

Chapter 14

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

Timothy M. Miller

M. David Griffith, Jr.

Robinson & McElwee PLLC

Charleston, West Virginia

R. Timothy McCrum

Providence Spina

Crowell & Moring LLP

Washington, D.C.

Synopsis

§ 14.01.	Overview of Shale Gas Development Opportunities on Eastern and Midwestern Public Lands	517
	[1] — State Parks and Forests in the Marcellus Region	518
	[2] — Pennsylvania’s Recent Leasing of Public Lands and Existing Operations	520
§ 14.02.	Recent Federal Litigation Involving Operations on Public Lands.....	521
§ 14.03.	Recent State Litigation Involving Operations on Public Lands.....	522
	[1] — <i>Belden & Blake Corporation v. Commonwealth of Pennsylvania, Department of Conservation and Natural Resources</i>	522
	[2] — <i>Cabot Oil & Gas Corporation v. Huffman</i>	523
	[3] — <i>Michigan Oil Co. v. Natural Resources Commission</i>	525
	[4] — <i>Miller Brothers v. Department of Natural Resources</i>	527
§ 14.04.	Analysis of Laws and Regulations Applicable to Operations on Federal Public Lands	529
	[1] — Private Mineral Estates in National Forests: Lessons of <i>Minard Run Oil</i> Litigation	529
	[a] — Background Facts: Allegheny National Forest	529
	[b] — Reserved and Outstanding Mineral Rights	530
	[c] — 1980 <i>Minard Run Oil</i> Litigation.....	530
	[d] — U.S. Forest Service’s Past Administrative Practice: Cooperation, Not Regulation.....	532

	[e] — 1991 U.S. Forest Testimony to U.S. Congress re Alleghany National Forest Practices: No Federal Action; NEPA Inapplicable	533
	[f] — Judge McLaughlin’s Conclusions: No Federal Action that Triggers NEPA.....	534
	[g] — Preliminary Injunctive Relief Warranted Where Irreparable Harm Was Demonstrated.....	535
	[h] — Threatened New U.S. Forest Service Rulemaking on Split Estates	536
§ 14.05.	Analysis of Laws and Regulations Applicable to Operations on State Public Lands.....	537
§ 14.06.	Leasing Federal Oil and Gas.....	539
	[1] — Procedures for Acquiring Federal Oil and Gas.....	539
	[2] — Terms of Federal Oil and Gas Leases	541
	[3] — Forest Lands	543
	[4] — National Environmental Policy Act, 42 U.S.C. § 4332, Applies to Leasing Federal Minerals.....	543
	[5] — Bureau of Land Management and Forest Service’s NEPA Obligations Prior to the Issuance of a Lease.....	544
	[6] — Exclusions from NEPA	545
	[7] — NEPA Case Study: <i>Anglers of Au Sable v. United States Forest Service</i>	546
	[8] — Other Federal Statutes Applicable to Leasing Federal Minerals.....	548
	[a] — Endangered Species Act, 16 U.S.C. § 1536	548
	[b] — National Historic Preservation Act, 16 U.S.C. § 470 <i>et seq.</i>	550
§ 14.07.	Leasing State Owned Minerals.....	551
	[1] — Pennsylvania.....	551
	[2] — West Virginia	553
	[3] — Ohio.....	555
	[4] — Michigan	556
§ 14.08.	Conclusions.....	557

§ 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.¹ 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.² 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.³ The lands are intended by the U.S. Congress to be

¹ See, e.g., “The Birth of the Modern Oil Industry,” www.geoexpro.com/history/birthofoilindustry. See also “The SUNY Fredonia Shale Research Institute, The Early History of Natural Gas,” www.fredonia.edu/shaleinstitute/history.asp (visited April 26, 2011).

² See “Assessment of Undiscovered Natural Gas Resources in Devonian Black Shale, Appalachian Basin, Eastern U.S.A.,” Robert C. Milici, U.S. Geol. Survey Open-File Report 2005-1268 (2005), available at www.marcellus.psu.edu/resources/PDFs/USGS2005-1268.pdf. See also “Shale Lifts Prospects in Ohio,” *Wall Street Journal*, Mar. 7, 2011 (explaining that the Utica shale lies below parts of eight states from Tennessee to New York).

³ 16 U.S.C. § 511-21.

managed according to “multiple use” principles, which includes economic uses of the resources.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).⁵

[1] — State Parks and Forests in the Marcellus Region.

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:

⁴ See Forest and Rangeland Renewable Resources Planning Act of 1974, as amended, 16 U.S.C. § 1600-1614. See also Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701-1785.

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.”).