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Minard Run Oil Company v. United States Forest Service

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Minard Run Oil Company v. United States Forest Service, ___ F.3d ___, 2011 WL 4389220 (3d Cir. Sept. 20, 2011).

Bradley R. Jones

I. INTRODUCTION

In *Minard Run Oil Co. v. U.S. Forest Service*¹, the United States Third Circuit Court of Appeals upheld a preliminary injunction against the U.S. Forest Service (Forest Service) over its analysis of oil and gas drilling on the Allegheny National Forest (ANF).² The court's ruling invalidated a Forest Service policy, which required mineral rights holders to complete an administrative application, called a Notice to Proceed, as a preliminary step before allowing access to drill on the surface of the National Forest.³ The court held that the Forest Service irreparably harmed the lease-holding plaintiffs when it ceased issuing new Notices to Proceed pending completion of a forest-wide Environmental Impact Statement (EIS), a practice which had ordinarily been granted to lease-holders under previous forest policy.⁴

II. FACTUAL BACKGROUND

The Allegheny National Forest, located in northwestern Pennsylvania, was created in 1923 out of lands primarily bought from private landowners pursuant to the Weeks Act of 1911.⁵ The Weeks Act authorized the Secretary of Agriculture to purchase private lands for the creation of forest reservations which ultimately became part of the National Forest System.⁶ Although the federal government bought the surface of the lands now comprising the ANF, in most cases, the mineral rights remained as either "reserved" rights or "outstanding" rights.⁷ More than 93%

¹ *Minard Run Oil Co. v. U.S. Forest Ser.*, ___ F.3d ___, 2011 WL 4389220 (3d Cir. Sept. 20, 2011).

² *Id.* at *1.

³ *Id.* at *14.

⁴ *Id.*

⁵ *Id.* at *1.

⁶ *Id.*

⁷ *Id.* at *2. Reserved rights are those that were reserved in the contracts for the sale of land by surface owners when they sold the property to the federal government. About 48% of the mineral rights on the ANF are reserved rights.

of the mineral rights in the ANF are held by private interests. Due to the terms of the original contract for sale negotiated by previous landowners on what is now the ANF, reserved right holders could be bound by U.S. Department of Agriculture “rules and regulations” if they choose to access their mineral rights.⁸ Often these terms included reasonable use of the surface estate by mineral right holders to reach their mineral rights, payment for any timber removed to provide access to the minerals, and general remediation of the mining or drilling sites in the ANF.⁹ Outstanding rights, however, are governed solely by Pennsylvania statutory and common law, which do not require that the surface owner grant permission for the mineral rights holder to access those rights, but does require that a mineral owner give adequate notice of intent to drill or mine.¹⁰

Previous oil and gas drilling on the ANF was approved by the Forest Service through a system of Notices to Proceed (NTP). NTPs were issued to individual mineral rights owners through a process which began when the mineral right holder provided the Forest Service with a 60 day notice of intent to drill.¹¹ In response to increasing natural gas development on National Forest land, environmental groups sued the Forest Service, alleging that its policy of issuing NTPs without environmental review was contrary to the National Environmental Policy Act (NEPA).¹² The Forest Service settled out of court with the environmental groups.¹³ After the settlement, the Forest Service issued a public statement (Marten Statement) announcing that it

Outstanding rights are those that were owned by a third party who did not convey those mineral rights to the government.

⁸ *Minard Run*, 2011 WL 4389220 at *2.

⁹ *Id.* at *2.

¹⁰ *Id.*

¹¹ *Id.* at *1.

¹² *Id.* at *4 (see U.S.C. § 4332(2)(C) (2006)).

¹³ *Id.*

would process pending mineral rights claims but would not process new requests for NTPs while conducting a comprehensive EIS.¹⁴

PROCEDURAL BACKGROUND

On June 1, 2009, Minard Run Oil Company¹⁵ brought suit against both the Forest Service and environmental groups who had jointly negotiated a settlement to suspend processing of NTPs.¹⁶ The district court granted the plaintiffs an injunction from using the environmental review process as a precondition to dispensation of NTPs. The court further mandated that the Forest Service negotiate and process each NTP for access to mineral rights in a sixty day period.¹⁷ The Forest Service appealed to the Third Circuit.

ANALYSIS

The court began its analysis by considering jurisdiction over the plaintiffs' claims. The court considered whether it had jurisdiction under the Administrative Procedures Act (APA).¹⁸ The APA allows for judicial review of final agency actions when the agency's action is the consummation of the agency's decision-making process and the action is one by which rights or obligations are defined or from which legal consequences will follow.¹⁹ The court ruled that the Marten Statement functioned as a final decision on whether the NTPs would continue to be issued according to previous policy or whether new NTPs would be withheld until the completion an EIS.²⁰ Moreover, the court held that legal consequences would materialize from the Forest Service's action because new drilling on the ANF would be precluded and mineral

¹⁴ *Id.* at *4.

¹⁵ Other plaintiffs in the case were the County of Warren, Pennsylvania, the Pennsylvania Independent Oil and Gas Association, and other associated industry groups.

¹⁶ *Minard Run*, 2011 WL 4389220 at *5.

¹⁷ *Id.* at *6.

¹⁸ 5 U.S.C. § 702.

¹⁹ *Minard Run*, 2011 WL 4389220 at *6.

²⁰ *Id.* at *6.

rights holders may face civil or criminal penalties if they attempt to drill.²¹ Further, the court ruled it had jurisdiction over the matter to quickly resolve the question of the Forest Service's authority to regulate access to privately held mineral rights on the ANF and the question of NEPA's applicability to drilling on the ANF.²²

Next, the court considered whether to uphold the district court's order granting plaintiffs a preliminary injunction against the Forest Service. This decision turned on whether the plaintiffs had shown: (1) a likelihood of success on the merits of their claim, (2) that they would suffer irreparable harm if the injunction wasn't granted, (3) that granting a preliminary injunction would not produce greater harm to the non-moving party, and (4) that the public interest would benefit from the preliminary injunction.²³

HOLDING

The court addressed whether a preliminary injunction was appropriate, beginning with whether plaintiffs were likely to succeed on the merits of their claim. Minard Run's claim was that issuance of NTPs was a major federal action which required NEPA analysis prior to processing new NTP requests.²⁴ The court held that mineral rights holders need not obtain approval from the Forest Service to exploit those rights and, therefore, issuance of NTPs was not a major federal action.²⁵ The court ruled that NEPA analysis would have only been required if issuing NTPs was a major federal action.²⁶

The court reached its conclusion by reviewing the text and history of the Forest Service's Organic Act and the Weeks Act.²⁷ The court held that when easements or reservations retained

²¹ *Id.* at *7.

²² *Id.*

²³ *Id.* at *8 (*see Kos Pharm. v. Andrx Corp.*, 369 F.3d 700, 708 (3d. Cir. 2004)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Minard Run*, 2011 WL 4389220 at*8 (*see* 42 U.S.C. § 4332(2)(C)).

²⁷ *Id.* at *9.

by the owner of a mineral estate are conveyed to the federal government, Forest Service regulations only apply where that fact is specifically stated in the contract for deed.²⁸ The court acknowledged that the Organic Act allowed the Forest Service to regulate occupancy of the national forests²⁹ and that federal regulations designate all uses of national forests as subject to special use restrictions mandated by the Forest Service.³⁰ The court held that Forest Service regulations, not specifically included in the original land conveyance, would not apply to privately-held mineral rights underlying lands acquired by the Weeks Act because there is no reasonable interpretation of the text or intent of the Act which would suggest such applicability.³¹ Consequently, the court held that the Forest Service's rights were those of any surface owner under state property law: notice from mineral rights owners of intent to access their rights and a limited right to negotiate how those mineral rights would be accessed on the surface owners land.³²

The court next considered whether the Forest Service's action was a change in policy or rules that would require public notice and opportunity for comment under the APA.³³ Under § 551(4) of the APA, a rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."³⁴ The court looked to case law and determined that the Marten Statement created new rights and duties on mineral rights holders by requiring a different process to access their holdings. As a result, the ANF's policy was a substantive rulemaking and, therefore, required an opportunity for public comment.³⁵

²⁸ *Id.* (See 16 U.S.C. § 518).

²⁹ *Id.* at *10.

³⁰ See 36 C.F.R. § 251.50(a) (2009).

³¹ *Minard Run*, 2011 WL 4389220 at *10.

³² *Id.* at *12.

³³ The APA, under §§ 5 U.S.C. 553(b)–(c) requires federal agencies to publish public notice and offer an opportunity for public comment before creating any substantive rule.

³⁴ 5 U.S.C. § 551(4).

³⁵ *Minard Run*, 2011 WL 4389220 at *12.

Next, the court in looked to the element of irreparable harm to the plaintiff.³⁶ The court agreed with defendants that, as a general rule, irreparable harm would not be shown purely in terms of economic loss, but cited an exception to the rule where the potential economic loss “is so great as to threaten the existence of the movant’s business.”³⁷ The court held that plaintiffs’ testimony was sufficient to establish severe economic loss, potentially to the point of bankruptcy, if plaintiffs were unable to access their rights when needed. Therefore, the Forest Service’s action would likely result in irreparable harm to the plaintiffs.³⁸ The court held that this reasoning was particularly compelling because the “rule of capture,” which governs Pennsylvania oil and gas law, would allow those drillers who get to an oil or gas pocket first to have prior rights to exploit all of the resource they can extract.³⁹

Finally, the court looked to the last two factors of the preliminary injunction standard: whether the balance of equities between the parties would be affected and whether the public interest was favored by an injunction.⁴⁰ The court ruled that a preliminary injunction against the Forest Service would not harm the public interest, but would instead support the public interest by promoting the local economy and upholding the dominant mineral estates of the plaintiffs.⁴¹ The court held that under previous Forest Service policy, oil and gas drilling had not unduly harmed the Service’s interest in protecting the environmental resources of the ANF, while it also allowed reasonable access of private parties to their mineral rights.⁴²

³⁶ *Id.* at *13.

³⁷ *Id.* (citing *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 485 (1st. Cir. 2009)).

³⁸ *Id.*

³⁹ *Id.* at *13.

⁴⁰ *Id.* at *13.

⁴¹ *Minard Run*, 2011 WL 4389220 at *14.

⁴² *Id.*

CONCLUSION

In *Minard Run*, the Third Circuit reinforced the dominance of privately-held mineral estates on surface estates, even when those lands have since been purchased by the federal government and become public lands.⁴³ The court held that, although the Forest Service had some power in negotiating how oil and gas drilling could be implemented on national forests, those rights were only equal to the rights that any surface owner would enjoy under state law in a split estate situation.⁴⁴ The court held that environmental assessments of oil and gas drilling could not be used as a precondition to allowing access of mineral rights holders onto the Allegheny National Forest.⁴⁵

⁴³ *Id.* at *1.

⁴⁴ *Id.* at *11.

⁴⁵ *Id.* at *1.