabot.

In reversing the DEP’s decision, the circuit court concluded that W. Va. Code Section 20-5-2-(b)(8) does not apply to minerals that are not owned by the State of West Virginia and, to apply the statute otherwise, would deprive mineral owners of their private property rights and would, therefore, be unconstitutional. The circuit court further held that denial of Cabot’s

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27 The property was initially designated as “Chief Logan Recreation Area” and was later accorded state park status in 1969 and renamed “Chief Logan State Park.”
29 Huffman, 705 S.E.2d at 811.
well work permits would constitute an inverse condemnation or regulatory taking and would violate Article III, Section 4 of the Constitution of West Virginia inasmuch as it would impair the obligation of a contract.\textsuperscript{30}

The DEP appealed the circuit court’s decision to the Supreme Court of Appeals of West Virginia which affirmed the circuit court’s decision. The supreme court held that the 1960 deed between Lawson Heirs and Logan Civic Association was a contract.\textsuperscript{31} Typically, the law in effect at the time of a contract is the law that thereafter applies to and governs the parties’ agreement.\textsuperscript{32} The statute relied upon by the DEP in denying the well work permits was not in effect at the time of the parties’ contract and was not retroactive.

\textit{Lessons from Huffman}:

\begin{itemize}
\item W. Va. Code Section 20-5-2-(b)(8) applies only to minerals owned by the State.
\item The law in effect at the time of the parties’ contract applies to and governs their contract.
\item WVDEP’s denial of work well permits on State Park land where the State does not own the mineral rights would likely be an unconstitutional taking.
\end{itemize}

\textbf{[3] — \textit{Michigan Oil Co. v. Natural Resources Commission}.\textsuperscript{33}}

In 1968, the Michigan Department of Natural Resources offered at public auction oil and gas leases on state-owned land in the State’s northern lower peninsula. Bids totaling $1,122,788 were accepted for oil and gas leases covering 546,196.69 acres of state land. Michigan Oil subsequently obtained rights to an oil and gas lease from the public auction on 160 acres of land.

\textsuperscript{30} \textit{Id.} at 812.
\textsuperscript{31} \textit{Id.} (citing Southern v. Sine, 123 S.E. 436, 437-38 (W. Va. 1924)).
\textsuperscript{32} \textit{Id.} (citing Syl., Franklin Sugar Ref. Co. v. Martin-Nelly Grocery Co., 119 S.E. 473 (W. Va. 1923)).
situate within the boundaries of Pigeon River State Forest. At the time, Pigeon River State Forest was one of the few remaining habitats in Michigan’s lower peninsula inhabited by large populations of elk, bear, and bobcats.

In 1972, Michigan Oil made application to the Michigan Supervisor of Wells for a permit to drill a well on the property which was denied on the basis that “oil and gas operations could not be conducted on the proposed site without causing or threatening to cause serious damage to animal life and molesting or spoiling state-owned lands.” Michigan Oil appealed the denial of its permit application to the Michigan Natural Resources Commission, which upheld the denial making additional findings that to permit drilling would constitute “waste” and result in “damage to or destruction of the surface, soils, animals, fish or aquatic life” in violation of certain Michigan statutes. Michigan Oil appealed that Commission’s order to a state circuit court. And, after losing the circuit court appeal, ultimately appealed to the Court of Appeals of Michigan on grounds that denial of the drilling permit on the bases cited below was an unconstitutional taking of property without just compensation and an impairment of contract. The court of appeals denied leave to appeal by published opinion.

The court of appeals held that the oil and gas lease was expressly made subject to all “rules and regulations of the commission now and hereafter in force” so long as such rules and regulations did not affect the “term of lease, rate of royalty, rental or acreage.” Moreover the court acknowledged that the record below demonstrated that, at the time Michigan Oil purchased the lease, it did so because a prior drilling permit sought by the seller had been denied.

In conclusion, the court of appeals held that oil and gas leases obtained from the State by virtue of the 1968 public auction remained subject to the Natural Resource Commission’s authority to regulate state lands under its control, that the leases did not guarantee that the lessee would be permitted to drill, and that the commission expressly retained statutory authority to

34 Id. at 135, 140.
prevent “molestation, spoliation, (or) destruction of the property in question, as well as the prevention of waste in the production of oil and gas on that property.”  

Lessons from Michigan Oil:

• Oil and Gas Leases obtained from the State at public auction were taken subject to all rules and regulations of the State Natural Resource Commission.

• Oil and Gas Leases obtained from the State at public auction did not guarantee that drilling would be permitted.

• Drilling permit applications are subject to the State’s obligation to preserve natural resources, to prevent waste, molestation, spoliation, or destruction on State lands.

However, as noted below, 17 years after the Michigan Oil decision, the Michigan Court of Appeals reached a different result and affirmed that a “taking” had occurred when the Nordhouse Dunes Area was designated a protected area in Mason County, Michigan. The distinction, however, may lie in the court’s finding that the mineral interests underlying the Nordhouse Dunes Area were privately owned and had no other economically viable use. Whereas, the lease holders in the Michigan Oil case had prior notice that drilling permits on the same parcel had already been denied to prior owners before acquiring their leasehold interest from the state.


On April 23, 1987, the director of Michigan’s Department of Natural Resources (DNR), acting in his capacity as Supervisor of Wells, designated a 4,500-acre area in Mason County, Michigan as the Nordhouse Dunes

35 But see, MCL 324.61901-04 regarding drilling in the Pigeon River State Forest.
37 Id.
38 See, MCL 319.3(1) and MSA 13.139(3)(1).
Area. Upon making the designation, the director found that any oil and gas
development in the area would constitute waste prohibited by law. 39

Plaintiffs, consisting of owners of oil and gas rights within the protected
area and developers who had existing oil and gas leases in the area and who
were preparing to develop the area’s resources, initiated inverse condemnation
actions against the state claiming that the director’s decision effectively took
their property without just compensation. The trial court granted plaintiffs’
motion for summary disposition, finding that the director’s decision amounted
to a taking and awarded the plaintiffs $71,479,000 as “just compensation”
for the property, plus interest, costs and attorneys’ fees.

The court of appeals affirmed the trial court’s grant of summary
disposition that the director’s decision amounted to a “taking.” However the
court vacated and remanded the “just compensation” and interest awards and
reversed the attorneys’ fees award in the absence of a statutory provision for
the award of the same. 40

In affirming the trial court’s grant of summary disposition on the taking,
the court of appeals found that the plaintiffs’ mineral interests had only one
economically viable use: the extraction of oil and gas and the director’s
action was unequivocal that no permits would be issued for drilling in the
protected area and that applying for drilling permits would have been a futile
gesture. 41 The court of appeals also found that directional drilling from drill
sites located outside of the protected area could not be used to extract all of
the oil and gas that might underlie the protected property.

Lessons from Miller Brothers:

• Michigan’s current approach requires an economic value
  comparison, before and after the regulatory action.

• If there is economically viable use of what remains after
government regulation, there is no taking, but government action

39 See MCL 319.4 and MSA 13.139(4).
40 See MCL 213.75; see also, Muskegon v. Slater, 152 N.W.2d 652 (Mich. App. 1967);
41 The “Conclusive Findings and Determination of the Supervisor of Wells” stated: “IT IS
DETERMINED that hydrocarbon exploration of production and any and all developments,
facilities, access corridors related thereto constitute waste and are therefore prohibited from
preventing access to or development of privately owned minerals is a taking.


Several key principles can be gleaned from the 2009 Minard Run Oil decision rendered by Judge Sean J. McLaughlin of the U.S. District Court for western Pennsylvania:

- Common law mineral estate principles apply to U.S. Forest Service as surface land owner.
- U.S. Forest Service purposefully acquired surface estates in early 1900s, viewing oil and gas as consistent with forest management purposes.
- The mineral estate is dominant.
- Cooperation and accommodation governs.
- When a private party exercises severed mineral rights, there is no “federal action” under the NEPA.
- The U.S. Forest Service has limited authority.

These points and the factual context for the findings made in the Minard Run Oil litigation are discussed below.


As Judge McLaughlin noted, “In 1859, Colonel Edwin L. Drake struck oil in the Allegheny Plateau region of Pennsylvania, pioneering a new method of oil extraction that would eventually lead to rapid oil and gas development throughout the Allegheny Plateau and world-wide.”

Decades after oil and

gas was developed in northwestern Pennsylvania, the federal government established the Alleghany National Forest. The 1911 Weeks Act established funding and procedures for acquiring the privately held property interests that became the ANF and other eastern national forests.\(^{43}\)

[b] — **Reserved and Outstanding Mineral Rights.**

As a result of the federal government’s decision to forgo the acquisition of mineral rights, over 93 percent of the mineral estates in the Alleghany National Forest are privately owned.\(^{44}\) These private mineral estates exist in two distinct categories: “reserved” mineral rights, and “outstanding” mineral rights. “Reserved mineral rights” were created when the fee owner transferred the surface estate to the federal government and retained the mineral estate. “Outstanding mineral rights,” on the other hand, were created when the surface estate and the mineral estate were severed from one another in a transaction between private parties prior to the federal government’s acquisition of the surface estate. Under the 1911 Weeks Act, as amended, reserved private mineral rights are subject to federal control only to the extent set forth in “rules and regulations . . . expressed in the written instrument of conveyance.”\(^{45}\)

[c] — **1980 Minard Run Oil Litigation.**

The respective property rights of the Alleghany National Forest surface owner and the private owners of outstanding mineral rights were addressed over three decades ago in the earlier 1980 case of *United States v. Minard Run Oil Co.* in the same western Pennsylvania district court.\(^{46}\) In the 1980 Minard Run Oil decision, the court held that the owner of mineral rights had an “unquestioned right” to enter the property to access and extract his minerals.\(^{47}\) Recognizing that the owner of the dominant estate had

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44 *Minard Run Oil*, 2009 WL 4937785 at *3.
45 *Id.* at *3* (citing 16 U.S.C. § 518).
47 *Id.* at *13.
an obligation to reduce unnecessary disturbance of the surface estate, the court in 1980 prescribed what it characterized as “minor restrictions which . . . should not seriously hamper the extraction of oil and gas.” The court observed that “the United States specifically disclaimed any intention of proceeding as a sovereign in regulating the use of the surface for the purpose of the Allegheny National Forest and it is obvious the United States in this situation has no greater rights than any other landowner having acquired title to the surface subject to the mineral rights beneath.” Notably, although the National Environmental Policy Act (NEPA) had been enacted for about one decade by 1980, the U.S. Forest Service never contended in that case that NEPA applied to the exercise of private mineral estates in the National Forest. Specifically, the court ordered oil and gas drillers to provide the following details “no less than 60 days in advance” of commencing drilling operations:

- A designated field representative.
- A map showing the location and dimensions of all improvements including but not limited to well sites and road and pipeline accesses.
- A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.
- A plan of erosion and sedimentation control.
- Proof of ownership of mineral title.

The judicial order in the 1980 Minard Run Oil case did not provide for any U.S. Forest Service approval role. After issuance of the preliminary injunction, the United States and Minard Run Oil stipulated to entry of a permanent injunction in 1981, based on the preliminary injunction terms and rationale. The resolution of this litigation then provided a framework for the U.S. Forest Service’s administrative practices for many years.

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48 Id. at *6, 1980 U.S. Dist. LEXIS 9570 at 6.
49 Id.
50 Id. at *8.
In the 2009 *Minard Run Oil* litigation, Judge McLaughlin took note that the “Forest Service Manual, Chapter 2830, provides Forest Service personnel with applicable direction in those situations where the United States does not own the minerals and/or rights to minerals underlying lands in the National Forest System.”[^51] He found further that “[r]eserved mineral rights are subject to ‘[t]he appropriate rules and regulations in effect at the time of the mineral reservation’ which were incorporated as part of the deed by which the United States acquired the surface. The ‘specific terms of the deeds by which the surface and subsurface owners acquired their interests also provide the Forest Service authority to administer mineral reservations and outstanding mineral rights.”[^52] The Forest Service Manual has long acknowledged that “the Forest Service does not have authority to deny the exercise of a mineral reservation or outstanding mineral right.”[^53]


Three highly experienced former U.S. Forest Service officials testified at the 2009 preliminary injunction hearing about the agency’s past administrative practices. This testimony and supporting evidence enabled the judge to find that, “Following *Minard Run*, the Forest Service developed a relationship of ‘cooperation’ and ‘trust’ with the private oil and gas industry operating in the Alleghany National Forest. Activities in the ANF were managed on a ‘cooperative’ basis. . . . The Forest Service officials in the ANF also interacted continuously with Pennsylvania regulatory authorities.”[^56] One

[^52]: *Id.*
[^53]: *Id.*
[^56]: *Id.*
of the witnesses, David Wright, a 38-year employee of the Forest Service and the Forest Supervisor of the Alleghany National Forest from 1987 through 1992, viewed the 60-day time frame set forth in Minard Run as “a commitment between [the Forest Service] and the industry to accomplish both of our needs during that time frame.” Mr. Wright, along with two other experienced former U.S. Forest Service officials, David Fredley and Ernest Rozelle, offered testimony at the 2009 Minard Run preliminary injunction hearing which described the agency practices followed for decades.


As Judge McLaughlin further found, “In 1991, Wright, in his capacity as ANF Supervisor, gave testimony at an Oversight Hearing before the Subcommittee on Energy and Environment of the U.S. House Committee on Interior and Insular Affairs . . . . During the hearing, Wright explained to the Chairman of the [House] Subcommittee the basis for the Forest Service’s position that NEPA did not apply to the processing of individual private oil and gas proposals:

MR. KOSTMAYER: what is the basis for your view that NEPA does not apply?

MR. WRIGHT: We must have a Federal action that really triggers for NEPA documents to kick in. And in this particular case, when a private mineral right owner exercises his constitutional right, that is not really a Federal action. We respond to that action that he takes and try to negotiate . . . . But it is being looked at right now, as I was advised by our attorneys. It appears at this time that it really does not apply.

MR. KOSTMAYER: Well, the impact on the forest is not a Federal action?

MR. WRIGHT: No, sir.”

57 Id. at *8.
58 Id. at *7-9.
59 Minard Run Oil, 2009 WL 4937785 at *9 (emphasis added).
Following that testimony, Mr. Wright submitted to the House Subcommittee Chairman Kostmayer a letter dated October 4, 1991 from the Office of General Counsel of U.S. Department of Agriculture where the U.S. Forest Service reaffirmed its legal conclusion that NEPA did not apply to the exercise of outstanding private oil and gas rights in the Alleghany National Forest. The legal opinion concluded as follows:

... we do not find the exercise of such rights on National Forest lands in Pennsylvania to be a federal action for NEPA purposes. This is so, in part, because Forest Service approval is not a legal condition precedent to the exercise of such rights under either state law, current federal law or regulation, or Forest Service policy.

In summary, we find that in Pennsylvania, the third party mineral owner, without any express words of grant, is entitled to occupy and use so much of the surface as may be necessary to operate the mineral estate and remove the product. The question of whether the right can be exercised, and the ability to deny that right, is simply not left to the surface owner under Pennsylvania law!"60

[f] — Judge McLaughlin’s Conclusions: No Federal Action that Triggers NEPA.

In contrast to long-standing practice of cooperative interaction described above, the Settlement Agreement obligated the Forest Service to apply NEPA to all future oil and gas proposals in the Alleghany National Forest. NEPA is an information gathering statute which requires all agencies of the federal government to “prepare a detailed environmental analysis for major Federal actions significantly affecting the quality of the human environment.”61 However, this seemingly benign procedural requirement can typically take an average of up to five years and more to comply with where a full Environmental Impact Statement (EIS) is prepared.62

60 Id. at *10.
62 Minard Run Oil, 2009 WL 4937785 at *11-12.
Judge McLaughlin concluded, however, that “NEPA is triggered only by a proposal for major federal action.”63 Thus, in determining whether NEPA applies to an action, the court must make the ‘threshold determination’ whether there is a major federal action.64 Judge McLaughlin held that a “project conducted by non-federal actors, such as oil and gas drilling by private parties, will only trigger NEPA if it requires a federal agency to undertake ‘affirmative conduct’ before the non-federal actor may act.”65

Judge McLaughlin found that a “federal agency’s authority to regulate in a split estate context is properly determined by the terms of the specific statute pursuant to which the federal estate was acquired.” In United States v. Srnsky,66 the Fourth Circuit held: “[w]ith unmistakable clarity, [the 1911 Weeks Act] does require that any rules or regulations that the Secretary wishes to apply to easements reserved by the grantor must be ‘expressed in and made part of’ the instrument of conveyance.” The Srnsky precedent was followed by Judge McLaughlin in Minard Run Oil, and he distinguished the Eighth Circuit cases of Duncan Energy v. U.S. Forest Service,67 which upheld Forest Service regulatory roles on other National Forest lands not acquired under the Weeks Act.

[g] — Preliminary Injunctive Relief Warranted Where Irreparable Harm Was Demonstrated.

Judge McLaughlin found “substantial evidence that several oil and gas businesses that rely on drilling in the ANF for their livelihoods may be forced out of business if the drilling ban continues into mid-summer 2010.”68 He added: “Where the economic loss would be so great as to threaten destruction of the moving party’s business, a preliminary injunction should be issued to

63 Id. at 19 (citing Sierra Club v. Penfold, 857 F.2d 1307, 1312 (9th Cir. 1988).)
65 Id. at 54-55, n. 31.
67 Duncan Energy v. U.S. Forest Serv., 50 F.3d 584 (8th Cir. 1995), and Duncan Energy v. U.S. Forest Serv., 109 F.3d 497 (8th Cir. 1997).
68 Minard Run Oil, 2009 WL 4937785 at *29.
maintain the status quo.”69 Notably, “[w]hen interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interests.”70


Notwithstanding Judge McLaughlin’s preliminary injunction order in Minard Run Oil, in the Fall 2010 and Summer 2011 Unified Agenda of Regulatory and Deregulatory Actions, the U.S. Forest Service indicated its intention to promulgate new regulations on the “Management of National Forest System Surface Resources with Privately Held Mineral Estates.” The Forest Service initiated the rulemaking process on December 29, 2008, when it published an Advanced Notice of Proposed Rulemaking in the Federal Register.71 During the rulemaking process numerous comments were submitted by interested parties opposing any increase in the regulatory burden.

In an April 6, 2011 U.S. House Letter to U.S. Department of Agriculture Secretary Thomas Vilsack, several members of the U.S. House stated: “The development of a new federal permitting regime would result in massive multi-year delays of much needed additional domestic oil and natural gas production while adding significant costs for small and large domestic energy producers. In addition to harming the national economy, this would needlessly affect local and state governments depriving them of the economic benefits of oil and natural gas development and production. This is particularly true in rural communities and states such as Pennsylvania, Ohio, West Virginia, Virginia, Kentucky, Arkansas, Michigan, North Dakota, Louisiana and Texas.” Signatories to the letter were: Doc Hastings, Chairman, House Natural Resources Committee; Doug Lamborn, Chairman, Energy & Mineral Resources Subcommittee; Frank Lucas, Chairman, House

69 Id.
70 Id. (citing RoDa Drilling Co. v. Siegal, 552 F.3d 1203, 1210 (10th Cir. 2009).
Agriculture Committee; and Glenn Thompson, Chairman, Conservation, Energy & Forestry Subcommittee.

§ 14.05. Analysis of Laws and Regulations Applicable to Operations on State Public Lands.

West Virginia prohibits the director of the DNR from leasing public lands for development or allowing the exploitation of minerals in West Virginia state parks, but this prohibition does not apply to deprive the owner of private property rights.\(^{72}\)

Other states in the Marcellus region do not have specific statutory prohibitions against development in state parks and forest, other than the general oil and gas permitting statutes and federal and state environmental statutes of general applicability that would apply to any drilling operation or pipeline installation.

Many state parks and recreation areas, however, have received funding from the federal government under the provisions of the Land & Water Conservation Fund Act (L&WCFA), 16 U.S.C. §460l-4 et seq. The L&WCFA, enacted in 1964, provides that the Secretary of the Interior may provide to the states up to 50 percent matching grants for the acquisition and development of lands for public outdoor recreation use.\(^{73}\) The L&WCFA further provides:

No property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversions only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.

Provided, That wetland areas and interests therein as identified in

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\(^{72}\) W. Va. Code § 20-5-2(b)(8).

the wetlands provisions of the comprehensive plan and proposed to be acquired as suitable replacement property within that same State that is otherwise acceptable to the Secretary, . . . shall be considered to be of reasonably equivalent usefulness with the property proposed for conversion.\textsuperscript{74}

Conservation groups and state economic development authorities have alleged on occasion that private development of mineral rights in state parks which have been developed, at least in part, by matching funds from the L\&WCFA, prohibit the state recreation authorities or the state development offices from allowing mineral development in the absence of the approval of a conversion by the Secretary of the Interior. This argument was raised by the Sierra Club in the \textit{Huffman v. Cabot Oil & Gas} case, but was expressly rejected by the West Virginia Supreme Court of Appeals on the basis that the federal statute was not enacted until 1964, and could not be interpreted to allow a taking of pre-existing private mineral rights and reservation of surface uses for lands which later became a state park.\textsuperscript{75}

Case law interpreting the L\&WCFA has focused primarily on whether the proposed use of the public lands constitutes a conversion which requires the approval of the Secretary of the Interior.\textsuperscript{76} The cases have recognized that the Department of the Interior expressly recognizes that the installation of underground utilities, pipelines, and other similar construction might not constitute a conversion if the surface area is restored to its preconstruction condition and there is no relinquishment of control, and that the sale of subsurface rights or the “nondestructive” extraction of oil and gas from public

\textsuperscript{74} 16 U.S.C. § 460l-8(f)(3); \textit{see also}, 36 C.F.R. § 59.3.
\textsuperscript{75} \textit{Huffman}, 705 S.E.2d at 813, n.5.
\textsuperscript{76} \textit{See} Sierra Club v. Davies, 955 F.2d 188 (8th Cir. 1992)(test drilling in state park to determine feasibility of commercial diamond mining was temporary, would not permanently damage land, and was not a conversion); Friends of Shawangunks, Inc. v. Clark, 754 F.2d 446 (2d Cir. 1985)(proposed construction of private golf course on lands subject to a conservation easement constituted a conversion); Weiss v. Kempthorne, 580 F. Supp. 2d 184 (D.D.C. 2008)(motion for a temporary restraining order to prohibit lease of park acreage for golf course as part of larger development for public outdoor use, denied).
lands does not constitute a conversion under the Act.\textsuperscript{77} These exceptions to the rule requiring approval of the Secretary of the Interior, however, fails to address the fundamental question of property rights, takings and inverse condemnation when the mineral rights are severed before the creation of the park, or the receipt of grant funds under the L&WCFA by a state. Fundamental principles of due process and a host of other constitutional protections have not been factored in the “conversion” analysis of existing case law, other than the West Virginia Supreme Court’s footnote in \textit{Huffman}. In \textit{Friends of Shawangunks}, the Marriott Corporation acquired its rights to lands which were subject to a prior conservation easement. The court held that the private developer’s rights were subject to the requirements of the L&WCFA, so it would seem logical that a park created or developed with federal funds after the mineral rights and surface uses were reserved to a private party could not be subjected to a restriction on private use.

\textbf{§ 14.06. Leasing Federal Oil and Gas.}

Although most of the mineral estates in the Marcellus Region are privately owned, the development of federally owned estates through federal gas leases will be an important component of developing this area, given the millions of acres of multiple use Forest Service lands in the region.

\textbf{[1] — Procedures for Acquiring Federal Oil and Gas.}

The sale procedures for federal oil and gas leases are governed primarily by the Mineral Leasing Act of 1920,\textsuperscript{78} and the Federal Mineral Leasing Act for Acquired Lands.\textsuperscript{79} The Mineral Leasing Act authorizes the Secretary of the Interior to lease lands owned by the United States that contain minerals, including oil and natural gas.\textsuperscript{80} The Federal Mineral Leasing Act for Acquired Lands extends the application of the mineral leasing laws,

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\textsuperscript{77} Sierra Club v. Davies, 955 F.2d at 1194 (citing to L&WCFA Grants Manual).
\textsuperscript{78} 30 U.S.C. § 181 \textit{et seq.}
\textsuperscript{80} 30 U.S.C. § 181.
\end{flushleft}
including the Mineral Leasing Act, to “acquired lands.”81 “Acquired lands” generally include land obtained by the federal government from non-federal government entities, including lands acquired under the Weeks Act.82 The Federal Land Policy Management Act (FLPMA) also establishes general federal land management rules that govern, among other things, how the Bureau of Land Management (BLM) decides which federal lands are available for public lease.83

Under the Federal Land Policy Management Act, the BLM develops a Resource Management Plan (RMP) for public lands subject to its jurisdiction.84 A Resource Management Plan is “designed to guide and control future management actions and the development of subsequent, more detailed and limited cope plans for resources and uses.”85 Thus, the RMP includes a BLM determination of which federal lands are available for public oil and gas leases and what conditions and limitations must be placed on those leases. The RMP process includes opportunities for public comment and requires an environmental assessment pursuant to NEPA.86

If a Resource Management Plan identifies certain BLM lands as being available for oil and gas leasing, BLM may sell oil and gas lease for those lands through a competitive bidding process. The Bureau of Land Management must hold competitive lease auctions at least quarterly for each state with leasable lands.87 BLM decides which lands it will make available for sale at the quarterly competitive auction. Private parties may also nominate public lands to be included in the competitive auction.88 BLM

83 43 U.S.C. § 1701 et seq.
84 43 U.S.C. § 1712; see also 43 C.F.R. § 1610.5-3.
85 43 C.F.R. § 1601.0-2.
86 See 43 U.S.C. § 1712(f); 43 C.F.R. § 1601.0-6.
88 43 C.F.R. § 3120.3-1.
must identify oil and gas leases that it will auction in a Notice of Competitive Lease Sale at least 45 days prior to conducting a competitive auction for those leases.\[89\] If the Bureau of Land Management receives a protest or appeal against offering a specific parcel for leasing, it may suspend its offer until the protest or appeal is resolved.\[90\]

The competitive auction is conducted through an oral bidding process.\[91\] The national minimum bid at the competitive auction is $2 per acre.\[92\] If the Bureau of Land Management does not receive any bids at or above the national minimum at the competitive auction for an oil and gas lease and therefore does not sell the lease, the lease becomes available for purchase through a non-competitive process. BLM must make the lands available for noncompetitive leasing within 30 days after the competitive auction.\[93\] The first person eligible to hold the lease that applies for the lease and pays the required application fee is entitled to the lease.\[94\] The lands remain available for noncompetitive leasing for two years after the auction.\[95\] If BLM does not sell the lease through the noncompetitive process within the two-year time period, the land again must be leased through the competitive process.


The primary term of a Bureau of Land Management oil or gas lease is 10 years.\[96\] It may be extended, however, as long as “oil or gas is produced in paying quantities.”\[97\] If actual drilling operations are commenced prior to the end of the term and are being diligently prosecuted when the term expires, the term may be extended for two years, and then for as long as oil

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\[89\] 30 U.S.C. § 226(f); 43 C.F.R. § 3120.4-2.
\[90\] 43 C.F.R. § 3120.1-3.
\[93\] 30 U.S.C. § 226(b), (c).
\[94\] 30 U.S.C. § 226(c).
\[96\] 30 U.S.C. § 226(e).
\[97\] 30 U.S.C. § 226(e).
and gas are being produced “in paying quantities.” 98 Rental fees are $1.50 per acre for the first five years and $2 per acre for each year thereafter. 99 The United States receives royalties of at least 12.5 percent “in amount or value of the production removed or sold from the lease.” 100

A federal oil or gas lease does not confer an unencumbered right to drill for oil or gas. In order to drill on a federal lands, a lessee must submit an “Application for Permit to Drill” (APD). 101 Before approving an APD, BLM must conduct an environmental assessment and determine whether an environmental impact statement is necessary. 102


Leasing public lands within the national forest system involves the same general process, except that the U.S. Forest Service must consent before the Bureau of Land Management may lease the land. 103 Like the BLM, the Forest Service develops Land Management Plans (LMPs) that govern the permissible uses of the subject forest land. 104 The Forest Service’s mineral leasing decisions for forest lands must be consistent with the Land Management Plans. 105 The Forest Service must comply with NEPA when developing LMPs and determining whether to lease forest land for oil and gas development. 106

The Forest Service has its own regulations governing the lease of national forest lands for oil and gas development. 107 Generally, the Forest

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100 30 U.S.C. §§ 226(b)(1)(A), (c)(1); 43 C.F.R. § 3103.3-1.
101 43 C.F.R. § 3162.5-1(a).
102 Id.
105 36 C.F.R. § 228.102; see also 16 U.S.C. § 1604(i).
106 36 C.F.R. § 220.4, 228.102.
107 36 C.F.R. §§ 228.100-.116.
Service decision to allow the issuance of oil and gas leases for forest lands is in two stages. First, it identifies areas that might be open to oil and gas development. The Forest Service also reviews specific, proposed oil and gas leases to ensure that their environmental impacts have been assessed, that the lease is consistent with the Land Management Plan, and that other regulatory requirements are met.

The Forest Service must also approve any drilling on a federal oil or gas lease on national forest lands. The lessee of a forest land oil or gas lease must submit with its Application for Permit to Drill a “surface use plan of operations covering proposed surface disturbing activities.” The Forest Service reviews the plan for compliance with the LMP and also with NEPA. Once the Forest Service decides to approve or disapprove the plan, it forwards its decision to the Bureau of Land Management which proceeds to act on the Application.


As already mentioned above, NEPA applies at several stages of the federal lands leasing process: (1) the development of an RPM or Land Management Plan, (2) the issuance of a lease, and (3) the approval of an Application for Permit to Drill. The agency can prepare an Environment Assessment (EA) to determine if the federal action is significant. As

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108 36 C.F.R. § 228.102(c).
109 36 C.F.R. § 228.102(e).
110 36 C.F.R. § 228.107(a); see also 30 U.S.C. § 226(g).
112 36 C.F.R. § 228.107(a).
113 36 C.F.R. § 228.107(d).
114 36 C.F.R. § 220.4, 43 C.F.R. § 1601.0-6.
115 36 C.F.R. § 228.102; see, e.g., New Mexico ex rel. Richardson v. Bur. of Land Mgmt., 565 F.3d 683 (10th Cir. 2009); Wyo. Outdoor Council v. U.S. Forest Serv., 165 F.3d 43, 50 (D.C. Cir. 1999).
116 36 C.F.R. § 228.107(a); 43 C.F.R. § 3162.5-1(a).
117 See 40 C.F.R. Part 1500, § 1508.9.
noted above, an Environmental Impact Statement under NEPA will result in multi-year delays and multi-million dollar costs.


Federal courts addressing BLM and the Forest Service’s NEPA obligations when issuing a federal oil and gas lease distinguish between “no surface occupancy” (NSO) leases and non-NSO leases. Generally, an NSO lease forbids the lessee from occupying or using the surface of the leases’ public land unless the lessor agency modifies the NSO stipulation by approving a surface disturbing activity.118 Thus, absent an agency approved modification of the lease, mineral rights granted under a no surface occupancy lease can be accessed only through slant or horizontal drilling.119 Thus, the issuance of an NSO lease is not an “irretrievable commitment of resources” requiring an EIS under NEPA.120

In contrast, the issuance of a non-NSO lease is an irretrievable commitment of resources because the leasing agency cannot preclude the lessor’s surface disturbing activity and thus must generally allow some reasonable surface-disturbing activities, like building roads.121 Thus, the BLM or Forest Service must conduct an Environmental Impact Statement before selling a non-NSO lease. Several federal courts have held, however, that even this requirement is limited in some fashion. The Tenth Circuit has held that whether a site-specific EIS is required prior to the issuance of a non-NSO lease depends on the extent to which the environmental impacts

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118 See Conner v. Burford, 848 F.2d 1441, 1447 (9th Cir. 1988).
119 See id. at 1447.
120 See id. at 1448.
121 See id. at 1448-49; see also Sierra Club v. Peterson, 717 F.2d 1409, 1411 (D.C. Cir. 1983) (“These stipulations [in the non-NSO lease] require the lessee to obtain approval from the Interior Department before undertaking any surface disturbing activity on the lease, but do not authorize the Department to preclude any activities which the lessee might propose. The Department can only impose conditions upon the lessee’s use of the leased land.”); see also id. at 1414-15 (explaining that the issuance of a non-NSO lease is an irrevocable commitment to some surface-disturbing activities).
are reasonably foreseeable at the time that the lease is issued. The Ninth Circuit has held that NEPA requires a site-specific EIS prior to the issuance of any non-NSO lease, but that the specificity of the Environmental Impact Statement will depend on the degree to which the environmental effects can be identified at the time of the lease.

[6] — Exclusions from NEPA.

Some drilling-related activities on federal land will not trigger NEPA if they fall within a categorical exclusion. Under Section 390 of the 2005 Energy Policy Act, there is a rebuttable presumption that a NEPA exclusion would apply to BLM’s or the Forest Service’s management of federal lands for certain activities if “the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil or gas.”

The activities include:

- Individual surface disturbances of less than five acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.
- Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within five years prior to the date of spudding the well.
- Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five years prior to the date of spudding the well.
- Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within five years prior to the date of placement of the pipeline.

122 See Richardson v. BLM, 565 F.3d at 717, 718 (distinguishing Park County Res. Council, Inc. v. U.S. Dep’t of Agric., 817 F.2d 609 (10th Cir. 1987), and explaining that a site-specific EIS is required before the issuance of non-NSO lease only if the “environmental impacts are reasonably foreseeable at the leasing stage”).
123 N. Alaska Envt. Ctr. v. Kempthorne, 457 F.3d 969 (9th Cir. 2006).
• Maintenance of a minor activity, other than any construction or major renovation or a building or facility.”

BLM sought to limit the availability of these categorical exclusions through a May 2010 Instruction Memorandum that, among other things, required an “extraordinary circumstances” review prior to the application of the categorical exclusions. Although a federal district court vacated the instructions as having been adopted contrary to required notice and comment procedures, the short-lived Instruction Memorandum illustrates the degree to which internal agency policies can impact the agency’s NEPA analysis.

The Forest Service has adopted additional NEPA categorical exclusions in its approval of Surface Use Plan of Operations. The exclusion applies to the Forest Service’s approval of Surface Use Plans for new oil and gas exploration and initial development as long as the approval does not authorize activities exceeding:

• One mile of new road construction;
• One mile of road reconstruction;
• Three miles of individual or co-located pipelines and/or utilities disturbance; or
• Four drill sites.


A recent case illustrates the potential impact of NEPA requirements on gas development activities. Anglers of Au Sable v. United States Forest Service involved a NEPA controversy over the drilling of a single well in the
Huron-Manistee National Forest in Michigan. From 1997 to 2002, Savoy Energy L.P. leased 640 acres of mineral rights from the State of Michigan and the Bureau of Land Management, including land in the Huron Manistee National Forest. In 2003, Savoy filed an Application for Permit to Drill with BLM and the Forest Service to conduct exploratory drilling in the forest. The Application sought approval to clear a 3.5-acre well site.\textsuperscript{130} The Forest Service completed an Environmental Assessment (EA) for the Application in 2004 and in January 2005 it issued a FONSI\textsuperscript{131} (Finding of No Significant Impact).\textsuperscript{132} In August 2005, the Bureau of Land Management approved Savoy’s Application for Permit to Drill.\textsuperscript{133}

In September 2005, two non-profit groups and an individual filed an eight-count complaint against BLM and the Forest Service seeking a preliminary injunction to prevent the permitted drilling. The plaintiffs alleged that the Forest Service and BLM had failed to comply with the National Environmental Policy Act in approving the Application for Permit to Drill.\textsuperscript{134} The court found that the plaintiffs had raised substantial questions about whether the project would have a significant environmental impact and thus whether the agencies’ FONSI was arbitrary and capricious.\textsuperscript{135} The court issued the preliminary injunction, finding that plaintiffs had provided evidence that the project would impact the wildlife dependant on the old growth forest, including one endangered bird species and would also affect the recreational uses of the forest.\textsuperscript{136} The court concluded that “[t]he FONSI addresses some concerns of potential environmental impact but makes no meaningful analysis of the habitat destruction that may occur beyond the

\begin{footnotesize}
\begin{enumerate}
\item A FONSI is a decisional document used in this instance by the Park Service to provide an explanation of why the selected action will have no significant effects on the human environment; hence a Finding of No Significant Impact.
\item Id. F. Supp. 2d at 829.
\item Id.
\item Id. at 830.
\item Id. at 835.
\item Id.
\end{enumerate}
\end{footnotesize}
confines of the project area, such as the habitat of the warbler, the northern hardwoods and the old growth forest.”\textsuperscript{137} Considering the balance of harms, the court found that the potential harm to the environment from the drilling was not outweighed by the harm of delay in drilling caused by the injunction. The court explained: “The harm to others that could result from a preliminary injunction to preserve the status quo while the merits of the plaintiffs’ complaint are addressed would be a delay of one year to Savoy and, perhaps, a potential compromise of state leases for the exploratory well. The defendants have not articulated why this harm is substantial . . . . The minerals Savoy seeks to explore and extract have been in place for thousands of years; a delay while this action pends appears insignificant when viewed in that context.”\textsuperscript{138}

In July 2008, the court ruled on the merits.\textsuperscript{139} The court found that the Forest Service’s and BLM’s decision to issue the FONSI was arbitrary and capricious and enjoined the agencies’ authorization of Savoy’s drilling project. In September 2008, after the court entered its decision, Savoy moved to intervene in the case for purposes of appeal. The court denied Savoy’s belated motion.\textsuperscript{140} In February 2010, the Forest Service and BLM published their notice of intent to prepare an Environmental Impact Statement (EIS) for the Savoy drilling project.\textsuperscript{141} The EIS has not been completed, and the court’s prediction that the preliminary injunction would result in a “one-year” delay has proven to be incorrect.


The Endangered Species Act (ESA) requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) before authorizing oil and gas

\textsuperscript{137} Id.

\textsuperscript{138} Id. at 839.


\textsuperscript{141} Dep’t of Agric., Forest Service, Huron-Manistee National Forests, Michigan, USA and State South Branch 1-8 Well, 75 Fed. Reg. 8297 (Feb. 24, 2010).
development activity on federal lands. Generally, a formal consultation is required “at the earliest possible time,” which has been interpreted to mean “as early as all of the necessary information is available.”

Courts have found that the Endangered Species Act consultation obligation is triggered when BLM is notified that the sale of an oil or gas lease might affect a threatened or endangered species. At that time, the U.S. Fish and Wildlife Service must prepare a biological opinion that assesses the impact not only of the leasing, but also “all post-leasing activities through production and abandonment.” In Conner v. Burford, the Ninth Circuit held that a biological opinion must address the impacts of post-leasing activities even if information about such activities — such as the location of future oil and gas development activities — is incomplete. A biological opinion may, however, rely on assumptions based on a “reasonable and foreseeable oil development scenario,” where complete information about post-leasing activities is unavailable.

The Forest Service or BLM may not, however, be required to consult with the Fish and Wildlife Service at the time an oil or gas lease is issued as long as the agency retains the authority to prevent surface disturbing activity. In Wyoming Outdoor Council v. Bosworth, plaintiffs argued that the BLM had violated the Endangered Species Act by failing to consult with FWS before issuing oil and gas leases in the Shoshone National Forest. The Fish and Wildlife Service had already issued a biological opinion at the time the

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142 “Each Federal agency shall confer with the Secretary [of the Interior] on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat . . . .” 16 U.S.C. § 1536.
143 50 C.F.R. § 402.14(a).
145 See Conner, 848 at 1452.
146 Id. at 1453.
147 Id. at 1454.
148 See N. Alaska Envtl. Ctr., 457 F.3d 969, 981 (9th Cir. 2006).
The court found that the plaintiffs’ challenge was not ripe because BLM and the Forest Service had retained its authority to prevent surface disturbing activity and therefore the leases were not an “irreversible commitment of resources.” Specifically, BLM and the Forest Service reserved the right to deny access to the leased land to impose restrictions required by the Endangered Species Act. The court also noted that the lessee was required to receive agency approval of an Application for Permit to Drill and a surface use plan of operations before engaging in surface disturbing activity. These reservations made the lessees right to development “far from certain.”

Wyoming Outdoor Council has been distinguished, however, on the basis that the Forest Service did consult with FWS prior to making the Shoshone Forest lands available for lease.


Under the National Historic Preservation Act (NHPA), an agency must before commencing any federal undertaking “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register” and “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.” The sale of an oil or gas lease is a federal undertaking triggering NHPA obligations.


The states in the Marcellus region which are granting permits for shale development generally allow the development of state owned mineral

150 Id. at 85-86.
151 Id. at 92-93.
152 Id. at 91.
153 Id. at 92.
154 Id.
interests, subject to certain criteria and restrictions. A brief review of the states with the most active drilling follows.


The Department of Conservation and Natural Resources (DCNR) is authorized to lease State Forest lands for oil and gas development when it is deemed by the DCNR to be in the best interest of the Commonwealth. From 1947 through January 2010, the DCNR has held 74 lease sales in State Forest lands.

For those interested in leasing public lands for oil and gas development in Pennsylvania, the DCNR’s Bureau of Forestry has adopted Guidelines for Administering Oil and Gas Activity on State Forest Lands to provide a protocol and guidance on managing State Forest lands to ensure the long-term health, vitality and productivity of the Commonwealth’s forests and to conserve native wild plants. The Bureau of Forestry has also created a Gas Management Team which is responsible for the DCNR’s day-to-day management of the gas program including acting as a liaison to the operators’ field staff and operations staff; approving new well pad locations; approving seismic surveys; approving water impoundment locations; new road construction and conditions monitoring; approving gathering pipeline location and construction; water withdraw and transport; and other related gas well development, production and site restoration issues. The Bureau of Forestry keeps a permanent file, typically on a per-tract basis, that contains the following information for oil and gas operations on State Forest lands:

158 Section 302(a)(6) of the Conservation and Natural Resources Act 18 of 1995; 71 P.S. §1349(a)(6).
159 See http://www.dcnr.state.pa.us/forestry/naturalgasexploration/policy/index.htm (last visited 7/20/11).
161 Id. at p. 6.
1. Copies of all correspondence
2. A copy of the executed lease
3. Plans submitted by operators:
   a. Seismic surveys
   b. Pipelines
   c. Roads
   d. Well pad development plan
   e. Erosion and Sedimentation (E&S) plan
   f. Water sourcing and waste handling plan
   g. Site restoration plan
   h. Material Safety Data Sheets (MSDS) for all chemicals stored and used on State Forest lands (these may be obtained by contacting the operator)
4. Other maps or drawings
5. Pennsylvania Natural Diversity Inventory (PNDI) report(s)
6. Inspection reports that will indicate whether or not the operator has obtained or completed the following required DEP permits and plans. These items are also required to be posted on site at all times.
   a. DEP Bureau of Oil and Gas Management’s Well Permit
   b. National Pollutant Discharge Elimination System (NPDES) Permit
   c. Erosion and Sedimentation Control Plan
   d. Preparedness, Prevention, and Contingency Plan
7. Contact information for routine and emergency situations shall be maintained by the district and the operator in an up-to-date status at all times.\(^{162}\)

\(^{162}\) Id. at p. 10.
Any operator or developer that is interested in leasing public land for oil and gas development in Pennsylvania should access and become familiar with the Guidelines as well as the Pennsylvania Department of Environmental Protection’s Bureau of Oil and Gas Management’s *Oil and Gas Operator’s Manual*, which provides a comprehensive overview of all Pennsylvania laws and regulations governing natural gas and oil exploration, development and production, including compliance responsibility, recommended practices, an overview of the permitting process, disposal processes, and detailed information concerning state inspection, monitoring and enforcement. A copy of the *Oil and Gas Operator’s Manual* can be accessed online and updates and modifications to the Manual can be obtained directly from the Bureau of Oil and Gas Management. 


In 2007, the Public Land Corporation was made a unit of the Real Estate Division of the Department of Administration. The Public Land Corporation is generally vested with title of the State of West Virginia in public lands, including mineral estates. The Public Land Corporation, however, does not own title to the rivers, streams, creeks or beds thereof or of other public lands managed or acquired by the Division of Natural Resources (DNR). 

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165 Contact Pennsylvania Department of Environmental Protection’s Bureau of Oil and Gas Management. P.O. Box 8765, Harrisburg, PA 17105-8765.


167 *Id*.

The Public Land Corporation is authorized by statute to enter into a lease or contract for the development of minerals, including oil and gas, provided that it is not permitted to lease or contract for the extraction of state owned minerals underlying any state park or state recreation area, nor the extraction of minerals by strip or auger miner under any state forest or wildlife refuse. Any lease or contract granted by the Public Land Corporation for the development of state owned minerals must follow a competitive bidding procedure, and is subject to a public notice and comment periods.

With respect to those lands subject to the control of the DNR, the Director of the DNR has the authority to sell or lease, with the approval in writing of the Governor, minerals including the oil and gas estate that may be found in lands under the jurisdiction and control of the Director, except lands that are designated as state parks. Operators wishing to develop the oil and gas underlying state forests are subject to certain restrictions and public notice and comment periods, as well as specific restrictions on oil and gas road construction and maintenance of access roads within state forests. Rules for accessing state forests contain specific notice requirements, notice of new road construction, notice of maintenance plans, and special requirements for environmental protection. In particular, the regulations modify provisions of the West Virginia Erosion and Sediment Control Field Manual of the West Virginia Office of Oil and Gas, Department of Environmental Protection ("Manual") as they apply to operations in state forests. In addition to the identification of significant features of the land proposed to be disturbed, the operator must check with the DNR regarding a list of species that are considered endangered, threatened or “of concern,” to see if that list identifies

174 5 C.S.R., Series 35.
175 Id.
any in the area proposed to be disturbed. The operator must also check with the Forest Superintendent for known locations of such plants and animal resources and during the public notice or comment period if any such areas of concern are noted, then the operator must relocate the land disturbance, or mitigate the loss in another place that a qualified botanist determines is likely to succeed.176

Ohio Legislators and the Governor have generally embraced the idea of allowing leasing and development of state owned minerals, including minerals underlying state parks.177 In 2011, The Ohio General Assembly passed Amended House Bill 133 to amend the Ohio Revised Code to create the Oil and Gas Leasing Commission (“Commission”) and to establish procedures for leasing land owned or under the control of state agencies, and to provide funding for capital costs for the agencies, but excluding nature preserves from drilling.178

The bill was signed into law by the Governor on June 30, 2011 and is effective September 30, 2011. The Commission consists of the Chief of the Division of Geological Survey and four members appointed by the Governor. H. B. 133 also provides for procedures to identify, analyze and approve leases for the development of state owned or controlled minerals, and to create trust funds for the money for the use of particular agencies. Pursuant to the bill, not later than 270 days after the effective date, the Commission is to adopt rules establishing the procedures for the identification, nomination, leasing, lease forms and other requirements for the leasing of state controlled mineral lands.179 Each calendar quarter identified properties deemed suitable for leasing and which are approved for nomination shall proceed to be advertised for bid.

176 58 C.S.R., § 35.6.2.b.
179 Id. See Section 1509.74, as amended.

Michigan has for many years authorized the sale or lease of state owned minerals but in 1994 the statutory system for the protection and enhancement of the public trust for managing public lands and mineral resources was reorganized by the enactment of the *Natural Resource and Environmental Protection Act*.\(^{180}\)

Michigan allows both the sale and lease of state owned oil and gas rights and gas storage rights, except drilling operations beneath the lake bottomlands of the Great Lakes or connected bays or connected harbors and waterways of the Great Lakes are prohibited.\(^{181}\) Regulations have been adopted specific to gas storage under public lands\(^{182}\) and for the procedures to apply for oil and gas leases of state lands.\(^{183}\) Michigan requires a specific application, notice and public comment prior to public auction.\(^{184}\)

The Michigan Department of Natural Resource’s website has posted a notice of a settlement in a case styled *Black Stone Mineral Co. LP v. Michigan Department of Treasury*.\(^{185}\) The *Black Stone* case challenged the State’s claim to oil and gas rights acquired by foreclosure of delinquent property taxes where oil and gas rights were owned separately, or “severed” from the surface ownership and whether owners of severed mineral rights were entitled to notification of the foreclosure. At a hearing on July 3, 2007, the Antrim County Circuit Court approved a settlement agreement (Settlement) reached by the parties. The terms of the Settlement include the return of previously severed oil and gas rights to the class members, for those oil and gas severed rights thought to have been acquired by the State through tax foreclosures occurring after 1975. The State will also relinquish any claim to bonus, rent, royalties, and suspended royalties to the class parcels, as well as, “take all

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\(^{181}\) MCL 324.502 (3), (4); 324.503 (3); *see also* MCL 324.61901-61904 regarding drilling in the Pigeon River State Forest.


\(^{184}\) *Id.*

reasonable steps . . . to assist Class Counsel in the recovery of Suspended Revenues held by the operators, owners, or producers on lands covered by the State Leases.” 186 Title abstractors therefore need to be cognizant that certain oil and gas properties previously claimed by the state may no longer be state property. A listing of the subject properties is listed on the website.

§ 14.08. Conclusions.

Cooperation with government agencies is essential when developing minerals underlying public lands. Oil and gas drilling activities on public lands should be done with due regard to environmental resource values of these lands. Consider strategies to drill on private inholdings associated with public lands. Companies must build public support for projects. Finally, private parties must actively defend their property rights and economic interests in litigation involving environmental non-government organizations and public agencies.

186 Id.