

Minard Run Oil Co. v. U.S. Forest Service: Split Estates in the Allegheny National Forest

INTRODUCTION

In *Minard Run Oil v. U.S. Forest Service (Minard Run)*, the Third Circuit determined that the United States Forest Service's authority is subordinate to private mineral rights in the Allegheny National Forest (ANF).¹ Prior to the decision, mineral rights owners sought Forest Service approval to initiate new mining operations or create access points to service existing ones.² The court in *Minard Run* declared that such approval, memorialized in the form of a Notice to Proceed permit (NTP), was not necessary for project development on federally owned surface land in the ANF.³ Although the Forest Service maintains extensive regulatory power, the court found that the Forest Service was not entitled to halt the issuance of new permits while it completed a multi-year Environmental Impact Statement (EIS), basing its decision on specific provisions located in ANF conveyance agreements that defeated the Forest Service's ability to do so.⁴

By weakening the regulatory authority of a federal agency over a national forest at a time when oil production in the ANF is rapidly increasing, the court's decision gives great deference to oil and mining companies on issues of land use at the expense of greater environmental protection and conservation. In attempting to protect access to valuable mineral rights, the Third Circuit further muddles a crowded field of opinions regarding the rights of federal agencies to police easements over federal lands and opens the door for greater abuse of surface land in national forests.⁵

Copyright © 2012 Regents of the University of California.

1. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236 (3d Cir. 2011).

2. *Id.* at 244–45.

3. *Id.* at 254.

4. *Id.*; *see also* Organic Administration Act, 16 U.S.C. § 475 (2006) (providing the Forest Service with a statutory basis for to regulating occupancy and use of national forests and providing for the protection of national forests).

5. *See* Petitioner's Brief at 28, *Minard Run* (No. 10-2332) (arguing that the district court erred in assessing the public interest by failing to give due weight to the broader purpose of the Weeks Act).

I. BACKGROUND

In 1897, Congress passed the Organic Administration Act (OAA), providing a basis for the management of the National Forest System (NFS), which it established years earlier out of existing federal holdings.⁶ Congress passed the Weeks Act in 1911 to expand the NFS, enabling the Secretary of Agriculture to purchase private land to add to the system.⁷ In the years that followed, the Secretary added millions of acres to the NFS, including the area comprising the ANF, which had been largely denuded by logging and oil exploration.⁸ Management of the ANF was placed under the auspices of the Forest Service, and the forest subsequently underwent a period of rapid recovery, heralded today as both an environmental and economic success.⁹

In the Allegheny region, as elsewhere, the Secretary sought to acquire the most land possible with the limited funding provided by Congress.¹⁰ The Secretary purchased the surface rights to large tracts of land, leaving the mineral rights below in private hands.¹¹ In the resulting split estates, private mineral interests exist as reserved rights and outstanding rights.¹² The former refers to mineral estates retained by the grantor at the time of conveyance, whereas the latter are interests severed from the surface rights in earlier deeds, prior to the surface rights' conveyance to the United States.¹³ The owners of either type of rights are entitled to make reasonable use of the lands' surface, now owned by the United States, to access their interests.¹⁴

6. *Minard Run*, 670 F.3d at 242; 16 U.S.C. § 475.

7. *Minard Run*, 670 F.3d at 242; 16 U.S.C. § 518.

8. *Minard Run*, 670 F.3d at 243; SAMUEL A. MACDONALD, *THE AGONY OF THE AMERICAN WILDERNESS* 22 (2005). The first commercially viable oil well was built in 1859 near Titusville on the current border of the Allegheny Forest. A stampede of settlers descended upon the area as a result. Eventually, exploration moved deeper into what is now the ANF, and then elsewhere in the state. The logging and tanning industries further decimated the forest. *Id.* at xiv, 6–10.

9. MACDONALD, *supra* note 8, at xiv, 7–11. Once denuded by loggers, the empty forestland saw an explosion of Black Cherry trees, which replaced older-growth Hemlock and Beech. Today, the Allegheny's Black Cherry trees are so valuable that the timber program in the Allegheny is one of the few in a national forest to turn a profit.

10. *Minard Run*, 670 F.3d at 242–43.

11. *Id.* The Weeks Act explicitly allowed for such purchases, stating that “such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which . . . in no manner interfere with the use of the lands so encumbered, for the purchase of this Act.” 16 U.S.C. § 518.

12. *Minard Run*, 670 F.3d at 243. In the case of outstanding rights, the government purchased surface land from a seller who did not own the mineral estate. The government was therefore bound by pre-existing agreements because it could buy no more of an interest in the surface than the seller already possessed and was thus free to convey. *Id.*

13. *Id.* The distinction is important because, until recently, the Forest Service assumed its regulatory power over outstanding rights to be far more limited than its power over reserved rights. An attempt to extend greater control over outstanding rights gave rise to the controversy in *Minard Run*. *Id.* at 245–46. See also *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, No. 08-323, 2009 WL 1324154 (W.D. Pa. May 12, 2009) (rejecting mineral rights owners' motion to intervene and set aside settlement agreement).

14. *Minard Run*, 670 F.3d at 245–46.

The heart of the court's decision in *Minard Run* was a question of just how far the Forest Service could extend its authority over the surface land when doing so would conflict with the free use of subsurface private mineral interests.¹⁵ The Forest Service has broad authority to regulate the use of federal forestlands under the OAA.¹⁶ In the years since the OAA was enacted, Congress supplemented the statute by providing various federal agencies, including the Forest Service, with additional layers of regulatory authority.¹⁷ In addition, the federal government has come to ask more of such agencies that manage public land holdings; the National Environmental Policy Act (NEPA) requires them to complete an (EIS) prior to any major federal action affecting the land.¹⁸ NEPA has affected the regulatory requirements for those who own mineral rights on federal land, including forestlands purchased through the Weeks Act.¹⁹

For much of the ANF's history, the Forest Service and mineral rights owners avoided conflict over the environmental impact of the latter's use of the forest. They achieved this through a loose "cooperative approach" referred to as the *Minard Run I* framework after a 1980 suit filed by the Minard Run Oil Company.²⁰ The approach first required mineral rights owners who wished to initiate new drilling operations to provide the Forest Service with advanced notice.²¹ Next, the parties would negotiate details regarding the operations, after which the Forest Service could issue an NTP, which permitted the mineral rights owner to use the land in the manner specified by an internal agreement between the parties.²² The process did not require preparation of an EIS.²³

15. *Id.* at 242, 246–47.

16. *Id.* at 250.

17. *See e.g.*, Weeks Act, ch. 186, 36 Stat. 962(1911) (codified at 16 U.S.C. § 518 (2006)); Organic Act, ch. 2, 30 Stat. 35 (codified at 16 U.S.C. § 551) ("[the Secretary shall] make provisions for the protection against destruction by fire and depredations upon public forests and national forests . . . [and] to make such rules and regulations and establish such services as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction"); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–87 (2006).

18. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4332(C) (2006) (requiring that a federal agency "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action").

19. *See, e.g.*, U.S. Dep't of Agric., Revised Environmental Assessment, Trans Superior Resources, Inc. Private Minerals Exploration in the Matchwood Tower Road Area (2007), available at www.allegenydefense.org/issues/ogm/TransSuperiorRevisedEA.pdf.

20. *U.S. v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980) (holding that mineral owners had an unquestioned right to enter surface land, subject to minor restrictions innocuous enough to not seriously hamper oil and gas extraction); *see also Minard Run*, 670 F.3d at 244. From 1980 until 2009, the Forest Service and mineral rights owners managed their affairs through a "cooperative approach," under which mineral rights owners gave 60 days advance notice before undertaking new drilling operations. After negotiating the details of the requested land use, including placement of roads and wells, the Forest Service issued a NTP without objection.

21. *Minard Run*, 1980 U.S. Dist. LEXIS 9570, at *14–15.

22. *Id.*

23. *Minard Run*, 670 F.3d at 245.

This cooperative framework continued until 2008, when an internal Forest Service legal memorandum suggested that, contrary to earlier beliefs, the Forest Service should in fact require NEPA analysis of oil and gas development proposals before authorizing any new action.²⁴ Certain environmental groups obtained a copy of the memorandum and sued to ensure Forest Service compliance with the requirements of NEPA.²⁵ As stipulated in the resulting settlement agreement between the parties, the Forest Service would not issue new NTPs until it could complete a forest-wide EIS.²⁶

The decision to halt the issuance of NTPs was immediately met with hostility.²⁷ After attempting to intervene in the earlier settlement, the Pennsylvania Independent Oil and Gas Association and the Allegheny Forest Alliance filed suit against the Forest Service, hoping to enjoin the new policy.²⁸ They asserted that the Forest Service overstepped its regulatory authority in the ANF by halting the issuance of permits until the completion of an EIS.²⁹ They argued that only those arrangements agreed upon in the instruments conveying the surface land to the United States in the first place could regulate access to their estates.³⁰ Since the signatory parties to the conveyances did not explicitly stipulate for the type of limited surface land use suggested by the Forest Service, any action halting the issuance of new NTPs was thus illegal.³¹

The district court ruled that the issuance of an NTP was not a major federal action under NEPA; therefore, the Forest Service's policy of halting the issuance of NTPs until completion of an EIS was unjustified.³² The court held it was in the public's best interest to enjoin the Forest Service from requiring the preparation of an EIS, returning the ANF to the cooperative land use model of years past.³³

On appeal, the Third Circuit held in *Minard Run* that "the Service does not have the broad authority it claims over private mineral rights owners' access to

24. *Id.*

25. *Id.*; Settlement Agreement, Forest Serv. Emp. for Env't Ethics v. U.S. Forest Serv., No. 08-323 (W.D. Pa. May 16, 2009), 2009 WL 4091171.

26. Settlement Agreement, *supra* note 25.

27. See *FSEEE v. U.S. Forest Serv. v. Penn. Oil and Gas Ass.*, No. 08-323, 2009 WL 1324154, at *1 (W.D. Pa. May 12, 2009) (denying motion to stay settlement).

28. See *Minard Run*, 670 F.3d at 246.

29. *Id.* at 246-47.

30. See 16 U.S.C. § 518 (2006) ("[R]ights of ways, easements, and reservation retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection and administration, and such rules shall be expressed in and made part of the written instrument conveying title of the land to the United States; and the use, occupation, and operation of such rights . . . shall be under, subject to, and in obedience with the rules and regulations so expressed.")

31. *Minard Run Oil Co. v. U.S. Forest Serv.*, No. 09-125, 2009 WL 4937785, at *33 (W.D. Pa. Dec. 15, 2009).

32. *Id.* at *32. The court also ruled that the new plan adopted in the Settlement Agreement was a "fundamental sea change" in Forest Service policy, thus requiring notice and comment procedures under the Administrative Policy Act. *Id.*

33. *Minard Run*, 670 F.3d at 256-57.

surface land.”³⁴ Specifically, the court held that the Forest Service’s regulatory powers did not apply to outstanding rights and were limited even as to reserved rights.³⁵ Although mineral estate owners must provide notice prior to taking any new actions that would damage the surface land, the court held that subsequent Forest Service approval is not required, and in fact never was.³⁶ Because the issuance of an NTP does not “enable [a] project by lease, license, permit, or other entitlement,” it is not a final agency action requiring an EIS.³⁷

II. ANALYSIS

A. *The Prevailing Circuit Split*

A comparison of the Third Circuit’s opinion in *Minard Run* and similar suits litigated in other circuits reveals much about the attitudinal differences between the circuits as they relate to the limits of the regulatory power of federal agencies and, in particular, the regulation of pre-existing easements.

The Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have released decisions in the past decade relating to easements over federal forest lands, parsing the text of state and federal statutes, such as the OAA, to determine whether the broad regulatory framework Congress established covers easements and rights-of-way.³⁸ The OAA empowers the Secretary of Agriculture to make provisions for public forests set aside prior to and following the OAA’s enactment.³⁹ The Third Circuit in *Minard Run* read the language of the Weeks Act as excluding certain easements, such as those at issue in the case, from regulation because rules affecting the use of the surface

34. *Id.* at 254.

35. *Id.*

36. *Id.* The court ruled that the purpose of an NTP is to memorialize any agreement or negotiation between the Forest Service and a mineral rights owner rather than to act as a permit to enter and develop an area of the forest.

37. *Id.*

38. *See, e.g.*, *United States v. Smsky*, 271 F.3d 595, 601 (4th Cir. 2001) (holding that neither the Organic Act, the Federal Land Policy and Management Act of 1976 nor the Alaska National Interest Lands Conservation Act (ANILCA) of 1980 allowed the Forest Service to compel landowners to apply for special use permits to use road through national forest which provided sole access to their home); *see also* *Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584 (8th Cir. 1995) (holding that the Forest Service has authority under special use regulations to determine what constitutes reasonable use of federal surface estate by mineral rights owners); *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994) (holding that the ANILCA justified Forest Service’s procedure for issuing permits regulating the use of roads through national forest); *Burlison v. United States*, 533 F.3d 419 (6th Cir. 2008) (holding that though government’s arguments regarding their right to regulate use of easement across national forest through the Organic Act, FLPMA and ANILCA and Refuge Act were not persuasive, the Fish and Wildlife Service may legitimately exercise the sovereign policy power of the federal government to regulate the easement).

39. 16 U.S.C. § 551 (2006) (“The Secretary of Agriculture shall make provisions for the protection against destruction by fire and predation upon the public forest and national forests . . . he may make such rules and regulations . . . as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction.”).

land must have been expressed in the language of the conveyance in order to be binding upon mineral rights owners.⁴⁰

The Fourth Circuit in *United States v. Srnsky* applied a similar analysis, holding that the Forest Service lacked authority to compel a landowner to apply for permits before using a road through a national forest when that road provided the sole means of accessing his home.⁴¹ Like the court in *Minard Run*, the Fourth Circuit looked to the regulatory power granted by the OAA and the Federal Land Policy and Management Act, but determined that neither was applicable to reserved and outstanding rights exempted from modern regulation when purchased under the Weeks Act.⁴² As a result, the Fourth Circuit found that the Forest Service has no basis for requiring permits.⁴³

The analysis of the Fourth Circuit, however, is directly at odds with conclusions reached by the Sixth, Eighth, Ninth, and Tenth Circuit courts. The most striking example is the Eighth Circuit's holding in *Duncan Energy Co. v. U.S. Forest Service*.⁴⁴ There, the owner and developer of mineral rights within the Custer National Forest sought a declaratory judgment from the court that the Forest Service could not require a permit to access its estate or regulate its development.⁴⁵ The Eighth Circuit instead rejected the contention that state law alone dictates what is meant by reasonable use.⁴⁶ It held that regardless of state law, the Forest Service had the same authority denied by the Third Circuit in *Minard Run*, since federal legislation granting the Forest Service the ability to issue "special use" regulations preempted state law.⁴⁷

Likewise, in *Burlison v. United States*, the Sixth Circuit held that the Fish and Wildlife Service may use its regulatory authority over an easement across national wildlife refuge, not under state law, but rather as a result of the

40. *Minard Run*, 670 F.3d at 251; 16 USC § 518 (stating that for pre-existing easements, "such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands in the United States"); see also *Srnsky*, 271 F.3d at 601.

41. *Srnsky*, 271 F.3d at 595.

42. See *id.* at 601.

43. See *id.*

44. 50 F.3d 584 (8th Cir. 1995).

45. *Id.* at 587–88.

46. *Id.* at 589. In *Minard Run*, the Third Circuit claimed that *Duncan Energy* was inapposite for two reasons, most importantly that, while the authority sought by the Forest Service was consistent with North Dakota law, it was not consistent with Pennsylvania law. *Minard Run*, 670 F.3d at 253. That argument is unpersuasive. The court in *Duncan Energy* held that the Forest Service has the right to determine reasonable use despite North Dakota law, not because of it. *Duncan Energy*, 50 F.3d at 589–91. Thus, the difference between North Dakota and Pennsylvania law, even if great, would not bear on the court's decision.

47. See *Minard Run*, 670 F.3d at 251 (holding that outstanding rights are not governable by the "special use regulations" promulgated under the act). But see *Duncan Energy*, 50 F.3d 584, 591 (acknowledging Forest Service prerogative regarding regulation under those same powers and stating that if North Dakota law is read to allow unrestricted access to surface, North Dakota law is inconsistent with special use regulation and is pre-empted by federal legislation). See generally 36 C.F.R. § 251.50(a) (2012) ("Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer.").

sovereign police power the government exercises over its land.⁴⁸ Decisions from the Ninth and Tenth Circuits similarly reveal a more accepting attitude toward the government's regulation of private easements over public land.⁴⁹ The Third Circuit's decision, in contrast, shows a greater skepticism. If the *Minard Run* court had applied the reasoning of *Duncan Energy*, Pennsylvania state law would not have been dispositive.

B. *The Property Clause*

The same split among the circuits can be seen more generally in the deference paid to federal agencies as stewards of federal land. The Third Circuit held in *Minard Run* that, at least where reserved and outstanding rights are concerned, the Forest Service has a very limited ability to dictate use of the government's own land. Other circuits are more tolerant of federal agency actions, often deferring to their judgment on what amounts to reasonable use.

The Property Clause of the United States Constitution provides the basis for federal control over federal land.⁵⁰ The Supreme Court in *Kleppe v. New Mexico* interpreted this power expansively, holding that it includes the right to issue regulations affecting non-public lands if doing so is required to achieve certain related policy goals.⁵¹ The Court thus declared that, "the power over the public land thus entrusted to Congress is without limitation."⁵²

The question posed by cases like *Minard Run* is whether the wide-ranging conception of the federal government's regulatory authority over its land extends to split estates.⁵³ In such cases, strict regulation of a private interest may be required for the government to realize conservation goals, articulated in major pieces of environmental legislation such as NEPA.⁵⁴ In theory, Pennsylvania law already provides room to do so. In Pennsylvania, a mineral developer's right of access is subject to a reasonableness standard; the holder of a servient estate must allow the dominant estate holder use of the land, though it can require that the dominant estate holder minimize damages to the

48. *Burlison v. U.S.*, 533 F.3d 419, 438 (6th Cir. 2008). At the same time, the court expressed doubt over the legitimacy of regulatory authority deriving from the Organic Act, FLPMA, and ANILCA. *Id.*

49. *See, e.g., Adams v. United States*, 3 F.3d 1254 (9th Cir. 1993); *United States v. Vogler*, 859 F.2d 638 (9th Cir. 2008); *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994).

50. U.S. CONST. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulation respecting the Territory or other Property belonging to the United States."); *see Burlison*, 533 F.3d at 432.

51. *Kleppe v. New Mexico*, 426 U.S. 529, 530 (1976) (holding that federal government could prevent a New Mexican livestock company from retrieving animals which had strayed onto privately owned land under the Wild Free-Roaming Horses and Burros Act).

52. *Id.*

53. *See Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 252–54 (3d Cir. 2011); *see also Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584, 589 (9th Cir. 1995); *Burlison*, 533 F.3d at 432.

54. *See* 42 U.S.C. § 4331(b) ("[it is] the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources . . . [so as to] attain the widest range of beneficial uses of the environment without degradation . . .").

surface.⁵⁵ A generous reading of such a law, deferring to the owner of the surface land to determine what constitutes reasonable use, is consistent with the mandate that the Court gave to federal agencies in the *Kleppe* decision.⁵⁶

Despite this possible theoretical basis, Pennsylvania courts have been loathe to interpret Pennsylvania's reasonableness standard so generously to owners of surface estates. The Third Circuit followed their interpretation of state law and affirmed that in Pennsylvania, it is not up to the Forest Service to determine what constitutes reasonable use.⁵⁷ The effect of the court's decision in *Minard Run*, then, is that in the absence of a change in Pennsylvania law, the Forest Service cannot use the Property Clause as a means of limiting oil and gas exploration in the ANF.⁵⁸

The Third Circuit's decision works in favor of mineral rights owners. While the Third Circuit worries that the Forest Service would abuse its right to determine reasonableness, the court appears comfortable granting that right to oil and gas companies.⁵⁹

CONCLUSION

The Third Circuit's ruling in *Minard Run* returns the ANF to the cooperative use framework established in 1980, enfeebling the Forest Service in the process. Riding the tide of rising oil prices, oil exploration in the ANF is rapidly increasing, with 3736 new wells approved between 2005 and 2008 alone.⁶⁰ By making the Forest Service a less-than-equal partner in negotiations over use of the forestland, this decision may hinder the miraculous recovery made by the ANF. And by eliminating federal property rights as an avenue to restrict oil and gas exploration in the ANF, conservationists can only stand back and hope mineral rights holders mind the harm done by their activities and limit their use to the least destructive possible.

Jeremy Goldstein

55. See, e.g., *Belden & Blake Corp. v. State*, 600 A.2d 559 (Pa. 2009); *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893); see also *Burlison*, 533 F.3d at 438.

56. See *Kleppe*, 426 U.S. at 539.

57. *Minard Run*, 670 F.3d at 252.

58. See *id.*; *Duncan Energy*, 50 F.3d at 589.

59. See *Minard Run*, 670 F.3d at 252 (quoting *United States v. Srnsky*, 271 F.3d 595, 604 (4th Cir. 2001)). The Third Circuit fears that granting wide authority to the Forest Service would effectively "wipe the National Forest System clean of any and all easements, implied or express and dramatically reduce the value of reserved mineral and timber rights." *Id.*

60. See Petitioner's Brief at 13, *Minard Run*, 670 F.3d 236 (No. 10-2332).