

3-1-2013

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Jessica Diaz

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Jessica Diaz, *A Forest Divided: Minard Run Oil Co. v. U.S. Forest Service and the Battle over Private Oil and Gas Rights on Public Lands*, 40 *ECOLOGY L. Q.* 195 (2013).

Available at: <http://scholarship.law.berkeley.edu/elq/vol40/iss2/3>

Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38NG2Q>

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A Forest Divided: *Minard Run Oil Co. v. U.S. Forest Service* and the Battle over Private Oil and Gas Rights on Public Lands

Jessica Diaz*

*While conflicts between energy development and environmental protection are rarely subdued, perhaps nowhere does this tension run higher than in the context of public lands. The Third Circuit Court of Appeals faced precisely such a conflict in *Minard Run Oil Co. v. U.S. Forest Service*, which involved the exercise of privately owned oil and gas rights in the Allegheny National Forest. This case illuminated the problems that arise in determining the boundary of the federal government’s authority over private drilling operations on “split estates,” where the federal government owns the surface of the land, but private parties own the underground oil and natural gas reserves. At issue in this case was the interpretation of two federal statutes: the Weeks Act, which governed the acquisition of much of the National Forest System, and the National Environmental Policy Act (NEPA), which requires the federal government to consider the environmental impacts of certain decisions. This Note argues that the court adopted an unnecessarily narrow reading of the Weeks Act and a similarly constrained view of agency discretion under NEPA, presenting environmental concerns not only for the National Forest System but also for other public lands as well. This Note concludes that the federal government’s ability to condition drilling operations on NEPA review is particularly important given the limitations of other federal statutes in curbing the environmental impacts of hydraulic fracturing.*

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* J.D. Candidate, University of California, Berkeley, School of Law (Boalt Hall), 2014; B.A., Government, Harvard University, 2006. I am grateful to Professor Eric Biber and Somerset Perry for their insights and guidance throughout the writing process, and to Distinguished Lecturer Bob Infelise for coteaching a wonderful writing seminar. My sincere thanks also go to Ecology Law Quarterly, and especially to Alexander Bandza for his outstanding editorial assistance.

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INTRODUCTION

In 1923 The U.S. government purchased 800 square miles¹ of largely logged and barren land in northern Pennsylvania to create the Allegheny National Forest.² The acquisition was one of many in the early twentieth century, as the federal government amassed a network of land that now occupies one-twelfth of the United States—the National Forest System.³ The concept of purchasing private property to preserve and restore forestland was not without controversy, but Congress's “not one cent for scenery” contingent⁴ was ultimately undone by the compelling arguments favoring public ownership—most notably, that public stewardship of watersheds in the Eastern

1. Susan Phillips, *Lawmakers to Vote on Stripping Feds of Water Withdrawal Authority in Allegheny National Forest*, STATEIMPACT (May 7, 2012), <http://stateimpact.npr.org/pennsylvania/2012/05/07/lawmakers-to-vote-on-stripping-feds-of-water-withdrawal-authority-in-allegheny-national-forest>.

2. U.S. FOREST SERV., ALLEGHENY NATIONAL FOREST RECORD OF DECISION FOR FINAL ENVIRONMENTAL IMPACT STATEMENT AND THE LAND AND RESOURCE MANAGEMENT PLAN at ROD-5 (2007), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5044088.pdf.

3. JOHN FEDKIW, U.S. FOREST SERV., *Introduction to MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905–1995* (1998), available at http://www.foresthistory.org/ASPNET/Publications/multiple_use/chap1.htm.

4. After the first proposal was introduced for creating national forests in the Eastern United States by acquiring private property, Joe Cannon, the powerful Speaker of the House, declared “not one cent for scenery.” GERALD W. WILLIAMS, U.S. FOREST SERV., *Forest Protection or Custodial Management 1910-1933*, in THE USDA FOREST SERVICE—THE FIRST CENTURY (2000), available at http://www.foresthistory.org/ASPNET/Publications/first_century/index.htm.

United States was critical for flood control.⁵ In implementing this ambitious conservation effort, federal officials embraced a vision of shared public and private use.⁶ As one of the very first chiefs of the newly created U.S. Forest Service noted, forests should not only be owned by the public “for their protective value,” but should also serve “as centers of cooperation with private owners.”⁷

A century later, however, the Allegheny National Forest provides a dramatic example of how illusory such cooperation can be. The forest—just miles away from the world’s first commercial oil well⁸—sits atop the Marcellus Shale, a vast expanse of untapped natural gas resources underlying Pennsylvania, West Virginia, Southern New York, and Eastern Ohio.⁹

The region has become a focal point for energy-development debates in recent years with the proliferation of hydraulic fracturing (or “fracking”), the vaunted and vilified natural-gas extraction technique. Fracking is a process for extracting natural gas trapped within underground shale, comprised of fine-grained, sedimentary rock.¹⁰ Millions of gallons of water, sand, and chemicals, the so-called “fracking fluid,” are pumped underground at high pressure to fracture the shale; the released gas is then extracted through horizontal wells.¹¹ While fracking technology is over fifty years old, the advent of horizontal wells, coupled with the high demand for natural gas, has for the first time made shale exploitation commercially viable.¹² The environmental concerns presented by fracking include its water use,¹³ the disposal of fracking fluid,¹⁴ the potential groundwater contamination caused by leaking wells or other exposure pathways,¹⁵ the air emissions from drilling and operational equipment,¹⁶ and the impacts of construction activities, such as building new

5. See ASHLEY L. SCHIFF, *FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST SERVICE* 119 (1962).

6. See FEDKIW, *supra* note 3.

7. WILLIAMS, *supra* note 4 (comments of Henry Graves, Chief Forester from 1910 to 1920).

8. Scott Detrow, *Perilous Pathways: Behind the Staggering Number of Abandoned Wells in Pennsylvania*, STATEIMPACT (Oct. 10, 2012), <http://stateimpact.npr.org/pennsylvania/2012/10/10/perilous-pathways-behind-the-staggering-number-of-abandoned-wells-in-pennsylvania>.

9. *Marcellus and Utica Shales Data*, OHIO DEP’T OF NATURAL RES. DIVISION OF GEOLOGICAL SURVEY, <http://www.dnr.state.oh.us/tabid/23014/default.aspx> (last visited June 8, 2013).

10. U.S. ENERGY INFO. ADMIN., *ENERGY IN BRIEF: WHAT IS SHALE GAS AND WHY IS IT IMPORTANT* (2012), available at http://www.eia.gov/energy_in_brief/about_shale_gas.cfm [hereinafter U.S. EIA].

11. U.S. DEP’T OF ENERGY, *MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER* (hereinafter *SHALE GAS PRIMER*), ES-4, April 2009, available at http://energy.gov/sites/prod/files/2013/03/f0/ShaleGasPrimer_Online_4-2009.pdf.

12. *Id.*

13. U.S. EIA, *supra* note 10.

14. *Id.*

15. *Id.*

16. See, e.g., John M. Broder, *U.S. Caps Emissions in Drilling for Fuel*, N.Y. TIMES (April 18, 2012), http://www.nytimes.com/2012/04/19/science/earth/epa-caps-emissions-at-gas-and-oil-wells.html?_r=0.

roads and wells.

Although some hail the development of widespread fracking as a godsend for rural economies and a solution to the nation's energy problems, others see its rise as a harbinger of unknown and unregulated environmental dangers. This clash of perspectives is particularly acute with respect to fracking operations on federally owned public lands. Moreover, conflicts are particularly prone to occur where underground oil and gas rights are privately held (a common scenario in the federally owned forests in the Eastern United States),¹⁷ in national parks,¹⁸ and in wildlife refuges.¹⁹ These so-called "split estates" create a tension between federal agencies' environmental stewardship obligations and the apparent right to use the public land for oil and gas extraction.²⁰ Contravening early forest officials' image of national forests as "centers of cooperation,"²¹ these conflicting uses came to legal fisticuffs in *Minard Run Oil Co. v. U.S. Forest Service (Minard Run II)*.²²

This case pitted the U.S. Forest Service (Forest Service), which owns the surface of the Allegheny National Forest (ANF), against mineral right holders, who own the oil and natural-gas reserves beneath the ANF.²³ The dispute began when the Forest Service attempted to subject drilling activities in the ANF to more rigorous environmental review than in years past, pursuant to its obligations under the National Environmental Policy Act (NEPA).²⁴ In order to conduct this comprehensive, ANF-wide analysis, the Forest Service in 2009 announced a temporary moratorium on new drilling operations.²⁵ Minard Run Oil Company (Minard Run) then filed suit, seeking an injunction to prevent the Forest Service from implementing the moratorium.²⁶ The U.S. District Court for the Western District of Pennsylvania granted the injunction, forcing the Forest Service to lift its moratorium and abandon its attempt to condition drilling operations on environmental review.²⁷ The Third Circuit Court of Appeals took up this injunction in *Minard Run II*.²⁸

While the injunction against the Forest Service was framed as a mandate

17. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 430 (1998).

18. See JESSICA GOAD, CTR. FOR AM. PROGRESS, DRILLING COULD THREATEN OUR NATIONAL PARKS (2012).

19. See Zachary H. Gerson, *The Unrealized Authority of the Fish and Wildlife Service to Protect National Wildlife Refuges from Surface Disturbance Due to Private Mineral Rights*, 29 STAN. ENVTL. L.J. 181, 184 (2010).

20. See generally Mergen, *supra* note 17.

21. See WILLIAMS, *supra* note 4.

22. *Minard Run Oil Co. v. U.S. Forest Serv. (Minard Run II)*, 670 F.3d 236, 257 (3d Cir. 2011).

23. See *id.* at 241–42.

24. *Id.* at 242; see also 42 U.S.C. § 4332(C) (2012).

25. *Minard Run II*, 670 F.3d at 245–46.

26. *Id.*

27. *Id.* at 246.

28. *Id.* at 242. As evident by its abbreviation, *Minard Run II* is not the first dispute between Minard Run and the Forest Service over cooperative-framework concerns in the ANF. See discussion *infra* Part I.B.

to return to a “cooperative framework,”²⁹ the Third Circuit’s holding did more than affirm the Forest Service’s duty to cooperate with private users. Instead, the court interpreted a key federal statute, the Weeks Act, as sharply limiting the Forest Service’s ability to regulate the use of privately held mineral rights in the ANF.³⁰ The court’s interpretation of the Weeks Act has broad implications for national forests in the Eastern United States,³¹ as well as other federally owned public lands.³² Furthermore, the court adopted a novel interpretation of NEPA that circumscribes the Forest Service’s ability to subject private drilling operations to environmental review.³³

This Note proceeds in five parts. Part I explains the statutes and common law that govern federal authority over mineral extraction in national forests, and surveys the major legal developments leading up to the Third Circuit’s decision in *Minard Run II*. Part II summarizes the Third Circuit’s opinion in *Minard Run II* and the potential scope of its application. Part III critiques the Third Circuit’s interpretation of the Weeks Act, arguing that this interpretation imposes unwarranted constraints on the Forest Service’s authority. Part IV reviews the implications of the Third Circuit’s NEPA analysis, and contrasts the Third Circuit’s narrow view of agency discretion with an alternative approach for applying NEPA to private uses on public lands. Finally, Part V explores the significance of NEPA review as a means of addressing contemporary environmental concerns about mineral extraction on public lands, concluding that a federal agency’s authority to conduct NEPA review is particularly critical in the context of fracking

I. BACKGROUND

A. *The Evolution of the National Forest System and Privately Held Mineral Rights*

Congress first authorized the creation of the National Forest System in 1891 by allowing the President to designate existing federal lands as national forest reserves.³⁴ Much of the dispute in *Minard Run II* centered on conflicting interpretations of the Forest Service’s authority under the two statutes governing the creation of national forests—the Organic Act and the Weeks Act.³⁵ The 1897 Organic Act authorized the Secretary of Agriculture to regulate the presidentially designated national forests’ “occupancy and use.”³⁶

29. *Minard Run II*, 670 F.3d at 247.

30. *See id.* at 251–52.

31. *See* discussion *infra* Part II.

32. *See id.*

33. *See* discussion *infra* Part V.

34. *Minard Run II*, 670 F.3d at 242.

35. *See id.* at 251 (discussing the Forest Service’s authority under the Organic Act and the Weeks Act).

36. *Id.* (citing 16 U.S.C. § 475 (2012)).

Today, this Organic Act power resides with the Forest Service.³⁷

The Weeks Act was signed into law in 1911, and it significantly expanded the forest program by authorizing the Secretary of Agriculture to acquire new land for national forests.³⁸ This authorization was instrumental to the creation of national forests in the Eastern United States, and the Weeks Act led to the creation of fifty national forests.³⁹ Among these was the ANF, designated as a national forest in 1923.⁴⁰ The Weeks Act allowed the Secretary of Agriculture to purchase the surface of a property (the “surface estate”) while leaving privately held mineral rights intact.⁴¹ Acquisitions of privately owned land for national forests gave rise to two categories of mineral rights, each governed by slightly different legal rules.⁴²

Those in the first category, “reserved rights,” were created when the Secretary of Agriculture purchased the surface of a property but where the seller “reserved” the underground mineral rights for continued private use.⁴³ The Weeks Act provides that reserved rights “shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States.”⁴⁴ When the Forest Service acquired the ANF in 1921, the Secretary of Agriculture had promulgated the most recent set of regulations regarding reserved rights in 1911 (the “1911 Regulations”),⁴⁵ which specified that mineral right holders should use no more of the surface than reasonably necessary, but did not require mineral right holders to get a permit from the Forest Service to exercise their rights.⁴⁶ Accordingly, the deed for the “vast majority” of ANF reserved rights accords with the 1911 Regulations.⁴⁷

The second category is “outstanding rights,” which were created when the Secretary of Agriculture purchased property where the surface estate, prior to the government’s acquisition, had already been severed from the underground

37. *Id.* at 251; *see also* Brief of Federal Defendants-Appellants at 6–7, *Minard Run II*, 670 F.3d 236 (3d Cir. 2011) (Nos. 10-1265 & 10-2332).

38. *Minard Run II*, 670 F.3d at 242.

39. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LANDS & RESOURCES LAW* 136 (6th ed. 2007).

40. *Minard Run II*, 670 F.3d at 242.

41. *Id.* at 243. Under this acquisition regime, the federal government could approach a private property owner with underground oil and gas reserves and offer to purchase only the surface of his or her land, thus leaving the right to extract underground resources in the hands of the private seller. *Id.* Purchasing a property’s surface alone was more affordable than buying land bundled with underground oil and gas rights. *Id.* at 242–43.

42. *See id.*

43. *Id.*

44. Weeks Act § 9, 16 U.S.C. § 518 (2012).

45. *Minard Run II*, 670 F.3d at 243.

46. *Id.*

47. *Id.*

mineral rights.⁴⁸ Since these outstanding rights were created prior to the Forest Service purchasing the surface rights, the Forest Service's position has been that outstanding mineral rights are not covered by its regulations but rather by state common law.⁴⁹ Under Pennsylvania common law, a mineral right owner must show "due regard" for the surface estate owner, but does not need the surface owner's consent before entering the land to mine.⁵⁰ Approximately half of the mineral rights in the ANF are outstanding rights.⁵¹

B. Minard Run I and Forest Service Employees for Environmental Ethics

Disputes over the precise legal parameters of the relationship between mineral right holders and the Forest Service are not new to the ANF. In 1980, the U.S. government filed suit against Minard Run, seeking a greater ability to regulate Minard Run's clearing of timber for road access and pipelines.⁵² The District Court for the Western District of Pennsylvania agreed with the United States that the lack of cooperation between the Forest Service and mineral right holders was causing irreparable damage to the ANF.⁵³ The court issued an injunction preventing Minard Run from drilling in the ANF unless the company adhered to specific requirements for communicating with the Forest Service about its operations.⁵⁴ These requirements, dubbed the "*Minard Run I* Framework," were memorialized in the Forest Service's 1984 Handbook and later codified in the Energy Policy Act of 1992.⁵⁵ Under the *Minard Run I* Framework, the mineral right holder was required to give the Forest Service at least sixty days' notice for a new drilling operation and negotiate certain details with the Forest Service, such as the location of access roads or wells.⁵⁶ When negotiations completed, the Forest Service would then issue a "Notice to Proceed" (NTP), acknowledging receipt of the notice and formalizing any agreements.⁵⁷

The *Minard Run I* Framework was silent on the Forest Service's obligations to undertake environmental review under NEPA when issuing NTPs,⁵⁸ creating uncertain legal terrain for the Forest Service. NEPA is "our

48. *Id.*

49. *Id.*; see also *United States v. Minard Run Oil Co. (Minard Run I)*, No. 9012, 1980 U.S. Dist. LEXIS 9570, at *14-15 (W.D. Pa. Dec. 16, 1980).

50. *Minard Run II*, 670 F.3d at 244.

51. *Id.* at 243.

52. See *Minard Run I*, 1980 U.S. Dist. LEXIS 9570 at *1.

53. *Id.* at *16.

54. *Id.* at *21-22.

55. *Minard Run II*, 670 F.3d 236, 244 (3d Cir. 2011); see also Energy Policy Act of 1992 § 2508, 30 U.S.C. § 226(o) (2012). The Energy Policy Act of 1992 addresses only mineral-right holders' notice obligations to the Forest Service, without addressing the Forest Service's authority to place further limitations on mineral extraction.

56. *Minard Run II*, 670 F.3d at 244.

57. *Id.*

58. See *id.*

basic national charter for protection of the environment.”⁵⁹ Rather than mandating particular results, NEPA sets forth procedures that ensure agencies take a “hard look” at environmental consequences of their proposed actions.⁶⁰ Specifically, NEPA seeks to “prevent or eliminate damage to the environment” by requiring that federal agencies evaluate the environmental impacts of “major federal actions,” which include licenses, permits and other entitlements.⁶¹ Accordingly, the agency need not conduct environmental review if the agency has no power to prevent the effects of a proposed action from occurring.⁶² NEPA requires that an agency complete a comprehensive report, called an Environmental Impact Statement (EIS), if the agency action will significantly affect “the quality of the human environment.”⁶³ However, an agency may begin the NEPA process by conducting a more perfunctory Environmental Assessment (EA).⁶⁴ If the EA demonstrates that no significant impacts will result from the proposed action, then the agency may fulfill its NEPA obligations by issuing a Finding of No Significant Impact (FONSI).⁶⁵

Until 2007, the Forest Service took the position that issuing an NTP was not a “major federal action,” and therefore, NEPA review was not required. Notably, however, mineral extraction within the ANF had not completely escaped environmental review. For example, the Forest Service occasionally conducted an EA within the sixty-day *Minard Run I* period before issuing an NTP.⁶⁶ Additionally, in connection with the Forest Service’s “Forest Plans” adopted in 1987 and 2007, the agency completed EISs that, in part, analyzed the forest-wide environmental impacts of mineral extraction.⁶⁷

In 2007, the Forest Service’s Office of General Counsel issued a memorandum concluding that NTP issuance was, in fact, a “major federal

59. 40 C.F.R. § 1500.1(a) (2013).

60. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

61. 42 U.S.C. §§ 4321, 4332(C) (2012).

62. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (holding that where an agency cannot prevent certain effects because of limited statutory authority over the relevant actions, NEPA analysis of those effects is not required).

63. 42 U.S.C. § 4332(C).

64. 40 C.F.R. § 1501.3–01.4. Federal agencies issue about 500 EISs annually, compared to over 50,000 EAs. Some NEPA scholars posit that federal agencies often aim to produce an EA just comprehensive enough to avoid creating a costlier and more litigation-prone EIS. *See, e.g., Bradley C. Karkkainen, Toward A Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 919 (2002); Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 347 (2004).

65. 40 C.F.R. § 1501.4. The vast majority (approximately ninety-nine percent) of the EAs produced annually lead to FONSI. *See Karkkainen, supra* note 64, at 909–10. Courts have recently upheld FONSI as fulfilling NEPA requirements for a program authorizing the lethal removal of sea lions preying on endangered salmon, *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1046, 1058 (9th Cir. 2010), a grant for a New Orleans housing project, *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 250 (5th Cir. 2006), and construction of a rail facility involving the rerouting of streams, *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Engineers*, 702 F.3d 1156, 1181 (10th Cir. 2012).

66. *Minard Run II*, 670 F.3d 236, 244 (3d Cir. 2011).

67. *Id.*

action” subject to NEPA’s obligations, although the memo resulted in no immediate policy change.⁶⁸ In 2008, the Forest Service Employees for Environmental Ethics (FSEEE)⁶⁹ and the Sierra Club sued the Forest Service, claiming that NTPs were “major federal actions” that triggered environmental-review obligations under NEPA.⁷⁰ In 2009, the Forest Service settled the case, agreeing to “undertake appropriate NEPA analysis prior to issuing Notices to Proceed.”⁷¹ In a separate statement issued by ANF Forest Supervisor Leanne Marten (the “Marten Statement”), the Forest Service announced that, except for NTP applications specifically carved out in the settlement agreement (the “Settlement Agreement”), no new drilling in the ANF would be authorized until an ANF-wide EIS was completed, with an anticipated completion date of April 2010.⁷²

C. The Plaintiffs’ Claims in Minard Run II and the Lower Court’s Decision

Two months after the Forest Service issued the Marten Statement, Minard Run, Warren County, the Pennsylvania Independent Oil and Gas Association, and the Allegheny Forest Alliance filed suit in the U.S. District Court for the Western District of Pennsylvania.⁷³ In addition to the Forest Service and various Forest Service officials, the plaintiffs also named the U.S. Attorney General and the environmental plaintiffs in *FSEEE*, claiming that the Settlement Agreement was unlawful.⁷⁴ Specifically, the plaintiffs alleged that the Settlement Agreement imposed a de facto drilling moratorium, which plaintiffs alleged exceeded the Forest Service’s authority, was contrary to NEPA, and violated the Administrative Procedure Act (APA).⁷⁵ Alleging that the ANF-wide EIS would likely take several years to complete, the plaintiffs

68. *Id.* at 245.

69. FSEEE is a private nonprofit founded in 1990, comprised of current and former Forest Service employees, as well as other concerned citizens. *Our Mission*, FSEEE, <http://www.fseee.org/index.php/about/mission> (last visited Feb. 20, 2012). Its mission is to “protect national forests and to reform the U.S. Forest Service by advocating environmental ethics, educating citizens, and defending whistleblowers.” *Id.*; see also *FSEEE’s New Millennium*, INNER VOICE NEWSLETTER (Jan/Feb. 2000), <http://www.fseee.org/forest-magazine/200397>.

70. *Id.*; see also *Forest Serv. Employees for Envntl. Ethics v. U.S. Forest Serv. (FSEEE)*, No. CIV.A.08-323ERIE, 2009 WL 1324154 (W.D. Pa. May 12, 2009).

71. *Minard Run II*, 670 F.3d at 245.

72. *Id.*

73. *Id.* at 246. Minard Run owns mineral rights beneath approximately 4,700 acres in the ANF. Complaint at 3, *Minard Run Oil Co. v. U.S. Forest Serv.*, No. C.A. 09-125ERIE, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009) (No. 09CV00125), 2009 WL 4050498. Pennsylvania Independent Oil and Gas Association is a trade association representing oil and natural gas producers. *Id.* at 3. The County of Warren is one of four counties in which the ANF is situated. *Id.* at 4. The Allegheny Forest Alliance describes itself as “a coalition of public school districts, municipalities, and businesses” whose aim is to support “sustainable development within the ANF, including sustainable forestry, environmental stewardship, and multiple-use management.” *Id.* at 3–4.

74. *Minard Run II*, 670 F.3d at 245.

75. *Id.*

further contended that the moratorium would cause significant losses to their business, and they moved for an injunction to prevent its enforcement.⁷⁶

The District Court granted the preliminary injunction.⁷⁷ First, the court held that it had jurisdiction under the APA, which provides judicial review only for “final agency actions.”⁷⁸ The court found that the Settlement Agreement, coupled with the Marten Statement, met this requirement.⁷⁹ Next, the court ruled that the moratorium was not justified under NEPA because issuing an NTP was not a “major federal action.”⁸⁰ Finally, the court enjoined the Forest Service from requiring the preparation of an EIS as a precondition to exercising mineral rights in the ANF, and it required that the Forest Service return to the strict *Minard Run I* Framework.⁸¹

II. THE THIRD CIRCUIT’S DECISION AND THE SCOPE OF *MINARD RUN II*

A. *The Third Circuit’s Decision*

The Third Circuit upheld the lower court’s decision to issue a preliminary injunction,⁸² resulting in a decisive victory for the mineral-rights holders. The Third Circuit first rejected the Forest Service’s APA-based jurisdictional challenge, holding that the Forest Service’s moratorium on new drilling constituted a “final agency action” and was, therefore, subject to judicial review.⁸³ On the merits, the Third Circuit found that the lower court had acted reasonably in evaluating all four prongs of the injunctive-relief test, which requires that a plaintiff demonstrate (i) a likelihood of success on the merits; (ii) that it will suffer irreparable harm if the injunction is denied; (iii) that granting the injunction will not result in even greater harm to the other party; and (iv) that the public interest favors such relief.⁸⁴

With respect to the first prong, the Third Circuit agreed with the lower court that the plaintiffs were likely to prevail on their claim that NEPA review was unnecessary to issue an NTP.⁸⁵ The court reasoned that issuing an NTP would only be considered a “major federal action” under NEPA if the Forest Service’s approval were *required* for mineral-rights holders to drill.⁸⁶ After analyzing how the Weeks Act and Pennsylvania common law applied to

76. *Id.*

77. *Id.* at 247.

78. *Id.* (citing 50 U.S.C. § 702 (2012)).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 257.

83. *Id.* at 248.

84. *See id.* (citing *Kos Pharm. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)).

85. *Id.* at 254–55.

86. *Id.* at 251 (citing *N.J. Dept. of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994)).

reserved and outstanding mineral rights in the ANF, the appellate court concluded that the Forest Service's approval was not required for a mineral-rights holder to access the forest surface.⁸⁷

As a threshold matter, the Third Circuit found that the Organic Act—and its broad grant of Forest Service regulatory authority—did not apply to the ANF because the Act concerned only forest reserves on lands already under federal ownership in 1897.⁸⁸ Since the ANF was acquired by purchasing private property, the Weeks Act provided the operative statutory language.⁸⁹

Under the Weeks Act, reserved rights are subject to “the rules and regulations prescribed by the Secretary of Agriculture,” and these rules and regulations “shall be expressed in and made part of the written instrument conveying title to the lands.”⁹⁰ While the Weeks Act did not specify that mineral rights were subject *only* to such regulations, the Third Circuit found that reading the statute otherwise would render this provision superfluous.⁹¹ Regarding outstanding rights, the appellate court noted that, although the Weeks Act did not specifically address what limitations should apply, the Act did provide that the Secretary of Agriculture should only acquire forestlands where outstanding encumbrances would “in no manner interfere” with the use of the land as a national forest.⁹² The Third Circuit reasoned that if Congress actually intended to give the Forest Service authority to simply “override” outstanding mineral rights, an approach consistent with the Settlement Agreement and the Marten Statement, this provision would have been superfluous.⁹³ Accordingly, the appellate court concluded that the Weeks Act barred the Forest Service from imposing new terms on outstanding mineral-rights holders.⁹⁴

Next, the court turned to the constitutional problems raised by the Forest Service's interpretation of its Weeks Act authority.⁹⁵ Citing a Fourth Circuit case involving a conflict between the Forest Service and an access road owner in West Virginia's Monongahela National Forest, the Third Circuit found that requiring mineral-rights holders to obtain a permit to exercise their rights would, in effect, “wipe the National Forest System clean of any and all easements.”⁹⁶ The court reasoned that giving such broad authority to the Forest Service could present a constitutional problem under the Fifth Amendment's Takings Clause, which prohibits the federal government from

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*; Weeks Act § 9, 16 U.S.C. § 518 (2012).

91. *Minard Run II*, 670 F.3d at 252–53.

92. *Id.* at 252 (citing Weeks Act § 9, 16 U.S.C. § 518).

93. *Minard Run II*, 670 F.3d at 252.

94. *Id.*

95. *Id.*

96. *Id.* (quoting *United States v. Smsky*, 271 F.3d 595, 604 (4th Cir. 2001)).

taking private property without just compensation.⁹⁷ Therefore, the Third Circuit was unwilling to give the Weeks Act this interpretation absent “a clear indication of congressional intent,” which it found lacking.⁹⁸

Finally, the plaintiffs claimed that the APA required the Forest Service to open its moratorium proposal to public notice and comment before implementation.⁹⁹ Here, too, the Third Circuit found that the lower court correctly deemed the plaintiffs likely to prevail on the merits.¹⁰⁰ The appellate court reasoned that the Settlement Agreement and Marten Statement were “rules” within the meaning of the APA because they created new duties for mineral-rights owners—barring the Forest Service from issuing new NTPs until an ANF-wide EIS was completed.¹⁰¹ Accordingly, the appellate court found that the Forest Service should have complied with the APA’s procedural rulemaking requirements.¹⁰²

With respect to the second prong, the Third Circuit found that, although purely economic injuries would usually fail to warrant injunctive relief, an exception existed in this case because the potential loss was so great as to threaten the existence of plaintiffs’ businesses.¹⁰³ The appellate court concluded that the lower court acted within its discretion to credit plaintiffs’ testimony that the moratorium could force them to shut down their businesses.¹⁰⁴ Additionally, the Third Circuit noted that the particular nature of the economic interest strengthened the potential for irreparable injury. Since sub-surface minerals are subject to the “rule of capture,”¹⁰⁵ the plaintiffs stood to lose resources to other landowners drilling on lands adjacent to the ANF, absent an injunction.¹⁰⁶

With respect to the third and fourth injunctive-relief prongs, the Third Circuit jointly evaluated the balance of the equities and the public interest at stake.¹⁰⁷ The court noted that the Forest Service successfully completed an ANF-wide EIS in 1986 without a moratorium on drilling operations, suggesting it was possible to undertake a comprehensive, NEPA-specific environmental review of drilling impacts while continuing to issue NTPs.¹⁰⁸ Additionally, the

97. *Id.*; see also U.S. CONST. amend. V.

98. *Minard Run II*, 670 F.3d at 252.

99. *Id.* at 255.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. The “rule of capture” states that “a landowner in a common source of oil and gas supply is legally privileged to take oil and gas from his or her land, even though in so doing he or she may take some of the oil or gas from adjoining lands.” 1 SUMMERS OIL AND GAS § 3:7 (3d ed. 2012).

106. *Minard Run II*, 670 F.3d at 256 (citing *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362 (1907)). Under the rule of capture, nearby landowners could legally extract oil and gas reserves beneath the forest’s surface even to the point of depletion, without compensating the plaintiffs. See *id.*

107. *Id.* at 245–46.

108. *Id.*

Forest Service's admission that environmental resources in the ANF had been adequately preserved under the *Minard Run I* framework tipped the equities in favor of the plaintiffs.¹⁰⁹ In sum, after affirming the lower court's reasoning under each prong of the four-part injunctive-relief test, the Third Circuit upheld the injunction against the Forest Service.¹¹⁰

B. *The Potential Reach of Minard Run II*

Minard Run II also affects other national forests acquired under the Weeks Act. Specifically, 124 of the 155 U.S. national forests were acquired at least in part under the Weeks Act, and these forests comprise the vast majority of national forests east of the Mississippi.¹¹¹ Furthermore, the land potentially affected by private mineral extraction is extensive. As of 1998, the Forest Service estimated that there were six million acres of privately held mineral rights under national forest lands.¹¹² At least two national forests operate under a sixty-day notice procedure nearly identical to the *Minard Run I* framework: the Wayne National Forest in Ohio, and the Monongahela National Forest in West Virginia.¹¹³ The Third Circuit's decision in *Minard Run II* seems likely to dissuade the Forest Service from implementing more stringent environmental review requirements for drilling applications beyond the "cooperative" frameworks already in place.

In addition, the reasoning in *Minard Run II* could have an impact on mineral extraction in public lands held by other federal agencies, most notably the Fish and Wildlife Service (FWS). While the Third Circuit's holding in *Minard Run II* was specific to Forest Service authority under the Weeks Act,¹¹⁴ the court's analysis regarding implied restrictions on agency authority could be extended to other land-acquisition statutes. A court might be particularly apt to extend the reasoning in *Minard Run II* where a statute—as the Weeks Act did—falls short of expressly permitting a land management agency to subject mineral rights to additional regulations over time and directs the agency to avoid conflicts between public and private uses.¹¹⁵

The statute governing FWS's operation of the National Wildlife Refuge

109. *Id.*

110. *Id.*

111. EZEKIEL J. WILLIAMS ET. AL, ROCKY MOUNTAIN INST., ENERGY DEVELOPMENT ON NATIONAL FOREST SYSTEM LANDS, 57 RMLF-INST 6-1 (2011).

112. Mergen, *supra* note 17.

113. See U.S. FOREST SERV., FREQUENTLY ASKED QUESTIONS ON OUTSTANDING AND RESERVED MINERAL RIGHTS BENEATH MONONGAHELA NATIONAL FOREST SYSTEM LANDS, available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5092919.pdf; U.S. FOREST SERVICE, FREQUENTLY ASKED QUESTIONS—OUTSTANDING AND RESERVED RIGHTS, available at <http://www.fs.usda.gov/detail/wayne/home/?cid=stelprdb5376875>.

114. See *Minard Run II*, 670 F.3d at 251.

115. See Weeks Act § 9, 16 U.S.C § 518 (2012).

System,¹¹⁶ for example, contains language strikingly similar to the provisions that the *Minard Run II* court held to be limiting.¹¹⁷ FWS estimates that private oil and gas rights have been exercised in 155 of the 575 national wildlife refuges.¹¹⁸ Like the Weeks Act, the Migratory Bird Control Act (MBCA) states that these rights “shall be subject to the rules and regulations” prescribed by the agency Secretary, and that “such rules and regulations” should be expressed in the deed conveying the property to the federal government.¹¹⁹ As with the national forest context, moreover, the impacts of private oil and gas extraction raise concerns about the extent of federal agency oversight. A 2003 General Accountability Office report on the National Wildlife Refuge System noted that the “lack of information on the effects of oil and gas activities on refuges hindered management, ability to reduce future impacts, and ability to identify and address past damage.”¹²⁰ Accordingly, the implications of *Minard Run II* for the federal government’s ability to serve as an effective steward of national resources¹²¹ may extend beyond the National Forest System.

III. THE WEEKS ACT AND THE BOUNDARIES OF AGENCY AUTHORITY

The Third Circuit found that despite the constitutional and statutory sources of authority asserted by the Forest Service, the Weeks Act limited the agency’s ability to regulate the exercise of privately held mineral rights. Yet, neither the language nor the legislative history of the Weeks Act forecloses an

116. Migratory Bird Conservation Act Amendments of 1935, Pub. L. No. 74-148, 49 Stat. 378, 381–82 (codified at 16 U.S.C. § 715(e) (2012)). See also Gerson, *supra* note 19.

117. The Migratory Bird Conservation Act Amendments of 1935 states that:

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

16 U.S.C. § 715(e). The relevant Weeks Act language reads:

Such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed.

16 U.S.C. § 518.

118. Jonathan Thrope, Case Comment, *Minard Run Oil Co. v. United States Forest Service*, 36 HARV. ENVTL. L. REV. 567, 588 (2012); see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-571, NATIONAL WILDLIFE REFUGES: OPPORTUNITIES TO IMPROVE THE MANAGEMENT AND OVERSIGHT OF OIL AND GAS ACTIVITIES ON FEDERAL LANDS 3 (2003).

119. See Thrope, *supra* note 118.

120. See Gerson, *supra* note 19, at 193.

121. See discussion *infra* Part V.

alternative conclusion: that flexible federal authority and private property interests in public lands can coexist. A more expansive reading of the Forest Service's authority under the Weeks Act can also be squared with the Takings Clause, and the Third Circuit's narrow reading was an unnecessary exercise in constitutional avoidance.

A. *An Alternative Reading of the Weeks Act's Text and Legislative History*

Under the Property Clause of the U.S. Constitution and the Organic Act, the Forest Service has broad authority to regulate private activities in national forests.¹²² The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."¹²³ This power is "without limitation," and it gives Congress expansive authority to promulgate rules that it deems necessary to protect public lands.¹²⁴ Notably, for the Forest Service, this authority extends to the regulation of *private* property adjoining public lands.¹²⁵

Pursuant to its Property Clause powers, Congress passed the Organic Act, tasking the Secretary of Agriculture with regulating the "occupancy and use" of national forests acquired "under section 471 of this title" to "preserve the forests thereon from destruction."¹²⁶ As noted in *Minard Run II*, section 471 initially applied only to national forests created on lands already under federal ownership.¹²⁷ However, the Weeks Act provides that forests acquired under its authority "shall be permanently reserved, held and administered as national forest lands under the provisions of section 471 of this title,"¹²⁸ bringing "Weeks Act" forests within the Forest Service's broad, Organic Act-based authority to regulate "occupancy and use."¹²⁹

While the Third Circuit did not completely reject these authorities, it interpreted section 9 of the Weeks Act as curtailing the Forest Service's ability to regulate private mineral rights.¹³⁰ In reaching this conclusion, however, the court overlooked alternative explanations for why Congress may have drafted this language the way it did.

Central to the Third Circuit's holding was language in the Weeks Act stating that reserved mineral rights would be "subject to the rules and

122. See U.S. CONST. art. IV, § 3, cl. 2; see also 16 U.S.C. § 551.

123. U.S. CONST. art. IV, § 3, cl. 2.

124. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)).

125. See *Camfield v. United States*, 167 U.S. 518, 525 (1897).

126. 16 U.S.C. § 551.

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

128. 16 U.S.C. § 521.

129. See 16 U.S.C. § 551.

130. See *Minard Run II*, 670 F.3d at 251–52.

regulations prescribed by the Secretary of Agriculture,” and that such rules and regulations “shall be expressed in and made part of the written instrument conveying the lands to the United States.”¹³¹ If this provision were to mean anything at all, the court reasoned, it must mean that the Forest Service could subject holders of reserved mineral rights *only* to the rules included in the original deed conveying the surface estate to the United States.¹³² However, rather than restricting the Forest Service’s authority, this requirement may have simply facilitated easier enforcement of whatever rules were in place at the time the surface estate was acquired.¹³³ Including any applicable rules in the documents conveying the surface estate to the United States would prevent mineral-rights holders from subsequently averring that the restrictions on surface access had not been understood.¹³⁴ Congress’s desire for the deed language to serve as a “regulatory floor” outlining access parameters for mineral-rights holders to the surface estate does not mean that the deed language must also serve as a “ceiling.”

Similar reasoning applies to the court’s interpretation of language allowing the Secretary of Agriculture to acquire split estates where encumbrances will “in no manner interfere” with the use of the land as a national forest.¹³⁵ The Third Circuit read this as binding the Forest Service to the original terms of outstanding rights, since the provision, in the court’s view, would have been superfluous if the agency could simply “override” any private use.¹³⁶ But Congress may have sought to avoid acquiring split estates where the private encumbrances were inherently incompatible with the operation of a national forest.¹³⁷ This preference does not foreclose the possibility that new rules could be necessary over time to avoid such incompatibility from arising.

Nothing in the legislative history is dispositive as to the precise aim of the

131. *See id.* (citing 16 U.S.C. § 518).

132. *Id.* at 251.

133. *See* Reply Brief of Federal Defendants-Appellants at 20, *Minard Run II*, 670 F.3d 236 (3d Cir. 2011) (Nos. 10-1265 & 10-2332) (noting lack of textual authority for the *Minard Run II* plaintiffs’ argument that the Weeks Act in any way served to restrict the Forest Service’s authority).

134. *See, e.g.,* *Downstate Stone Co. v. United States*, 712 F.2d 1215, 1218 (7th Cir. 1983) (looking in part to the language of the deed in holding that a mineral-right holder should have understood control over limestone quarrying to remain with the surface estate owner, the Forest Service).

135. *Minard Run II*, 670 F.3d at 251 (citing 16 U.S.C. § 518).

136. *Id.* at 251–52.

137. *See, e.g.,* Susan Anderson et al., *The National Forest Management Act: Law of the Forest in the Year 2000*, 21 J. LAND RESOURCES & ENVTL. L. 151, 169–70 (2001) (“Essentially, section 518 provides that any easement, right of way, or reservation retained by the original land owners shall not interfere with the uses prescribed by the SOA [Secretary of Agriculture]. These easements, rights of way, and reservations shall also be subject to all the rules and regulations expressed by the SOA.”); *see also Downstate Stone Co.*, 712 F.2d at 1217 (“It is clear from the face of the [Weeks] Act that land could be acquired by the United States when control of such lands by the Federal Government would promote the stated goals. Section 518 of Title 16 reinforces this view by providing that lands encumbered by rights of way, easements and reservations still may be acquired by the United States if the encumbrances do not interfere with the use of the lands for timber production or protection of navigable streams.”).

language in section 9; if anything, the overall narrative militates against reading the section as restricting the Forest Service's authority to regulate the use of the surface estate. One of the overriding policy goals of the Weeks Act was to "conserve one of the richest of our natural assets from serious impairment if not destruction, our navigable waterways."¹³⁸ In passing the Weeks Act, lawmakers noted that placing property within the ownership and "supervision" of the federal government was the only way to successfully achieve this outcome.¹³⁹ Congress's intent to leverage federal property ownership in order to better protect natural resources should at least caution against interpreting a statute in a way that serves to restrict, rather than broaden, agency authority over publicly owned land.¹⁴⁰

Conversely, Congress's general desire to delegate broad authority over national forests may have given way to a more specific interest in giving potential sellers certainty about what rules would apply to the exercise of their reserved mineral rights. One way to offer such assurance would be to proscribe the Forest Service from imposing *ex post facto* regulations. While the logic here is sound, there is no evidence in the legislative history indicating that this is what Congress had in mind in crafting section 9. If providing contractual certainty to potential surface-estate sellers had been of particular concern, moreover, Congress could have explicitly provided for it in the statute.

The Weeks Act's ambiguity on this issue can be contrasted with the clear congressional intent expressed in comparable legislation creating national wildlife refuges. When Congress first passed the Migratory Bird Conservation Act (MBCA) in 1929, it provided that reserved mineral rights on lands acquired as wildlife refuges would be subject to the rules and regulations promulgated by the Secretary of Interior "from time to time."¹⁴¹ In 1935, Congress amended the MBCA to remove this source of regulatory uncertainty, which a House Report flagged as a deterrent to potential sellers of surface estates.¹⁴² The new version specified that the deed conveying the surface estate to the United States must specify either that the reserved rights would be subject to (i) the rules and regulations recorded in the deed; or (ii) the rules prescribed "from time to time."¹⁴³ Section 9 of the Weeks Act, in contrast, contains no such

138. See S. REP. NO. 846, pt. 2, at 2–3 (1910).

139. See H.R. REP. NO. 1036, at 4, 8 (1910).

140. Brief of Federal Defendants-Appellants, *supra* note 37, at 41–42 (arguing that the Weeks Act reflected "a congressional desire to create one more mechanism to ensure protection of the surface"); see also *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 307–08 (3d Cir. 2010). In *In re Philadelphia Newspapers*, the Third Circuit discussed the maxim that specific statutory provisions prevail over more general provisions. *Id.* at 306–08. The court there noted that this maxim should only be used where applying the more general provision would undermine limitations imposed by the more specific provision. *Id.*

141. Gerson, *supra* note 19; see also Migratory Bird Conservation Act of 1929, Pub. L. No. 70-770, 45 Stat. 1222, 715(e) (codified as amended at 16 U.S.C. §§ 715–715r (2012)).

142. H.R. REP. NO. 74-886, at 2 (1935).

143. See Migratory Bird Conservation Act Amendments of 1935, Pub. L. No. 74-148, 49 Stat. 381-83 (codified at 16 U.S.C. § 715e).

requirement.¹⁴⁴

B. Constitutional Avoidance

In adopting a narrow interpretation of the Forest Service's statutory authority, the Third Circuit also gave unwarranted effect to the "constitutional avoidance" doctrine. Under this doctrine, a court will decline to interpret a statute in a manner that could present a constitutional problem, absent a clear expression of congressional intent.¹⁴⁵ In *Minard Run II*, the Third Circuit first found that the Forest Service's asserted authority—to impose regulatory requirements exceeding those in the original deed—had "no logical stopping point."¹⁴⁶ Equating this authority with an ability to "wipe the National Forest System clean" of any private rights, the court concluded that the Forest Service's interpretation of the Weeks Act raised "difficult constitutional takings questions."¹⁴⁷ The court reasoned that such constitutional issues could be avoided by interpreting the Weeks Act to require that "any" rules or regulations that the Secretary of Agriculture wished to apply be included in the original conveyance instrument.¹⁴⁸ Absent clear congressional intent, the court reasoned, this limited interpretation was the preferable reading of the Weeks Act.¹⁴⁹

However, in reaching this conclusion, the Third Circuit declined to address the particular limitations on the constitutional avoidance doctrine in the takings context, namely those set forth in *United States v. Riverside Bayview Homes*.¹⁵⁰ There, the U.S. Supreme Court held that

the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred.¹⁵¹

The underlying dispute in *Riverside Bayview Homes* involved the proper interpretation of a Clean Water Act section authorizing the Army Corps of

144. See 16 U.S.C. § 518.

145. *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) ("[I]n the absence of a clear expression of Congress' intent . . . 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."). See also *Jones v. United States*, 565 U.S. 227, 239 (1999) (citing the "repeatedly affirmed" rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"); *United States v. X-Citement Video*, 513 U.S. 64, 78 (1994); *Harris v. United States*, 536 U.S. 545, 555 (2002).

146. *Minard Run II*, 670 F.3d 236, 252 (3d Cir. 2011) (quoting *United States v. Srnsky*, 271 F.3d 595, 604 (4th Cir. 2001)).

147. *Id.* at 252.

148. *Id.*

149. *Id.*

150. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

151. *Id.*

Engineers (Corps) to impose permit requirements for the discharge of dredged material or fill on wetlands adjacent to navigable waterways.¹⁵² The Sixth Circuit adopted a “narrowing construction” of the Corps’ regulatory definition of wetlands in order to avoid potential taking of private property under the Fifth Amendment.¹⁵³ In reversing the Sixth Circuit, the U.S. Supreme Court concluded that a property owner who suffered a taking resulting from a permit denial would have recourse under the Tucker Act,¹⁵⁴ which “presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute.”¹⁵⁵

Since *Riverside Bayview Homes*, other cases have similarly affirmed that the availability of a remedy under the Tucker Act ameliorates the need to apply the constitutional avoidance doctrine in the takings context.¹⁵⁶ In *Railway Labor Executives Association v. United States*, the D.C. Circuit Court of Appeals reiterated that because compensation is presumptively available under the Tucker Act for a takings claim, “there is neither an unconstitutional result nor an unconstitutional doubt to be averted by interpretation.”¹⁵⁷ This same logic applies to a potential taking of a mineral-rights holder’s property in the ANF. The Third Circuit’s “narrowing construction” of the Weeks Act was unnecessary to avoid a constitutional takings question because compensation would be available to a mineral-rights holder suffering a taking as a result of the Forest Service’s drilling moratorium.¹⁵⁸ If the Forest Service refused access to the forest’s surface, or imposed conditions so stringent as to deprive miners of the ability to exercise their mineral rights, a monetary-compensation claim under the Tucker Act would be available.¹⁵⁹ The court’s concern that the

152. *Id.* at 123–24.

153. *Id.* at 126.

154. The Tucker Act states that:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Passed in 1887, the Tucker Act expanded the jurisdiction of what is now called the Court of Federal Claims, giving individuals an opportunity to sue the federal government for money damages. *Statutory Exceptions to Sovereign Immunity—Actions Under the Tucker Act*, 14 FED. PRAC. & PROC. JURIS. § 3657 (3d ed. 2013). Since the Tucker Act gives the Court of Federal Claims jurisdiction over constitutional claims, an individual may bring suit to recover just compensation afforded by the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984); *see also Moden v. United States*, 404 F.3d 1335, 1341 (D.C. Cir. 2005) (holding that the Takings Clause is “money mandating” and thus jurisdiction under the Tucker Act for a Takings Clause claim was proper).

155. *Riverside Bayview Homes*, 474 U.S. at 128–29 (citing 28 U.S.C. § 1491 (2012)).

156. *See, e.g., Ry. Labor Executives’ Ass’n v. United States*, 987 F.2d 806, 816 (D.C. Cir. 1993); *Bldg. Owners & Managers Ass’n Int’l v. F.C.C.*, 254 F.3d 89, 99 (D.C. Cir. 2001).

157. *Ry. Labor Executives’ Ass’n*, 987 F.2d at 816.

158. *See Minard Run II*, 670 F.3d at 252; *Riverside Bayview Homes*, 474 U.S. at 128.

159. *See Ruckelshaus*, 467 U.S. at 1017; *see also* 28 U.S.C. § 1491 (“The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any

authority asserted by the Forest Service has “no logical stopping point” is accordingly misplaced.¹⁶⁰

The Forest Service’s interpretation of the Weeks Act also survives scrutiny under the “public use” prong of the Takings Clause, which prohibits the taking of private property unless it is rationally related to a public purpose.¹⁶¹ In *Kelo v. City of New London*, for example, the U.S. Supreme Court held that the “public use” test was satisfied where the City of New London used its eminent domain power to facilitate economic development, even though the taking involved the transfer of land from one private property owner to another.¹⁶² While the precise contours of what constitutes a “public purpose” is a topic of spirited debate in modern takings jurisprudence,¹⁶³ the authority the Forest Service asserted in *Minard Run II* comfortably fits within current jurisprudential bounds. The federal government’s duty to protect the national forests is evidenced by the language of the Organic Act,¹⁶⁴ as well as Supreme Court precedent suggesting that the U.S. government holds federally owned lands in trust for the public.¹⁶⁵ For these reasons, evaluating the environmental impacts of private drilling activity on public lands would be considered a “legitimate public purpose” under the Takings Clause.

C. Regulation of Private Property Interests on Other Public Lands

Interpreting the Weeks Act in such a way that allows for regulatory authority over private mineral estates is consistent with the relationship between private and public property interests in other federal-lands contexts. While the Third Circuit’s approach was to read a bright line into the governing statute, other courts have found that notions of reasonableness are sufficient to balance private- and public-property interests on federal lands.

For example, under the 1872 Mining Act,¹⁶⁶ a private citizen may enter certain federal lands to explore for hard rock minerals and is allowed to perfect

express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”).

160. See *Minard Run II*, 670 F.3d at 252.

161. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984).

162. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

163. See, e.g., Arthur C. Spalding & Alexander Denton, *Michigan Post-Kelo: The Scope of Michigan’s 2006 Constitutional Just Compensation Amendment and the Constitutionality of the Subsequent Amendment of the State Agencies Act*, 39 MICH. REAL PROP. REV. 191 (2012); David A. Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for A New Public Use Test*, 32 VT. L. REV. 129, 129 (2007).

164. See 16 U.S.C. § 551 (2012) (“The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests.”).

165. See Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND RESOURCES & ENVTL. L. 173, 174 (2004) (“[T]he [U.S. Supreme] Court has also employed specific trust language in describing the public domain as ‘held by the Government as part of its trust . . . [t]he Government is charged with the duty and clothed with the power to protect it from trespass and unlawful appropriation.’”).

166. See 30 U.S.C. § 22.

a mining claim and secure a patent for the mining of that land, subject to the Act's restrictions and federal regulations.¹⁶⁷ Like underground mineral rights, unpatented mining claims¹⁶⁸ are considered "fully recognized possessory interest[s]."¹⁶⁹ Yet a host of agencies, including the Forest Service, retain significant regulatory authority over access to public lands for hard rock mining activities.¹⁷⁰ While agencies lack the authority to prohibit mining activities outright, they retain the ability to approve or modify a miner's proposed plan of operations.¹⁷¹ Courts have consistently upheld such an exercise of regulatory authority.¹⁷² In *United States v. Weiss*, for instance, the Ninth Circuit considered the validity of Forest Service regulations requiring holders of unpatented mining claims to submit a mining plan for Forest Service approval and post a bond during mining operations.¹⁷³ The court found that the Forest Service's preservation interests and the miner's property interests "were intended to and can coexist."¹⁷⁴ Unlike the *Minard Run II* court, the Ninth Circuit did not conclude that this coexistence demanded the creation of a "logical stopping point" through an unduly narrow statutory construction.¹⁷⁵ Instead, the coexistence of private and public property interests in *Weiss* was achieved through "reasonable rules and regulations which do not impermissibly encroach upon the right to the use and enjoyment."¹⁷⁶

Private rights of way created under Revised Statute 2477 ("R.S. 2477 roads")¹⁷⁷ similarly illustrate how even expansive federal regulatory authority

167. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 572 (1987); see also Roger Flynn & Jeffrey C. Parsons, *The Right to Say No: Federal Authority over Hardrock Mining on Public Lands*, 16 J. ENVTL. L. & LITIG. 249, 253 (2001).

168. The 1872 Mining Act allows a private citizen to "perfect" an unpatented mining claim by discovering valuable mineral deposits on federal land, properly staking the land and complying with other statutory requirements. *Granite Rock Co.*, 480 U.S. at 575. A holder of an unpatented mining claim "shall have the exclusive right of possession and enjoyment of all the surface," but the U.S. government retains legal title. *Id.* (quoting 30 U.S.C. § 26). Pursuant to the Act and subsequently promulgated regulations, an unpatented mining claim holder can apply to patent the right, and which point legal title of the land is transferred to the private party. *Granite Rock Co.*, 480 U.S. at 575.

169. *United States v. Locke*, 471 U.S. 84, 86 (1985).

170. Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 ECOLOGY L.Q. 57, 63–64 (1997).

171. *Id.* at 87–89.

172. See, e.g., *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981); *Locke*, 471 U.S. at 105 ("[T]he property right here is the right to a flow of income from production of the claim. Similar vested economic rights are held subject to the Government's substantial power to regulate for the public good the conditions under which business is carried out and to redistribute the benefits and burdens of economic life.").

173. *Weiss*, 642 F.2d at 297.

174. *Id.* at 299.

175. *Id.*; see also *Minard Run II*, 670 F.3d 236, 252 (3d Cir. 2011).

176. *Weiss*, 642 F.2d at 299.

177. R.S. 2477 was enacted as part of the Mining Act of 1866 and codified as section 2477 of the Revised Statutes. See Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, repealed by Federal Lands Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2744, 2793 (codified at 43 U.S.C. § 1769 (2012)). R.S. 2477 as originally enacted read: "[T]he right-of-way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted." *Id.* When

can coexist with private encumbrances of public land. In *Vogler v. United States*, for instance, the Ninth Circuit held that the National Park Service had the authority to regulate the use of R.S. 2477 roads by requiring a permit before road owners operated heavy, off-road vehicles.¹⁷⁸ The *Vogler* court noted that the regulations were necessary to preserve the “natural beauty” of the land in question and, accordingly, fell within the government’s general power to regulate national parks.¹⁷⁹

These examples of more expansive agency authority may not foreclose a conclusion that the Weeks Act simply imposes more stringent limitations than other federal statutes. However, at the very least, these other contexts illustrate that severely restricting an agency’s regulatory authority over the public-land use should be the exception, and not the norm. It is certainly conceivable that Congress—in creating a framework for acquisition of public land—might strike a “grand bargain,” granting a general power to protect natural resources while carving out an area of private domain into which the agency may not intrude.¹⁸⁰ The risk of this strategy is that this carve-out may prove, over time, to be too great a limitation on the agency’s protective abilities.¹⁸¹ The courts should therefore exercise caution in reading such a bargain into a statute without any indication that Congress meant to take such a risk.

IV. NEPA AND PRIVATE MINERAL RIGHTS ON PUBLIC LANDS

NEPA review is critical to understanding the environmental impact of a range of public and private uses on federally owned lands. By facilitating coordination and planning of various uses based on environmental impacts, environmental review can help further the vision of successful cooperative use promoted by the Forest Service’s early leaders¹⁸² and ostensibly embraced by the Third Circuit in *Minard Run II*.¹⁸³ However, as the dispute in *Minard Run II* illustrates, conflict arises when mineral-rights holders’ need to proceed expeditiously with oil and gas drilling collides with the surface-estate owner’s need for more time to sufficiently evaluate the impacts of those activities.¹⁸⁴ In

R.S. 2477 was repealed in 1976, existing rights of way established under R.S. 2477 were grandfathered in. Matthew L. Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. ANN. SURV. AM. L. 547, 556–57 (2008).

178. See *United States v. Vogler*, 859 F.2d 638, 639, 642 (9th Cir. 1988).

179. *Id.* at 642.

180. For example, in establishing the National Wildlife Refuge system, Congress opted to limit the Fish and Wildlife Service’s authority in subjecting private mineral right holders to new regulations over time. See Gerson, *supra* note 19, at 194.

181. There is evidence to suggest that in the national wildlife refuge context, lax FWS oversight over the exercise of privately held oil and gas rights has hindered the federal government’s ability to monitor and mitigate environmental impacts. See Gerson, *supra* note 19, at 193 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 118, at 3).

182. WILLIAMS, *supra* note 4.

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

184. See generally *id.*

resolving this conflict, the Third Circuit drew a bright-line rule that undercut the Forest Service's ability to complete NEPA review. While purporting to enforce a "cooperative" framework,¹⁸⁵ the appellate court's restrictions on the rights of the surface owner unnecessarily privilege the mineral-rights holders at the expense of environmental protection.

A. *NEPA as a Floor, Not a Ceiling, for Environmental Review*

In assessing the validity of the Forest Service's temporary moratorium on new drilling operations, the Third Circuit found that the merits of the drillers' claims turned solely on the question of whether the Forest Service was required to undertake NEPA review.¹⁸⁶ Yet, unlike in *FSEEE*, where environmental plaintiffs sought to compel the Forest Service to complete an environmental analysis, the relevant issue in *Minard Run II* was not the Forest Service's obligation to undertake NEPA review, but its ability to.¹⁸⁷ While NEPA mandates environmental review for "major federal actions," nothing in the statute precludes an agency from voluntarily undertaking environmental review.¹⁸⁸ The *Minard Run II* opinion glosses over the Forest Service's arguments on this point.¹⁸⁹

Notably, the Forest Service's ability to restrict mineral-rights holders' access is not without some legal boundary. However, rather than looking to NEPA, the proper sources for identifying such a limit are the Constitution's Property Clause,¹⁹⁰ the federal statutes governing national forests,¹⁹¹ and state property law.¹⁹² With respect to federal law, the Third Circuit concluded that

185. See *id.* at 242.

186. *Id.*

187. See generally *FSEEE*, No. CIV.A.08-323ERIE, 2009 WL 1324154 (W.D. Pa. May 12, 2009).

188. See 42 U.S.C. § 4332(C) (2012); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) ("Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 10, *Pacific Gas and Elec. Co. v. San Luis Obispo Mothers for Peace*, 549 U.S. 1166 (2007) (No. 06-466) (noting that the EPA has a policy of sometimes undertaking voluntary NEPA review).

189. See Brief of Federal Defendants-Appellants, *supra* note 37, at 31–33.

190. See *Duncan Energy Co. v. U.S. Forest Serv. (Duncan I)*, 50 F.3d 584, 588–89 (8th Cir. 1995) (analyzing whether the Forest Service's actions were consistent with "special use" regulations promulgated pursuant to the Property Clause, U.S. CONST. art. IV, § 3, cl. 2).

191. See, e.g., *Minard Run II*, 670 F.3d 236, 251–53 (3d Cir. 2011) (analyzing the Forest Service's authority over reserved rights under the Weeks Act); *Duncan I*, 50 F.3d at 589 (noting the Forest Service's authority to promulgate "special use" regulations under the Bankhead-Jones Farm Tenant Act); *United States v. Srnsky*, 271 F.3d 595, 601–04 (4th Cir. 2001) (looking at whether the Organic Act, the Forest Land Policy and Management Act, or the Alaska National Interest Lands Conservation Act preempted state law property law).

192. See *Duncan I*, 50 F.3d at 588 (assessing whether affording the Forest Service flexibility in processing drilling applications was consistent with the mineral estate's dominant status under North Dakota common law); see also *Minard Run II*, 670 F.3d at 243 (noting that outstanding rights are governed by Pennsylvania property law).

the Weeks Act precludes what would otherwise be broad regulatory authority under the Constitution's Property Clause and the federal Organic Act.¹⁹³ Even without the court's unnecessarily narrowing construction of the Weeks Act,¹⁹⁴ the reasonableness of the Forest Service's attempt to delay new drilling operations could have been assessed under Pennsylvania state common law.¹⁹⁵

Under Pennsylvania common law, while the mineral estate is considered "dominant" over the surface estate, this dominant status does not give the mineral-right holder unfettered access to the surface estate.¹⁹⁶ Instead, the mineral estate owner is afforded as much access to the surface estate as is "reasonably necessary" for mining operations, but must also show "due regard" for the surface estate owner.¹⁹⁷ Accordingly, the Third Circuit should have looked to whether the temporary moratorium impermissibly encroached on mineral extractors' right to reasonable access, and whether forcing the Forest Service's hand within a shorter time period would be consistent with the requirement to show the surface estate "due regard." This approach is consistent with the Eighth Circuit's analysis in a similar case, *Duncan Energy v. U.S. Forest Service (Duncan II)*.¹⁹⁸ There, the Eighth Circuit directed the lower court to evaluate the Forest Service's delay in approving proposed mining operations based on the totality of the circumstances, and it found that granting mineral-rights holders access as a matter of right after a strict sixty-day window was too inflexible.¹⁹⁹

Understandably, even under a *Duncan II*-type analysis based on the totality of the circumstances, an appellate court might still find that the length of the potential delay in *Minard Run II* denied plaintiffs the right to reasonable use of the surface estate. But this alternative holding would have been much narrower, potentially leaving the door open for the Forest Service to complete more expedient or scaled-back NEPA environmental review. In *Duncan II*, the Eighth Circuit noted that the Forest Service's processing time should be "reasonable, expeditious, and as brief as possible," but nonetheless held that the imposition of a strict sixty-day limitation was "too rigid a schedule for the Forest Service to meet."²⁰⁰ This more flexible approach is arguably more consistent with the purported "cooperative" framework than strictly circumscribing the surface owner's ability to undertake meaningful environmental review.

193. *Minard Run II*, 670 F.3d at 251–52.

194. See *infra* discussion Part III.

195. The Forest Service conceded before the District Court in *Minard Run II* that federal law did not preempt Pennsylvania common law, and it argued that its asserted authority was consistent with those common law principles. *Minard Run II*, 670 F.3d at 254 n.11.

196. *Minard Run II*, 670 F.3d at 243–44; *Belden & Blake Corp. v. Commonwealth, Dep't of Conservation & Natural Res.*, 989 A.2d 528, 532 (Vt. 2009).

197. *Minard Run II*, 670 F.3d at 243–44.

198. *Duncan Energy v. U.S. Forest Serv. (Duncan II)*, 109 F.3d 497 (8th Cir. 1997).

199. *Id.* at 500.

200. *Id.*

B. Agency Discretion and Public Lands under Split Ownership

While the Third Circuit may have misjudged the relevant inquiry, the court's answer to its chosen question also has serious implications for analyzing federal agencies' environmental obligations. Because NEPA requires environmental review only for "major Federal actions,"²⁰¹ the Third Circuit looked at whether the Forest Service-issued NTPs met this definition under NEPA and related jurisprudence.²⁰² In analyzing the "major federal action" question, the Third Circuit discounted the significance of the Forest Service's discretion to influence the environmental impacts of mining activities.

The Third Circuit relied primarily on a rule from *New Jersey Department of Environmental Protection and Energy v. Long Island Power Authority*,²⁰³ that "[f]ederal approval of a private party's project, where that approval is not required for the project to go forward, does not constitute a major federal action."²⁰⁴ In *Long Island Power Authority*, the power authority wanted to ship radioactive material via barge through ocean waters, and it voluntarily submitted an operations plan to the Coast Guard illustrating compliance with industry standards.²⁰⁵ Although the Coast Guard's approval was not required, the Long Island Sound Port Captain responded with a letter stating that he had reviewed the shipping plan, and final approval would be contingent on the barges' inspection.²⁰⁶ The Third Circuit held that, because the submission of an operations plan and the Coast Guard's subsequent approval had been voluntary, the Coast Guard's actions did not trigger NEPA.²⁰⁷

While *Long Island Power Authority* may stand for the proposition that an entirely voluntary approval does not trigger NEPA, this rule does not translate well to the mineral estate-surface estate relationship. In contrast to *Long Island Power Authority*, *Minard Run II* did not involve purely voluntary submissions to a federal agency.²⁰⁸ Pursuant to the NTP process, as memorialized in the federal statute, mineral-rights holders are required to provide advance notice of drilling operations to the Forest Service.²⁰⁹ While the Forest Service may be barred under state common law from denying access outright,²¹⁰ the NTP process is not entirely voluntary.²¹¹

NEPA case law reveals a more relevant formulation of "major federal action" for the facts of *Minard Run II*: Where an agency "has no ability to

201. NEPA, 42 U.S.C.A. § 4332(C) (2012).

202. See *Minard Run II*, 670 F.3d at 250.

203. 30 F.3d 403 (3d Cir. 1994).

204. *Minard Run II*, 670 F.3d at 250 (quoting *Long Island Power Auth.*, 30 F.3d at 417).

205. *Long Island Power Auth.*, 30 F.3d at 416–17.

206. *Id.* at 416.

207. *Id.*

208. See *id.*; *Minard Run II*, 670 F.3d at 244 (describing the notice "required" under the *Minard Run I* framework).

209. See 30 U.S.C. § 226(o) (2012).

210. See *Minard Run II*, 670 F.3d at 244.

211. See *id.*

prevent a certain effect due to its limited statutory authority over the relevant actions,” the agency need not consider such an effect when determining whether its decision is a “major federal action.”²¹² Rather than focusing narrowly on whether the Forest Service can entirely block mineral-rights holders’ access, this alternative rule shifts the inquiry to whether the Forest Service has the ability to prevent or reduce certain environmental effects.²¹³ The NTP process provides precisely such an opportunity, allowing the Forest Service to negotiate mineral-rights holders’ “reasonable use” of the forest surface.²¹⁴ Through the NTP process, the Forest Service has the ability to influence the placement of roads and wells, as well as mitigation measures such as reseeded, erosion controls, and visual screening.²¹⁵ The NTP process’s existence suggests that the Forest Service retains the power to prevent certain environmental effects, notwithstanding its status as the subservient estate owner under Pennsylvania common law.²¹⁶ Rather than addressing whether this influence over environmental effects was sufficient to trigger NEPA, the Third Circuit instead concluded outright that the requisite agency discretion was lacking simply because mineral-rights holders were not required to obtain the Forest Service’s “approval.”²¹⁷

The Third Circuit’s approach in *Minard Run II* stands in contrast to other cases involving federal-agency discretion to influence private activity on public lands. Rather than focusing on the binary question of whether the private action required agency “approval,” the inquiry has instead been focused on the degree of discretion.²¹⁸ Under this framework, courts have looked to whether a federal agency’s discretion is sufficient to influence the activity’s environmental effects²¹⁹ or effectuate NEPA’s purposes.²²⁰ This alternative approach is evident in at least two other contexts involving public lands—private rights of way and coal leases on Bureau of Land Management (BLM) lands.

For example, this more nuanced view of agency discretion is evident in *Sierra Club v. Babbitt*,²²¹ where the Ninth Circuit addressed NEPA obligations of private rights of way.²²² The BLM property at issue was part of a “checkerboard” pattern of private and public forest ownership.²²³ Congress had authorized the Secretary of the Interior to execute right-of-way agreements with

212. Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 770 (2004).

213. See *id.*

214. *Minard Run II*, 670 F.3d at 242.

215. 30 U.S.C. § 226(o) (2012) (memorializing the sixty-day NTP process); see also Brief of Federal Defendants-Appellants, *supra* note 37, at 10.

216. See *Minard Run II*, 670 F.3d at 243–44.

217. *Id.* at 255.

218. See, e.g., *Sierra Club v. Babbitt*, 65 F.3d 1502, 1513 (9th Cir. 1995); *Wilderness Soc’y v. Robertson*, 824 F. Supp. 947, 952 (D. Mont. 1993).

219. *Sierra Club*, 65 F.3d at 1513.

220. *Wilderness Soc’y*, 824 F. Supp. at 952.

221. *Sierra Club*, 65 F.3d at 1502.

222. *Id.*

223. *Id.* at 1505.

private-property owners, and in 1962, BLM signed a right-of-way agreement with a logging company, Seneca Sawmill.²²⁴ The agreement, signed eight years before NEPA was enacted, gave Seneca Sawmill access to existing logging routes on BLM lands and allowed it to construct new roads as necessary to access its private property.²²⁵ Under the terms of the agreement, BLM could only veto the construction of a new road under three specifically prescribed circumstances.²²⁶ In light of these restrictions, the court reasoned that the agency lacked the ability to “meaningfully influence” the right-of-way construction and, therefore, construction did not constitute a discretionary federal action that would trigger NEPA.²²⁷

The D.C. Circuit took a similar approach in analyzing the Department of the Interior’s NEPA obligations with respect to coal leases on BLM land.²²⁸ In *Natural Resources Defense Council v. Berklund*,²²⁹ the court evaluated agency discretion where the Secretary of Interior was obliged to grant a coal lease after a finding of commercial viability, but retained the discretion to dictate the terms of the lease.²³⁰ The court concluded that in order to fulfill NEPA’s purposes of informing agency decision making and fostering public involvement, the Secretary should have access to information on the environmental impacts of “possible performance lease standards, alternative methods for meeting those standards, and estimated cost of compliance.”²³¹ While the Secretary’s discretion to deny a coal lease may not have been absolute, NEPA review nonetheless had the potential to help shape lease terms that would better mitigate potential environmental impacts.²³²

This outcome can be distinguished from the conclusion of the U.S. District Court for the District of Montana in *Wilderness Society v. Robertson*.²³³ Unlike *Berklund*, *Wilderness Society* involved a purely nondiscretionary act—the determination of a mining claim’s validity under the Mining Act of 1872.²³⁴ The court concluded that requiring environmental review in this context would

224. *Id.*

225. *Id.*

226. *Id.* at 1506. Under the terms of the agreement, the landowner could object only if the proposed road “(1) does not constitute the most reasonably direct route for the removal of forest products from the lands of the road builder, taking into account the topography of the area, the cost of road construction and the safety of use of such road, (2) the proposed road will substantially interfere with existing or planned facilities or improvements on the lands of the landowner, or (3) would result in excessive erosion to lands of the landowner.”

227. *Id.* at 1512–13.

228. *See* *Natural Res. Def. Council, Inc. v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978).

229. *Id.*

230. *Id.* at 937.

231. *Id.* at 938.

232. *See id.* For a similar analysis outside of the Ninth Circuit, see *United States v. Garfield Cnty.*, 122 F. Supp. 2d 1201, 1254 (D. Utah 2000) (holding that the National Parks Service was required to do NEPA review for improvements to an R.S. § 2744 right of way within Capitol Reef National Park, even though it could not deny access to the easement).

233. *See* *Wilderness Soc’y v. Robertson*, 824 F. Supp. 947 (D. Mont. 1993).

234. *Id.* at 953.

do nothing to further NEPA's objectives.²³⁵ The BLM's sole responsibility was to determine whether the "mining rights conferred by Congress had come into existence," and a review of environmental impacts would not help inform this analysis.²³⁶

In the cases above, the inquiry focused not on whether the BLM could *stop* the private activity; instead, the inquiry focused on how much discretion the agency retained to influence the activity's environmental effects. This latter, influence-based framework better tracks NEPA's purposes than the narrow question of whether an agency's approval is "required." If an agency is ultimately obliged to approve an activity but still retains discretion over how the activity takes place, environmental review furthers both of NEPA's "twin aims."²³⁷ First, environmental analysis has the potential to influence agency decision making by providing the agency with better information about the effectiveness of proposed mitigation measures and conditions.²³⁸ Regarding public involvement, NEPA review affords the public an opportunity to weigh in on what terms the agency should negotiate with the easement or mineral-rights holder.²³⁹ In looking only to the narrow question of whether the Forest Service had ultimate "approval" authority over the exercise of mineral rights, the court in *Minard Run II* crafted an overly broad rule that could lead courts to inappropriately discount the significance of agency discretion.

The Third Circuit's narrow view of agency discretion in *Minard Run II* also may influence the analogous Endangered Species Act (ESA) consultation provision.²⁴⁰ Section 7(a)(2) of the ESA requires federal agencies to consult with the Fish and Wildlife Service before approving an action that might "jeopardize the continued existence of any endangered species or threatened species."²⁴¹ However, the requirement only applies where there is "discretionary Federal involvement or control."²⁴² While the subject of what constitutes sufficient agency discretion to trigger the ESA's consultation requirement has been a source of significant debate,²⁴³ some courts have

235. *Id.*

236. *Id.*

237. *See id.*

238. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–52 (1989) (describing the importance of NEPA for evaluating steps that can be taken to mitigate potential environmental impacts); *Natural Res. Def. Council, Inc. v. Berkland*, 458 F. Supp. 925, 938 (D.D.C. 1978).

239. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (noting that one of NEPA's "twin aims" is to inform the public about environmental impacts); Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND RESOURCES & ENVTL. L. 297, 309 (2006) (noting that "including more interested citizens and considering a broader range of ideas and values, the very thing NEPA is designed to do, can work as Congress intended").

240. *See* Endangered Species Act of 1973, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (2012).

241. *Id.*

242. 50 C.F.R. § 402.03 (2012) (emphasis added).

243. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007); Reed D. Benson, *Dams, Duties, and Discretion: Bureau of Reclamation Water Project Operations and the Endangered Species Act*, 33 COLUM. J. ENVTL. L. 1, 7 (2008).

analogized the test for “discretionary” action under the ESA to NEPA’s “major federal action” trigger.²⁴⁴ Accordingly, the Third Circuit’s narrow view of the Forest Service’s discretion could be imported to ESA consultation analysis and, therefore, further limit federal agencies’ environmental obligations with respect to privately held mineral rights.

V. IMPLICATIONS FOR FRACKING ON PUBLIC LANDS

When the federal government acquired the ANF nearly a century ago, it scarcely could have anticipated the sheer scale of mineral extraction occurring today. While the forest system’s creation was motivated in large part by a desire to protect the nation’s waterways,²⁴⁵ the potential impacts of drilling operations, to the extent Congress considered them at all, were dwarfed by concerns about large-scale logging and destructive forest fires.²⁴⁶ Environmental statutes such as NEPA have evolved as a result of both new environmental problems and new knowledge of how human activity impacts the environment.²⁴⁷ Though the environmental review process may not afford federal agencies *carte blanche* to impinge on private property interests, environmental considerations should at least be taken into consideration when defining a mineral-rights holder’s reasonable use of the surface. Mineral-rights holders’ legitimate interest in getting access permits processed expeditiously must be balanced with the need to mitigate the environmental impacts of drilling activities on public lands.

The facts of *Minard Run II* illustrate both the extent and the continuing evolution of these impacts. In the ANF, 93 percent of the subsurface estates are privately owned.²⁴⁸ Before the District Court issued the injunction, the Forest Service had evaluated proposals for more than 2,400 wells and hundreds of miles of new roads.²⁴⁹ While the parties presented conflicting evidence on whether the extent of mineral extraction had increased compared to the 1980s,²⁵⁰ the Forest Service reported that within just the past few years, the number of proposals for new wells had quadrupled.²⁵¹ Proceeding to evaluate NTPs on a piecemeal basis had resulted in a system of duplicative roads and prevented the Forest Service from creating a comprehensive plan that allowed it to effectively mitigate environmental effects such as sedimentation in ANF’s

244. See, e.g., *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1075 (9th Cir. 1996) (“The standards for ‘major federal action; under NEPA and ‘agency action’ under the ESA are much the same.”).

245. See S. REP. NO. 846, pt. 2, at 2–3 (1910).

246. H.R. RES. 1348, at 2 (2010).

247. LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 2 (2005).

248. U.S. FOREST SERV., ALLEGHENY NATIONAL FOREST FINAL ENVIRONMENTAL IMPACT STATEMENT TO ACCOMPANY THE LAND AND RESOURCE MANAGEMENT PLAN PREFACE 6 (2007).

249. Brief of Federal Defendants-Appellants, *supra* note 37, at 30.

250. See *Minard Run II*, 670 F.3d at 257.

251. Brief of Federal Defendants-Appellants, *supra* note 37, at 12.

streams and the resulting impact to the riparian habitat.²⁵²

The logistical imperative to coordinate the construction of new mining roads weighed heavily in favor of a forest-wide environmental analysis. As expressed in NEPA regulations, the best way to assess the “combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.”²⁵³ Where, as in this case, a purely piecemeal approach to assessing environmental impacts had proven ineffectual, a cumulative analysis is necessary.²⁵⁴

Notwithstanding the need for a forest-wide analysis of drilling’s environmental impacts, one might wonder whether this could be accomplished without a moratorium on new NTPs.²⁵⁵ In *Minard Run II*, the fact that the Forest Service had twice before completed forest-wide environmental impact statements curtailed its persuasiveness in arguing that continuing under the sixty-day time frame was unworkable.²⁵⁶ However, Forest Service staff attested that forcing the agency to *continue* to issue NTPs, without the benefit of a comprehensive analysis, would result in greater surface use than that which would be minimally necessary to access and develop privately owned oil and gas.²⁵⁷ If forced to comply with the strict sixty-day limit, the Forest Service may have been able to complete a comprehensive analysis to inform how it approached subsequent NTPs, but it would not have the benefit of incorporating the huge volume of pending drilling proposals into its analysis.²⁵⁸ Once an NTP is issued, the Forest Service’s ability to impose

252. *Id.* at 26, 29.

253. *See* 40 C.F.R. § 1508.25(a)(3) (2012).

254. *See, e.g.,* High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 640–41 (9th Cir. 2004) (upholding a trial court determination that the Forest Service abused its discretion in failing to prepare an EIS for multi-year, special-use permits for commercial backpacking operations, given the permits’ cumulative impacts); Alpine Lakes Prot. Soc. v. U.S. Forest Serv., 838 F. Supp. 478, 484 (W.D. Wash. 1993) (holding that the Forest Service’s failure to consider the cumulative impacts of seven timber company logging permits was arbitrary and capricious).

255. *See Minard Run II*, 670 F.3d at 257.

256. *See id.*

257. In *Minard Run II*, the Third Circuit described the Forest Service as having “conceded” that the sixty-day framework had been sufficient to preserve environmental interests. 670 F.3d at 257. The lower court had noted that in oral arguments, the Forest Service conceded that “from 1981 to the inception of the drilling ban, the cooperative interactive approach of *Minard Run* adequately protected the environmental interests of the Forest Service as surface owner and that it had no occasion to seek judicial relief to protect the interests of its surface estate.” *Minard Run Oil Co. v. U.S. Forest Serv., C.A. No. 09-125ERIE*, 2009 WL 4937785 at *15 (W.D. Pa. Dec. 15, 2009). However, Forest Service staff also testified that its actions were based on its “desire to acquire a holistic, comprehensive view of the impact of gas and oil drilling within the ANF” and that the goal was “to enable the Forest Service to better manage the ANF as a whole and mitigate environmental damage that might result from viewing individual drilling proposals too narrowly.” *Id.* at *14.

258. *See* Brief of Federal Defendants-Appellants, *supra* note 37, at 12–13 (“Specifically, the Forest Service concluded that it was no longer possible to propose adequate mitigation in an NTP without a comprehensive review in light of the substantial increase in the number of applications, the preexisting dense network of roads and wells, and the realization that prior case-by-case analysis had resulted in environmental harm that could have been avoided through more comprehensive analysis.”).

additional mitigation measures is lost;²⁵⁹ accordingly, having a forest-wide view of mining's environmental effects gives the agency better information on what mitigation should be extracted through any individual NTP negotiation.²⁶⁰

Forcing the Forest Service to grant access within an inflexible timeframe may also frustrate another one of NEPA's purposes: to provide an avenue for public participation and input.²⁶¹ This participatory function is even more important where the proposed use involves significant impacts to public land and, potentially, the public's use of that land.²⁶² Subjecting mineral-rights holders' plans to NEPA review ensures the public has a seat at the table.²⁶³ This viewpoint is significant not only procedurally, in encouraging greater democratic participation, but could impact substantive outcomes as well. A vigorous public-review process may bring stakeholders to the table, such as other forest users, improving the information the Forest Service brings to bear on negotiations with mineral-rights holders.²⁶⁴

Curtailing the federal government's authority under NEPA is particularly important in the context of fracking on public lands. In addition to experiencing a rapid deployment in recent years and taking center stage in an intense public debate, environmental review of fracking is paramount because it presently enjoys exemptions under other federal environmental statutes.²⁶⁵ While the Underground Injection Control (UIC) program of the Safe Drinking Water Act would otherwise regulate fracking because of the potential for groundwater

259. See *id.* at 28 (noting that the Forest Service views the issuance of an NTP as a "final agency action"). In *Minard Run II*, the Third Circuit described the issuance of an NTP as memorializing any agreements between the drilling applicant and the Forest Service, and further noted that the drilling permits required by Pennsylvania's Department of Environmental Protection are generally issued before the NTP. 670 F.3d at 244 n.3.

260. See Brief of Federal Defendants-Appellants, *supra* note 37, at 12–13.

261. Michelle B. Nowlin, *NEPA and Environmental Justice*, SN044 ALI-ABA BUS. L. COURSE MATERIALS J., 583, 588 (2007).

262. See, e.g., First Amended Complaint for Declaratory and Injunctive Relief (National Environmental Policy Act) at 15–16, *FSEEE*, No. CIV.A.08-323ERIE, 2009 WL 1324154 (W.D. Pa. May 12, 2009) (NO. 1:08-cv-323-SJM), 2008 WL 5596935 (noting that NTP's are issued without public notice and there is no opportunity for the public to seek review of the project before operations commence).

263. Various provisions in NEPA's implementing regulations require some level of public participation or disclosure. See, e.g., 40 C.F.R. § 1501.7 (2013) (providing for a scoping process that includes consultation with "interested persons (including those who might not be in accord with the action on environmental grounds)"); 40 C.F.R. § 1502.19 (requiring circulation of draft and final environmental impact statements); 40 C.F.R. § 1503.1-1503.4 (requiring agencies to take and respond to comments); 40 C.F.R. § 1506.6 (requiring agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures").

264. See, e.g., ENVTL. LAW INST., *NEPA SUCCESS STORIES: CELEBRATING 40 YEARS OF TRANSPARENCY AND OPEN GOVERNMENT* 21–22 (2010), available at http://www.elistore.org/reports_detail.asp?ID=11405 (describing the effective use of NEPA review in incorporating forest users' input into an off-road vehicle travel plan for Utah's Dixie National Forest).

265. See, e.g., Jody Freeman, *The Wise Way to Regulate Gas Drilling*, N.Y. TIMES (July 5, 2012), <http://www.nytimes.com/2012/07/06/opinion/the-wise-way-to-regulate-hydraulic-fracturing.html> (calling for cooperative federalism).

contamination, Congress expressly exempted fracking from UIC requirements through the Energy Policy Act of 2005.²⁶⁶ Oil and gas exploration in general is exempt under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program, which requires a permit for the discharge of any pollutant to navigable waters.²⁶⁷ As a result, only states and their agencies are empowered to use their independent authority to regulate storm water run-off resulting from road construction and other drilling-related activities.²⁶⁸ Finally, oil and gas exploration is exempted from the purview of the Resource Conservation and Recovery Act (RCRA) "Subtitle C" hazardous waste regulations, which impose requirements to ensure that hazardous wastes are handled "cradle to grave" in a way that protects human health.²⁶⁹

With respect to fracking on public lands, federal regulatory efforts are similarly limited. In May 2012, the BLM released draft regulations that would require fracking-related drillers to release a list of chemicals used in the fracking process, addressing the potential for groundwater contamination.²⁷⁰ However, mineral rights on BLM lands are largely owned by the federal government and merely *leased* to private parties.²⁷¹ Moreover, as the BLM noted, the fracking operations covered are already subject to lease terms that explicitly require drilling activities to be subject to subsequently promulgated rules or regulations.²⁷² Accordingly, neither the statutory construction arguments nor the constitutional avoidance considerations at play in *Minard Run II* would apply. However, the narrow construction of statutory authority in *Minard Run II* threatens to limit the ability of land-managing agencies to regulate fracking in situations where, unlike on BLM lands, subsurface mineral estates are privately owned.

Given the statutory carve-outs fracking receives under other federal environmental laws, the federal government's leverage to undertake NEPA review based on its landowner status is especially critical. The facts of *Minard*

266. *Regulation of Hydraulic Fracturing Under the Safe Drinking Water Act*, U.S. EPA, http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm (last visited Oct. 13, 2012).

267. 33 U.S.C. § 1342(l)(2) (2012) (exempting fracking from the National Pollution Discharge Elimination System permit requirements).

268. SHALE GAS PRIMER, *supra* note 11, at 31–32.

269. *Id.* at 37; *see also* U.S. EPA, EXEMPTION OF OIL AND GAS EXPLORATION AND PRODUCTION WASTES FROM FEDERAL HAZARDOUS WASTE REGULATIONS 5–8 (2002) (noting that the EPA issued a regulatory determination in 1988 that the control of gas exploration and production wastes through Subtitle C was not warranted); David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 451–52 (2013).

270. *Interior Releases Draft Rule Requiring Public Disclosure of Chemicals Used in Hydraulic Fracturing on Public and Indian Lands*, U.S. DEP'T OF INTERIOR, <http://www.doi.gov/news/pressreleases/Interior-Releases-Draft-Rule-Requiring-Public-Disclosure-of-Chemicals-Used-in-Hydraulic-Fracturing-on-Public-and-Indian-Lands.cfm> (last visited Oct. 14, 2012).

271. *Mineral Materials*, DEP'T OF THE INTERIOR, http://www.blm.gov/wo/st/en/prog/more/non-energy_minerals.html (last visited Oct. 14, 2012).

272. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27, 691, 27,704 (proposed May 11, 2012) (to be codified at 43 C.F.R. pt. 3160).

Run II, moreover, reveal at least one significant problem that NEPA review is well-suited to address: the lack of coordination in road construction and the resulting unnecessary environmental impacts to rivers and streams within national forests.²⁷³ None of the federal regulations reviewed above address this concern. This problem is particularly important given that one of the major purposes of establishing the National Forest System was to protect navigable waterways.²⁷⁴ The curtailing of the Forest Service's authority in *Minard Run II* restricted agencies' ability to use a key environmental planning tool uniquely tailored to address an existing gap in federal regulations.

CONCLUSION

While there is considerable debate about whether more robust federal regulation should be developed to supplement the current patchwork of state-by-state approaches to fracking,²⁷⁵ the unique nature of publicly owned land weighs with particular force toward ensuring a baseline of federal environmental protection. If federally owned lands are truly to be held in trust for the public,²⁷⁶ then the Forest Service's assertion of authority in *Minard Run II*—to evaluate how mineral extraction might impact the natural resources held in this trust—seems eminently reasonable. The Third Circuit's contrary reasoning casts a troubling shadow over the future balance between environmental stewardship and private property rights on public lands.

273. See Brief of Federal Defendants-Appellants, *supra* note 37, at 10.

274. SCHIFF, *supra* note 5, at 122–23.

275. See, e.g., Freeman, *supra* note 265.

276. See Pearson, *supra* note 165, at 174.

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