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Defeating "Sue And Settle" Agreements: Third Circuit Decision Supporting Shale Gas Development Shows The Way

by R. Timothy McCrum

Western Pennsylvania is the birthplace of the world's oil and gas industries, and today it is the site of one of the largest natural gas discoveries in the United States in the Marcellus Shale—made possible through the ingenious combination of hydraulic fracturing and horizontal drilling. In recent years, an epic legal battle has been underway there between oil and gas producers and drilling opponents. Fortunately, this protracted battle is nearing a happy ending for the hard-working people and small businesses in this region. The case's resolution also provides something of a road map to defeat similar "sue and settle" agreements.

On September 26, 2013, the U.S. Court of Appeals for the Third Circuit affirmed final declaratory relief against U.S. Forest Service efforts to prevent the exercise of private mineral rights on split-estate lands in the 500,000-acre Allegheny National Forest ("ANF"). In so doing, the court upheld a 2012 district court's order vacating 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 series of favorable rulings in *Minard Run Oil Co. and Pennsylvania Independent Oil and Gas Association ("PIOGA") v. U.S. Forest Service, et al.,* has significance for the development of important oil and gas resources and, more generally, for businesses seeking to challenge unlawful sue and settle agreements reached between federal agencies and environmental groups.

The ANF is located in western Pennsylvania, near Edwin Drake's first ever oil well drilled in 1859. The National Forest encompasses major parts of four counties. The 1911 Weeks Act authorized land acquisition for eastern national forests, and when the federal government acquired private lands for the ANF in the 1930s, the oil and gas mineral rights were severed from the land surface. Today, private oil and gas rights reside under more than 93 percent of the ANF. Mineral owners and the ANF had a history of working cooperatively to reach accommodations that allowed prompt oil and gas development, with due regard to National Forest surface estate uses.

In the depths of the 2009 economic downturn, two actions led to the *Minard Run Oil* suit. First, under a settlement with environmental groups, including the Sierra Club, the U.S. 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 Leanne Marten implemented the settlement by announcing 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. Mineral owners were threatened with criminal prosecution if they ignored the drilling ban.

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ANF oil and gas interests (joined by Warren County, Pennsylvania) brought suit in June 2009 seeking a preliminary injunction against the multi-year shutdown of new oil and gas development. The named defendants included the U.S. Forest Service, the U.S. Attorney General, and the Sierra Club, which was a party to the settlement agreement. At a three-day hearing, plaintiffs provided considerable factual evidence regarding the Forest Service's traditional practices, the recent changes, and the severe economic hardship those changes were causing. Federal Judge Sean J. McLaughlin issued the requested preliminary injunction against the drilling ban in *Minard Run Oil Co. v. U.S. Forest Service*, 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 power, NEPA did not apply; and (4) the Forest Service's change in legal policy through the settlement agreement was an arbitrary departure from past practice which violated the Administrative Procedure Act ("APA").

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. 2012). The court rejected claims that judicial review was not available on the settlement agreement and the implementing 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[d] new duties for mineral rights owners," they were substantive rules that could only be adopted "pursuant to the notice-and-comment procedures" of the APA, which had not been followed in the settlement agreement. The court found that substantial economic injuries (*e.g*., potential bankruptcies) and interference with real property rights constituted the irreparable injuries 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," protecting "the property rights of mineral rights owners," and ensuring "public participation in agency rulemaking as required by the APA."

In 2012, Judge McLaughlin converted the 2009 preliminary injunction order into a final judgment. *See Minard Run Oil Co. v. U.S. Forest Service, et al*., 894 F. Supp.2d (W.D.Pa. 2012). He vacated the April 8, 2009 Settlement Agreement between the Forest Service and the environmental group defendants. He 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 2011 ruling. In the latest ruling by the Third Circuit, *Minard Run Oil Co. v. U.S. Forest Service, et al*., 2013 WL 5357066 (3d Cir. Sept. 26, 2013), a new panel unanimously affirmed again. The court invoked the law of the case doctrine and referred to the prior panel decision as having "decisively resolved the legal claims."

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 mineral development situations. Most notably, the decision enhances industry's ability to challenge NEPA and other regulatory delays as well as sue and settle-style litigation in which federal agencies may unduly accommodate interests that oppose resource development. Importantly, key parts of the Third Circuit's 2012 opinion—especially the court's ruling that substantial economic injuries and local economic benefits can support an injunction—will assist business interests that seek to enjoin illegal federal action in other contexts.

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