

MINARD RUN OIL CO. V. UNITED STATES FOREST SERVICE

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INTRODUCTION

*Minard Run Oil Co. v. United States Forest Service*¹ (*Minard Run II*) presents a traditional story with a unique cast of characters. The common law has long established that within a single parcel of property, the surface and the minerals can be separately owned.² Where property has been so divided into a “split estate,” the law presumes that the mineral estate is dominant; unless the deed severing the property provides otherwise, an implied easement burdens the surface estate, permitting the mineral owner to use the surface as may be reasonably necessary to access the minerals.³ *Minard Run II* provides a twist on this common split estate arrangement — it asks what happens when a private party owns the minerals of a split estate and the federal government owns the surface. Specifically, in *Minard Run II*, private mineral owners sought access to oil and gas through surface owned by the federal government and included in a national forest. The case explores the extent to which the U.S. Forest Service, as the land management agency with jurisdiction over the surface, could regulate this surface access. *Minard Run II* ultimately holds, perhaps surprisingly, that the Forest Service had no regulatory authority beyond what a private surface owner would have in an analogous situation. This constraining outcome, however, was not the result of a flawed opinion, but instead an unexpectedly restrictive statute.

In most cases, when the federal government is a party to a split estate, it owns the mineral rights, and a private party owns the surface.⁴ In total, the United States owns over sixty million acres of minerals in split estates.⁵ This is largely a result of early twentieth century statutes that reserved for the federal government all or some of the minerals in land disposed to the pub-

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¹ 670 F.3d 236 (3d Cir. 2011).

² See *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898) (“Unquestionably, at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface.”); *Smith v. Jones*, 60 P. 1104, 1106 (Utah 1900) (“The law is well settled that, as to mineral lands, the surface may be owned by one person and the mineral underneath by another, and that each owner may have an indefeasible title.”).

³ See John S. Lowe, *The Easement of the Mineral Estate for Surface Use*, in *THE NATURAL RESOURCES LAW MANUAL* 239, 239–40 (Richard J. Fink ed., 1995); Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 *ECOLOGY L.Q.* 43, 66–68 (1991).

⁴ Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 *LAND & WATER L. REV.* 419, 426 (1998).

⁵ JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 243–44 (1987); Mergen, *supra* note 4, at 426.

lic.⁶ In rare instances, though, as in *Minard Run II*, the federal government owns the surface estate and a private party owns the dominant mineral interest.⁷ These split estates are a product of private land acquisitions by the federal government that excluded mineral rights, either by design or because the mineral interest had previously been severed from the surface estate. This arrangement is common in the national forests, especially eastern forests, where there are approximately six million acres of federally owned surface atop privately owned minerals.⁸ Other federal lands with privately held minerals split from the federally owned surface include those managed by the National Park Service (“NPS”) and the Fish and Wildlife Service (“FWS”).⁹

This less common split estate arrangement is prone to litigation.¹⁰ To date, there have been cases involving the Forest Service, the NPS, and the FWS disputing federal regulation of private mineral rights.¹¹ This Comment will focus on the latest in this series of controversies. In *Minard Run II*, the U.S. Court of Appeals for the Third Circuit affirmed a preliminary injunction granted to private mineral rights owners in the Allegheny National Forest (“ANF”) that barred the Forest Service from continuing a moratorium on new oil and gas development within the ANF.¹² The Forest Service had intended to continue the moratorium until it completed a forest-wide Environmental Impact Statement (“EIS”) for the ANF.¹³ The court rejected the applicability of NEPA, consequently holding that private mineral rights owners do not need Forest Service authorization before disturbing the ANF surface, provided they supply the Forest Service with sufficient notice of their surface use plans.¹⁴ This Comment will describe the factual background of the case, discuss the Court of Appeals’ opinion, and assess *Minard Run II* in the broader context of split estates involving the federal government as surface owner.

⁶ GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 664 (6th ed. 2007); Mergen, *supra* note 4, at 426. Statutes that reserved mineral estates for the federal government include the Coal Lands Act of 1909 and the Stock-raising Homestead Act of 1916. LESHY, *supra* note 5, at 243–44.

⁷ See COGGINS ET AL., *supra* note 6, at 675; Mergen, *supra* note 4, at 428–29.

⁸ COGGINS ET AL., *supra* note 6, at 675.

⁹ *Id.*

¹⁰ Mergen, *supra* note 4, at 428.

¹¹ See, e.g., *Duncan Energy Co. v. U.S. Forest Serv. (Duncan II)*, 109 F.3d 497 (8th Cir. 1997); *Duncan Energy Co. v. U.S. Forest Serv. (Duncan I)*, 50 F.3d 584 (8th Cir. 1995); *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 964 F. Supp. 1125 (S.D. Tex. 1995), *aff’d on other grounds*, 112 F.3d 1283 (5th Cir. 1997); *Caire v. Fulton*, No. 84-3184, 1986 U.S. Dist. LEXIS 31049 (W.D. La. Feb. 10, 1986); *United States v. Minard Run Oil. Co (Minard Run I)*, No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Penn. Dec. 16, 1980).

¹² *Minard Run II*, 670 F.3d 236, 242 (3d Cir. 2011).

¹³ *Id.* at 245. An EIS is an environmental analysis required by the National Environmental Policy Act for “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C) (2006).

¹⁴ 670 F.3d at 254 (“Although the Service is entitled to notice from owners of these mineral rights prior to surface access, and may request and negotiate accommodation of its state-law right to due regard, its approval is not required for surface access.”).

Of the still-limited case law on the extent of federal authority over such split estates, *Minard Run II* represents a data point strongly in favor of private mineral owners: after providing the Forest Service notification of their plans, private mineral owners are not regulated by the Forest Service. Yet, as the law develops, it may not stand as an outlier. The holding in *Minard Run II* relied on an interpretation of a century-old statute permitting the United States to acquire surface land without acquiring the associated minerals, and the structure and language of the statute is not unique. Thus, though *Minard Run II* is an appellate opinion regarding forests acquired under a specific statute, its reach may go beyond the Third Circuit and national forests. If courts follow *Minard Run II*'s interpretive lead, then the Forest Service, and potentially other land management agencies, will find its regulatory authority over private mineral owners constrained. Even if the parcel is located in a national forest or other federal land, the government may have no more rights than a similarly situated private surface owner. The government, without regulatory options, will then have to rely on the common law to restrict surface access.

I. BACKGROUND

A. *The Allegheny National Forest and Minard Run I*

A map of the United States' National Forests is demonstrative of the history of the nation's forest system.¹⁵ In the West, the forests are plentiful and contiguous — large swaths of forests cover Northern California, Idaho, Colorado, and the Pacific Northwest. In the East, the map is speckled with smaller, isolated patches of forest. This dichotomy can largely be explained by how land originally became a part of the National Forests. In 1891, Congress first authorized the establishment of forest reserves, but limited designation to land already owned by the federal government.¹⁶ As a result, national forests were largely confined to the West, where abundant lands had not yet been dispensed to the public.¹⁷ If the national forests were to have a significant footprint in the East, then, the federal government would have to acquire the underlying land. It gained authority to do just that in 1911 under the Weeks Act,¹⁸ which authorized the federal government to purchase the largely depleted, privately owned forests of the East for inclusion into the

¹⁵ See U.S. FOREST SERV., DEP'T OF AGRIC., A GUIDE TO YOUR NATIONAL FORESTS AND GRASSLANDS 2 (2009) available at <http://www.fs.fed.us/maps/products/guide-national-forests09.pdf>.

¹⁶ Act of Mar. 3, 1891, § 24, 26 Stat. 1103 (repealed 1976).

¹⁷ GLEN O. ROBINSON, THE FOREST SERVICE 11 (1975).

¹⁸ Pub. L. No. 61-435, 36 Stat. 961 (codified as amended at 16 U.S.C. §§ 480, 500, 513-519, 521, 522, 563 (2006)).

National Forests.¹⁹ The Weeks Act produced the disconnected series of forests that now dot the eastern United States.²⁰

The ANF is one of the eastern forests purchased by the government pursuant to the Weeks Act. President Calvin Coolidge established the ANF in September 1923.²¹ Located in the Northwestern corner of Pennsylvania, the forest now encompasses approximately 517,000 acres.²² Like most of the eastern United States at the turn of the twentieth century, at purchase the ANF was largely logged and barren,²³ but it has since recovered to become one of the most timber-rich Appalachian forests.²⁴

Whether because the federal government wanted to maximize land purchases or because it believed that most mineral resources were already exhausted by the time of sale,²⁵ it primarily purchased only the surface rights for the land that now comprises the ANF.²⁶ As a result, ninety-three percent of the mineral rights in the ANF are still privately owned.²⁷ Approximately forty-eight percent of these privately owned minerals are “reserved.”²⁸ Reserved mineral estates were retained by the owner from whom the federal government purchased the surface, meaning the surface and minerals were separated at the time the federal government purchased the land. The other fifty-two percent of the privately owned mineral estates are “outstanding.”²⁹

¹⁹ ROBINSON, *supra* note 17, at 11.

²⁰ WILLIAM E. SHANDS & ROBERT G. HEALY, *THE LANDS NOBODY WANTED* xii, 120 (1977).

²¹ Proclamation No. 1675, *reprinted in* 43 Stat. 1925 (1923); U.S. FOREST SERV., DEP’T OF AGRIC., ALLEGHENY NATIONAL FOREST RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT AND THE LAND AND RESOURCE MANAGEMENT PLAN 7 (2007), *available at* www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5044088.pdf.

²² U.S. FOREST SERV., *supra* note 21, at ROD-5.

²³ U.S. FOREST SERV., *supra* note 21, at ROD-7 (noting that at the time of the purchase, the land making up the ANF was informally referred to as the “Allegheny Brush Patch”).

²⁴ *See* SHANDS & HEALY, *supra* note 20, at 256.

²⁵ U.S. FOREST SERV., *supra* note 21, at ROD-6; *see* U.S. FOREST SERV., DEP’T OF AGRIC., MINERAL CONSIDERATIONS IN WEEKS LAW PURCHASES AND EXCHANGES I (1972) (hereinafter U.S. FOREST SERV., CONSIDERATIONS) (explaining that the Forest Service used this rationale in many early Weeks Act acquisitions, based on “the conviction that the great majority of such mineral rights were wholly speculative in character and probably dated back to some boom or excitement long since exploded”).

²⁶ *Minard Run II*, 670 F.3d 236, 242–43 (3d Cir. 2011).

²⁷ *Id.* at 243.

²⁸ *Id.*

²⁹ *See id.* Initially, the Weeks Act made it difficult for the Forest Service to acquire surface with outstanding mineral rights attached. The original version of the Weeks Act was interpreted at the time to require the Forest Service to enter an agreement with the owner of outstanding mineral rights before the federal government could purchase the surface estate atop the minerals. The agreement was to stipulate that Department of Agriculture regulations would apply to the outstanding minerals. This was difficult, if not impossible, to execute: the owner of the surface could not enter into such an agreement, since she lacked ownership of the mineral rights, and the actual owner of the outstanding mineral rights may have been unknown, let alone unamenable to such an agreement. *See* NAT’L FOREST RESERVATION COMM’N, REPORT OF THE NATIONAL FOREST RESERVATION COMMISSION FOR THE YEAR ENDED JUNE 30, 1911, at 2–3 (1911); NAT’L FOREST RESERVATION COMM’N, REPORT OF THE NATIONAL FOREST RESERVATION COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1912, at 8 (1912). In 1913, Congress amended the Weeks Act to eliminate this requirement; the federal government could acquire surface encumbered by outstanding mineral rights without having to track down the

Outstanding mineral estates were severed from the surface estate in a transaction between two private parties at some point before the federal government purchased the surface.

These privately owned minerals, whether reserved or outstanding, hold significant value in the oil- and gas-rich ANF. In 1859, oil was discovered in the Allegheny Plateau,³⁰ and Northwestern Pennsylvania became the location of the nation's first oil well.³¹ Since then, the ANF has been the site of extensive oil and gas development and as of the 2007 ANF Forest Plan the ANF contained 8000 active wells.³² Because nearly all of the mineral rights in the ANF are privately owned, oil and gas companies have not had to reach leasing agreements with the Forest Service to carry out these operations. Instead, they have drilled pursuant to their authority as the dominant estate.

The exact extent of the mineral owners' dominance in the ANF first came under judicial scrutiny in 1980, when the U.S. District Court for the Western District of Pennsylvania decided *United States v. Minard Run Oil Co. (Minard Run I)*.³³ The United States sought a preliminary injunction to regulate the operations of Minard Run Oil Company ("Minard Run"), which owned both oil and gas interests in the ANF.³⁴ As part of a new project, Minard Run had cleared out road and pipeline accesses as well as well-site areas for fourteen wells in the ANF, providing more than five days notice to the Forest Service for only one well.³⁵

District Court Judge William W. Knox held that the Forest Service was entitled to reasonable advance notice of the mineral operations.³⁶ In order to take "appropriate action to prevent unnecessary disturbance," as Pennsylvania law requires,³⁷ Minard Run was required to provide the Forest Service at least sixty days notice before it developed new mineral operations or intensified existing ones.³⁸ This would provide the Forest Service sufficient time to market the merchantable timber cleared by such operations and allow the parties to jointly consider alternative use plans that would limit surface disturbances.³⁹ Judge Knox's decision explicitly did not depend on the fact

outstanding owner and reach an agreement on the applicability of Department of Agriculture regulations. Act of Mar. 4, 1913, 37 Stat. 855 (codified as amended at 16 U.S.C. § 518 (2006)). This left open the question of whether the outstanding mineral rights could be subject to Department of Agriculture regulations in the absence of an agreement; this Comment will in part address that question.

³⁰ 670 F.3d at 242.

³¹ U.S. FOREST SERV., *supra* note 21, ROD-6.

³² *Id.*

³³ No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980).

³⁴ *Id.* at *1.

³⁵ *Id.* at *8-9. Minard Run did not provide any notice before clearing the road and pipelines accesses and well-site areas for three of the wells. *Id.* at *9.

³⁶ *Id.* at *19.

³⁷ *Id.* at *13 (citing *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Pa. 1893)).

³⁸ *Id.* at *21-22. Among other things, the notice had to include a map showing the locations and dimensions of all planned improvements, a schedule for construction and drilling, and proof of ownership of the mineral estate. *Id.* at *11, *22.

³⁹ *Id.*

that the surface owner was the federal government.⁴⁰ “It is obvious,” Judge Knox noted, “that 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.”⁴¹ Judge Knox’s decision instead relied on his interpretation of Pennsylvania common law.⁴² He found that in Pennsylvania, mineral owners had an obligation to avoid “unnecessary impairment of surface resources,” and determined that this could only be accomplished by providing surface owners — in this case the Forest Service — with notice of the surface use plans.⁴³ Judge Knox concluded that a mineral operator was incapable of making this determination unilaterally.

For the next nearly three decades, *Minard Run I* directed the relationship between the Forest Service and mineral developers in the ANF. A “co-operative approach” developed in which mineral rights owners planning to drill gave the Forest Service at least sixty days notice, the two parties negotiated the details of the drilling plan to minimize surface use, and the Forest Service issued a Notice to Proceed (“NTP”) to confirm that it received proper notice and had no objections to the development.⁴⁴ However, *Minard Run I* did not address the legal status of any other elements of this process beyond the notice requirement, and thus left unanswered a number of questions. Did the private mineral owner have to take part in negotiations or was notice alone sufficient? What would happen if the negotiations broke off and the two parties could not agree on a course of action? What was the legal status of an NTP? The *Minard Run II* litigation that is the focus of this Comment emerged from these unanswered questions. Specifically, the case asked whether and how the National Environmental Policy Act (“NEPA”)⁴⁵ fits into this scheme. More broadly, it considered what legal duties, beyond

⁴⁰ Even when considering the public interest, as part of his decision to grant a preliminary injunction, Judge Knox did not seem to put any weight on the fact that the land was within a national forest. *Id.* at 20–21 (“The interest of the public lies in the preservation of valuable natural resources on the surface of lands from unnecessary impairment in the course of development of a mineral resource.”).

⁴¹ *Id.* at *15.

⁴² See *id.* *18–19. Judge Knox principally relied on two Pennsylvania cases. *Chartiers Block Coal Co. v. Mellon*, according to Knox, established that the mineral owner had access to as much of the surface as necessary to exercise his rights, but must show “due regard” to the surface owner. *Id.* at *18. *Gillespie v. American Zinc and Chemical Co.*, 93 A. 272 (Pa. 1915), Judge Knox said, subsequently required the mineral operator to choose the least detrimental operation plan, all other things being equal between the potential plans. *Id.* at *18–19. Consequently, Judge Knox imposed the notice requirement, because “[a] mineral operator cannot presume to be capable of adjudging without reasonable advance notice to the surface owner and therefore, unilaterally, that his operations will not unnecessarily impair the use of the surface.” *Id.* at *19.

⁴³ *Id.* at *14.

⁴⁴ *Minard Run II*, 670 F.3d 236, 244 (3d Cir. 2011); *Minard Run Oil Co. v. U.S. Forest Serv.*, No. 09-125, 2009 U.S. Dist. LEXIS 116520, at *21 (W.D. Pa. Dec. 15, 2009). In the Energy Policy Act of 1992, Congress codified the notice requirement for private oil and gas operators within the ANF. 30 U.S.C. § 226(o) (2006).

⁴⁵ 42 U.S.C. §§ 4321–4361 (2006).

notice, private mineral rights owners might owe to the Forest Service as surface owner.

B. *Minard Run II*

In November 2008, the Forest Service Employees for Environmental Ethics (“FSEEE”) and the Sierra Club sued the Forest Service, arguing that it had failed to conduct the required NEPA analysis before issuing NTPs in the ANF.⁴⁶ This suit followed a May 2007 memorandum from an attorney in the Forest Service’s Office of General Counsel that concluded that the issuance of an NTP is a “major federal action” subject to the requirements of NEPA.⁴⁷ This memorandum represented a marked change from previous Forest Service practice and pronouncements.⁴⁸

Just two days after District Court Judge Sean J. McLaughlin granted a motion to intervene by the Pennsylvania Oil and Gas Association (“POGAM”) and Allegheny Forest Alliance (“AFA”),⁴⁹ the Forest Service reached a settlement with the environmental groups, agreeing to cease issuing any additional NTPs without “the use of a categorical exclusion or the preparation of an Environmental Assessment or an Environmental Impact Statement.”⁵⁰ In a subsequent statement by the Forest Supervisor of the ANF (the “Statement”), the Forest Service announced that it would conduct a forest-wide EIS before issuing any additional NTPs.⁵¹

Concurrent with these developments, the Forest Service also had begun asserting that NTPs were mandatory before mineral rights owners could

⁴⁶ FSEEE v. U.S. Forest Serv., No. 08-323, 2009 U.S. Dist. LEXIS 40055 at * 2–3 (W.D. Pa. May 12, 2009) (denying a motion filed by the Pennsylvania Oil and Gas Association and Allegheny Forest Alliance to stay the settlement).

⁴⁷ *Minard Run II*, 670 F.3d at 245.

⁴⁸ In 1991, while testifying at an Oversight Hearing for the Subcommittee on Energy and Environment of the U.S. House Committee on Interior and Insular Affairs, ANF Supervisor David F. Wright explicitly stated that oil and gas operations in the forest did not trigger NEPA. *Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania: Oversight Hearing before the Subcomm. on Energy & the Env. of the H. Comm. on Interior and Insular Affairs*, 102nd Cong. 79 (1992) (“We must have a Federal action that really triggers for NEPA documents to kick in. And in this particular case, when a private mineral owner exercises his constitutional right, that is not really a Federal action.”). The Department of Agriculture’s Office of the General Counsel subsequently confirmed this position in a letter to the Chairman of the subcommittee. See *Minard Run II*, 2009 U.S. Dist. LEXIS 116520, at *28 (“[W]e 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. . . .”) (emphasis omitted).

⁴⁹ FSEEE v. U.S. Forest Serv., No. 08-323, 2009 U.S. Dist. LEXIS 29698 (W.D. Pa. Apr. 7, 2009) (granting a motion for leave to intervene). POGAM is a non-profit trade association of Pennsylvania’s independent oil and gas producers; the AFA is a non-profit contingent of school districts, municipalities, and business with interests affected by the ANF. *Id.* at *2.

⁵⁰ *Minard Run II*, 670 F.3d at 245. This excluded fifty-four grandfathered NTP applications. *Id.*

⁵¹ *Id.* The statement indicated that the EIS process would take until at least mid-April 2010. *Id.*

make any changes to surface land in the ANF.⁵² For example, following the Settlement Agreement and Statement, the Forest Service on several occasions instructed mineral rights owners that new drilling operations without an NTP were not permitted and could result in criminal penalties.⁵³ Thus, the Settlement Agreement and Statement collectively put a de facto moratorium on new drilling operations in the ANF; the Forest Service refused to issue any NTPs until it completed the EIS and continued to take the position that all new drilling operations required an NTP.

These developments marked the end of the “cooperative approach” that had existed in the ANF since *Minard Run I* and, unsurprisingly, did not sit well in the ANF oil and gas community. Thus began a new adversarial phase between the Forest Service and mineral owners. First, several mineral owners brought individual lawsuits challenging the Forest Service’s emboldened view of the legal status of an NTP.⁵⁴ Following the announcement of the EIS-driven moratorium on new NTPs, the POGAM, AFA, Minard Run, and the County of Warren jointly brought the suit that is the subject of this Comment. The plaintiffs sought to enjoin the Forest Service from prohibiting new oil and gas development in the ANF until it completed the EIS; they argued that the de facto drilling ban in the ANF exceeded the Forest Service’s authority under NEPA and the Administrative Procedure Act (“APA”).⁵⁵ This suit incorporated the previous individual challenges to the Forest Service’s shift in policy, because to decide the applicability of NEPA in the ANF the court needed to determine the legal status of the NTPs generally and whether private mineral developers had any obligations to the Forest Service other than providing notice. These questions had remained unanswered since *Minard Run I*.

II. THE CIRCUIT COURT’S OPINION

The plaintiffs ultimately prevailed in both the District Court for the Western District of Pennsylvania,⁵⁶ as well as the Third Circuit.⁵⁷ The Forest Service had to return to the post-*Minard Run I* framework: mineral rights owners were required to give the Forest Service sixty days notice before initiating any new development but they did not need Forest Service permission to proceed.⁵⁸ The Forest Service lacked authority to institute the mora-

⁵² *Id.* at 246. For the period preceding this policy change, according to the court, “the [Forest] Service viewed itself as a resource management agency negotiation use of jointly owned land, not as a regulatory agency issuing permits.” *Id.* at 244–45.

⁵³ *Id.* at 246.

⁵⁴ *Id.* at 249 n.6.

⁵⁵ *Id.* at 246.

⁵⁶ *Minard Run II*, No. 09-125, 2009 U.S. Dist. LEXIS 116520, at *92–93 (W.D. Pa. Dec. 15, 2009).

⁵⁷ *Minard Run II*, 670 F.3d at 242.

⁵⁸ *See id.* at 242, 254.

torium as it prepared the EIS because the issuance of an NTP did not constitute a “major federal action.”⁵⁹

Writing for a unanimous Third Circuit panel, Judge Jane Richards Roth first rejected a jurisdictional challenge brought by the Forest Service,⁶⁰ but the resolution of that administrative law issue will likely have little bearing on federal land management. The relevant portion of *Minard Run II* for the purposes of this Comment came thereafter, when the court concluded that the District Court had been correct to issue the preliminary injunction. The plaintiffs had made two claims: (1) that issuance of an NTP is not major federal action subject to NEPA; and (2) that the Settlement Agreement and Statement were substantive rules for which the APA required the Forest Service to go through notice and comment rulemaking.⁶¹ Judge Roth first examined the likelihood on success of each claim,⁶² and then, after finding such a likelihood, proceeded to determine that a preliminary injunction was appropriate.⁶³

Judge Roth spent more time examining the likelihood of success of the first claim, and that portion of her opinion is most significant to this Comment. This claim — that NEPA did not require the Forest Service to conduct an EIS before issuing additional NTPs — ultimately hinged on whether new drilling operations in the ANF needed Forest Service approval.⁶⁴ If NTPs, or some sort of Forest Service authorization, were required before new mineral development could proceed, then the issuance of an NTP would be major federal action subject to NEPA review; if NTPs were not required, then NEPA would not apply.⁶⁵ To decide the applicability of NEPA, therefore, Judge Roth had to establish the underlying legal authority of the Forest Service over private mineral rights owners.

⁵⁹ *Id.* at 254.

⁶⁰ The Forest Service had argued that there was no “final” agency action under review and that the APA therefore did not grant the District Court jurisdiction over the case. *Minard Run II*, 670 F.3d at 247–49. Section 704 of the APA provides that where review is not authorized by a substantive statute, courts can review “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704 (2006), and the Forest Service argued that the conduct contested was an intermediate step outside the court’s scope of review, *Minard Run II*, 670 F.3d at 247–48. Though the issuance of an NTP should be considered final agency action, the Forest Service argued, the Settlement Agreement and subsequent Statement, which merely committed the Forest Service to perform NEPA analysis, should not. *Id.* at 248. The Third Circuit dismissed this argument, finding that the Statement in particular constituted final agency action since it represented “the consummation of the [Forest] Service’s decision making process” and had “significant legal consequences” for the defendants. *Id.* at 247–49.

⁶¹ *Id.* at 250.

⁶² *Id.* at 250–55.

⁶³ *Id.* at 257. To get a preliminary injunction, the plaintiffs had to prove: (1) a likelihood of success on the merits; (2) that it would suffer irreparable harm should the injunction be rejected; (3) that the defendant would not suffer even more harm as a result of the injunction; and (4) that the public interest supported the injunction. *Id.* at 249–50 (citing *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)).

⁶⁴ *Id.* at 250 (citing *N.J. Dep’t of Env’tl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994)).

⁶⁵ *See id.*

The Forest Service appeared to have precedent on its side. In *Duncan Energy Co. v. United States Forest Service (Duncan I)*,⁶⁶ the U.S. Court of Appeals for the Eighth Circuit enjoined a private energy company from initiating oil operations in Custer National Forest in North Dakota without first receiving express written authorization from the Forest Service, the owner of the surface. Though the Forest Service did not have veto authority over the drilling activity, the court concluded, it did have the power to determine the reasonable use of the surface through its special use regulations.⁶⁷ In effect, the *Duncan I* court adopted the notice requirement of *Minard Run I* and supplemented it with an authorization requirement — mineral rights holders were forbidden from disturbing the surface without first getting Forest Service approval of the surface use plan. Thus, under the *Duncan I* framework, the Forest Service could argue that NTPs provided mandatory authorization and therefore constituted major federal action for which NEPA review was required.

The court dismissed this argument, and *Duncan I*, as “inapposite.”⁶⁸ First, the forestland in *Minard Run II* was located in a different state than that in *Duncan I*. Judge Roth concluded that while North Dakota law was consistent with the authority the Forest Service asserted in *Duncan I*, Pennsylvania law was “flatly inconsistent” with the authority it asserted in the ANF.⁶⁹ Just two years earlier, the Pennsylvania Supreme Court had decided a case similar to *Minard II* — one involving a split estate in which Pennsylvania owned the surface and a private party owned the minerals.⁷⁰ The Supreme Court of Pennsylvania held that the mineral owner did not need authorization from the Pennsylvania Department of Conservation and Natural Resources (“DCNR”) to proceed with drilling.⁷¹ The DCNR could impose conditions on the drilling, but it had the burden of proving that they

⁶⁶ *Duncan Energy Co. v. U.S. Forest Serv.*, 50 F.3d 584 (8th Cir. 1995).

⁶⁷ *Id.* at 589, 591–92. The Eighth Circuit clarified in a footnote:

Implicit in our conclusion that the Forest Service is authorized to determine the reasonable use of the federal surface is our assumption that the Forest Service’s inquiry must be reasonable, and thus, expeditious. Otherwise, the Forest Service’s authority could expand to “veto authority” over mineral development. The Forest Service concedes that it cannot prohibit mineral development and recognizes the mineral holder’s absolute right to develop its mineral estate.

Id. at 591 n.8.

⁶⁸ *Minard Run II*, 670 F.3d at 253.

⁶⁹ *Id.*

⁷⁰ *Belden & Blake Corp. v. Penn. Dep’t of Conservation and Natural Res.*, 969 A.2d 528, 532–533 (Pa. 2009).

⁷¹ *See id.* at 532 (“A subsurface owner’s rights cannot be diminished because the surface comes to be owned by the government, or any party with statutory obligations, regardless of their salutary nature.”).

were reasonable.⁷² To Judge Roth, this Pennsylvania precedent distinguished *Minard Run II* from the North Dakota-based *Duncan I*.⁷³

Second, and most importantly, the federal government acquired the land in *Minard Run II* under a different statute than in *Duncan I*. While the United States acquired the ANF land under the Weeks Act, it had acquired the land in *Duncan I* under the Bankhead-Jones Farm Tenant Act of 1937 (“BJFTA”).⁷⁴ Judge Roth found limiting language in the Weeks Act that precluded an extension of the *Duncan I* holding to *Minard Run II*.⁷⁵ This language played a central role in the ultimate outcome of the case. Specifically, section 9 of the Weeks Act provides 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, from their nature will, in the opinion of the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of this Act. Such rights of way, easements, and reservations 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 and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed.⁷⁶

Section 9 explicitly allows the Secretary of Agriculture to acquire split estates in which it owns the surface and a private party owns the mineral rights. However, it allows acquisition of such surface only if certain conditions are met. First, it requires that before the federal government makes such a purchase, the Secretary of Agriculture determine that the privately held mineral right will not interfere with the purposes of the Act.⁷⁷ Second, it establishes certain requirements for reserved mineral rights. As stated earlier, reserved mineral rights are those that were severed from the surface *at the time* the United States purchased the surface and outstanding mineral rights are those that were split from the surface *before* the United States

⁷² *Id.* at 532–33.

⁷³ It is questionable whether this distinction is relevant. At multiple points in the *Duncan I* opinion, the court indicated that it was applying federal law and that if state law conflicted with it, then state law did not apply. *See, e.g., Duncan I*, 50 F.3d at 588, 591 (noting that “[i]f North Dakota law is read to allow a developer unrestricted access after twenty days’ notice, North Dakota law is pre-empted or falls under choice-of-law principles”).

⁷⁴ Pub. L. No. 75-210, § 32, 50 Stat. 522, 525–526 (1937).

⁷⁵ I argue later that the BJFTA has similar limiting language that the *Duncan I* court ignored. *See infra* Part III.A.2.

⁷⁶ 16 U.S.C. § 518 (2006).

⁷⁷ The Weeks Act permits the Secretary of Agriculture to acquire land for the purposes of regulating the flow of navigable streams or timber production. *See id.* § 515.

purchased the surface. Since the second half of Section 9 is limited to “reservations retained by the owner from whom the United States receives title,”⁷⁸ the court concluded that the subsequent requirements only apply to reserved mineral rights.⁷⁹ Interpreting this portion of Section 9, Judge Roth held that reserved mineral rights could only be subject to the Department of Agriculture regulations explicitly stated in the instrument that severed the two estates. Relying heavily on *United States v. Srnsky*,⁸⁰ Judge Roth dismissed the Forest Service’s argument that the regulations in the deed could be supplemented by subsequent regulations under the rationale that this would make Section 9 superfluous and leave “no logical stopping point” for the Forest Service’s authority over reserved mineral rights.⁸¹ This limitation proved fatal to the Forest Service’s argument that reserved mineral rights holders could not proceed without its permission, since Judge Roth subsequently found that the regulations contained within the relevant ANF deeds did not require Forest Service pre-approval of surface use plans.⁸²

The court concluded that outstanding mineral rights holders similarly did not require Forest Service pre-approval because the surface land encumbered by outstanding mineral rights could only be acquired after the Secretary of Agriculture signed off, as mandated by the first half of Section 9, and this approval would be meaningless if the use could subsequently be prohibited by regulation. “This limitation,” the court held, “only makes sense if the Forest Service is bound by the terms of outstanding rights and cannot simply invoke its regulatory authority to override any private use of outstanding rights that it considers inconsistent with the purposes of the Weeks Act.”⁸³ While *Duncan I* held that the Forest Service’s special use regulations could be applied to outstanding mineral estates acquired under the BJFTA, the Third Circuit rejected an extension of this holding to outstanding mineral estates acquired under the Weeks Act.⁸⁴

Thus, *Minard Run II* held that neither reserved nor outstanding mineral rights holders needed Forest Service approval before disturbing the surface. Consequently, an NTP did not constitute major federal action.⁸⁵ The Third Circuit thus concluded that the plaintiffs were likely to succeed on their claim that NEPA did not mandate an EIS before the Forest Service issued an NTP.

⁷⁸ *Id.* § 518.

⁷⁹ *Minard Run II*, 670 F.3d 236, 251 (3d Cir. 2011).

⁸⁰ 271 F.3d 595 (4th Cir. 2011).

⁸¹ *Minard Run II*, 670 F.3d at 251-52 (quoting *Srnsky*, 271 F.3d at 604).

⁸² The ANF deeds contained the Department of Agriculture’s 1911 regulations, which “did not require mineral rights owners to obtain a permit from the [Forest] Service in order to exercise their mineral rights.” *Id.* at 243.

⁸³ *Id.* at 252.

⁸⁴ *Id.* at 254.

⁸⁵ *Id.* (“An NTP is an acknowledgment that memorializes any agreements between the [Forest] Service and a mineral rights owner, but it is not a permit. . . . [and therefore] issuance of an NTP is not a ‘major federal action’ under NEPA and an EIS need not be completed prior to issuing an NTP.”).

Judge Roth spent less time on the APA claim,⁸⁶ but again concluded that the plaintiffs were likely to succeed on the merits: both the Settlement Agreement and Statement were substantive rules that could only be promulgated following notice and comment.⁸⁷ Collectively, the two had “the purpose and effect . . . to prevent new drilling by mineral rights owners during the course of a multi-year EIS.”⁸⁸ This created new duties for the mineral rights holders that had a “substantive adverse impact” on them.⁸⁹

Judge Roth quickly went through the final three requirements for a preliminary injunction: irreparable harm, balancing of the equities, and the public interest. She agreed with the plaintiffs that the moratorium irreparably harmed the appellees because, not only did it cause temporary economic loss, but it also threatened existence of several local businesses.⁹⁰ In addition, because Pennsylvania law embraces the rule of capture,⁹¹ the moratorium could cause mineral rights owners to lose oil and gas to landowners drilling on private lands.⁹² This additional property interest, according to Judge Roth, made the finding of irreparable harm even more compelling.⁹³ Judge Roth then considered the final two elements — consideration of the public interest and balancing of the equities — simultaneously, and concluded that both pointed in the appellees’ favor.⁹⁴ A preliminary injunction would reinstate the *Minard Run I* framework, an arrangement that had concededly been effective in protecting the ANF over the past thirty years, and it would protect the public interest by aiding the local economy, protecting property rights, and guaranteeing public participation in agency rulemaking.⁹⁵ For these reasons, Judge Roth found that the appellees had met the final two elements as well. Having established the elements required for a preliminary injunction, the Third Circuit enjoined the moratorium and forced a return to the post-*Minard Run I* structure that had been in place for the previous three decades.

III. ANALYSIS

Minard Run II represents an unqualified defeat for the Forest Service. Not only did the court order the Forest Service to lift its moratorium, but it also concluded that the Forest Service lacked regulatory authority over pri-

⁸⁶ *Id.* at 254–56.

⁸⁷ *Id.* at 254–55.

⁸⁸ *Id.* at 255.

⁸⁹ *Id.* (quoting *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003)).

⁹⁰ *Id.* at 255–57.

⁹¹ The rule of capture “permits an owner to extract oil and gas even when extraction depletes a single oil or gas reservoir lying beneath adjoining lands.” *Id.* at 256 (citing *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 365 A. 801 (Pa. 1907)).

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Id.* at 256–57.

⁹⁵ *Id.* at 257. The District Court had rejected the Forest Service’s argument that a recent increase in drilling justified the change in procedure, finding that drilling is cyclical, and the Forest Service did not reintroduce this argument on appeal. *Id.*

vately held mineral rights in Weeks Act land, beyond any explicitly granted in the instrument that severed the surface and mineral estates. For reserved mineral rights, this means that the Forest Service's authority is limited to that asserted in the Department of Agriculture regulations that were in effect at the time of severance and that the Weeks Act required to be placed into the deed. For outstanding mineral rights, this means the Forest Service is at the mercy of a deed to which it was not even a party and that presumably does not mention Department of Agriculture regulations. The Forest Service is entitled to timely notice of impending mineral development, the court held, but if it is dissatisfied with the plans for that development, and the deed does not give it permitting authority, it is in the same position as any other private surface owner within a split estate: it has the common law as a backstop, but no other rights.

Minard Run II had less to do with Congress' authority to regulate private mineral estates and much more to do with Congress' apparent failure to delegate this authority to the Forest Service. In *Kleppe v. New Mexico*,⁹⁶ the Supreme Court described Congress' power over public lands under the Property Clause as "without limitations,"⁹⁷ and courts have consistently permitted federal regulation of private activity on nonfederal land affecting federal property.⁹⁸ It has been proposed that the Supreme Court has developed a kind of constitutional common law around the Property Clause, which favors the government over the private sector, national control over state and local control, and conservation over development.⁹⁹ *Minard Run II* cuts decidedly against the grain of this common law, favoring private parties over government and development over conservation.

⁹⁶ 426 U.S. 529 (1976).

⁹⁷ *Id.* at 539. The Property Clause of the U.S. Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2.

⁹⁸ *See, e.g.,* United States v. Alford, 274 U.S. 264, 267 (1927) (finding constitutional a federal statute that prohibited abandoning unextinguished fires on private lands near public forests because "Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests"); *Camfield v. United States*, 167 U.S. 518 (1897) (upholding the application of the Unlawful Enclosures Act to a fence erected entirely on private land but that enclosed certain public lands); *Minnesota v. Block*, 660 F.2d 1240, 1251 (8th Cir. 1981) (permitting federal regulation of motorized vehicle use on lands and waters not owned by the United States based on a Congressional conclusion that such use would interfere with the intended purpose of nearby public land); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (allowing Department of Agriculture permit requirements to be applied to a campsite located on state land within the boundaries Hells Canyon National Recreation Area); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977) (upholding the application of federal hunting regulations to waters located within a national park but arguably still owned by the state); *see also* COGGINS ET AL., *supra* note 6, at 173 ("A substantial line of cases affirms that the Property Clause does give Congress authority to regulate activities occurring *off* federal lands if their effects can be felt on federal lands.").

⁹⁹ John D. Leshy, *A Property Clause for the Twenty-First Century*, 75 U. COLO. L. REV. 1101, 1104-06 (2004) (citing, among other cases, *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987); *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Cameron v. United States*, 252 U.S. 450 (1920); *United States v. Midwest Oil*, 236 U.S. 459 (1915)).

Nonetheless, it is unsurprising that the Forest Service lost the case. Forest Service victory was highly unlikely, given that the Service had so dramatically changed an apparently effective thirty-year policy without any industry input. This case, though, was not one in which bad facts led to bad law. Even had the Forest Service advanced a more moderate position, perhaps making NTPs mandatory but not instituting the multi-year moratorium, the court likely would have reached the same conclusion. *Minard Run II* was based upon compelling arguments of statutory interpretation that did not rely on the extreme facts of the case.

The ANF is not the only national forest in which the Service owns the surface of a split estate and the Forest Service is not the only federal agency in such an arrangement. Therefore, it is important to place *Minard Run II* in the broader context of federally owned surface sitting atop privately owned minerals. Rather than finding fault with the Circuit Court's opinion, this Comment will consider its potential implications for the Forest Service, the NPS, and the FWS. *Minard Run II* demonstrates that acquisition statutes written many decades ago will often dictate the regulatory authority of these three agencies. Among these statutes, the Weeks Act of 1911 is not an aberration. Congress has passed other land acquisition statutes that likely should be read to similarly limit federal authority over privately owned minerals.

Finally, this Comment will conclude with a potential alternative to the interpretive approach proffered in *Minard Run II*: that courts should grant these land management agencies broader regulatory authority over outstanding mineral rights than reserved mineral rights. This might seem counterintuitive, as the owners of outstanding minerals never negotiated a transaction with the federal government, while owners of reserved mineral rights did. Yet, this interpretation might be warranted based on the inducements Congress had to provide to private parties selling land to the federal government. Where reserved mineral rights were involved, private owners selling surface land to the federal government needed assurances that the government would not overregulate their minerals. Where outstanding rights were involved, though, and a split estate already existed between two private parties, no similar assurances were necessary — the private owner transferring the surface to the federal government had no stake in the minerals. This might explain the unique structure of some of these land acquisition statutes and provide a chance for agencies partially to avoid constraints like those established in *Minard Run II*.

A. *Beyond the ANF: What Minard Run II Might Mean for the Forest Service Generally*

1. *The Impact of Minard Run II on Weeks Act Forests*

The 517,000-acre ANF is but a small portion of the forestland acquired by the United States under the Weeks Act.¹⁰⁰ There are over twenty million acres of Weeks Act forests, approximately one-third of which consisting of split estates with the federal government as surface owner.¹⁰¹ The impact *Minard Run II* will have on a specific Weeks Act split estate ultimately depends on whether the mineral rights are outstanding or reserved and when the United States acquired the surface. For outstanding mineral rights, *Minard Run II* interpreted the Weeks Act to give the Forest Service the same regulatory authority over the minerals as that of the previous surface owner, from whom it purchased the surface. The likelihood that the original deed establishing the split estate, negotiated by two private parties without Forest Service involvement, contains reference to Department of Agriculture regulations is negligible; further, it is almost as unlikely that it gives the private surface owner permitting authority over mineral use. Therefore, in almost all instances under *Minard Run II*, the owner of outstanding minerals does not need Forest Service approval before disturbing the surface.

By contrast, for reserved mineral rights, *Minard Run II*'s interpretation of the Weeks Act will not have such a uniform impact throughout Weeks Act forests. *Minard Run II* held that Forest Service regulatory authority over reserved mineral rights is limited to the regulations specified in the deed, and the Weeks Act requires that the deed contain the latest Department of Agriculture regulations. The Department of Agriculture reserved mineral regulations have been revised several times since 1911, and thus the timing of the severance is highly relevant. Since 1937, the Forest Service's regulations have required reserved mineral owners to obtain a permit from the Forest Service before using the surface for mineral extraction;¹⁰² before 1937, as the Third Circuit noted, the regulations did not.¹⁰³ Thus, the Service's authority over reserved mineral rights severed since 1937 is more expansive than its authority over the reserved mineral rights at issue in *Minard Run II*.

This authority, however, may not be as expansive as it first appears. For example, it is worth noting that even had the *Minard Run* split estate deeds included the post-1937 regulations, the court may still have reached the

¹⁰⁰ U.S. FOREST SERV., *supra* note 21, at ROD-5.

¹⁰¹ See U.S. FOREST SERV., *supra* note 25, at 1, 3. An estimated twenty percent contain outstanding minerals while thirteen percent contain reserved minerals. *Id.*

¹⁰² See 2 Fed. Reg. 135, 135-136 (Jan. 26, 1937).

¹⁰³ See *Minard Run II*, 670 F.3d 236, 243 & n.1 (3d Cir. 2011). The Department of Agriculture had acquired 15.7 million acres of land under the Weeks Act by June 1936. NAT'L FOREST RESERVATION COMM'N, REPORT OF THE NATIONAL FOREST RESERVATION COMMISSION FOR THE YEAR ENDED JUNE 30, 1936, at 4 (1937). Where this land included privately owned reserved mineral rights, the deed severing the surface and minerals would have included the 1911 Department of Agriculture regulations.

same outcome. While the Forest Service likely would have met the threshold for “major federal action” — namely that its authorization was required for the project to proceed — the court could have used the rationale of *Duncan I*,¹⁰⁴ along with the rehearing in *Duncan II*,¹⁰⁵ to strike down the lengthy moratorium as an unreasonable delay. *Duncan I* interpreted the Forest Service’s special use regulations, as applied to outstanding mineral rights on BJFTA land, as not giving the Forest Service “veto authority” over surface use plans.¹⁰⁶ The regulations required developers to get Forest Service authorization before proceeding, but the Forest Service could not reject such plans; the limited purpose of the Forest Service’s permitting authority was to determine the reasonable use of the surface as part of the mineral development.¹⁰⁷ Thus, in *Duncan II*, the court held that the processing time for such authorization “must be reasonable, expeditious, and as brief as possible.”¹⁰⁸ Anything longer and the Forest Service would come too close to exercising veto power that it lacked. The language of the special use regulations¹⁰⁹ and the post-1937 reserved mineral regulations¹¹⁰ are similar enough that a court might interpret the reserved regulations to similarly withhold “veto power” from the Forest Service. This in turn would impose the *Duncan II* time limit on surface use authorization. Thus, because the EIS-driven moratorium in *Minard Run II* was so lengthy and such a stark departure from precedent, the moratorium could have been struck down as an unreasonable permitting delay, regardless of which regulations were contained in the deed. Looking beyond the facts of *Minard Run II*, this limited interpretation of the reserved mineral rights regulations would preclude the Forest Service from ever prohibiting surface use by owners of reserved mineral rights on Weeks Act land, regardless of which iteration of the regulations are in the deed.

2. A Reconsideration of *Duncan*

Apart from the land acquired by the Forest Service pursuant to the Weeks Act, the Forest Service also manages split estates acquired pursuant to the BJFTA.¹¹¹ Most of the National Grasslands, which are administered

¹⁰⁴ *Duncan I*, 50 F.3d 584 (8th Cir. 1995).

¹⁰⁵ *Duncan II*, 109 F.3d 497 (8th Cir. 1997).

¹⁰⁶ *Duncan I*, 50 F.3d at 591 n.8.

¹⁰⁷ *Id.*

¹⁰⁸ *Duncan I*, 50 F.3d at 498, 500.

¹⁰⁹ “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.” 36 C.F.R. § 251.50(a) (2011).

¹¹⁰ “None of the lands in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for authorized programs of the Forest Service until the record owner of the reserved rights . . . shall have applied for and received a permit authorizing such use, occupancy, or disturbance . . . as may reasonably be necessary to exercise of the reserved right.” 36 C.F.R. § 251.15(a).

¹¹¹ 7 U.S.C. §§ 1010–1012, 1013a (2006).

by the Forest Service, were acquired through this Act.¹¹² The *Duncan* line of cases concerned national grasslands acquired under the BJFTA.¹¹³ In *Duncan I*, the U.S. Court of Appeals for the Eighth Circuit concluded that the Forest Service's special use regulations applied to outstanding minerals severed from surface land acquired by the federal government pursuant to the BJFTA.¹¹⁴ In *Minard Run II*, the Third Circuit held that outstanding minerals severed from surface land acquired pursuant to the Weeks Act were not subject to any Forest Service regulations.¹¹⁵ In distinguishing *Minard Run II* from the *Duncan* cases, Judge Roth emphasized that the cases concerned different land acquisition statutes.¹¹⁶

However, courts need not distinguish the Weeks Act and the BJFTA the way the *Minard Run II* court did. In fact, *Minard Run II* should prompt a reconsideration of *Duncan I* because language in the Weeks Act that was dispositive to the *Minard Run II* court is also found within the BJFTA. The *Minard Run II* opinion notes that the BJFTA "does not contain the limiting language of the Weeks Act."¹¹⁷ This interpretation ignores certain BJFTA provisions that were within the Act when the federal government acquired the land that would become the national grasslands.¹¹⁸ Under section 32(a) of the BJFTA, the Secretary could only acquire reserved and outstanding estates "which the Secretary determines will not interfere with the utilization of such property for the purposes of this title."¹¹⁹ Under the Weeks Act, the Secretary can only acquire surface encumbered by reservations that "will, in the opinion of the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of this Act."¹²⁰ In *Minard Run II*, this language restricted the Forest Service's regulatory authority; in *Duncan I*, it had no effect.

The *Duncan I* court ultimately permitted the application of the special use regulations, despite the apparently limiting language in the original BJFTA, because of a subsequent section that allowed the Secretary to "make such rules and regulations as he deems necessary to prevent trespasses and otherwise regulate the use and occupancy of property acquired . . . for the purposes of this subchapter."¹²¹ This, however, does not resolve the conflict between *Minard Run II* and *Duncan I*; a subsequent section in the Weeks Act grants similar generalized authority over the acquired land. Section 11 of the Weeks Act provides that "the lands acquired under this Act shall be

¹¹² NAT'L GRASSLANDS MGMT. REVIEW TEAM, REPORT OF THE NATIONAL GRASSLANDS MANAGEMENT REVIEW TEAM 3 (1995), reprinted in ERIC OLSON, U.S. DEP'T OF AGRIC., NATIONAL GRASSLANDS MANAGEMENT: A PRIMER app. A (1997), available at http://www.fs.fed.us/grasslands/resources/documents/primer/App_A_NG_Mgmt_Rvw_Team.pdf.

¹¹³ See *Duncan I*, 50 F.3d at 585–86 n.1.

¹¹⁴ *Id.* at 591–92.

¹¹⁵ *Minard Run II*, 670 F.3d 236, 252 (3d Cir. 2011).

¹¹⁶ *Id.* at 253.

¹¹⁷ *Id.*

¹¹⁸ See 50 Stat. 525, 525–526 (1937) (repealed 1962).

¹¹⁹ *Id.*

¹²⁰ 16 U.S.C. § 518 (2006).

¹²¹ 7 U.S.C. § 1011(f).

permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one . . . and Acts supplemental to and amendatory thereof.”¹²² The 1891 Act referenced is the Forest Reserve Act,¹²³ which permitted the President to set aside and reserve forest bearing public land.¹²⁴ It is fair to assume that the National Forest Organic Act of 1897¹²⁵ is “supplemental to and amendatory” of the 1891 Act.¹²⁶ Thus, it was likely the understanding of Congress in 1911, when it passed section 11 of the Weeks Act, that the lands acquired under that Act would be administered under the provisions of the 1897 Organic Act. Any other interpretation would implausibly deprive the Forest Service of regulatory authority over virtually all Weeks Act land.¹²⁷

The structures of the Weeks Act and BJFTA are therefore near-mirror images — a section restricting regulation of land encumbered by outstanding rights is followed by a section granting broad regulatory authority to the Forest Service over all land acquired under the respective acts. While the *Minard Run II* court argued that the restrictive section would be superfluous if the Forest Service was given broad regulatory authority over all mineral estates in Weeks Act land, the *Duncan I* court never acknowledged the language in section 32(a) of the BJFTA at all. It should have. As the *Minard Run II* court stated, “[t]his limitation [in Section 9 of the Weeks Act] only makes sense if the Service is bound by the terms of outstanding rights and cannot simply invoke its regulatory authority to override any private use of outstanding rights that it considers inconsistent with the purposes of the Weeks Act.”¹²⁸ In both the Weeks Act and BJFTA, the sections granting the

¹²² 36 Stat. 963 (1911) (current version at 16 U.S.C. § 521 (2006)).

¹²³ 16 U.S.C. § 471 (1970) (repealed 1976).

¹²⁴ See *id.*; COGGINS ET AL., *supra* note 6, at 124; James L. Huffman, *A History of Forest Policy in the United States*, 8 ENVTL. L. 239, 258–260 (1978) (discussing enactment of the Forest Reserve Act).

¹²⁵ 30 Stat. 34, 34–36 (1897) (codified as amended at 16 U.S.C. §§ 475, 478, 551 (2006)).

¹²⁶ This is substantiated by the fact that the Organic Act conferred authority to the Secretary of Interior to make rules and regulations to protect the land already acquired under the Forest Reserve Act. See 30 Stat. at 35. Further, in a 1905 Act transferring management authority over forest reserves from the Department of the Interior to the Department of Agriculture, Congress used language identical to the Weeks Act:

[T]he Secretary of the Department of Agriculture shall . . . execute or cause to be executed all laws affecting public lands heretofore or hereafter reserved under the provisions of section twenty-four . . . and Acts supplemental to or amendatory thereof. . . .

Pub. L. No. 58-33, 33 Stat. 628, 628 (1905) (codified as amended at 16 U.S.C. § 472 (2006)). Since then, the Forest Service has used the authority given to it by this Act to promulgate rules and regulations pursuant to the Organic Act, even though the 1905 Act does not explicitly mention the Organic Act.

¹²⁷ Under this implausible interpretation, the only regulations applicable to Weeks Act land would be those explicitly stated within the deeds of reserved mineral rights. In other words, the Forest Service would be seemingly unable to regulate property on which it owned both the surface and mineral estates.

¹²⁸ *Minard Run II*, 670 F.3d 236, 252 (3d Cir. 2011).

Secretary such broad regulatory authority should only be applied to estates acquired in fee, unburdened by privately held mineral rights. *Minard Run II* introduced a compelling argument not addressed in *Duncan I* that could influence future interpretations of the Forest Service's authority under the BJFTA.

3. Alternatives

The *Minard Run II* framework thus leaves the Forest Service essentially without regulatory authority over private mineral estates under Weeks Act or BJFTA lands. The only exception is for reserved mineral rights on Weeks Act land acquired after 1937, which contain regulations requiring Forest Service approval for surface use.¹²⁹ While in the past, mineral holders have made takings claims to prevent federal regulation of their mineral activity on Weeks Act land,¹³⁰ now they can use a *Minard Run II*-type argument and avoid the constitutional argument. However, the Forest Service does have two additional options to moderate surface use: it can purchase the mineral rights or it can argue that the proposed surface use for mineral access was not among the bundle of rights granted to the mineral estate owner.

Where the Forest Service wishes to regulate surface use by a private mineral rights holder, but cannot due to the limitations of the Weeks Act, it can do what it failed to do originally: buy the mineral rights. For example, the 1975 Eastern Wilderness Areas Act¹³¹ seemed to anticipate *Minard Run II* when it authorized the Secretary of Agriculture to purchase or condemn private interests in eastern wilderness areas.¹³² That Act designated sixteen wilderness areas and seventeen wilderness study areas on eastern national forest lands.¹³³ Seven of the wilderness areas and seven of the wilderness study areas contained privately owned mineral rights.¹³⁴ Congress recognized that private ownership might interfere with the purposes of the wilderness area, as it appropriated five million dollars for the purchase or condemnation of lands, waters, or interests located in lands designated as wilderness under the Act.¹³⁵ Congress theoretically could do the same for

¹²⁹ See *id.* 670 F.3d at 243 & n.1.

¹³⁰ See, e.g., *Ramex Mining Corp. v. Watt*, 753 F.2d 521 (6th Cir. 1985).

¹³¹ Pub. L. No. 93-622, 88 Stat. 2096 (1975).

¹³² The Act authorizes the Secretary of Agriculture to

acquire by purchase . . . [such lands] as he determines necessary or desirable for the purposes of this Act. . . . [or] acquire such land or interest without consent of the owner or owners whenever he finds such use to be incompatible with the management of such area as wilderness and the owner or owners manifest unwillingness, and subsequently fail, to promptly discontinue such incompatible use.

88 Stat. at 2100–01.

¹³³ See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-84-101, PRIVATE MINERAL RIGHTS COMPLICATE THE MANAGEMENT OF EASTERN WILDERNESS AREAS 2–3 (1984), available at www.gao.gov/assets/150/141961.pdf.

¹³⁴ *Id.* at 4.

¹³⁵ *Id.*

any national forest land on which private mineral rights threaten to interfere with the Forest Service's administration of the land. This could be expensive, and determination of the mineral value might in itself require disturbance of the surface.¹³⁶ Nonetheless it is an option if there is a particularly compelling reason for prohibiting surface use by private mineral owners.¹³⁷

Additionally, in rare instances, the Forest Service might be able to forbid the proposed surface use by arguing that the deed severing the surface and mineral estate did not give the mineral owner the right to engage in the proposed activity. To do so, the Forest Service must show that the proposed surface use was not intended at the time of the severance and therefore not part of the mineral right. This argument has been successfully advanced where mineral rights owners sought to strip mine¹³⁸ and quarry for limestone¹³⁹ on Weeks Act land. In both of these cases, the courts held that the parties to the mineral reservation did not intend to convey the right to totally destroy the surface and therefore the mineral rights owner did not possess that right. *Downstate Stone Co. v. United States*¹⁴⁰ suggests that this argument is always available to the Forest Service on Weeks Act land, and by implication, on BJFTA land as well. This is one instance where the first half of section 9 of the Weeks Act actually bolsters the Forest Service's position. Section 9 only permits the United States to acquire land where the reservation will "in no manner interfere with the use of the lands so encumbered, for the purposes of the Act."¹⁴¹ This implies that the acquired land must be available to the surface owner for some use. Under the presumption that limestone quarrying would totally destroy the surface, the *Downstate* court noted that, "[i]n light of the purposes of the Weeks Act [and] the fact that the grantors knew the land was being acquired under the authority of the Act . . . the original parties could not have intended to include limestone within the mineral rights reservation."¹⁴² This rationale could likely be extended to all uses destroying the surface on Weeks Act or BJFTA land.

However, this is a rarely available option for the Forest Service and is unlikely to have an effect in forests like the ANF, where the private mineral rights holders are drilling for oil or gas. There are certainly new drilling techniques being employed in such forests that did not exist when the estates

¹³⁶ See, e.g., *id.* at 8–13.

¹³⁷ As indicated by the Eastern Wilderness Areas Act, this is probably most likely to be the case in wilderness areas, where the Forest Service has much more conservationist goals than other national forest areas.

¹³⁸ *United States v. Stearns*, 816 F.2d 279 (6th Cir. 1987) (holding that a reserved mineral rights owner could not strip mine without first receiving permission from the United States, which owned the surface, because the terms of the deed, though silent on strip mining, indicated that "the parties did not contemplate that Stearns could totally destroy the surface").

¹³⁹ *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (holding that a right to quarry limestone was not included in the mineral reservation conveyed when the United States purchased the land under the Weeks Act).

¹⁴⁰ *Id.*

¹⁴¹ 16 U.S.C. § 518 (2006).

¹⁴² *Downstate Stone Co.*, 712 F.2d at 1218 (emphasizing as well that "it was common knowledge that limestone comprised part of the surface").

were split, for example hydraulic fracturing. Yet, a court is unlikely to strike down the new use, unless these novel techniques have substantial effects on the surface that were not caused by the techniques in existence at the time of conveyance. On split estates within the national forests, the Forest Service's hands are thus largely tied.

B. *Beyond the National Forests*

Thus far, this Comment has focused on *Minard Run II*'s interpretation of the Weeks Act and what that interpretation might mean for the Forest Service more generally. However, the *Minard Run II* decision may reverberate beyond the Forest Service, affecting other land management agencies — the NPS and FWS — that oversee split estates like those in the ANF. Therefore, it is important to account for how these agencies currently regulate these split estates and whether their current regimes are consistent with the decision in *Minard Run II*.

Like the Forest Service, the NPS and the FWS oversee significant acreage of land encumbered by private mineral owners.¹⁴³ The NPS estimates that approximately five million acres of land it manages contain privately owned rights, either in the form of private inholdings or privately owned minerals split from federally owned surface.¹⁴⁴ There are currently 668 nonfederal oil and gas operations in twelve National Park units, approximately eighty-four percent of which require access through federal land.¹⁴⁵ As for the FWS, an estimated 155 of 575 National Wildlife Refuges within the National Wildlife Refuge system have had oil and gas activity at some point in time, and currently 1806 active wells are spread among thirty-six of the refuges.¹⁴⁶ These two agencies have taken markedly different approaches to overseeing private oil and gas operations; the NPS has been very hands-on (and is currently trying to expand its reach through rulemaking), while the FWS has been decidedly hands-off.

1. *The Fish and Wildlife Service*

The FWS has long taken the position that it has limited regulatory authority over private mineral estates within federal refuges.¹⁴⁷ This stance

¹⁴³ Mergen, *supra* note 4, at 428–432.

¹⁴⁴ COGGINS ET AL., *supra* note 6, at 675; Mergen, *supra* note 4, at 431–432.

¹⁴⁵ *Nonfederal Oil and Gas Wells in Units of the National Park System*, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR (Mar. 2012), http://www.nature.nps.gov/geology/oil_and_gas/documents/2012-03-16%20Nonfederal%20Oil%20and%20Gas%20Wells%20in%20NPS%20Units.pdf (on file with Harvard Law School Library).

¹⁴⁶ U.S. GEN. ACCOUNTING OFFICE, GAO-03-571, NATIONAL WILDLIFE REFUGES: OPPORTUNITIES TO IMPROVE THE MANAGEMENT AND OVERSIGHT OF OIL AND GAS ACTIVITIES ON FEDERAL LANDS 3 (2003). In the twelve months preceding January 2003, these wells produced 23.7 million barrels of oil and 88,171 million cubic feet of natural gas. *Id.* at 14.

¹⁴⁷ See *id.* at 55; Zachary H. Gerson, *The Unrealized Authority of the Fish and Wildlife Service to Protect National Wildlife Refuges from Surface Disturbance Due to Private Mineral Rights*, 29 STAN. ENVTL. L.J. 181, 187 (2010) (“At present, where mineral rights are privately

stems from the Department of the Interior's interpretation of the 1929 Migratory Bird Conservation Act ("MBCA"),¹⁴⁸ which first authorized the federal government to acquire private property for inclusion in refuges.¹⁴⁹ As originally passed, the MBCA, much like the Weeks Act, permitted the Secretary of Agriculture to purchase land encumbered by rights of way, easements, or reservations.¹⁵⁰ However, unlike the Weeks Act, the MBCA originally permitted the Secretary of Agriculture to prescribe regulations "from time to time" to be applied to all reserved rights;¹⁵¹ these regulations did not have to be explicitly included in the instrument of conveyance.¹⁵² This changed in 1935, when Congress amended this section of the MBCA to look much more like section 9 of the Weeks Act by eliminating the language which generally allowed new regulations from "time to time" and instead providing that reserved mineral rights were subject only to the rules and regulations set out in the deed.¹⁵³

owned, whether outstanding or reserved, the FWS does not regulate use of the surface for mineral activities unless the deed specifically subordinates mineral activities to FWS regulation.").

¹⁴⁸ Pub. L. No. 70-770, 45 Stat. 1222 (current version at 16 U.S.C. §§ 715-715r (2006)). Both the FWS and the NPS are located in the Department of the Interior.

¹⁴⁹ The Act created the Migratory Bird Conservation Commission to review recommendations made by the Secretary of Agriculture for land purchases necessary for the conservation of migratory game birds. 16 U.S.C. § 715a (2006).

¹⁵⁰ "[T]he acquisition of such areas by the United States shall in no case be defeated because of rights of way, easements, and reservations which from their nature will in the opinion of the Secretary of Agriculture in no manner interfere with the use of the areas so encumbered for the purposes of this Act." 45 Stat. at 1223. The functions of the Secretary of Agriculture were transferred to the Secretary of the Interior in 1939. Reorganization Plan No. II of 1939, 4 Fed. Reg. 2731, reprinted in 53 Stat. 1431, 1434 (July 1, 1939).

¹⁵¹ The MBCA originally provided that

such rights of way, easements, and reservations retained by the grantor or lessor, from whom the United States receives title, shall be subject to rules and regulations prescribed from time to time by the Secretary of Agriculture . . . ; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights of way, easements, and reservations shall be subordinate to and subject to such rules and regulations.

45 Stat. at 1223. That this provision only applies to reservations "retained by the grantor or lessor" from whom the United States receives titles suggests that it does not apply to outstanding rights.

¹⁵² However, the instrument of conveyance did have to indicate that the private rights would be subject to regulation from time to time. *See id.* This suggests that at this time, Congress thought it could not regulate mineral reservations unless the deed specifically permitted it to.

¹⁵³ *See* Migratory Bird Conservation Act Amendments of 1935, Pub. L. No. 74-148, 49 Stat. 378, 381-82 (codified at 16 U.S.C. § 715e (2006)). Currently, the MBCA provides that

[s]uch rights-of-way, easements, and reservations retained by the grantor or lessor from whom the United States receives title under this subchapter or any other Act for the acquisition by the Secretary of the Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of the Interior . . . ; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time.

The language of the 1935 amendment has dictated the FWS' oversight of private mineral rights within federal refuges.¹⁵⁴ A 1986 legal opinion of the Department of the Interior interpreted the MBCA to deny FWS regulatory authority over reserved mineral rights, except when the deed explicitly provided otherwise.¹⁵⁵ The FWS Service Manual extended this position to outstanding mineral rights¹⁵⁶ and the relevant regulations do not require owners of reserved or outstanding mineral rights to obtain a permit before drilling.¹⁵⁷ *Caire v. Fulton*,¹⁵⁸ a 1986 unpublished district court opinion, reiterated the FWS's limited authority over reserved mineral rights, holding that "in the absence of any express contractual terms which subject reserved mineral interests to governmental regulation[s]" the FWS cannot regulate reserved mineral estates.¹⁵⁹ The opinion relied heavily on the 1935 MBCA amendment as well as a failed amendment to the National Wildlife Refuge System Administration Act that would have expressly permitted the Secretary of Interior to issue regulations for such surface use.¹⁶⁰

Minard Run II bolsters these interpretations of the MBCA. There is no relevant difference between section 9 of the Weeks Act and the post-1935 section e of the MBCA. Both permit acquisitions of land encumbered by private reservations only after the relevant Secretary determines that the private use will not interfere with the purposes of the act and both require that regulations pertaining to reserved mineral rights be stated within the deed.¹⁶¹ Additionally, each contain an alternative section — section 11 in the case of the Weeks Act and section i in the case of the MBCA — that grants the respective agency very broad authority over all other private acts within the acquired land, aside from those reserved by private owners.¹⁶² Thus, arguments that subsequent statutes granting broad authority to the FWS have changed the status quo can likely be defeated; without explicitly referring to

16 U.S.C. § 715e.

¹⁵⁴ See Gerson, *supra* note 147, at 186.

¹⁵⁵ Memorandum from Gale Norton, Assoc. Solicitor, Conservation and Wildlife, to the Assistant Sec'y Fish and Wildlife and Parks 3 (Dec. 22, 1986). The Norton Memorandum opined that

the view that the Service has a broad, inherent authority to require permits for entry and use of lands necessary to enjoyment of a retained mineral interest would require establishing that the Service has been given extra-common-law powers in this regard. Yet the actions of Congress in 1929 and 1935 strongly suggest that Congress did not intend such authority . . . [W]e believe that the better view is that the Service has power to require advance approval and permit issuance for entry, access or use for purposes of enjoying a reserved mineral interest only where it has reserved such power in the deed conveying the land.

Id. at 7 (footnotes omitted).

¹⁵⁶ U.S. FISH & WILDLIFE SERV., DEP'T OF THE INTERIOR, SERVICE MANUAL pt. 612, §§ 1.8(D)(3), 2.9, 3.12(A) (2012).

¹⁵⁷ See 50 CFR § 29.32 (2011).

¹⁵⁸ No. 84-3184, 1986 U.S. Dist. LEXIS 31049 (W.D. La. Feb. 10, 1986).

¹⁵⁹ *Id.* at *22.

¹⁶⁰ *Id.* at *18.

¹⁶¹ Compare 16 U.S.C. § 518 (2006), with 16 U.S.C. § 715e (2006).

¹⁶² Compare 16 U.S.C. § 520, with 16 U.S.C. § 715i.

privately owned mineral rights, these statutes do not change the division of regulatory authority established by the MBCA.¹⁶³

A court interpreting the MBCA would have an even stronger argument than the *Minard Run II* court to restrict FWS authority, since the legislative history of the 1935 Amendments indicates a clear intention to do just that. A House Report proposing an amendment to the MBCA noted that “experience has shown that some owners of very desirable areas are unwilling to convey them to the Government on such indefinite and uncertain terms as regulations made ‘from time to time.’”¹⁶⁴ The amendment was meant to give certainty to private landowners otherwise unwilling to convey surface rights to the United States.¹⁶⁵ The legislative history confirms Congress’s intent to forbid supplemental regulations from being applied to mineral rights held by private owners. Notably, the 1935 amendment applies not only to land acquired pursuant to the MBCA, but also to land acquired under “any other Act for the acquisition of areas for wildlife refuges.” Thus, this restrictive interpretation of section e of the MBCA may have significant consequences for the administration of all wildlife refuges containing acquired land.

2. *The National Park Service*

Unlike the Forest Service and FWS, the NPS has acquired land under a patchwork of statutes.¹⁶⁶ Generally, its authority to purchase land has been granted on a park-by-park basis in the individual statutes establishing each national park unit.¹⁶⁷ In 1978, pursuant to its Organic Act, the NPS promulgated service-wide regulations covering nonfederal oil and gas operations

¹⁶³ For an argument that the Norton Memorandum’s rationale is outdated and should not be followed, see generally Gerson, *supra* note 147. For an additional argument that the FWS has the authority to regulate split estates more strongly than it currently does, see Mergen, *supra* note 4, at 466–467.

¹⁶⁴ H.R. REP. NO. 74-886, at 2 (1935); see also S. Rep. No. 74-822, at 2-3 (1935) (“[S]ome owners are not willing to convey their lands to the Federal Government on the indefinite and uncertain terms as provided in regulations made ‘from time to time.’”).

¹⁶⁵ Chief Justice Burger acknowledged this in his *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), majority opinion:

The legislative history of the Migratory Bird Conservation Act confirms the importance of contractual certainty to the federal land acquisition program it authorizes. As originally enacted in 1929, the Act provided that land acquisitions might include reservations, easements, and rights of way but that these were to be subject to “such rules and regulations” as the Secretary of Agriculture might prescribe from “time to time.” This sweeping statement of the Secretary’s power to modify contract terms in favor of the Government had an unsettling effect on potential vendors; in 1935, the Act was amended to require the Secretary either to include his rules of regulations in the contract itself or to state in the contract that the reservation or easement would be subject to rules and regulations promulgated “from time to time.”

Id. at 597–598 (internal citations omitted).

¹⁶⁶ U.S. DEP’T OF THE INTERIOR & U.S. DEP’T OF AGRIC., NATIONAL LAND ACQUISITION PLAN 53–56 (2005), available at <http://www.fs.fed.us/land/staff/LWCF/Final%20DOI-USDA%20Land%20Acquisition%20Report%20to%20Congress.pdf>.

¹⁶⁷ See *id.* at 54. The NPS Organic Act itself does not authorize the acquisition of private land for inclusion in the National Park System. See 16 U.S.C. §§ 1–18f (2006).

within national parks (the “9B Regulations”).¹⁶⁸ Among other things, the 9B Regulations require operators to submit an extensive plan of operations that must be approved by the NPS before surface access is permitted. The 9B Regulations give the NPS the authority to reject a plan of operations.¹⁶⁹ These regulations do not apply to development that began before 1979 with a valid state permit or to development for which access through federally owned surface land is not required; however, the NPS is currently conducting rulemaking to eliminate these exemptions.¹⁷⁰ There are also alternative NPS regulations applicable to mineral operations not involving oil and gas.¹⁷¹

Why has the NPS taken such an expansive position of its regulatory authority over private mineral rights, while the Forest Service and FWS are left on equal footing with private surface owners? The NPS is so empowered by a combination of a broad Organic Act and underlying land acquisition statutes that do not contain restrictive language like that in the Weeks Act. The NPS Organic Act states that, “[t]he Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks.” This language has permitted the 9B regulations to be applied to private mineral development on split estates acquired pursuant to statutes that: (a) specifically authorize the regulation of privately owned minerals;¹⁷² (b) are silent with regard to the regulation of private mineral development;¹⁷³ and (c) only explicitly permit the regulation of reserved minerals.¹⁷⁴ Because these statutes do not expressly restrict NPS authority over private mineral rights, the NPS has used its authority under its Organic Act to regulate the private use. It is impossible to make a general statement about the applicability of *Minard Run II* to the national parks, because the acquisition statutes are so varied and numerous. Yet, *Minard Run II* shows that both the NPS and private mineral rights owners must not merely rely on the Organic Act to determine their respective rights; both parties must also parse the language of the relevant acquisition statute to determine whether it has any limiting language akin to that in the Weeks Act.

For the past decade-and-a-half, this parsing has occurred in litigation over the NPS’s authority to regulate private mineral rights holders located

¹⁶⁸ 36 C.F.R. §§ 9.30–9.52 (2011).

¹⁶⁹ See 36 C.F.R. § 9.37.

¹⁷⁰ See 9B Rulemaking, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, http://www.nature.nps.gov/geology/oil_and_gas/9b_index.cfm (last updated Mar. 16, 2012) (on file with the Harvard Law School Library).

¹⁷¹ 36 C.F.R. §§ 9.1–9.18.

¹⁷² See, e.g., 16 U.S.C. § 698m-4 (2006) (Big Cypress National Preserve) (“Within nine months from April 29, 1988, the Secretary shall promulgate . . . such rules and regulations governing the exploration for and development and production of non-Federal interests in oil and gas located within the boundaries of the Big Cypress National Preserve.”).

¹⁷³ See, e.g., 16 U.S.C. § 460eee (Lake Meredith National Recreation Area); 16 U.S.C. § 460ff (Cuyahoga Valley National Park).

¹⁷⁴ 16 U.S.C. § 459d-3 (Padre Island National Seashore).

within the Padre Island National Seashore (“PINS”).¹⁷⁵ Private mineral owners in the PINS brought two cases challenging the NPS’s authority to regulate: the first challenged the NPS’s power to pass the 9B regulations in the first place and, in the alternative, to apply them to outstanding mineral rights in the PINS;¹⁷⁶ the second challenged an NPS plan to close off certain areas of the seashore to any mining operations.¹⁷⁷

In the first case, *Dunn-McCampbell v. NPS (Dunn-McCampbell I)*,¹⁷⁸ both the District Court and Fifth Circuit ultimately concluded that the plaintiff’s challenges were time-barred; nevertheless, Judge Janis Graham Jack, writing for the District Court, addressed the merits and ruled for the NPS, finding statutory authority for the 9B Regulations under the NPS Organic Act.¹⁷⁹ The Organic Act, according to the Judge Jack, both authorized the NPS to pass regulations “for the purpose of preserving and protecting National Parks,” and obligated the NPS to manage parks for this purpose, unless Congress explicitly provided otherwise.¹⁸⁰ Judge Jack concluded that the NPS promulgated the 9B Regulations pursuant to this purpose and therefore the regulations fit within the bounds of NPS authority, even though they covered nonfederal interests.

To determine if the 9B regulations could be applied to the plaintiff’s outstanding mineral estate, Judge Jack examined the language of the PINS’s enabling act. The Padre Island National Seashore Act (“Padre Enabling Act”)¹⁸¹ contains a provision that explicitly permitted the Secretary to prescribe regulations for reserved mineral rights, but lacks an analogous provision for outstanding rights. Section 4(a) of the Act states that private owners can extract minerals from their reserved estates, “under such regulations as may be prescribed by [the Secretary]” with respect to such mining or removal.¹⁸² This language is notably broader than that in the Weeks Act authorizing the acquisition and regulation of reserved mineral rights. The Padre Enabling Act, however, has no language at all on the acquisition or regulation of outstanding mineral rights. Judge Jack interpreted this silence as granting the NPS the same regulatory authority over outstanding mineral

¹⁷⁵ Congress established the Padre Island National Seashore in 1962. It comprises 66 miles of the roughly 113-mile long Padre Island in Southeastern Texas — the longest natural barrier island along the Gulf of Mexico. W. DWAYNE JONES, NAT’L PARK SERV., U.S. DEP’T OF THE INTERIOR, PADRE ISLAND NATIONAL SEASHORE: AN ADMINISTRATIVE HISTORY (1999), available at http://www.cr.nps.gov/history/online_books/pais/adhit.htm.

¹⁷⁶ *Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv. (Dunn-McCampbell I)*, 964 F. Supp. 1125 (S.D. Tex. 1995), *aff’d on other grounds* 112 F.3d 1283 (5th Cir. 1997).

¹⁷⁷ *Dunn-McCampbell Royalty Interest Inc. v. Nat’l Park Serv. (Dunn-McCampbell II)*, 630 F.3d 431 (5th Cir. 2011).

¹⁷⁸ *Dunn-McCampbell I*, 964 F. Supp. at 1125.

¹⁷⁹ *Id.* at 1133. The Organic Act provides that “[t]he Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use of the parks . . . under the jurisdiction of the National Park Service.” 16 U.S.C. § 3.

¹⁸⁰ 964 F. Supp. at 1133.

¹⁸¹ Pub. L. No. 87-712, 76 Stat. 650 (1962) (codified at 16 U.S.C. §§ 459d to 459d-7).

¹⁸² 16 U.S.C. § 459d-3(b).

rights as reserved mineral rights.¹⁸³ There did not need to be a section conferring regulatory authority over outstanding rights, according to Judge Jack, because “Congress had already vested the NPS with authority to regulate Plaintiffs’ mineral estate” in the NPS Organic Act.¹⁸⁴

Here, *Dunn-McCampbell I* and *Minard Run II* directly conflict. *Minard Run II* interpreted section 9 of the Weeks Act to restrict regulatory authority over reserved mineral rights in part because the section would have been superfluous otherwise. Yet, the *Dunn-McCampbell I* decision implicitly admits that section 4(a) of the Padre Enabling Act, which permits regulations of reserved mineral rights, is superfluous. If the NPS Organic Act already conferred authority to regulate both reserved and outstanding mineral rights, then why did the Padre Enabling Act include a section covering reserved mineral rights? The 1913 amendment to the Weeks Act, which permitted the Forest Service to acquire surface with outstanding minerals attached, was enacted to fill in a statutory gap very similar to this one; the court in *Dunn-McCampbell I* filled the gap itself. Nonetheless, the outcome in *Dunn-McCampbell I* is likely justified. The NPS regulations have been applied to nonfederal oil and gas development in national parks without any provision within their enabling acts that specifically authorize the regulation of privately owned minerals.¹⁸⁵ It would therefore be odd to limit NPS authority in the PINS merely because the Padre Enabling Act happened to provide specific authorization for the regulation of reserved minerals.

Almost fifteen years later, the same plaintiffs again sued the NPS in like-named *Dunn-McCampbell v. NPS (Dunn-McCampbell II)*,¹⁸⁶ arguing that certain aspects of the 2001 PINS Oil and Gas Management Plan exceeded NPS authority. Specifically, the plaintiffs challenged the Plan’s regulation of Sensitive Resource Areas (“SRAs”).¹⁸⁷ The Plan called for a variety of operation restrictions in the SRAs that would in turn prohibit any surface use on 7.6% of the park.¹⁸⁸ The plaintiffs argued that the NPS could not categorically restrict a private mineral rights owner’s surface access, and Judge John D. Rainey, writing for the District Court for the Southern District of Texas, agreed.¹⁸⁹ A three-judge panel of the Fifth Circuit reversed. While

¹⁸³ *Dunn-McCampbell I*, 964 F.Supp. at 1135 (“It is not . . . that in order to be *included* under the federal regulatory scheme, Congress must have expressly enumerated Plaintiffs’ mineral estate in the Padre Enabling Act. Instead, in order to be *excluded* from the reach of federal regulation, Congress must have ‘directly and specifically provided’ for such exemption.” (quoting 16 U.S.C. §1a-1 (1978)) (emphasis in original)).

¹⁸⁴ *Id.*

¹⁸⁵ See *Nonfederal Oil and Gas Wells in Units of the National Park System*, *supra* note 145 (demonstrating the application of 9B Regulations in Lake Meredith National Recreation Area and Cuyahoga Valley National Park). Note that some enabling acts fall on the other side of the spectrum, specifically authorizing regulation of all nonfederal mineral rights. See, e.g., 16 U.S.C. §§ 698m et seq. (Big Cypress National Preserve).

¹⁸⁶ *Dunn-McCampbell II*, 630 F.3d 431 (5th Cir. 2011).

¹⁸⁷ *Id.* at 434.

¹⁸⁸ *Id.*

¹⁸⁹ *Dunn-McCampbell II*, No. V-06-59, 2008 WL 4450312, at *17 (S.D. Tex. Sept. 30, 2008).

leaving the door open for owners of reserved mineral estates, the Fifth Circuit concluded that owners of outstanding mineral rights did not have a guaranteed right of access to the surface. The outcome in *Dunn-McCampbell II* depended on the court's interpretation of the Texas Consent Statute,¹⁹⁰ which Texas' legislature had passed immediately after Congress approved the Padre Enabling Act at issue in *Dunn-McCampbell I*. This statute gave the United States permission to acquire both state-owned and privately owned surface estates within the park boundaries, under certain conditions.¹⁹¹ The Plaintiffs argued that the Texas Consent Statute conditioned the federal acquisition of state-owned and privately owned surface estates on the continuous accessibility of the surface by private mineral rights owners.¹⁹² Two sections of the Texas Consent Statute arguably restricted NPS regulation of the plaintiff's land.¹⁹³ Section 3, which authorized the United States to acquire Texas-owned land, stated that "the Secretary of the Interior shall permit a reservation by the grantor of all oil, gas, and other minerals . . . the right of occupation and use of so much of the surface of the land or waters as may be required for the purposes of reasonable development of oil, gas, and other minerals" ¹⁹⁴ Section 6, which authorized the U.S. acquisition of privately owned land, conditioned that "[t]he acquisition of lands in such area shall not deprive the grantor or successor in title of the right of ingress and egress for the purpose of exploring for, developing, processing, storing and transporting minerals from beneath said lands and waters" ¹⁹⁵ Assuming the Texas Consent Statute was binding on the NPS, as the court did, these sections indisputably restrict NPS regulation of the PINS surface estate. However, according to the court, these restrictions do not apply to *outstanding* mineral rights holders. The court found the text unambiguous and therefore rejected use of legislative history to determine if the state legislature meant for this result. Each section explicitly applies to "the grantor or successor in title," which, according to the court, is only meant to apply to reserved mineral rights holders, who therefore are entitled to access that outstanding mineral rights holders are not.

At first glance, the different outcomes of *Dunn-McCampbell I* and *II* might seem anomalous. In the first case, where the text permitted regulations on reserved mineral rights, but was silent with regards to outstanding mineral rights, the court permitted the extension of the regulations to outstanding rights. In the second case, where the text clearly restricted regulation of reserved minerals, but was silent on outstanding minerals, the court did not find this omission determinative. In one case, the court interpreted

¹⁹⁰ *Dunn-McCampbell II*, 630 F.3d. at app. I, 443-46 (quoting TEX. REV. CIV. STAT. ANN. art. 6077t (West 1970) (repealed 1975)).

¹⁹¹ *Id.* at 433-34.

¹⁹² *Id.* at 434-35.

¹⁹³ *Id.* at 437.

¹⁹⁴ *Id.* at app. I, 445 (quoting TEX. REV. CIV. STAT. ANN. art. 6077t at § 3 (West 1970) (repealed 1975)).

¹⁹⁵ *Id.* at app. I, 465 (quoting TEX. REV. CIV. STAT. ANN. art. 6077t at § 6 (West 1970) (repealed 1975)).

silence to indicate inclusion and in the other, the court interpreted silence to indicate exclusion. The one constant between the two cases is that outstanding mineral rights holders came out for the worse; where it was ambiguous whether the outstanding minerals should be subjected to NPS regulations, the court decided they should be.

C. *An Alternative Interpretative Approach*

It is not entirely surprising that the one constant between *Dunn-McCampbell I* and *II* is that the statutory language was interpreted to the detriment of outstanding mineral rights holders. As the legislative history of the MBCA demonstrated, a likely motivating factor of legislators drafting acquisition statutes was to induce owners to sell their surface rights. This may have been the situation at the PINS as well. Where grantors of the surface to the United States still had an ownership stake in the minerals at the time of sale, they wanted some assurance that federal government would not over-regulate their mineral rights. Where the mineral rights were outstanding at the time of sale, though, grantors did not care how the federal government planned to regulate surface access.

With this in mind, the *Minard Run II* court may have been able to interpret the Weeks Act to give the Forest Service more expansive power over outstanding mineral rights than it did. On its face, the Weeks Act seems to grant the Forest Service more extensive regulatory authority over reserved mineral rights than outstanding rights. The statute requires that the reserved mineral rights be subject to the rules and regulations of the Department of Agriculture. There is no similar requirement for outstanding mineral rights; the only requirement is that the outstanding reservation not interfere with the purposes of the Act. It is possible, though, that by requiring rules and regulations to be included in the instrument for the reserved right, Congress may have in fact intended to *limit* the Forest Service's regulatory authority over reserved mineral rights compared to outstanding rights. It intended to provide certainty to reserved mineral rights holders who might not have otherwise conveyed their land to the United States. Maybe, then, the *Minard Run II* court should have given the Forest Service authority over Weeks Act outstanding estates akin to that granted in *Duncan I* for BJFTA outstanding estates: where surface-use plans first have to be approved by the Forest Service, but the Forest Service lacks veto power. This still would leave substance to the first half of section 9 of the Weeks Act because the Forest Service's control over use would be limited; the only way the Forest Service could veto a surface plan would be not to acquire the surface estate in the first place.

CONCLUSION

In 1991, the House's Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs held a hearing on oil and gas operations in the ANF.¹⁹⁶ Pennsylvania Representative Peter H. Kostmayer, Chairman of the Subcommittee, began with a harsh assessment of the oil and gas operations in the ANF and the Forest Service's regulation of them:

Because oil and gas development in the Allegheny National Forest has been weakly regulated, streams that used to support the native trout are now choked with silt. The fish themselves are inedible from pollution in some cases. Spills of toxic brine water, which may contain carcinogenic compounds and heavy metals dissolved from the oil, have killed trees in parts of the forest. Uncounted acres of the forest floor have been disturbed by road building, rock pits, and the dumping of debris and hazardous materials.¹⁹⁷

The Forest Service was Kostmayer's obvious scapegoat. "The Forest Service's attitude that it is a 'land manager' rather than a regulatory enforcement authority is wrong," Kostmayer stated. "[P]roof of the Forest Service's effectiveness as a land manager should lie not in its extensive paperwork but in the roads, trails, and streams within the Allegheny."¹⁹⁸ When ANF Forest Supervisor David J. Wright pushed back on Kostmayer's insistence that the Forest Service had unused regulatory authority over oil and gas operations in the ANF, the representative found it hard to believe. "[Y]ou have a funny view of the law," Kostmayer responded, "I do not know whether you are wrong or right, but I do not know what is the point of having the Forest Service there at all."¹⁹⁹

In the words of Representative Kostmayer, there are a series of "funny" laws that govern split estates where private owners hold the mineral rights and the federal land management agencies control the surface. In many instances, these old laws are in tension with the other statutory mandates that have been directed towards these agencies. The land acquisition statutes of the Forest Service, the NPS, and the FWS, largely written many decades ago and often meant to entice land sales, can lead to the exact result Kostmayer could not seem to grasp: depending on the precise language of these acquisition statutes, it is possible that the federal government as surface owner will be treated no differently than a private citizen. This is the outcome of *Minard Run II*.

¹⁹⁶ *Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania, Oversight Hearing Before the Subcomm. on Energy & the Env't. of the H. Comm. on Interior & Insular Affairs*, 102d Cong. 80 (1991) (Statement of Rep. Kostmayer, Chairman, Subcomm. on Energy & the Env't.).

¹⁹⁷ *Id.* at 1.

¹⁹⁸ *Id.* at 2.

¹⁹⁹ *Id.* at 76.

If *Minard Run II*'s rationale is persuasive in other circuits, the Forest Surface will not have authority to regulate any oil and gas operations on split estates acquired under the Weeks Act before 1937. Of the land acquired after that, *Minard Run II* only permits the Forest Service to regulate operations by reserved mineral rights holders. The United States made this choice at the start of the twentieth century, when it decided to buy as much eastern forestland surface as it could, at a low price, by excluding minerals from the purchases. It also made this choice in 1935, when it amended the MBCA to entice owners of land in potential wildlife refuges to sell their surface estates to the United States. As a result of these "funny" laws, federal land management agencies may often be at the mercy of state common law. Frequently, their only recourse will be litigation as the subservient estate. And federal regulation may not be an option.