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CLIENT ALERT

Federal District Court Grants Final Declaratory Relief to Energy Resource Producers in Marcellus Shale Region, Vacating Harmful U.S. Forest Service/Sierra Club Settlement

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On September 6, 2012, the U.S. District Court for the Western District of Pennsylvania granted final declaratory relief against U.S. Forest Service interference with private mineral rights on split-estate lands in the 500,000-acre Allegheny National Forest (ANF) and vacated a 2009 Settlement Agreement between the Forest Service and the Sierra Club and other environmental groups, which had imposed a Forest-wide drilling ban. The opinion in *Minard Run Oil Co. and PIOGA v. U.S. Forest Service, et al.*, has significance for development of oil and gas (including Marcellus shale gas) in split-estate situations created under the federal Weeks Act and, more generally, for businesses seeking to challenge overreaching by federal agencies and environmental groups. Crowell & Moring is lead counsel for the victorious Plaintiffs, including the Pennsylvania Independent Oil and Gas Association.

History and Context

The ANF is located in western Pennsylvania, near Col. Drake's first ever oil well drilled in 1859. The 1911 Weeks Act authorized land acquisition for eastern National Forests. The ANF encompasses major parts of four western Pennsylvania counties. Mineral owners and the ANF had a history of working cooperatively to reach accommodations that allowed prompt oil and gas development in a manner giving due regard to surface estate uses. Things went well until about 2007, when the Forest Service began asserting increasingly broad regulatory authority. Two 2009 actions led to the *Minard Run* suit. First, under a sweetheart settlement with environmental groups, including the Sierra Club, the Forest Service committed in an April 8, 2009 Settlement Agreement to conducting National Environmental Policy Act (NEPA) analyses on private mineral development in the ANF. Second, an April 10, 2009 statement from ANF Supervisor Marten announced a multi-year moratorium on "approving" private mineral development through Notices to Proceed (NTPs) until a forest-wide Environmental Impact Statement (EIS) had been prepared and approved. Mineral owners were later threatened with criminal prosecution if they did not obey the drilling ban and engaged in oil and gas operations without an NTP.

District Court Preliminary Injunction Proceedings

ANF oil and gas interests (joined by Warren County, Pa.) brought suit in June 2009 and sought a preliminary injunction against the multi-year shutdown in new oil and gas development. At a three-day hearing, Plaintiffs provided considerable factual evidence on the Forest Service's historic practices, the recent changes, and the severe economic hardship those changes were causing. Federal Judge Sean J. McLaughlin of the Western District of Pennsylvania issued the requested preliminary injunction in *Minard Run Oil Co. v. U.S. Forest Service*, No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009), finding that: (1) mineral rights are dominant; (2) the Forest Service was exceeding its limited authority under the Weeks Act and Pennsylvania property law; (3)

since the Forest Service had no permitting or approval power, NEPA did not apply; and (4) the Forest Service's change in legal policy was an arbitrary, unexplained departure from past practice.

The 2011 Third Circuit Rulings And Their Significance

A unanimous Third Circuit panel affirmed the preliminary injunction, praising the "District Court's thorough, well-reasoned opinion," and affirming it "in all respects."*Minard Run Oil Co. and PIOGA v. U.S. Forest Service, et al.,* 670 F.3d 236 (3d Cir. Sept. 20, 2011). The appellate opinion rejected federal claims that judicial review is not available on the Settlement Agreement and Marten Statement, which together had imposed the drilling ban. The Third Circuit held: " In sum, the Service does not have the broad authority it claims over private mineral rights owners' access to surface lands." Because no federal permit is required for the exercise of dominant private mineral rights, "the District Court properly concluded that issuance of an NTP is not a 'major federal action' under NEPA and an EIS need not be completed prior to issuing an NTP." The court also held that, because the Settlement Agreement and Marten Statement "create new duties for mineral rights owners," they are substantive rules that could only be adopted "pursuant to the notice-and-comment procedures" of the Administrative Procedure Act, which had not been followed. The court found that substantial economic injuries (*e.g.*, potential bankruptcies) and interference with real property rights do constitute the irreparable injury needed for an injunction. Further, the Third Circuit found, under the public-interest factor for an injunction, that "granting the injunction would vindicate the public's interests in aiding the local economy," protect "the property rights of mineral rights owners," and ensure "public participation in agency rulemaking as required by the APA."

September 6, 2012 Final Judgment Vacating Sierra Club-U.S. Forest Service Settlement

In the final judgment rendered by Judge McLaughlin, the district court converted the 2009 preliminary injunction order into a final declaratory judgment. In the final judgment, Judge McLaughlin vacated the April 8, 2009 Settlement Agreement between the U.S. Forest Service and the environmental defendants, who included the Sierra Club, the Allegheny Defense Project, and the Forest Service Employees for Environmental Ethics. In a well-reasoned (45-page) opinion, Judge McLaughlin re-examined the merits issues and rejected each point that the Sierra Club defendants raised. The federal defendants had conceded merits issues following the Third Circuit's ruling.

These rulings should be quite helpful as Marcellus and Utica Shale hydrocarbon resources are developed in the eastern United States. The significance of the rulings extends beyond Weeks Act and mineral development situations. For example, the decision enhances industry's ability to challenge sweetheart litigation settlements, and to challenge NEPA and other regulatory delays. Importantly, key parts of the Third Circuit's opinion - especially the Court's ruling that substantial economic injuries and local economic benefits can support an injunction - assist business interests that seek to preliminarily enjoin federal overreaching in other contexts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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