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Drilling for Split Estate Clarity: The Impact of Minard Run Oil Company v. United States Forest Service

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DRILLING FOR SPLIT ESTATE CLARITY: THE IMPACT OF *MINARD RUN OIL COMPANY V. UNITED STATES FOREST SERVICE*

I. Introduction

Although split estates have existed in the United States for more than a century, conflicts between owners of surface estates and owners of subsurface mineral estates continue to result.[1] Of such conflicts, those where the federal government is the owner of the surface estate but a private party owns the mineral estate can be particularly problematic.[2] The federal government created four primary agencies to manage the millions of acres in its possession, one of which is the United States Forest Service (USFS).[3] The

1. *See* Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 Land & Water L. Rev. 419, 425, 428-29 (1998) (discussing history of private mineral estates beneath federal surface estates). Individuals or governments create split estates when a tract of land is severed into surface and subsurface estates, and the surface rights and subsurface mineral rights are owned by separate parties. *Id.* at 419-20. The notion of split estates differs from traditional common law land ownership in that an owner of a tract of land no longer controls the tract "from the heavens to the center of the earth." *Id.* at 420.

2. *See id.* at 428-29 (describing various complications that may arise depending on which federal agency is responsible for surface management). Split estate disputes between the federal government and private parties are significant because the lands involved often possess important environmental qualities. *Id.* at 421. Further, gas and oil development and mining can adversely impact the ecosystem, including plant and wildlife species, living on the federal government's surface estate. *Id.* Split estate conflicts can also trigger debates over whether the federal or state governments should manage public lands. *Id.* In such disputes on federal lands, state law protecting natural resources, absent preemption by constitutional federal legislation, generally applies. Mergen, *supra* note 1, at 421-22. Additionally, split estate disputes between the federal government and mineral rights owners often raise questions regarding the government's ability to regulate mineral development while avoiding difficult Takings Clause issues. *Id.* at 422.

3. *Id.* at 429 (listing four federal agencies responsible for managing federal lands). The other three agencies responsible for managing federal lands are the Bureau of Land Management, the National Park Service, and the Fish and Wildlife Service. *Id.* Of the four, the Bureau of Land Management is responsible for the largest amount of land, totaling roughly 272 million acres. *Id.* The USFS is responsible for the second largest amount of land, with roughly 191 million acres under its control. *Id.* The Fish and Wildlife Service manages the third largest amount of land with roughly 91 million acres, 84% of which is in Alaska, and the National Park Service manages the least amount of land at only around 77 million acres. *Id.* The USFS notes the purpose of the national forests is "to improve the forest, provide favorable conditions for water flows, and furnish a continuous supply of wood to meet people's needs." *Allegheny National Forest - Home*, U.S.Dep't of Agric. Forest Serv., http://www.fs.usda.gov/detail/allegheny/home/?cid=stelprdb5043684 (last visited Apr. 18, 2013) (describing purposes and uses of ANF and USFS). As a result, the USFS manages seedlings to ensure the sustainability of the

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USFS, which is part of the Department of Agriculture, acquired the bulk of its land through the Weeks Act of 1911 and the Bankhead-Jones Farm Tenant Act of 1937.[4] When the USFS acquired this land, it purchased only the surface rights because private owners elected to reserve control of the subsurface mineral rights.[5]

Among the land the USFS acquired through the Weeks Act is the Allegheny National Forest (ANF), located in northwestern Pennsylvania.[6] The ANF resides atop part of the Marcellus Shale, a natural gas formation located in the northeastern United States that is considered one of the largest natural gas formations in the country.[7] With recent advances in gas drilling technology, drilling companies have begun aggressively purchasing the mineral rights

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forests and protects watersheds to safeguard the water supply for fisheries. *Id.* Through its initiatives, the USFS attempts to preserve wood products, protect wildlife habitats, ensure watershed protection, and provide outdoor recreational environments for enjoyment by present and future Americans. *Id.*

4. Mergen, *supra* note 1, at 430 (discussing how USFS acquired most of its land). The USFS's primary purpose for land acquisition under the Weeks Act was forestry and watershed protection. *Id.* In contrast, the USFS generally acquired land under the Bankhead-Jones Farm Tenant Act for the conservationist purposes of reforestation, protection of watersheds, and protection of public lands. *Id.*

5. *Id.* (describing policy behind split estates for land acquired under Weeks Act and Bankhead-Jones Farm Tenant Act).

6. *See* Minard Run Oil Co. v. United States Forest Serv. (*Minard Run II*), 670 F.3d 236, 242 (3d Cir. 2011) (detailing Secretary's acquisition of ANF); *see also* *Pennsylvania Regions*, WILDERNET, http://www.wildernet.com/pages/area.cfm?areaID=PAREG&CU_ID=1 (last visited Feb. 25, 2013) (illustrating ANF's location). The ANF spans roughly 513,000 acres and consists of more than 600 miles of trails. *Allegheny National Forest Area, Pennsylvania*, WILDERNET, http://www.wildernet.com/pages/area.cfm?areaID=PAARAL&CU_ID=1 (last visited Feb. 25, 2013). The USFS currently manages the ANF for purposes of maintaining its present uses, which include: "hunting, fishing, swimming, hiking, camping, cross-country skiing, snowmobiling, boating, mountain biking, ATV riding, group camping and environmental education." *Id.*

7. *See Marcellus Shale - Marcellus Shale Map – Natural Gas Field PA*, OILSHALEGAS.COM, http://oilshalegas.com/marcellusshale.html (last visited Feb. 25, 2013) [hereinafter *OilShaleGas*] (describing Marcellus Shale natural gas discovery). The Marcellus Shale spans across the northeastern portion of the United States and extends through Pennsylvania, New York, Ohio, and West Virginia. *See id.* In 2002, experts estimated the shale holds more than 1.9 trillion cubic feet of natural gas. *Id.* Initial reports of the large natural gas deposit did not generate much excitement, however, because of the minimal amount of gas drillers could actually extract and the low price of natural gas. *Id.* Several years later, a new survey by Terry Englander, a Pennsylvania State University geoscience professor, and Gary Lash, a State University of New York at Fredonia geology professor, revealed upwards of 500 trillion cubic feet of natural gas in the Marcellus Shale. *Id.* Of the 500 trillion cubic feet, experts estimate 50 trillion cubic feet is accessible using new technologies that improve drilling techniques. *OilShaleGas*, *supra* note 7. Additionally, as a result of higher natural gas prices, the estimated value of the Marcellus Shale increased, thus increasing the likelihood drillers will pursue operations in the Marcellus Shale. *Id.*

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to the Marcellus Shale natural gas beneath the ANF.[8] Between 2005 and 2011, oil and gas companies drilled 3,845 wells in the ANF, including fifteen Marcellus Shale gas wells since 2009.[9] Despite so many recent purchases and so much recent drilling, only a small number of disputes between surface owners and mineral owners have reached the courts, though this likely will change given the increased production anticipated in the Marcellus Shale and ANF.[10]

The United States Court of Appeals for the Third Circuit answered questions that may arise in future ANF and Marcellus Shale litigation in *Minard Run Oil Co. v. United States Forest Service* (*Minard Run II*).[11] In *Minard Run II*, ANF mineral rights owners and related businesses sought a preliminary injunction against the USFS to prevent it from implementing a moratorium on new drilling operations.[12] The suit arose because the federal government, which only

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8. *Id.* (explaining advances in gas drilling technology causing companies to "go on a gigantic land mineral rights land grab"). The technological advances in drilling led to a new drilling method called horizontal drilling, or fracking, which requires the drilling company to first drill vertically to the level of the gas reserve and then drill horizontally. *Id.* In carrying out this process, the company uses large amounts of fresh water combined with sand, and blasts the shale to create a fracture. *Id.* The company then pumps out and stores the contaminated water. *Id.* Recently, however, the Pennsylvania Department of Environmental Protection discovered that fracking may threaten the local environment and Pennsylvania's water resources. *Id.*

9. Sara Scoville-Weaver, *U.S. National Forests No Match for Drilling Boom*, SKYTRUTH (Nov. 2, 2011, 3:28 PM), http://blog.skytruth.org/2011/11/us-national-forests-no-match-for.html (documenting number and location of oil and gas wells drilled between 2005 and 2011).

10. Kevin C. Abbott & Nicolle R. Snyder Bagnell, *Recent Decisions Affecting the Development of the Marcellus Shale in Pennsylvania*, 72 U. PITT. L. REV. 661, 682 (Summer 2011) (discussing minimal number of split estate cases involving ANF and Marcellus Shale and likelihood of future disputes). Anticipated to impact these future disputes is the fact that since the late nineteenth century, Pennsylvania courts have remained dedicated to allowing mineral rights owners to use as much of the surface as is "reasonably necessary" to enjoy their rights. *Id.* at 679. In using the land reasonably, mineral rights owners must exercise their rights in such a way as to prevent unnecessarily disturbing the surface estate owner. *Id.* (citing United States v. Minard Run Oil Co. (*Minard Run I*), No. 80–129, 1980 U.S. Dist. LEXIS 9570, at *13-14 (W.D. Pa. Dec. 16, 1980)). Further, although companies anticipate increasing drilling operations in the Marcellus Shale regions, they will not do so unless they find it profitable. *See OilShaleGas*, *supra* note 7 (analyzing how natural gas cost impacts drilling company operations). For example, in 2012, drilling companies reduced the number of active Marcellus Shale operations due to low natural gas prices. *See id.* Natural gas prices have since risen, however, and experts expect drilling companies to increase the number of active wells as a result. *See id.*

11. *See Minard Run II*, 670 F.3d at 242 (analyzing split estate dispute involving federally owned ANF lands and privately owned mineral rights); *see also* Abbott & Bagnell, *supra* note 10, at 680-81 (discussing *Minard Run II* holding).

12. *Minard Run II*, 670 F.3d at 242 (describing underlying facts leading to mineral rights owners' claim). The plaintiffs in *Minard Run II* included the Penn-

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owns the surface rights to the national forest, attempted to regulate the surface in a manner that would prevent the private mineral rights owners from accessing their subsurface property.[13] The case arrived in the Third Circuit after the USFS appealed the United States District Court for the Western District of Pennsylvania's decision granting the mineral rights owners a preliminary injunction.[14]

One of the two primary issues in *Minard Run II* was whether the USFS's actions qualified as final agency action, which would grant the Third Circuit jurisdiction over the matter.[15] The second issue was whether the mineral rights owners could obtain a preliminary injunction on the USFS's moratorium by showing: (1) they were likely to succeed on the merits; (2) an irreparable harm would result if the court failed to grant the injunction; and (3) a balance of the equities and the public interest.[16] The Third Circuit ultimately affirmed the district court's decision, holding the USFS's moratorium constituted final agency action and the plaintiffs had satisfied the requirements for obtaining a preliminary injunction.[17]

This Note examines the Third Circuit's analysis of a split estate dispute in which the surface owner is the federal government and the mineral rights owner is a private party.[18] Part II of this Note discusses the underlying factual context giving rise to *Minard Run II*.[19] Part III examines the legislative actions resulting in split federal and private estates, as well as judicial precedent regarding such

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sylvania Independent Oil and Gas Association, the Allegheny Forest Alliance, the Minard Run Oil Company, and the County of Warren, Pennsylvania. *Id.* at 246. In addition to the USFS, other named defendants include three USFS officers, the Pennsylvania Attorney General, the Forest Service Employees for Environmental Ethics, the Sierra Club, and the Allegheny Defense Fund. *Id.*

13. *Id.* at 242 (explaining private ownership of mineral rights beneath federal land).

14. Minard Run Oil Co. v. United States Forest Serv. (*Minard Run WD*), CA No. 09-125 Erie, 2009 WL 4937785, at *1, 34 (W.D. Pa. Dec. 15, 2009) (granting preliminary injunction).

15. *Minard Run II*, 670 F.3d at 247-49 (affirming district court's decision).

16. *Id.* at 249-57 (discussing preliminary injunction issues). Although the traditional test for granting preliminary injunctions analyzes the balance among equities and whether the injunction benefits the public interest separately, the district court and the Third Circuit analyzed the last two prongs together because the Government was the party opposing the injunction. *Id.* at 256.

17. *Id.* at 257 (affirming district court's decision to grant preliminary injunction).

18. For a narrative analysis of the Third Circuit's decision in *Minard Run II*, see *infra* notes 106-156 and accompanying text. For a critical analysis of the decision, see *infra* notes 157-193 and accompanying text. For an examination of the potential impact *Minard Run II* will have on subsequent disputes, see *infra* notes 194-233 and accompanying text.

19. For a discussion of the relevant facts in *Minard Run II*, see *infra* notes 24-48 and accompanying text.

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conflicts.[20] Part IV of this Note describes the legal analysis the Third Circuit employed in reaching its holding.[21] Part V compares the Third Circuit's rationale to that in prior decisions from other circuit courts and other Pennsylvania courts.[22] Finally, Part VI concludes this Note by examining the potential impact *Minard Run II* may have on future split estate issues and on ANF and Marcellus Shale drilling.[23]

II. FACTS

Since 1980, ANF mineral rights owners have been entitled to reasonable use of the surface above their mineral estates for oil and gas drilling.[24] Mineral rights owners and the USFS functioned in a cooperative manner under the reasonable use policy, which required mineral rights owners to provide the USFS with notice of their drilling plans sixty days in advance.[25] After receiving notice, the USFS would issue a Notice to Proceed (NTP) to the mineral owners.[26] These NTPs solidified any agreements between the mineral owner and the USFS regarding the ensuing drilling operations.[27] The USFS would also occasionally conduct an Environmental Assessment (EA), an environmental analysis less ambitious than a full Environmental Impact Statement (EIS), when issuing NTPs for particular drilling operations.[28] The USFS typi-

20. For discussion of relevant background material concerning split estates between private parties and the federal government, as well as jurisprudential approaches to such matters, see *infra* notes 49-105 and accompanying text.

21. For a narrative analysis of the Third Circuit's decision in *Minard Run II*, see *infra* notes 106-156 and accompanying text.

22. For a critical analysis of the Third Circuit's holding in *Minard Run II*, see *infra* notes 157-193 and accompanying text.

23. For an examination of the potential impact *Minard Run II*, see *infra* notes 194-233 and accompanying text.

24. *Minard Run II*, 670 F.3d 236, 242-44 (3d Cir. 2011) (detailing prior practices of ANF mineral rights holders).

25. *Id.* at 244 (explaining notice procedures between mineral rights owners and USFS).

26. *Id.* (discussing process by which mineral rights owners acquire NTPs from USFS).

27. *Id.* (describing NTPs as USFS's means of recognizing drilling operation agreements between USFS and mineral rights owners).

28. *Id.* (explaining additional processes USFS occasionally undertakes when issuing NTPs to mineral rights owners); *see also* Howard Geneslaw, *Cleanup of National Priorities List Sites, Functional Equivalence and the NEPA Environmental Impact Statement*, 10 J. LAND USE & ENVTL. L. 127, 130-33 (Fall 1994) (describing additional EA requirement). Agencies typically conduct an EA prior to an EIS to determine whether an EIS is necessary. *Id.* at 130-31. Upon completion, an EA will include information regarding the project's potential environmental effects and whether any alternatives exist. *Id.* at 131. If the EA indicates a project could have an adverse effect on the environment, the agency will then prepare an EIS. *Id.*

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cally completed the EAs promptly and within the requisite sixty-day framework.[29]

Despite using the same procedure for more than twenty years, the USFS reached a settlement agreement with environmental groups in 2009 that caused the USFS to alter its NTP policy.[30] The agreement resulted in the USFS ceasing to issue NTPs to mineral rights owners until the USFS performed a multi-year, forest-wide EIS under the National Environmental Policy Act (NEPA).[31] Prior to this settlement, however, the USFS successfully completed two EISs in 1986 and 2007 without suspending NTP issuances.[32] Leanne Marten, the ANF Forest Supervisor, released a statement (Marten Statement) explaining the settlement and indicating the USFS would not process any pending or future proposals until the forest-wide EIS was completed.[33] Consequently, aside from fifty-four NTPs grandfathered into the settlement agreement, the USFS would not authorize any new ANF drilling until completing the forest-wide EIS.[34]

While implementing these policy changes, the USFS also informed mineral rights owners of the serious consequences that might result if the owners attempted to make any changes to ANF

For a further discussion of NEPA environmental analyses, see *infra* note 126 and accompanying text.

29. *See Minard Run II*, 670 F.3d at 244 (providing typical timeframe for conducting EAs).

30. *Id.* at 242, 244-45 (detailing background regarding USFS settlement with Forest Service Employees for Environmental Ethics and Sierra Club). The Forest Service Employees for Environmental Ethics and the Sierra Club's suit against the USFS arose from the two organizations seeking a declaration from the USFS indicating that its practice of issuing NTPs without a prior environmental analysis was contrary to NEPA. *Id.* at 245. The two organizations also sought to enjoin USFS from issuance of further NTPs. *Id.* As a result of the pending litigation, the USFS ceased processing and issuing NTPs. *Id.* The parties eventually reached a settlement in which the USFS would "undertake appropriate NEPA analysis prior to issuing [NTPs] . . . for oil and gas projects on split estates including both reserved and outstanding mineral interests," and that the appropriate NEPA analysis would consist of an EA or an Environmental Impact Assessment. *Id.*

31. *Id.* at 242, 245 (describing the USFS's policy change); *see also* National Environmental Policy Act, 42 U.S.C. § 4332(C) (2006) (detailing NEPA EIS requirements). NEPA also requires federal agencies to conduct an EIS prior to taking "'major federal actions significantly affecting the quality of the human environment.'" *Minard Run II*, 670 F.3d at 244 (quoting 42 U.S.C. § 4332(C)). Further, the USFS made an exception for 54 NTPs, which the USFS could grant under the settlement agreement. *Id.* at 245.

32. *Minard Run II*, 670 F.3d at 244 (noting USFS's prior EIS procedure).

33. *Id.* at 245 (quoting Marten Statement). The Marten Statement reads, in part, that "'[a]ll . . . pending oil and gas proposals, and all future proposals, will be processed after the appropriate level of environmental analysis has been conducted under the NEPA.'" *Id.*

34. *Id.* (explaining settlement's effects).

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land without obtaining an NTP.[35] For example, the USFS sent one mineral rights owner a letter indicating that the owner needed the USFS's express written approval before entering the National Forest System lands to remove timber.[36] To ensure the owner would seek approval, the USFS letter directed the mineral rights owner to statutes imposing criminal penalties on those who fail to abide by USFS regulations.[37] The USFS also warned other owners and contractors that new drilling operations proceeding without an NTP could also result in criminal penalties.[38] Despite these warnings, however, the USFS did not adopt a rule imposing such penalties.[39]

The *Minard Run II* plaintiffs, who included mineral rights owners and affected private parties, filed for a preliminary injunction, alleging that as a result of the settlement agreement with environmental groups, the USFS imposed a de facto drilling ban in the ANF until the completion of the forest-wide EIS.[40] The plaintiffs maintained that the ban exceeded the USFS's authority and was contrary to NEPA and the Administrative Procedure Act (APA) because the issuance of a mere NTP did not require a full EIS and because the USFS failed to provide the requisite notice and comment period before imposing the drilling ban.[41] The plaintiffs also alleged the USFS's estimated EIS completion date was unrealistic.[42] Lastly, the plaintiffs argued the moratorium prevented mineral rights owners from exercising their property rights.[43]

35. *Id.* at 246 (detailing USFS's warnings to mineral rights owners).

36. *Id.* (describing contents of USFS's letter to mineral rights owner regarding making changes to ANF land).

37. *Minard Run II*, 670 F.3d at 246 (noting USFS's letter to mineral rights owner mentioned potential criminal liability).

38. *Id.* (explaining other warnings USFS gave to mineral rights owners).

39. *Id.* (detailing USFS's failure to change policy upon issuing warnings to mineral rights owners). Further, despite the USFS's failure to adopt a rule outlining the potential consequences mineral rights owners could face for attempting to access their land, the agency asserted that new drilling without an NTP may result in civil enforcement actions or criminal penalties. *Id.*

40. *Id.* at 242, 246 (summarizing plaintiffs' complaint regarding USFS's moratorium on drilling).

41. *Id.* at 246 (explaining APA aspect of plaintiffs' complaint). For further discussion regarding the Third Circuit's analysis of the NEPA and APA aspects of the plaintiffs' complaint, see *infra* notes 123-143 and accompanying text.

42. *Minard Run II*, 670 F.3d at 246 (describing plaintiffs' complaint allegations concerning time required for forest-wide EIS). The USFS's anticipated completion date for the forest-wide EIS was roughly one year after it issued the drilling moratorium. *See id.* Former Forest Rangers testifying for the plaintiffs, however, estimated that the forest-wide EIS would likely require several years to complete. *Id.*

43. *Id.* (noting imposition on owner's property rights could harm owners, related businesses, and local communities). To further their position, the plaintiffs presented the testimony of affected business owners who could no longer drill new

The USFS responded by contending that an increase in the number of NTP applications hindered forest management because the USFS could not give the NTP applications the necessary individualized attention they require.[44] The USFS also argued oil and gas drilling diminished the ANF's natural beauty.[45] Finally, the USFS alleged that the United States District Court for the Western District of Pennsylvania lacked jurisdiction because there had been no final agency action susceptible to judicial review, as required by the APA.[46]

Ultimately, both the United States District Court for the Western District of Pennsylvania and the Third Circuit concluded the USFS's moratorium on new drilling in the ANF constituted final agency action for purposes of the APA.[47] The circuit court held the district court correctly issued the injunction because: (1) the plaintiffs were likely to succeed on the merits; (2) the USFS's moratorium would cause irreparable harm to the mineral rights owners; and (3) the district court appropriately balanced the equities with the public interest.[48]

III. BACKGROUND

The promulgation of several federal statutes during the past century has led to the creation of many split estates in which the

wells. *Id.* The business owners testified that this ban on new wells harmed the community due to the significant losses to their businesses. *Id.* The plaintiffs also presented Forest Rangers to describe the USFS's historical NTP and EIS practices and to testify on the estimated completion time of a forest-wide EIS. *Id.*

44. *Id.* (outlining USFS's arguments). USFS's two witnesses included ANF Forest Supervisor Leanne Marten and Forest Ranger Richard Scardina. *Id.* The two witnesses testified that a forest-wide EIS was necessary prior to approving additional NTPs because the USFS's previous policy of assessing each NTP individually impeded forest management. *Id.* This impaired management resulted in the building of "duplicative roads . . . for adjoining pieces of land, and unnecessary clearing of the forest." *Id.*

45. *Id.* (describing environmental defendants' arguments). In addition to the USFS witnesses, the environmental defendants presented two members of local environmental groups claiming that oil and gas drilling impaired the natural beauty of the forest. *Id.* The plaintiffs disputed this testimony and offered rebuttal witnesses. *Id.*

46. *Id.* at 247-48 (discussing "final agency action" requirement for courts to exercise judicial review). "Final agency action" occurs when an agency's actions mark the end of its decision-making process and when legal consequences will follow for third-parties that do not abide by the agency's actions. *Id.* (citing TSG Inc. v. EPA, 538 F.3d 264, 267 (3d Cir. 2008)).

47. *Minard Run II*, 670 F.3d at 247-49 (concluding "final agency action" existed for jurisdiction purposes).

48. *See id.* at 249-57 (explaining rationale for upholding district court's injunction award).

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government owns the surface rights to a particular plot of land and a private party owns the subsurface rights to that land.[49] One of these statutes, the Weeks Act, allows the USFS to acquire surface estates for the federal government.[50] Despite the federal nature of the Weeks Act and similar statutes, state law, rather than federal law, governs the ability of mineral rights owners to utilize surface land to access their subsurface estates.[51] Still, the Weeks Act and similar federal statutes grant the federal government varying amounts of authority to regulate surface use, as each contains different provisions regarding split estates.[52]

A. Statutory Enactments Creating ANF and Split Estates

During the nineteenth century, private landowners owned all of the land that now comprises the ANF.[53] In 1897, Congress passed the Organic Act, which authorized the Secretary of Agriculture (the Secretary) to regulate the occupancy and use of lands designated as federal forest reservations by the President of the United States.[54] In 1911, Congress passed the Weeks Act to set aside funds for the Secretary to purchase private land to become federal forest reservations.[55] In the subsequent years, the Secretary purchased

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49. *See* Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893) (holding owner of mineral estate has right to go upon surface to reach estate below). In accessing their land, however, the mineral rights owner may only go upon the surface "as might be necessary to operate his [or her] estate." *Id.* Further, as the Pennsylvania Supreme Court noted, the right must be exercised with "due regard" to the owner of the surface estate. *Id.*; *see also* Mergen, *supra* note 1, at 430-33 (discussing history of split estate creation and caution resulting from Weeks Act and Bankhead-Jones Farm Tenant Act); Abbott & Bagnel, *supra* note 10, at 681 (detailing Pennsylvania law in which subsurface owner's must exercise their rights reasonably).

50. Aaron Shultz Heishman, *Recent Developments in Environmental Law*, 23 TUL. ENVTL. L.J. 561, 585 (Summer 2010) [hereinafter *Recent Developments*] (describing Congress's authorization to purchase land through 1911 Weeks Act). Due to the federal government's policy to generally not purchase mineral rights, private parties own the vast majority of minerals residing beneath the more than 500,000 acre ANF. *Id.*

51. *Minard Run II*, 670 F.3d at 243, 253 (stating Pennsylvania law controlled in *Minard Run II*).

52. *See id.* at 253 (noting different federal statutes permit differing types and degrees of federal land use regulation).

53. *Id.* at 242 (detailing history of ownership rights in ANF).

54. Organic Act, 16 U.S.C. § 475 (2006) (granting federal government limited surface rights purchasing power). The Organic Act, however, applied only to land already owned by the federal government or acquired for other purposes. *See Minard Run II*, 670 F.3d at 242. The Act did not authorize the purchase of land to establish federal reservations. *Id.*

55. Weeks Act, 16 U.S.C. § 518 (2006) (granting federal government funds to purchase surface rights for forest preservation); *Minard Run II*, 670 F.3d at 242 (discussing congressional framework for government surface estate acquisitions).

large tracts of Pennsylvania surface estates that President Calvin Coolidge eventually designated as the Allegheny National Forest in 1923.[56] Despite this federal purchase of the ANF surface, private parties retained much of the subsurface rights and currently own 93% of ANF mineral estates.[57]

The rights ANF mineral estate owners possess are either reserved or outstanding.[58] Reserved rights are those that the estate owner retains upon conveyance of surface ownership to the United States.[59] If conveyance of these surface rights occurred under the Weeks Act, an owner's exercise of reserved rights is subject to rules and regulations promulgated by the Secretary, which are included in the conveyance instrument.[60] Outstanding rights, in contrast, are those that the owner severs from the surface estate prior to conveyance to the United States, and these rights are governed by state property law and the terms of the earlier conveyance that severed the mineral rights from the surface estate.[61]

B. The Ability to Access Mineral Estates in Pennsylvania

Although the mineral rights at issue in *Minard Run II* pertain to land located within a federally owned national forest, the applicable law is Pennsylvania state law, not federal law.[62] The Penn-

56. *Minard Run II*, 670 F.3d at 242 (describing purchase of ANF). Before purchasing land in a state, the Weeks Act requires the Secretary to obtain that state's consent. *Id.*

57. *Id.* at 243 (discussing ownership rights of minerals beneath ANF).

58. *Id.* (describing classifications of mineral rights).

59. *Id.* (defining reserved rights). Parties referring to reserved rights generally do so by referencing the year of regulation promulgation in effect at the time of the government's acquisition. *Id.* Thus, in *Minard Run II*, the majority of the reserved rights in the ANF are 1911 rights. *Id.* The 1911 regulations "generally required mineral rights owners to use no more of the surface than reasonably necessary, pay for any timber cut down when clearing space for wells, take appropriate measures to prevent fire, and remove all facilities or refuse when drilling operations cease." *Id.* Further, the 1911 regulations did not mandate the mineral rights owner obtain a permit from the USFS before exercising those rights. *Id.*

60. *Id.* at 243 (discussing restrictions on reserved rights holders); *see also* 16 U.S.C. § 518 (stating requirements for Secretary to acquire surface estates on behalf of United States). Further, all regulations prescribed by the Secretary "shall be expressed in and made part of the written instrument conveying title to the lands to the United States." *Id.*

61. *Minard Run II*, 670 F.3d at 243 (discussing choice of law for outstanding rights). Congress amended the Weeks Act in 1913 to permit the purchase of surface estates with outstanding mineral rights so long as the acquisition of the mineral rights would not hinder the workings of the forest reservation. *Id.* The USFS did not attempt to apply its regulations to mineral rights owners until the institution of the drilling moratorium. *Id.* at 243-44.

62. *Id.* at 243-44 (describing Pennsylvania mineral estate law and relevant cases); *see also* Mergen, *supra* note 1, at 433 (discussing efforts by courts and state

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sylvania Supreme Court outlined the rules governing mineral rights owners' ability to access their mineral estates in Pennsylvania in the seminal case *Belden & Black Corp. v. Dep't of Conservation and Natural Res.*[63] In *Belden*, the plaintiff, Belden and Black Corporation, owned or leased oil and natural gas estates on several parcels of property in a Pennsylvania state park.[64] In 2004 and 2005, Belden and Black notified the defendant, the Department of Conservation and Natural Resources (DCNR), that the company was in the preliminary stages of gas well development on its parcels and provided the DCNR with copies of permit applications.[65] Belden and Black also posted bond with the Department of Environmental Protection pursuant to Pennsylvania's Oil and Gas Act.[66] After Belden and Black submitted the required documents, however, the DCNR imposed a coordination agreement requiring the company to pay substantial fees prior to accessing the land.[67]

Belden and Black proceeded to file a petition for review in the Commonwealth Court, wherein it sought an injunction to prevent the DCNR from further interference with its rights.[68] The Com-

legislatures to further define rights of surface and mineral rights owners). One of the approaches adopted by states is the "accommodation doctrine," which generally "requires the mineral owner to act with prudence and to have due regard for the interests of the surface owner in exercising its right to use the surface to explore for and extract minerals." *Id.* Other approaches, such as that reflected in the surface damage statute adopted in North Dakota, seek to move from traditional common law mineral estate dominance toward greater protections for surface estates. *Id.* at 433-34.

63. Belden & Black Corp. v. Dep't of Conservation and Natural Res., 969 A.2d 528, 532 (Pa. 2009) (recognizing state law governs mineral rights owners' ability to access surface land to exercise their subsurface mineral rights).

64. *Id.* at 529 (holding DCNR could not restrict owner of oil and gas rights from entering parcels containing drill wells). The plaintiff in the case was Belden & Blake, an owner of oil and natural gas estates in Oil Creek State Park, and the defendant was the DCNR. *Id.*

65. *Id.* (describing plaintiff's notification). The plaintiff notified the defendant about development on two of the parcels in December, 2004, and informed the defendant of development on the third parcel in March, 2005. *Id.* The plaintiff also supplied maps documenting proposed access routes and well sites. *Id.*

66. *Id.* (detailing plaintiff's compliance with the Oil and Gas Act); *see also* Oil and Gas Act, 58 PA. CONS. STAT. ANN. § 3225(a)(1) (2012) (describing bond filing requirement for well sites).

67. *Belden*, 969 A.2d at 529 (describing coordination agreement terms). The fees included a $10,000 performance bond per well and stumpage fees for the removal of timber. *Id.* The stumpage fees charged to the plaintiffs totaled $74,885 – double the fair market value. *Id.*

68. *Id.* at 529-30 (noting plaintiff's claims). The plaintiff's claimed, among other things, that it acquired an implied easement with a right to access the parcels when it purchased the oil and gas estates. *Id.* at 529. Further, due to acknowledging the good faith limitation on the easement with respect to reasonable use, the plaintiff notified the defendants months in advance of its plan to exercise its rights and also met with the defendants to discuss the best methods for preserving the

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monwealth Court granted the company's motion, holding that Belden and Black had a right to enter its land and that the DCNR had no power to condition the company's exercise of that right.[69] The DCNR subsequently appealed.[70]

On appeal, the Pennsylvania Supreme Court noted that an owner's mineral rights are not diminished simply because the government owns the surface rights to that land.[71] If a mineral rights owner wishes to access their property, however, the surface owner may seek to impose conditions for use of the surface.[72] In the event the parties fail to reach an agreement on the reasonableness of surface-use conditions, the surface owner must seek redress in a judicial forum.[73] The Pennsylvania Supreme Court, upholding the Commonwealth Court's decision, concluded the mineral estate is the dominant estate and that a mineral rights owner has the right to go upon the surface and use the surface as necessary to operate their estate.[74]

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surface. *Id.* In response to plaintiff's claims, the defendants argued they were authorized to regulate the surface use of a state park as trustees for public resources. *Id.* at 530.

69. *Id.* at 530 (providing procedural history and case holding). The court also concluded the plaintiff had a duty to exercise its rights with "due regard" to the defendants' rights as surface owners. *Id.*

70. *Id.* at 531 (noting defendant's appeal).

71. *Id.* at 532 (detailing rights retained by mineral rights owners). Further, a surface owner cannot unilaterally impose additional regulations on mineral rights owners unless the regulations are reasonable. *Id.* at 532-33. As a surface owner, the government and its agencies are held to the same standards as any other surface owner. *Id.*

72. *Belden*, 969 A.2d at 533 (discussing surface owner's ability to impose conditions on land use).

73. *Id.* (comparing rights of surface owner to those of subsurface owner). Any regulations the surface owner attempts to impose cannot be done unilaterally and cannot be done without compensation. *Id.* The compensation to the mineral rights owner would be for the diminution of the mineral owner's rights. *Id.*

74. *Id.* at 532-33 (affirming Commonwealth Court's decision); *see also* Martin L. Wade, *Belden & Blake Corp. v. Department of Conservation & Natural Resources: Guarding the Right of Private Companies to Enter Public Land to Access Subsurface Mineral Rights*, 20 WIDENER L.J. 477, 480 (2011) (discussing how *Belden* affected split estate drilling disputes). By requiring the DCNR and other similar organizations to prove a drilling operation's unreasonableness, the Pennsylvania Supreme Court effectively promoted "a policy of encouraging activities that generate jobs and revenue." *Id.* Among the possible long-term effects of the court's decision in *Belden* are increased costs to the state because state agencies will be required to sue for relief instead of imposing restrictions. *Id.* at 480-81. *Belden* may also shift power from the executive branch to the judiciary to determine whether drilling is reasonable. *Id.* This power shift could have a negative effect because courts likely will not be as competent as the DCNR with respect to evaluating the impact of drilling operations. *Id.* at 494. Additionally, drilling companies may be less likely to make improvements to reduce their environmental impact because the burden of proving unreasonableness is on the DCNR. Wade, *supra* note 74, at 493-94. The deci-

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Still, years before the Pennsylvania Supreme Court handed down its decision in *Belden*, a federal district court articulated the limits of a mineral rights owner's ability to use a surface estate in *United States v. Minard Run Oil Co.* (*Minard Run I*).[75] In *Minard Run I*, plaintiff USFS brought suit when defendant Minard Run Oil Company began operating on the USFS's surface estates without prior notice.[76] Minard Run's construction operations also devastated the surface land.[77] These issues led the USFS to file for a preliminary injunction in the District Court for the Western District of Pennsylvania to regulate Minard Run's operations.[78]

In analyzing the USFS's claim, the court began by noting that the two parties must exercise "due regard" for the rights of the other and that while a mineral rights owner has an "unquestioned right" to enter upon the property, the mineral owner must avoid unnecessarily disturbing the surface.[79] The district court also noted the federal government does not have greater rights than any other landowner in a similar circumstance simply by virtue of being the federal government.[80] The court stressed the importance of the USFS's ownership of the surface resources, particularly the USFS's right to realize the benefits of its timber, and held that a mineral rights owner must provide reasonable notice no less than sixty days in advance of its operations so that the surface owner, at a minimum, can market its surface resources.[81] *Minard Run I* had a sub-

sion in *Belden*, however, represents a continuation of the Pennsylvania courts' position favoring private property rights over the preservation of federal public lands, a position that began in 1893. *Id.* at 494-95. Further, this position holds true regardless of whether the surface estates contain "beautiful landscapes, majestic forests, and sparkling mountain streams." *Id.*

75. *Minard Run I*, No. 80–129, 1980 U.S. Dist. LEXIS 9570, at *14-15, *22 (W.D. Pa. Dec. 16, 1980) (holding that "due regard" to USFS required mineral rights owners to inform USFS of drilling plans no less than 60 days before beginning drilling operations).

76. *Id.* at *1 (describing defendant's failure to notify Allegheny National Forest Administration of oil and gas operations).

77. *Id.* (detailing destruction defendants caused). The devastation to the surface resulted from logging roads across the terrain to access the sites of proposed wells. *Id.*

78. *Id.* (describing case issues). The complaint filed by the plaintiffs was for a declaratory judgment, injunctive relief, and damages. *Id.*

79. *Id.* at *13 (discussing Pennsylvania jurisprudence regarding rights of mineral owners and surface owners). The Pennsylvania Western District court relied on Pennsylvania precedent from *Chartiers*. *Id.* (citing Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (Pa. 1893)).

80. *Minard Run I*, 1980 U.S. Dist. LEXIS 9570, at *14-15 (noting United States does not have greater landowning rights than private parties).

81. *Id.* at *18-22 (detailing surface owner's entitlement to surface resources and analyzing elements of notice mineral rights owners must provide). Further, the defendant's notice must include a designated field representative, a map show-

stantial impact on mineral operations in the ANF, as exemplified by the incorporation of the sixty-day notice provision into the USFS's 1984 ANF Handbook of standard operating procedures.[82] Congress further codified the *Minard Run I* ANF notice provisions in the Energy Policy Act of 1992.[83]

C. Interpreting the Weeks Act

The United States Court of Appeals for the Fourth Circuit narrowed the USFS's authority to regulate the National Forest System through the Weeks Act and the Organic Act in *United States v. Srnsky*.[84] In *Srnsky*, landowners in West Virginia conveyed more than seven hundred acres of land, which later became the Monongahela National Forest, to the United States while expressly reserving an interior tract for themselves.[85] Despite this reservation, the deed conveying the land did not expressly reserve the owners' right of access to a road that was the only means of accessing the interior tract.[86] New landowners who had subsequently purchased the interior tract from the original landowners then attempted to use the road to access their home.[87] In response, the USFS brought an action to compel the new landowners to apply for a special use permit

ing the location and dimensions of all improvements, a plan of operations, a plan for erosion and sedimentation control, and proof of ownership. *Id.*

82. *See Minard Run II*, 670 F.3d 236, 244 (3d Cir. 2011) (describing how *Minard Run I* affected ANF Handbook). The 1984 ANF Handbook also indicates that outstanding mineral rights "*are not* subject to any of the [Secretary's] rules and regulations." *Id.* at 244 n.2 (emphasis in original).

83. *See* Energy Policy Act, 30 U.S.C. § 226(o) (2005) (codifying *Minard Run I*'s notice provisions but applying them only to ANF); *Minard Run II*, 670 F.3d at 244 (describing effects of *Minard Run I* and Congress's codification of its notice provisions).

84. *See* United States v. Srnsky, 271 F.3d 595, 598-601 (4th Cir. 2001) (discussing impact Organic Act might have on common law easements on land acquired under Weeks Act). In *Srnsky*, the Fourth Circuit held the Organic and Weeks Acts do not preempt implied easements in national forests. *Id.* at 605.

85. *Id.* at 598 (detailing USFS's acquisition of national forest lands). The total amount of land conveyed to the United States was roughly 742.5 acres and the interior tract was roughly 6.8 acres. *Id.*; *see also Monongahela National Forest - Home*, U.S. DEP'T OF AGRIC. FOREST SERV., http://www.fs.usda.gov/main/mnf/home (last visited Feb. 26, 2013) (providing general information about Monongahela National Forest). The Monongahela National Forest spans roughly one million acres and receives roughly 1.3 million visitors per year. *Monongahela National Forest – Recreation*, U.S. DEP'T OF AGRIC. FOREST SERV., http://www.fs.usda.gov/recmain/mnf/recreation (last visited Feb. 26, 2013). Among the forest's purposes are that it provides visitors with an opportunity for outdoor recreational activities and produces timber, water, and minerals. *Id.*

86. *Srnsky*, 271 F.3d at 598 (describing provisions in instrument of conveyance).

87. *Id.* at 598, 604 (explaining how conflict arose between defendants and USFS and importance of road to defendants). The plaintiffs and the defendants

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to use the road because of its concerns that the landowners' use of the road could negatively affect the forest and an endangered plant species.[88]

In its analysis in *Srnsky*, the Fourth Circuit emphasized that the United States purchased the land that became the Monongahela National Forest through the Weeks Act.[89] When considering the Act's controlling language, the court held that any regulations the Secretary wished to impose on reservations must be expressly written into the instrument of conveyance.[90] The court then stated, however, that the Weeks Act does not preempt implied reservations.[91] Consequently, due to fears that the USFS's position had no "logical stopping point," the Fourth Circuit declined to accept the USFS's position that its regulatory authority under the Organic Act allowed it to override all easements on the National Forest System.[92] The court further noted that its decision comports with Supreme Court precedent requiring courts to interpret statutes in such a way so as to avoid a Fifth Amendment Takings Clause analysis.[93]

disagreed about whether the road existed at the time the original owner conveyed the land to the United States. *Id.* at 598.

88. *Id.* at 598 (discussing USFS's initiation of action against defendants). Prior to bringing the action to compel, the USFS first requested that the plaintiffs apply for a special use permit to continue using the road. *Id.*

89. *Id.* at 600 (describing statute USFS used to acquiring disputed land). As a result of using the Weeks Act to purchase the land and because the land surrounding the interior tract was privately owned, the Fourth Circuit concluded the Organic Act does not apply to the dispute, nor to other lands acquired under the Weeks Act. *Id.*

90. *Id.* at 601-02 (explaining Weeks Act provision requiring Secretary to explicitly state any restrictions in instrument of conveyance); *see also* Weeks Act, 16 U.S.C. § 518 (1911) (detailing authority Weeks Act grants to Secretary). The Weeks Act, in granting land acquisition authority to the Secretary, expressly states that any rules or regulations applicable to the acquired land "shall be expressed in and made part of the written instrument conveying title to the lands to the United States." *Id.*

91. *Srnsky*, 271 F.3d at 601-02 (noting Weeks Act requires Secretary to expressly list all transaction regulations in conveyance instrument).

92. *Id.* at 604 (describing implications of following USFS's Weeks Act interpretation). The Fourth Circuit reached this conclusion because the government's argument did not limit itself to only implied easements. *Id.* As a result, the court was "reluctant to read such a result into an ambiguous statute." *Id.*

93. *Id.* (discussing Supreme Court's reluctance to confront Takings Clause issues). Further, as stated by the Supreme Court, "'we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the' takings clause." United States v. Sec. Indus. Bank, 459 U.S. 70, 82 (1982) (internal citation omitted).

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D. Split Estates Resulting from the Bankhead-Jones Farm Tenant Act

The United States Court of Appeals for the Eighth Circuit addressed the complications arising from the issuance of NTPs in *Duncan Energy Co. v. United States Forest Service* (*Duncan I*).[94] The Eighth Circuit held that mineral rights owners must obtain USFS authorization prior to commencing mining operations on lands the United States acquired through the Bankhead-Jones Farm Tenant Act, which authorized the federal government to acquire and manage certain lands.[95] In *Duncan I*, the plaintiff drilling company submitted surface use plans to the USFS, which was the defendant, for permission to begin drilling.[96] The drilling company repeatedly contacted the USFS regarding the status of the authorization because it needed to commence drilling quickly to avoid a liquidated damages clause in its contract with the mineral rights owner.[97] The USFS then informed the drilling company that it planned to conduct an environmental survey regarding the new road the company sought to build to facilitate its drilling.[98] Nevertheless, the drilling company began operations shortly thereafter without obtaining the necessary USFS approval.[99]

In analyzing the issues raised in *Duncan I*, the Eighth Circuit noted the mineral rights owner had a state law right to reasonable use of the surface estate.[100] The court further stated, however, that the USFS's "special use" regulations authorized the agency to determine whether a mineral owner's proposed surface use is reasona-

94. Duncan Energy Co. v. United States Forest Serv. (*Duncan I*), 50 F.3d 584, 585-86 (8th Cir. 1995) (analyzing split estate issues involving federal land purchased under the Bankhead-Jones Farm Tenant Act).

95. *Duncan I*, 50 F.3d at 589 (noting USFS must approve all designated special uses); Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010 (1937) (granting Secretary authority to manage land conservation and utilization). To carry out the Bankhead-Jones Farm Tenant Act's objectives, the Act also authorizes the Secretary to make rules necessary for conserving and utilizing acquired lands. *Id.*

96. *Duncan I*, 50 F.3d at 586 (describing contractor's submitted plan and USFS's subsequent environmental analysis of well and access route). According to a previous memorandum of understanding, the USFS was to process surface use plans within ten working days of receipt. *Id.*

97. *Id.* (detailing contractor's attempts to send letters and contact to USFS to obtain approval to begin drilling).

98. *Id.* at 586-87 (explaining USFS wanted to conduct environmental survey because revised access route varied two-tenths of mile from original, staked route).

99. *Id.* at 587 (noting drilling company began operations absent USFS approval).

100. *Id.* at 589 (noting USFS does not have "veto authority" over mineral development).

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ble.[101] As a result, while protecting the rights of mineral rights owners, the Eighth Circuit also expanded surface owners' right to regulate the use of their land by upholding their ability to determine whether a mineral rights owner's proposed surface usage is reasonable, provided the surface owner does so in a reasonable time.[102]

Relying heavily on the favorable USFS decision in *Duncan I*, the USFS's Office of General Counsel issued a memorandum stating that the issuance of an NTP in the ANF is a "major federal action" subject to time-consuming NEPA environmental analyses.[103] Despite this memorandum, the USFS did not immediately change its NTP issuance policies, leading the Forest Service Employees for Environmental Ethics (FSEEE) and the Sierra Club to seek an injunction against USFS issuances of further NTPs in the ANF without NEPA analyses.[104] The USFS, FSEEE, and the Sierra Club reached a settlement, later memorialized in the Marten Statement, in which the USFS agreed to perform a NEPA analysis prior to issuing additional NTPs.[105]

IV. NARRATIVE ANALYSIS

The Third Circuit began its review in *Minard Run II* by analyzing whether the district court had jurisdiction over the matter, which required a determination of whether the USFS's Marten

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101. *Duncan I*, 50 F.3d at 591 (stating agency must be given deference and latitude in adapting rules and policies). Further, agencies must be able to adapt their rules to meet changing circumstances. *Id.*

102. *See id.* at 591 n.8 (concluding USFS must make determinations within reasonable periods of time); Duncan Energy Co. v. United States Forest Serv. (*Duncan II*), 109 F.3d 497, 499 (8th Cir. 1997) (clarifying *Duncan I* by stating 60-day limit is not inflexible). The Eighth Circuit derived the 60-day limit from the USFS's representation in *Duncan I* that surface plan approval generally required two months. *Duncan II*, 109 F.3d at 499-500. Further, the reasonableness of processing time can be longer or shorter than the 60-day recommendation if circumstances so require. *Id.* at 500. The Eighth Circuit also left open the possibility of revisiting the processing time standard if USFS exhibited a pattern of unwarranted delay. *Id.*

103. *Minard Run II*, 670 F.3d 236, 245 (3d Cir. 2011) (describing memorandum's broader interpretation of USFS's authority than that adopted in *Minard Run I*). The memorandum cited the decision in *Minard Run I* only once and did not discuss the decision in detail. *Id.*

104. *See* Forest Serv. Emps. for Envtl. Ethics v. United States Forest Serv., Civil Action No. 08–323 Erie, 2009 WL 1324154, at *1 (W.D. Pa. May 12, 2009) (describing plaintiffs' position). The plaintiffs also sought a declaration from the USFS stating that its practice of issuing NTPs without conducting a NEPA environmental analysis was contrary to law. *Id.*

105. *Minard Run II*, 670 F.3d at 245 (detailing settlement agreement). Further, excepted from the settlement agreement were 54 NTPs, all of which were grandfathered in. *Id.*

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Statement amounted to "final agency action."[106] The court then explored whether the plaintiffs satisfied the requisite elements to warrant awarding a preliminary injunction.[107]

A. Determining Jurisdiction Through "Final Agency Action"

For a court to have jurisdiction over an agency's action, the action must be considered "final agency action," which occurs when the agency's action satisfies two conditions.[108] First, the action must be the "consummation of the agency's decision-making process."[109] Second, the action must be one from which legal consequences would follow.[110] In applying the "final agency action" test to the Marten Statement in *Minard Run II*, the Third Circuit began by noting USFS determinations made prior to actions such as the completion of an EIS or the issuance of an NTP could constitute "final agency actions."[111] Regarding the consummation element of final agency action, the court stated that an agency's determination of a particular issue represents the consummation of the agency's decision-making process if the agency will not reconsider the issue in

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106. For further discussion of the Third Circuit's analysis of whether the district court had jurisdiction over the matter due to "final agency action," see *infra* notes 108-117 and accompanying text.

107. *Minard Run II*, 670 F.3d at 249-57 (explaining rationale for upholding district court's injunction). Preliminary injunctions require plaintiffs to show the following elements: (1) a likelihood of success on the merits; (2) irreparable harm to the plaintiffs if the injunction is denied; (3) there is no greater harm to the defendants than that which the plaintiffs would receive without the injunction; and (4) that the injunction is in the public interest. *Id.* at 249-50. For further discussion of the Third Circuit's analysis of whether the district court was correct in granting the plaintiffs a preliminary injunction against the USFS, see *infra* notes 118-156 and accompanying text.

108. *Minard Run II*, 670 F.3d at 247 (describing APA's provision for judicial review of "final agency action"); *see also* Administrative Procedure Act, 5 U.S.C. § 702 (1996) (providing United States can be defendant when plaintiffs suffer legal wrongs because of agency action).

109. *Minard Run II*, 670 F.3d at 247-48 (stating final agency action must not be tentative or intermediate). The USFS argued its decision to conduct an EIS prior to issuing the NTPs was only a "preliminary, procedural, or intermediate agency action," and that the decision-making process would not be final until the completion of the EIS and issuance of the NTPs. *Id.*

110. *Id.* (discussing second element of "final agency action" standard). With respect to the second prong of the "final agency action" test, the USFS argued its moratorium only had an incidental effect of delaying agency proceedings. *Id.* at 248.

111. *Id.* at 248 (explaining intermediate action can be "final agency action" in certain circumstances). For a discussion of the Marten Statement, see *supra* note 33 and accompanying text.

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the future.[112] The Third Circuit concluded the Marten Statement satisfied the consummation element of the "final agency action" test because there was no indication the USFS would reconsider lifting the requirements the Marten Statement imposed.[113]

After finding the Marten statement satisfied the consummation element of the "final agency action" test, the Third Circuit considered whether the USFS's moratorium on new drilling imposed legal consequences.[114] The court held that the Marten Statement did impose such consequences because mineral rights owners faced significant legal ramifications due to the Statement's moratorium requirement that owners stop all new drilling or face criminal penalties.[115] The court also noted that final agency action must have a "pragmatic definition" and concluded that the Marten Statement met the standard for having such a definition.[116] As a result, the Third Circuit concluded the courts had jurisdiction over the matter because the USFS's actions satisfied both prongs of the "final agency action" test.[117]

B. Granting a Preliminary Injunction

The Third Circuit next turned to the primary issue in the case and examined whether the plaintiffs satisfied the four requirements for obtaining a preliminary injunction.[118] In doing so, the court first explored whether the plaintiffs showed a likelihood of success

112. *Id.* (stating even if USFS revisited propriety of drilling moratorium, EIS completion would moot such revisitation). Further, the USFS failed to claim it intended to revisit the moratorium decision prior to completing the EIS. *Id.*

113. *Id.* (noting USFS did not claim it would revisit issue until EIS completion).

114. *Minard Run II*, 670 F.3d at 248 (continuing "final agency action" analysis). Legal consequences for purposes of "final agency action" can arise when regulations requiring plaintiffs to significantly change their processes penalize noncompliance. *Id.* (citing Abbott Labs v. Gardner, 387 U.S. 136, 154 (1967)).

115. *Minard Run II*, 670 F.3d at 248 (describing legal consequences of USFS's drilling moratorium).

116. *Id.* at 249 (identifying several pragmatic considerations regarding finality of agency action). The Third Circuit listed five factors considered for establishing a pragmatic definition. *Id.* These factors included: whether the decision represents an agency's definitive position, whether the decision has the status of law, whether the decision immediately impacts day-to-day operations, whether the decision involves a pure question of law, and whether immediate judicial review would expedite enforcement of it. *Id.* (citing Exxon Corp. v. Fed. Trade Comm'n, 588 F.2d 895, 901-02 (3d Cir. 1978)). After applying the five factors to the USFS's drilling moratorium, the Third Circuit concluded the Marten Statement satisfied all five factors. *Minard Run II*, 670 F.3d at 249.

117. *Minard Run II*, 670 F.3d at 249 (concluding USFS's moratorium on new drilling in ANF constituted "final agency action").

118. *Id.* at 250 (noting injunctions are reviewed for abuse of discretion).

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on the merits.[119] Next, the court discussed whether the plaintiffs would suffer irreparable harm if the court failed to grant the injunction.[120] The Third Circuit then confronted the issue of whether granting the injunction would result in a greater harm to the defendants than that faced by the plaintiffs.[121] Finally, the court considered whether an injunction would be in the public interest.[122]

1. Likelihood of Success on the Merits

The Third Circuit considered whether the plaintiffs would be likely to succeed on the merits of two claims.[123] The first claim was that the issuance of an NTP is not a "major federal action" requiring prior NEPA environmental analysis.[124] The second claim was that the USFS's settlement agreement and the Marten Statement constituted substantive rules that should have been preceded by APA notice and comment procedures.[125]

The Third Circuit approached the plaintiffs' first claim by identifying three types of agency action that typically constitute "major federal action": (1) undertaking a project; (2) supporting a project by means of financial assistance; and (3) enabling the project by lease, license, or permit.[126] The Third Circuit also noted the

119. For an examination of the Third Circuit's analysis of the plaintiffs' likelihood of success on the merits, see *infra* notes 123-143 and accompanying text.

120. For an analysis of the Third Circuit's approach to the irreparable harm that plaintiffs would suffer without the preliminary injunction, see *infra* notes 144-151 and accompanying text.

121. For a discussion of the harm the USFS would experience by granting the preliminary injunction, see *infra* notes 152-154 and accompanying text.

122. For an examination of the Third Circuit's analysis of the public interest concerns, see *infra* notes 155-156 and accompanying text.

123. *Minard Run II*, 670 F.3d at 250 (explaining plaintiff's claims). By way of further explanation, the Third Circuit analyzed "major federal action" and APA notice and requirement claims because the USFS appealed the district court's decision concluding that the plaintiff was likely to succeed on both claims. *Id.* at 250-57.

124. For further discussion of whether the issuance of an NTP was a "major federal action", see *infra* notes 126-137 and accompanying text.

125. For further examination of the Third Circuit's analysis of the Marten Statement and settlement agreement, see *infra* notes 138-143 and accompanying text.

126. *Minard Run II*, 670 F.3d at 249-50 (illustrating how court analyzed plaintiff's claim that moratorium was "major federal action" requiring environmental analysis); *see also* National Environmental Policy Act, 42 U.S.C. § 4332(C) (1970) (requiring that "major federal actions" must be preceded by environmental analysis). The statute requires assessing the following for a NEPA analysis:

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

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exception that when a private party receives unnecessary federal approval to proceed with a project, it is not a "major federal action" requiring an environmental analysis under NEPA.[127] As a result of this exception, the court asserted that "the dispositive question is whether mineral owners are required to obtain the approval of the [USFS]" and continued its analysis by examining the extent to which Congress authorized the USFS to regulate the use of national forests.[128]

In discussing the extent of the USFS's authority from Congress, the Third Circuit explained that Congress, through the Organic Act, authorized the USFS to enact "special use regulations" to regulate the occupancy and preservation of national forests.[129] Further, Congress also required actions deemed "special uses" subject to USFS approval.[130] The Third Circuit then discussed lands purchased under the Weeks Act and concluded that reserved rights are subject only to regulations included in the written document conveying title to the United States.[131] The court further determined that the Weeks Act contained no limiting language on regulations pertaining to outstanding rights because such rights exist prior to conveyance and cannot be limited by regulations inserted into the document defining conveyance rights.[132]

(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C)(i-v) (1970).

127. *Minard Run II*, 670 F.3d at 249-50 (expounding on instances of "major federal actions" requiring environmental analyses) (internal citation omitted).

128. *Id.* (analyzing USFS's arguments regarding congressional authority to regulate national forest use). The USFS relied on Congress's broad Property Clause powers to regulate the use of private land that affects public land. *Id.* The USFS argued that because Congress authorized the USFS to regulate the national forest use through "special use regulations," drilling by mineral owners in the ANF constituted a "special use" subject to its approval. *Id.* at 250-51.

129. *Id.* at 250 (describing power Congress granted USFS to regulate national forests); *see also* Organic Act, 16 U.S.C. § 551 (1897) (authorizing USFS to make rules regulating occupancy and use of national forests).

130. *Minard Run II*, 670 F.3d at 250 (explaining extent of USFS's authority to grant approval of "special use" actions); *see also* Organic Act, 16 U.S.C. § 475 (1897) (granting federal government limited surface rights purchasing power).

131. *Minard Run II*, 670 F.3d at 251 (noting Weeks Act provision requiring including regulation terms in conveyance instruments); *see also* Weeks Act, 16 U.S.C. § 518 (1911) (granting federal government funding to purchase surface rights for forest preservation).

132. *Minard Run II*, 670 F.3d at 252 (discussing Weeks Act vis-à-vis outstanding rights). The Third Circuit further stated that the Weeks Act's language "indicates that Congress expected the government to be bound by the terms of outstanding rights" because the Act permits the purchase of land with outstanding rights only

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The Third Circuit distinguished *Minard Run II* from *Duncan I* by noting the land in *Duncan I* was acquired through the Bankhead-Jones Farm Tenant Act, a statute that does not contain limiting language such as that in the Weeks Act.[133] Moreover, in *Duncan I* the Eighth Circuit applied North Dakota law, whereas Pennsylvania law controlled in *Minard Run II.*[134] In applying Pennsylvania law, the Third Circuit supported its position by citing *Belden*, in which the Pennsylvania Supreme Court concluded that, under Pennsylvania law, a surface owner could not restrict mineral rights owners' exercise of their subsurface rights.[135] Additionally, the Third Circuit concluded *Duncan II* could not justify the USFS's multi-year moratorium on new drilling because such a long-term suspension from the moratorium exceeds the type of delay contemplated in *Duncan II.*[136] Consequently, the Third Circuit held that because mineral rights owners do not need the USFS's federal approval for surface access, the issuance of NTPs is not a "major federal action" warranting NEPA environmental analysis.[137]

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when there will be no interference with the use of the encumbered lands. *Id.* Consequently, the court concluded such limitations work only if the USFS is bound by the terms of outstanding rights and cannot create regulations to override the private use of outstanding rights that it considers contrary to the purposes of the Weeks Act. *Id.*

133. *Id.* at 253 (distinguishing land acquired under Weeks Act from land acquired in *Duncan I* under Bankhead-Jones Farm Tenant Act); *see also* Duncan Energy Co. v. United States Forest Serv., 50 F.3d 584, 590-91 (8th Cir. 1995) (stating USFS's authority allowed it to determine whether mineral rights owner's proposed surface use was reasonable); Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010 (1937) (requiring mineral rights owners obtain USFS authorization before commencing harvesting operations).

134. *Minard Run II*, 670 F.3d at 253 (noting difference between North Dakota law and Pennsylvania law regarding mineral owner rights). For a more complete analysis of the Eighth Circuit's decisions in *Duncan I* and *Duncan II*, see *supra* notes 94-102 and accompanying text.

135. *Minard Run II*, 670 F.3d at 253 (relying on *Belden*); *see also* Belden & Black Corp. v. Dep't of Conservation & Natural Res., 969 A.2d 528, 532 (Pa. 2009) (holding surface owner has no right to determine what constitutes reasonable use). The Pennsylvania Supreme Court further held mineral rights owners are not required to obtain surface owner approval prior to exercising their mineral rights. *Belden*, 969 A.2d at 532.

136. *Minard Run II*, 670 F.3d at 253-54 (comparing *Minard Run II* to *Duncan I* and *Duncan II*'s holding regarding suspension of NTPs); Duncan Energy Co. v. United States Forest Serv., 109 F.3d 497, 500 n.1 (8th Cir. 1997) (contemplating delays not exceeding 100 days for processing drilling applications).

137. *Minard Run II*, 670 F.3d at 254 (affirming district court's holding that NTPs are not "major federal action" under NEPA and that USFS can issue NTPs without conducting EIS). Regarding NTPs, the Third Circuit also stated that "[a]n NTP is an acknowledgement that memorializes any agreements between the [USFS] and a mineral rights owner, but it is not a permit." *Id.*

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Following its discussion on whether an NTP is a "major federal action," the Third Circuit next examined the plaintiff's second claim that the USFS's settlement agreement and the Marten Statement constituted substantive rules that should have been preceded by APA notice and comment procedures.[138] In approaching the issue, the court noted that rules subject to the APA notice and comment requirements create substantive changes in prior regulations or impose new laws, rights, or duties.[139] To determine whether a rule creates substantive changes, the court considered whether the rule has a substantive adverse impact on the plaintiffs.[140] In doing so, the court concluded the settlement agreement and the Marten Statement created new duties for mineral rights owners because the rules' purpose and effect were to prevent new drilling during a multi-year EIS.[141] The court then determined that the drilling moratorium had a substantive adverse impact on mineral rights owners by directly interfering with their rights to enter ANF lands and drill for oil and gas on their subsurface estates.[142] The Third Circuit concluded, therefore, that the plaintiffs were likely to succeed on the merits of their claim – that the USFS did not meet the APA's notice and comment procedures regarding the settlement agreement and Marten Statement – because they were substantive rules adversely affecting the mineral owners.[143]

2. *Irreparable Harm*

The Third Circuit next analyzed whether the plaintiffs would suffer irreparable harm if the court denied the injunction.[144] At

138. *Id.* (discussing likelihood of success of plaintiffs' second claim regarding APA); *see also* Administrative Procedure Act, 5 U.S.C. § 553 (1966) (outlining APA's notice and comment requirements). While the USFS agreed the settlement agreement and Marten Statement were rules within the meaning of the APA, it argued they were not substantive rules. *Minard Run II*, 670 F.3d at 254-55. In doing so, the USFS argued the rules were excepted from the APA's notice and comment requirements because they were "rules of agency organization, procedure, or practice." *Id.* at 255 (citing 5 U.S.C. § 553 (1966) (outlining APA notice and comment requirements)).

139. *Minard Run II*, 670 F.3d at 255 (examining differences between rules subject to APA notice and comment requirements and those that are not).

140. *Id.* at 254-55 (describing interpretation of substantive rule changes).

141. *Id.* at 255 (discussing how settlement agreement and Marten Statement affected mineral rights owners).

142. *Id.* at 255-56 (exploring moratorium's impact on mineral owners' property interests).

143. *Id.* at 257 (affirming district court decision).

144. *Minard Run II*, 670 F.3d at 255 (stating district court's finding that moratorium on new drilling would cause irreparable harm). The Third Circuit concluded the moratorium irreparably harmed the plaintiffs because it infringed on their property rights and threatened their businesses with bankruptcy. *Id.*

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the outset of its analysis, the court noted the irreparable injury requirement could not be satisfied by a purely economic injury unless the potential loss threatened the existence of a plaintiff's business.[145] The court then highlighted testimony given by several business owners during the district court's proceedings indicating that the new moratorium on drilling drastically affected their business and would likely cause them to cease operations.[146] Further, the Third Circuit noted that preliminary injunctions are increasingly appropriate in situations involving real property because real property is unique to its owner.[147]

The Third Circuit considered the real property interests of the mineral rights owners to be particularly important because, under Pennsylvania law, oil and gas resources are subject to the "rule of capture," a doctrine permitting owners to extract limitless amounts of oil and gas beneath the adjoining land of a different owner, even if extraction would completely deplete an oil or gas reservoir.[148] The remedy in such situations, the court noted, is for an owner to do likewise to a rival mineral rights owner.[149] The Third Circuit concluded, therefore, that the USFS's new drilling moratorium would deprive ANF mineral landowners of their "rule of capture" remedy in situations where landowners on private land adjoining the ANF, who are not subject to the moratorium, drain the ANF mineral owners' oil and gas reservoirs.[150] The Third Circuit thus held the moratorium causes irreparable harm to ANF mineral

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145. *Id.* (stating requirements for showing irreparable harm). The USFS argued the district court's findings that some business might suffer temporary economic loss and others might go bankrupt were insufficient to establish irreparable harm. *Id.*

146. *Id.* (discussing lower court's consideration of business owner testimony regarding potential bankruptcy resulting from moratorium). Among some of the testimony contemplated by the district court was that one business experienced a 47% reduction in revenues due to the moratorium and found itself in "survival mode"; one business laid off 40% of its workforce due to decreased revenues resulting from the moratorium; and another business, which had constantly increased oil production over the thirty years prior to the moratorium, experienced a roughly 20% a decline in oil production due to the moratorium. *Minard Run WD*, Ca. No. 09-125 Erie, 2009 WL 4937785, at *15-16 (W.D. Pa. 2009). In total, eight businesses testified before the district court regarding significant financial losses, laid off employees, and decreased oil production as a result of the moratorium. *Id.*

147. *Minard Run II*, 670 F.3d at 256 (noting additional considerations involved when real property is at issue).

148. *See id.* (describing Pennsylvania's "rule of capture").

149. *Id.* (explaining remedy in "rule of capture" situations).

150. *Id.* (describing moratorium's potential effects because of "rule of capture").

rights owners by threatening them with bankruptcy and by depriving them of their unique oil and gas extraction opportunities.[151]

3. Balance of Equities and Public Interest

Per precedent, the Third Circuit considered the balance of equities and public interest prongs together because the government was the party opposing the preliminary injunction.[152] In doing so, the Third Circuit noted the USFS completed an EIS in 1986 without imposing a new drilling moratorium and that the *Minard Run I* framework adequately protected the USFS's interest in preserving ANF resources.[153] The Third Circuit also followed the district court's conclusion regarding the cyclical nature of ANF drilling activity in that although the number of active wells was higher than usual prior to the moratorium, this greater activity did not signal substantially more drilling operations than during the time the USFS used the *Minard Run I* framework for processing NTPs.[154] In focusing specifically on the public interest, the Third Circuit held that "granting the injunction would vindicate the public's interests in aiding the local economy, protecting the property rights of mineral rights owners, and ensuring public participation in agency rulemaking as required by the APA."[155] The Third Circuit ruled

151. *Id.* at 255-56 (affirming district court's holding regarding irreparable harm).

152. *Minard Run II*, 670 F.3d at 256 (describing approach to remaining preliminary injunction elements). The Third Circuit combined the balance of equities and the public interest prongs of the preliminary injunction test because when the government is the opposing party, analyzing the harm to the opposing party and weighing the public interest merge. *Id.* (citing Nken v. Holder, 556 U.S. 418, 436 (2009)). The Third Circuit also stressed that despite the USFS's statutory duty to protect the ANF, the district court was not required to adopt the USFS's claim that a preliminary injunction would prevent the USFS from adequately protecting the forest. *Id.* Further, the district court had stated that its grant of injunctive relief did not prohibit the USFS from completing an EIS in the ANF, only that the USFS could not conduct the EIS in the manner in which it wanted to conduct the study. *Minard Run WD*, Ca. No. 09-125 Erie, 2009 WL 4937785, at *33 (W.D. Pa. 2009).

153. *Minard Run II*, 670 F.3d at 256-57 (noting USFS did not suspend *Minard Run I* framework with prior EISs); *see also Minard Run WD*, 2009 WL 4937785, at *6 n.2 (stating 1986 EIS was part of 1986 Forest Plan to assess how oil and gas activities in ANF impacted USFS's land management practices). Further, unlike the moratorium, the 1986 EIS did not prevent oil and gas drilling activities from proceeding. *Id.*

154. *Minard Run II*, 670 F.3d at 257 (chronicling historical context of NTP framework).

155. *Id.* (demonstrating how public interest benefits from granting preliminary injunction). Further, because the Third Circuit found little distinction between the years prior to the moratorium, in which the *Minard Run I* framework was in effect, and the years when the moratorium was in effect, the Third Circuit ruled it was not clear error for the district court to conclude that reinstating the *Minard*

that the balance of equities and the public interest favored injunctive relief and affirmed the preliminary injunction entered by the district court.[156]

V. CRITICAL ANALYSIS

In *Minard Run II*, the Third Circuit correctly applied the proper state and statutory authority, logically analogized similar cases, and thoroughly distinguished others.[157] Additionally, in reaching its conclusion, the court appropriately applied Pennsylvania law.[158] Further, the Third Circuit was consistent with Supreme Court and other circuit precedent by avoiding broaching difficult constitutional issues regarding the Takings Clause.[159] The court's decision, however, does create a possible circuit split regarding the treatment of mineral rights on lands where the USFS owns the surface rights.[160] Additionally, the Third Circuit's holding potentially distinguishes *Minard Run II* from *Duncan I* and *Duncan II* on overly narrow grounds, although by concluding that the plaintiffs would suffer an irreparable harm, it does properly account for the potentially substantial economic harm and loss of unique property interests.[161]

A. Correct Application of Pennsylvania Law

The Third Circuit appropriately relied on state law pertaining to mineral rights, focusing its attention on prior Pennsylvania rulings.[162] Although *Belden*, decided by the Pennsylvania Supreme Court, involved the DCNR rather than the USFS, it did involve federal ownership of surface rights and private ownership of mineral

Run I framework would not harm the public interest or the USFS's interest in preserving the ANF. *Id.*

156. *Id.* (affirming district court's finding regarding balance of equities and public interest and its awarding preliminary injunction).

157. For a critical analysis of the Third Circuit's decision in *Minard Run II*, see *infra* notes 162-193 and accompanying text.

158. For a discussion of the Third Circuit's reliance on Pennsylvania law in *Minard Run II*, see *infra* notes 162-167 and accompanying text.

159. For a discussion of the potential Takings Clause issue in *Minard Run II*, see *infra* notes 168-173 and accompanying text.

160. For an examination of the conflict between the Third Circuit's decision in *Minard Run II* and the Eighth Circuit's decision in *Duncan I*, see *infra* notes 174-180 and accompanying text.

161. For discussion regarding how the Third Circuit distinguished *Minard Run II* from *Duncan I* and *Duncan II*, see *infra* notes 181-186 and accompanying text. For an analysis of the Third Circuit's irreparable harm conclusion, see *infra* notes 187-193 and accompanying text.

162. For a discussion of Pennsylvania precedent influencing the Third Circuit's decision in *Minard Run II*, see *supra* notes 62-83 and accompanying text.

rights.[163] In the *Belden* decision, the Pennsylvania Supreme Court held that a mineral rights owner was not obligated to obtain the surface owner's approval prior to taking action to enjoy their mineral rights.[164] *Minard Run II* arose in Pennsylvania and involved a mineral and surface rights dispute, and therefore, the Third Circuit was required to apply Pennsylvania state law.[165] Thus, the Third Circuit appropriately applied the principal set forth in *Belden*, that a surface owner has no right to determine what constitutes a mineral rights owner's reasonable use of the surface.[166] The Third Circuit rendered a decision in *Minard Run II* consistent with Pennsylvania law and *Belden*, by holding the mineral estate is the dominant estate and mineral rights owners can use as much surface land as is reasonably necessary to operate their estate without seeking the approval of the surface owner.[167]

B. Proper Avoidance of Takings Clause Issues and Weeks Act Interpretation

Out of concern of providing the USFS with "no logical stopping point" to its regulatory authority of national forests, the Third Circuit properly followed the Fourth Circuit's Weeks Act interpretation.[168] As the Third Circuit noted, failure to follow the Fourth Circuit's interpretation of the Weeks Act would allow the USFS to effectively require any holder of reserved rights to obtain a permit before exercising their rights, regardless of existing implied or express easements.[169] Similarly, the Fourth Circuit noted that grant-

163. Belden & Blake Corp. v. Com., Dept. of Conservation and Natural Res., 969 A.2d 528, 529-30 (Pa. 2009) (providing case's factual background).

164. *Id.* at 532 (concluding Pennsylvania surface owners have no right to restrict mineral rights owners ability to enjoy their subsurface rights). Parties accessing their mineral rights, however, must exercise their rights with "due regard" for the owner of the surface. *Id.* at 530; *see also* Chartiers Block Coal Co. v. Mellon, 25 A. 597, 598 (1893) (establishing Pennsylvania "due regard" precedent).

165. *Minard Run II*, 670 F.3d 236, 253 (3d Cir. 2011) (applying Pennsylvania law).

166. *See id.* (holding mineral estate owner has right to access surface as reasonably necessary to enjoy subsurface estate).

167. *See id.* (remaining consistent with Pennsylvania jurisprudence); *Belden*, 969 A.2d at 532 (limiting surface rights owners' ability to restrict mineral rights owners).

168. *See Minard Run II*, 670 F.3d at 252 (discussing considerations in *Srnsky*). It was due to the lack of a "logical stopping point" that the Fourth Circuit concluded the USFS's claimed regulatory authority under the Weeks Act would raise difficult constitutional questions. United States v. Srnsky, 271 F.3d 595, 604 (4th Cir. 2001).

169. *Minard Run II*, 670 F.3d at 252 (describing how accepting USFS's position would affect reserved rights holders). Further, the Third Circuit did not be-

ing the USFS such power would "wipe the National Forest System clean of any and all easements."[170] As a result of seeking to avoid granting the USFS such power, the Third Circuit followed the Fourth Circuit's lead by avoiding granting power that would inevitably give rise to a Takings Clause issue.[171] The Third Circuit's avoidance aligns with prior Supreme Court decisions in which the Court chose not to confront difficult questions concerning out of Takings Clause guarantees.[172] The Third Circuit's decision, therefore, was consistent with the Fourth Circuit's Weeks Act interpretation by concluding that the Secretary must express any regulations applied to reserved rights in the conveyance instrument and also maintained congruence with Supreme Court decisions in avoiding Takings Clause issues.[173]

C. Potential Circuit Split with the Eighth Circuit

The Third Circuit's conclusion departs from that reached by the Eighth Circuit in *Duncan I* and *Duncan II*, and potentially causes a circuit split.[174] Despite this deviation, however, the Third Circuit correctly reconciled its position with the Eighth Circuit's in several respects.[175] First, the language of the controlling statutes in the two cases differs significantly.[176] For example, the Weeks Act, which controlled in *Minard Run II*, requires the document conveying the surface rights to contain any regulations of the mineral rights own-

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lieve Congress intended the Weeks Act to grant the USFS the authority to overrule any easements or rights of way that mineral rights owners possess. *Id.*

170. *Srnsky*, 271 F.3d at 604 (analyzing USFS's Weeks Act interpretation). The Fourth Circuit concluded that accepting the USFS's position on the Weeks Act would not only override any implied easements that existed in the national forest system, but also any express easements as well. *Id.*

171. *See Minard Run II*, 670 F.3d at 252 (adopting Fourth Circuit's Weeks Act interpretation).

172. *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 82 (1982) (declining to resolve difficult Takings Clause questions); *Srnsky*, 271 F.3d at 604 (citing Supreme Court's reluctance to construe statutes in manners that require resolving difficult Takings Clause questions).

173. For a further discussion of the Third Circuit's approach to analyzing *Srnsky* and applying Supreme Court precedent regarding Takings Clause issues, see *supra* note 93 and accompanying text.

174. *See Minard Run II*, 670 F.3d at 253-54 (distinguishing *Minard Run II* from *Duncan I*); Duncan Energy Co. v. United States Forest Serv., 50 F.3d 584, 589 (8th Cir. 1995) (holding mineral rights owners must obtain authorization from USFS prior to commencing mining operations).

175. For a discussion of the Third Circuit's rationale for distinguishing *Minard Run II* from *Duncan I*, see *supra* note 134.

176. *Compare* Bankhead-Jones Farm Tenant Act, 7 U.S.C. § 1010 (1937) (outlining Secretary's authority under Bankhead-Jones Farm Tenant Act), *with* Weeks Act, 16 U.S.C. § 518 (1911) (granting Secretary limited acquisition authority).

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ers within it, whereas the Bankhead-Jones Farm Tenant Act that controlled in *Duncan I* and *Duncan II* subjects acquired land to any encumbrances the Secretary deems do not interfere with the use of the property for title purposes.[177] Second, because the two cases arose in different states and involved a split estate dispute, the two circuits appropriately applied state law.[178] As a result, the Third Circuit correctly structured its holding around Pennsylvania law, which, by granting mineral rights owners unrestricted access to surface lands to enjoy their mineral rights, differs from the North Dakota laws applicable in *Duncan I* and *Duncan II* allowing surface owners to limit mineral rights owners' access to only reasonable uses.[179] The Third Circuit, therefore, correctly distinguished *Minard Run II* from *Duncan I* and *Duncan II* on grounds regarding the different controlling statutes and varied state laws.[180]

Despite properly distinguishing *Minard Run II* from *Duncan I* and *Duncan II*, the Third Circuit risks misrepresenting the Eighth Circuit's position regarding the length of time for USFS NTP processing.[181] This issue arises because the Third Circuit stated that the indefinite suspension of NTP processing in *Minard Run II* exceeded the delays contemplated in *Duncan II*.[182] While the Third Circuit may be correct, the Eighth Circuit in *Duncan II* did not place an upper limit on the time the USFS may spend processing an NTP.[183] Furthermore, although the Eighth Circuit held the USFS could not unduly delay NTP processing, the court also explicitly noted the totality of circumstances relating to the surface use determines the reasonableness of the USFS's processing time.[184] It is

177. For a discussion of the Weeks Act's power grants and limitations it imposes on that power, see *supra* note 90.

178. *See Minard Run II*, 670 F.3d at 253 (noting *Duncan I* involved North Dakota law, while *Minard Run II* involved Pennsylvania law).

179. *See id.* (relying on *Belden* to demonstrate Pennsylvania's lack of reasonable use authority for surface owners). Further, under North Dakota law, the USFS's "special use regulations" govern mineral rights owners' surface use and allow the USFS to determine whether proposed surface uses are reasonable. *Duncan I*, 50 F.3d 584 (8th Cir. 1995).

180. For a further discussion of the Third Circuit's approach to distinguishing *Minard Run II* from *Duncan I* and *Duncan II*, see *supra* notes 174-180 and accompanying text.

181. *See Minard Run II*, 670 F.3d at 253-54 (analyzing NTP processing time contemplated by Eighth Circuit in *Duncan II*).

182. *Id.* (comparing *Minard Run II* to *Duncan II*).

183. Duncan Energy Co. v. United States Forest Serv., 109 F.3d 497, 500 (8th Cir. 1997) (stating there is no set time limit USFS must follow in granting NTPs).

184. *Id.* (explaining factors influencing reasonableness of USFS's processing time). The Eighth Circuit noted that a factor to consider is the prior course of conduct between the USFS and the mineral rights owner. *Id.* The court does

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thus foreseeable that, given a particular set of circumstances and lack of unwarranted delays, the Eighth Circuit could apply *Duncan II* to a multi-year suspension of NTP issuances similar to that discussed in *Minard Run II*.[185] As such, contrary to the Third Circuit's statement that the USFS's multi-year moratorium on new drilling would not be justified under *Duncan II*, the Eighth Circuit did not explicitly hold that a large-scale EIS would not warrant the significant NTP processing delays associated with it.[186]

D. Irreparable Harm

The Third Circuit correctly affirmed the district court's weighing of the circumstances and application of law in evaluating the likelihood of irreparable harm absent an injunction.[187] As the circuit court noted, if a party argues economic loss as a basis for irreparable harm, the loss must threaten the existence of the party's business and cannot be mere economic injury that is monetarily compensable.[188] As highlighted by the district court, one of the plaintiff companies would have suffered an immense loss because the moratorium would bar it from operating seventy-five percent of its total wells, as the wells were located within the ANF.[189] Furthermore, another plaintiff controlled 5,700 acres of mineral rights in the ANF, and the moratorium would force them to lay off workers if it continued, thereby extending the harm not only to the plaintiff company, but also to the communities in which those workers lived.[190] Additionally, the moratorium could have deprived the

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note, however, that such prior conduct is not a controlling factor in determining the USFS's obligations. *Id.*

185. *See id.* (holding NTP processing time need only be "reasonable" and "expeditious" to be upheld).

186. *See Minard Run II*, 670 F.3d 236, 253-54 (3d Cir. 2011) (distinguishing *Minard Run II* from *Duncan I* and *Duncan II* on grounds that Eighth Circuit did not contemplate multi-year NTP issuance suspension); *Duncan II*, 109 F.3d at 499-500 (holding NTP processing must be "expeditious" and not unduly delayed).

187. For a discussion of the Third Circuit's rationale for finding the moratorium caused irreparable harm, see *supra* notes 144-151 and accompanying text.

188. *Minard Run II*, 670 F.3d at 255 (citing prior circuit and Supreme Court decisions).

189. *Minard Run WD*, C.A. No. 09-125 Erie, 2009 WL 4937785, at *16 (W.D. Pa. Dec. 15, 2009) (describing plaintiff Pennsylvania General Energy Company's ownership of 40,000 acres of mineral rights in ANF); *see also Recent Developments, supra* note 50, at 588 (providing further detail regarding Pennsylvania General Energy Company's intent to drill in Marcellus Shale lands).

190. *Minard Run WD*, 2009 WL 4937785, at *17-18 (recounting testimony by plaintiff Minard Run Oil's CEO regarding necessity of future layoffs should moratorium continue); *Recent Developments, supra* note 50, at 588 (describing Minard Run Oil Company's testimony regarding 134-year presence in ANF region).

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plaintiffs of their ability to prevent mineral drillers on private adjacent lands from depleting the gas and oil deposits in the plaintiffs' subsurface estates because of Pennsylvania's "rule of capture."[191] Given this risk, the Third Circuit accurately held the moratorium would cause ANF mineral rights owners irreparable harm by depriving them of their ability to defend their mineral rights from private adjacent land owners.[192] Consequently, due to the severe economic harm the plaintiffs would suffer, as well as the loss of their property rights, the Third Circuit correctly affirmed the district court's finding of irreparable harm in the event of the moratorium's continuance.[193]

VI. IMPACT

While the Third Circuit's holding in *Minard Run II* focused on the narrow issue of the USFS's authority over surface estates it acquired through the Weeks Act, the court's decision could have a significant effect on future split estate disputes in Pennsylvania, other Third Circuit states, and the nation.[194] The impact is likely to reverberate with particular strength in Pennsylvania disputes regarding Marcellus Shale drilling in the ANF.[195] Additionally, the court's holding intensifies the present struggle to define the role of the USFS and national forests in the modern-day United States.[196] Furthermore, the decision advances the jurisprudential trend of placing greater value on the mineral rights of private landowners than on the authority of the USFS.[197] Finally, the Third Circuit's decision furthers the transition of weighing possible economic benefits of harvesting subsurface materials beneath national forests from the executive branch to the judicial branch.[198] Despite the

191. *Minard Run II*, 670 F.3d at 256 (explaining threat to mineral rights owner's property from Pennsylvania's "rule of capture").

192. *See id.* (describing "rule of capture" remedy as ability to extract oil from neighboring lands).

193. *See id.* at 255 (noting substantial business losses plaintiffs faced warranted preliminarily enjoining moratorium).

194. For a discussion of the impact of the Third Circuit's decision in *Minard Run II*, see *infra* notes 200-233 and accompanying text.

195. For analysis of the implications of the *Minard Run II* decision on ANF Marcellus Shale drilling, see *infra* notes 204-209 and accompanying text.

196. For a further explanation of the Third Circuit's contribution to the ongoing process of determining the USFS's role, see *infra* notes 210-215 and accompanying text.

197. For an exploration of how courts are currently valuing private mineral rights against USFS authority, see *infra* notes 216-220 and accompanying text.

198. For an examination of the power shift from the executive branch to the judiciary regarding mineral right regulation, see *infra* notes 221-228 and accompanying text.

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implications the *Minard Run II* decision may have on similar future disputes, the Third Circuit is correct in concluding that the USFS must develop an alternative and less disruptive means to conduct a NEPA environmental analysis of the ANF.[199]

A. Influence on Split Estate Jurisprudence

The Third Circuit limited the impact its decision may have on courts within its jurisdiction as well as other circuits by narrowly focusing its opinion on the USFS's authority under the Weeks Act and Organic Act.[200] Further, as a result of this narrow focus, the court was able to appropriately distinguish its holding regarding the USFS's authority under the Weeks Act from the authority the agency derives from other acts, such as the Bankhead-Jones Tenant Farm Act discussed in *Duncan I* and *Duncan II*.[201] By distinguishing the acts as such, the Third Circuit avoided creating a circuit split with the Eighth Circuit regarding the USFS's authority and furthered the Weeks Act split estate interpretation set forth by the Fourth Circuit in *Srnsky*.[202] Despite limiting the USFS's authority in split estate matters, the Third Circuit lessened the impact of its decision by restricting it to only those lands the USFS acquired through the Weeks Act.[203]

B. Influencing Future ANF and Marcellus Shale Disputes

The *Minard Run II* decision could have significant implications on future ANF Marcellus Shale drilling disputes given the recent increase in the number of drilling surveys conducted in the ANF portion of the Marcellus Shale and new drilling initiatives involving fracking.[204] The disputes courts confront regarding Marcellus Shale drilling largely pertain to the drilling company's use of the

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199. For an overview of the Third Circuit's decision in relation to contemporary jurisprudence, see *infra* notes 229-233 and accompanying text.

200. For background information on the Weeks and Organic Acts, see *supra* notes 53-61 and accompanying text. For a further discussion of the Third Circuit's interpretation of the Weeks and Organic Acts, see *supra* notes 129-132 and accompanying text.

201. For an analysis of how the Third Circuit distinguished the Weeks Act from the Eighth Circuit's Bankhead-Jones Tenant Farm Act interpretation, see *supra* notes 133-137 and accompanying text.

202. For further discussion of the comparison between the Third and Fourth Circuits' interpretation of the Weeks Act, see *supra* notes 168-173 and accompanying text.

203. For further analysis of *Minard Run II*'s limited holding, see *supra* notes 162-186 and accompanying text.

204. For further discussion regarding the likelihood of an increase in Marcellus Shale disputes, see *supra* note 10 and accompanying text.

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surface, including building access roads, cutting timber, and using surface water.[205] Consistent with other states, most Pennsylvania disputes concern surface uses that are "reasonably necessary" for mineral rights owners to access their property because Pennsylvania does not have a surface damages law.[206] As a result, increased mineral development in the Marcellus Shale will likely cause an increase in split estate disputes similar to those in *Belden, Minard Run I*, and *Minard Run II* because of the many split estates littered throughout the ANF and because Pennsylvania does not yet have a statute clarifying use requirements in such estates.[207] Adjudicating courts, therefore, will likely defer to the Third Circuit's decision in *Minard Run II* given the potential similarity among disputes.[208] Thus, the Third Circuit's interpretation of the Weeks Act will likely limit the USFS's ability to restrict mineral owners' access to subsurface estates beneath lands acquired through the Weeks Act.[209]

C. The USFS's Future Role and Its Authority Weighed Against the Value of Private Property

In its *Minard Run II* decision, the United States Court of Appeals for the Third Circuit engaged in the ongoing struggle to redefine the role of national forests in the modern-day United States.[210] This struggle exists because the government originally created the national forests to provide the growing U.S. population with a steady supply of timber.[211] Recently, however, the need for timber from national forests is less crucial to the nation's well-being because of more sustainable logging practices and commercial tree farming operations.[212] Such reduced need has caused courts and the USFS to struggle to determine the best means for utilizing na-

205. For further explanation of common Marcellus Shale disputes, see *supra* notes 7-10 and accompanying text.

206. For an overview of the expectation associated with "reasonable use", see *supra* note 10 and accompanying text.

207. For a summary of the disputes arising in *Belden* and *Minard Run I*, see *supra* notes 62-83 and accompanying text.

208. For further discussion of potential ANF disputes regarding Marcellus Shale development, see *supra* notes 7-10 and accompanying text.

209. For further discussion of the Third Circuit's Weeks Act interpretation regarding USFS authority, see *supra* notes 129-132 and accompanying text.

210. For a summary of the Third Circuit's position on the USFS's authority under the Weeks and Organic Acts, see *supra* notes 129-132 and accompanying text.

211. For discussion of the original uses of national forests, see *supra* note 3 and accompanying text.

212. For an overview of contemporary national forest uses, see *supra* notes 3, 6 and accompanying text.

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tional forests to satisfy the future needs of the modern United States citizenry.[213] The Third Circuit's decision in *Minard Run II* could persuade future courts to avoid granting the USFS authority to regulate the impact mineral rights owners may have on national forests when accessing their rights.[214] It is important to note, however, that one could interpret *Minard Run II* to only restrict the USFS's authority over national forest split estates purchases under the Weeks Act, and not those the USFS acquired through other federal statutes.[215]

With respect to the value of property rights, the Third Circuit appears to bolster the historical sentiment that the value of an individual's property rights is greater than that of national forests.[216] As one commentator concluded, this perspective "has been the stance . . . since at least 1893, and not even the rise of the modern administrative state or the modern emphasis on environmental protection can overpower this fundamental property right."[217] The Third Circuit's holding continues the judicial trend of devaluing lands owned and managed for the general populous.[218] The ruling also adds support to recent mineral rights owners' contentions that federal land managers lack authority outside of state law to regulate mineral development.[219] The basis for these contentions rests on the owners' argument, furthered in *Minard Run II*, that state law should govern such management unless preempted by constitutionally-authorized federal legislation.[220]

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213. For an overview of recent decisions regarding the USFS's authority, see *supra* notes 75-102 and accompanying text.

214. For a summary of what *Minard Run II* permits mineral rights owners to do when accessing their mineral estates as compared to Eighth Circuit jurisprudence, see *supra* notes 133-136 and accompanying text.

215. For a discussion of the Third Circuit's Weeks Act analysis as compared to other acts granting the USFS purchasing authority, see *supra* notes 133-136 and accompanying text.

216. For an examination of the little weight Pennsylvania courts give public land scenery, see *supra* note 74 and accompanying text.

217. *See* Wade, *supra* note 74, at 495 (describing courts' high esteem for fundamental private property rights). For a discussion of the historic trend of Pennsylvania courts valuing mineral rights over the preservation of federal public lands, see *supra* note 74 and accompanying text.

218. For further analysis of split estate severances promoting the public interest in the development of mineral wealth, see *supra* note 1 and accompanying text.

219. For a further summary of the plaintiffs' contentions regarding state law governing mineral rights, see *supra* notes 40-43 and accompanying text.

220. For further discussion of preempting federal statutes, see *supra* notes 132-133 and accompanying text.

D. Power Shifting to the Judiciary to Determine Mineral Rights

By relying heavily on *Belden*, the Third Circuit continued the current jurisprudential trend toward shifting, from the executive to the judiciary, the power to weigh a private party's subsurface rights against the government's surface rights.[221] The court bolstered this trend by ensuring "drilling operations are not saddled with unreasonable fees and other economically detrimental restrictions."[222] By preventing these fees imposed by executive agencies, the court reduced the likelihood executive entities will discourage drilling companies from commencing and maintaining operations in Pennsylvania and the ANF.[223] Through continuing this trend, the Third Circuit also advanced the judiciary's authority to regulate drilling operation disputes likely to arise from increased drilling on Marcellus Shale ANF lands.[224]

One possible negative consequence of the Third Circuit's outward support for the economic benefits derived from mineral rights is that companies may be less motivated to improve their drilling techniques to limit potential environmental impacts.[225] With drilling companies aware that current precedent disfavors certain regulations on their rights, companies could now be less wary of possible disputes.[226] Another concern surrounding increased judicial control over such disputes is the judiciary may not be as qualified in regulating environmental matters as would agencies specializing in such fields.[227] Consequently, the continuing power shift from the executive to the judiciary with respect to weighing the value of min-

221. For an analysis of the current judicial trend of shifting the power to regulate mineral rights from the executive branch to the judiciary, see *supra* note 74 and accompanying text.

222. *See* Wade, *supra* note 74, at 492-93 (describing power shift from executive to judiciary regarding private property regulation). For an examination of how the USFS's drilling moratorium affected mineral rights owners, see *supra* notes 187-193 and accompanying text.

223. For a summary of how the USFS's drilling moratorium limited mineral rights owners' ability to protect their subsurface estates, see *supra* notes 187-193 and accompanying text.

224. For further discussion of Marcellus Shale drilling in the ANF, see *supra* notes 7-10 and accompanying text.

225. For analysis regarding the possibility that drilling companies will be less concerned about causing environmental harm, see *supra* note 74 and accompanying text.

226. For an analysis of the potential for drilling companies to be less diligent in mitigating their environmental impact, see *supra* note 74 and accompanying text.

227. For an overview of policy concerns associated with shifting power to the judiciary regarding mineral rights regulation, see *supra* note 74 and accompanying text.

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eral rights against surface rights could have both positive and negative implications for the exercise of ANF mineral rights.[228]

The Third Circuit's narrow holding in *Minard Run II* is consistent with the nationwide trend of holding an individual's private mineral rights to be of more value than the government's surface rights.[229] Further, the Third Circuit properly avoided the sensitive and controversial Takings Clause issue by following Supreme Court precedent and other circuit decisions.[230] With its decision in *Minard Run II*, and perhaps with an eye toward the future of Pennsylvania's economy, the Third Circuit removed one hurdle for Marcellus Shale drilling in the ANF and similar federally owned lands and potentially helped usher in the jobs and state revenue that will accompany such drilling.[231] The decision did, however, further cloud the present role of the USFS and of national forests.[232] Nevertheless, the Third Circuit's decision properly allowed the USFS to re-tailor its approach and find a narrower means of conducting an EIS of the ANF without effectively depriving private mineral rights owners of their property rights.[233]

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228. For a critical analysis of the balance between mineral rights and surface rights, see *supra* notes 152-156 and accompanying text.

229. For further analysis of Pennsylvania decisions and national decisions regarding private mineral rights usage beneath federal lands, see *supra* notes 62-102 and accompanying text.

230. For further explanation of the Third Circuit's approach to the Takings Clause, see *supra* notes 168-173 and accompanying text.

231. For further explanation of the positive and negative implications of Marcellus Shale drilling, see *supra* notes 7-10 and accompanying text.

232. For a summary of the current struggle to define the role of the USFS and national forests, see *supra* notes 210-215 and accompanying text.

233. For further discussion of how the USFS's moratorium affected drilling, see *supra* notes 144-151 and accompanying text.

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