

Substitute the following for Duncan Energy on p. 676 of the Casebook, through note 3 on page 681.

Minard Run Oil Co. v. U.S. Forest Service

___ F. 3d ___ 2011 WL 4389220 (3d Cir. 2011)

Before [FUENTES](#), [CHAGARES](#) and [ROTH](#), Circuit Judges.

[ROTH](#), Circuit Judge:

I. Introduction

This appeal concerns a dispute between the U.S. Forest Service (the Service) and owners of mineral rights in the Allegheny National Forest (ANF). Although the Service manages the surface of the ANF for the United States, mineral rights in most of the ANF are privately owned. Mineral rights owners are entitled to reasonable use of the surface to drill for oil or gas and from 1980 until recently the Service and mineral owners had managed drilling in the ANF through a cooperative process. Mineral rights owners would provide 60 days advance notice to the Service of their drilling plans and the Service would issue owners a Notice to Proceed (NTP), which acknowledged receipt of notice and memorialized any agreements between the Service and the mineral owner about the drilling operations. However, as a result of a settlement agreement with environmental groups, the Service dramatically changed its policy and decided to postpone the issuance of NTPs until a multi-year, forest-wide Environmental Impact Study (EIS) under the National Environmental Policy Act (NEPA) is completed.

Mineral owners and related businesses affected by this new policy sought to enjoin the Service from implementing the policy, which would halt new drilling in the ANF. After holding a hearing and carefully considering the evidence, the District Court issued a preliminary injunction against the Service, prohibiting it from making the completion of the forest-wide EIS a condition for issuing NTPs and requiring it to return to its prior, cooperative process for issuing NTPs. The Service, the Attorney General, and several environmental organizations appeal * * *. [W]e affirm in all respects the District Court's thorough, well-reasoned opinion.

II. Background

In the 19th century, all the land now comprising the ANF was privately owned. In 1891, Congress authorized the President to designate federal lands as forest reservations in order to preserve valuable timber resources and ensure protection of watersheds. Act of March 3, 1891 § 24, 26 Stat. 1095, 1103, *codified at* [16 U.S.C. § 471](#) (repealed) (the 1891 Act). In 1897, Congress passed the Organic Act authorizing the Secretary of Agriculture to regulate “occupancy and use” of forest reservations designated under the 1891 Act. [16 U.S.C. § 475](#). These Acts, however, did not authorize the purchase of land to establish federal forest reservations—they were limited to land already owned by the federal government or acquired for other purposes. After considerable

controversy and a decade of campaigning, * * * Congress passed the Weeks Act in 1911. Pub.L. No. 61–435, 36 Stat. 961. The Act set aside funds for purchase of private land by the Secretary of Agriculture to serve as forest reservations under the Organic Act. Before purchasing land in a State, the Act required the Secretary to obtain the State's consent. In the decades following the Act, the Secretary purchased large tracts of forest land, and in 1923, President Coolidge designated the lands acquired in Pennsylvania as the Allegheny National Forest.

A. Mineral Rights in the Allegheny National Forest

Coal mining was common in the Allegheny Plateau and oil had been discovered in the area in 1859. To acquire as much land as possible with limited funds, the Secretary of Agriculture purchased large tracts of surface estate in the ANF while leaving valuable mineral rights in private hands. As a result, over 93% of the mineral estates in the ANF are privately owned. The mineral rights in the ANF are of two kinds: reserved rights and outstanding rights.

Reserved rights are those reserved by the fee owner in the deed conveying surface ownership to the United States. The Weeks Act authorized the Secretary to acquire surface estates with a reservation of rights to the grantor and provided that the exercise of reserved rights would be subject to the “rules and regulations” promulgated by the Secretary and included in the instrument of conveyance. [16 U.S.C. § 518](#). Reserved rights are usually referred to by the year of promulgation of the regulations in effect at the time of federal acquisition, *i.e.*, 1911, 1937, 1947, or 1963 reserved rights. About 48% of the mineral rights in the ANF are reserved rights and the vast majority of these are 1911 rights. The 1911 regulations were quite minimal, and generally required mineral rights owners to use no more of the surface than reasonably necessary, pay for any timber cut down when clearing space for wells, take appropriate measures to prevent fire, and remove all facilities or refuse when drilling operations cease.¹ The 1911 regulations did not

¹ FN1. These regulations essentially required mineral rights owners to do the following:

- (1) Furnish proof of mineral rights ownership upon demand by the Service,
- (2) Use only so much of the surface as is necessary for mining operations,
- (3) Take all reasonable and usual precautions in making tunnels and shafts to support surface land, subject to inspection by the Service or other federal officials,
- (4) Pay (at locally prevailing rates) for timber cut, destroyed, or damaged in mining operations,
- (5) Remove all buildings, camps, or equipment within six months after completion or abandonment of mining operations,
- (6) Dispose of destructible refuse interfering with forest administration within six months after completion or abandonment of mining operations, and
- (7) Use “due diligence” to avoid or suppress fires in the area.

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require mineral rights owners to obtain a permit from the Service in order to exercise their mineral rights.

Outstanding rights are those that were severed from the surface estate prior to its conveyance to the United States. The Weeks Act was amended in 1913 to permit acquisition of severed surface estates with outstanding mineral rights, provided that the National Forest Reservation Commission [a federal body created by the Weeks Act to review proposed Forest Service acquisitions] concluded that these rights would not hinder administration of the forest reservation. 37 Stat. 828, 855 (1913). Until recently, the Service maintained that its regulations did not apply to outstanding mineral rights. Rather, because outstanding mineral rights were reserved prior to conveyance to the United States, these rights are governed by the terms of the earlier conveyance severing the mineral rights and Pennsylvania property law. *See United States v. Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570 (W.D.Pa. Dec. 16, 1980) (*Minard Run I*).

Under Pennsylvania law, the mineral estate is the dominant estate and entails the right to use of as much surface land as reasonably necessary to extract minerals. *Belden & Blake Corp. v. DCNR*, [600 Pa. 559, 969 A.2d 528, 532 \(Pa.2009\)](#). Although the mineral owner must show “due regard” to the rights of the surface owner, the mineral owner need not obtain consent or approval before entering land to mine for minerals. *Id.* [at 533](#); *see also Minard Run I* (mineral rights owner has an “unquestioned right” to enter the property, subject to “minor restrictions which ... should not seriously hamper the extraction of oil and gas”). *Minard Run I* concluded that “due regard” to the Service as surface owner required owners of outstanding mineral rights to provide information regarding drilling plans to the Service “no less than 60 days in advance” of commencing drilling operations.

The Service's 1984 ANF Handbook incorporated the *Minard Run I* framework into its “standard operating procedures” for outstanding mineral rights in the ANF. Congress codified the notice provisions of *Minard Run I* in the Energy Policy Act of 1992, [see [30 U.S.C. § 226\(o\)](#). [eds. This statute applied only to rights to oil and gas not owned by the U.S. in the Allegheny National Forest]. Until the change in policy that is the subject of this litigation, the Service and mineral rights owners in the ANF had relied on the *Minard Run I* framework and taken a cooperative approach to oil and gas drilling in the ANF. Under this framework, mineral rights owners who planned to conduct drilling operations would provide the Service with the required notice and the two parties would then negotiate the details of drilling operations, such as the location of wells or access roads, so as to prevent any unnecessary surface use. At the end of this process, the Service would issue a Notice to Proceed (NTP) to the mineral rights owner, which acknowledged receipt of notice from the mineral rights owner and memorialized any agreements between the parties regarding drilling operations.²

² Drilling in the ANF is regulated by the Pennsylvania Department of Environmental Protection (DEP) and subject to a permit process, *see* 25 Pa. Stat. §§ 77.51, 78.1, 86.11. A permit is usually obtained before applying for an NTP. As an affected landowner, the Service has the right to participate in the permit process and challenge the terms of a permit.

B. The Service's Policy Regarding NEPA and Split Estates

* * * The Service completed EISs in 1986 and 2007 in connection with adoption of a Forest Plan for the ANF, which governs the Service's management of the forest. The Service did not suspend the issuance of NTPs during these EISs. The Service also occasionally conducted an Environmental Assessment (EA)—a summary environmental analysis less demanding than an EIS—when issuing certain NTPs. * * * [T]hey appear to have been completed quite promptly and within the 60-day *Minard Run I* framework. However, until recently, the Service took the position that issuance of an NTP to a mineral rights owner was not a “major federal action” requiring environmental analysis under NEPA because the Service's rights as surface owner were so limited. When interacting with mineral rights owners in the ANF, the Service viewed itself as a resource management agency negotiating use of jointly owned land, not as a regulatory agency issuing permits.

C. Changes in Forest Service Policy

Several changes in the Service's policy led to this litigation. On May 24, 2007, an attorney in the Service's Office of General Counsel authored a memorandum concluding that the issuance of an NTP is a “major federal action” subject to NEPA. The memo relied heavily on *Duncan Energy Co. v. U.S. Forest Service*, [109 F.3d 497 \(8th Cir.1997\)](#) (*Duncan I*), and adopted a broader interpretation of the Service's authority over 1911 reserved rights than was adopted in *Minard Run I*, which the memorandum cited only once and did not discuss. However, there was no immediate change in the Service's policy in response to this memorandum.

On November 20, 2008, the Forest Service Employees for Environmental Ethics (FSEEE) and the Sierra Club filed suit against the Service seeking a declaration that its practice of issuing NTPs without conducting an appropriate environmental analysis under NEPA was contrary to law and also seeking an injunction against issuance of further NTPs without proper NEPA analysis. See *FSEEE v. U.S. Forest Service*, 2009 WL 1324154 (W.D. Pa. 2009). * * * On April 9, 2009, the parties to the *FSEEE* litigation entered into a Settlement Agreement purporting to resolve all claims. The Settlement Agreement provided that, with the exception of 54 grandfathered NTP applications,

[the Service] agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests. Appropriate NEPA analysis shall consist of the use of a categorical exclusion or the preparation of an Environmental Assessment or an Environmental Impact Assessment.

The Pennsylvania Independent Oil and Gas Association (PIOGA) and the Allegheny Forest Alliance (AFA), both appellees in this action, were not included in the settlement negotiations but sought to intervene in the case once they learned that the case might settle. Although PIOGA and AFA were permitted to intervene in the *FSEEE* action, the district court declined to consider their objections to the settlement and approved voluntary dismissal of the case. *FSEEE*, [2009 WL 1324154](#), at *4.

On April 10, 2009, ANF Forest Supervisor Leanne Marten issued a statement (the Marten Statement) explaining that * * * the Service would be “initiating a forest-wide site specific environmental analysis for proposals that were not included in the settlement and any other proposals for activity anticipated between now and 2013,” and that this process was estimated to take until at least mid-April 2010. Aside from the 54 NTP applications identified in the Settlement Agreement, no new drilling in the ANF would be authorized until the forest-wide EIS was complete.

As these policy changes were taking place, the Service took the position that mineral rights owners were required to obtain an NTP prior to making any changes to land in the ANF * * * [and] that new drilling without an NTP may result in a civil enforcement action or criminal penalties.

D. Litigation

On June 1, 2009, PIOGA, AFA, Minard Run Oil Company, and the County of Warren brought suit against the Service and three of its officers, the Attorney General, FSEEE, the Sierra Club, and the Allegheny Defense Fund. The plaintiffs' complaint alleged that * * * [the] *de facto* drilling ban in the ANF until a forest-wide EIS is completed * * * exceeded the authority of the Service and was contrary to NEPA and the Administrative Procedure Act (APA). * * *

At a hearing on the preliminary injunction motion, plaintiffs presented the testimony of several business owners, who testified that, as a result of the Service's ban on new drilling, they were prevented from drilling new wells, causing significant losses to their businesses and harm to the community. Plaintiffs also presented testimony from several former Forest Rangers who had worked in the ANF, who described the Service's historical practices regarding NTPs and EISs and estimated that the EIS would probably require at least several years to complete.

The Service presented the testimony of ANF Forest Supervisor Leanne Marten and Forest Ranger Richard Scardina. These witnesses claimed that, starting in 2007, there was a significant increase in the number of NTP applications. They explained that a forest-wide EIS is necessary before approving any new NTPs, because the Service's prior policy of individualized assessment of NTP applications has hindered forest management, resulting in duplicative roads or development facilities for adjoining pieces of land, and unnecessary clearing of the forest. The environmental defendants presented the testimony of two members of local environmental organizations who claimed that the natural beauty of the ANF had been impaired by oil and gas drilling. Plaintiffs disputed much of this testimony and presented rebuttal witnesses.

The District Court granted plaintiffs' motion for a preliminary injunction. * * * [T]his appeal followed. * * *

III. The Preliminary Injunction

To obtain a preliminary injunction, a plaintiff must show: “(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.” *Kos Pharm. v. Andrx Corp.*, [369 F.3d 700, 708 \(3d Cir.2004\)](#). In reviewing a preliminary injunction, we “exercise plenary review over the district court's conclusions of law and its application of law to the facts, but review its findings of fact for clear error.” *Id.* * * *

A. Likelihood of Success on the Merits

The District Court found that appellees were likely to prevail on the merits of two claims: (1) issuance of an NTP is not a major federal action for which prior NEPA analysis is required, and (2) the Settlement Agreement and the Marten Statement are substantive rules that were not preceded by notice and comment procedures as required by the APA. We consider each in turn.

1. Whether Issuance of an NTP Must be Preceded by NEPA Analysis

The merits of appellees' first claim turns on whether the issuance of an NTP is a “major federal action[] significantly affecting the quality of the human environment,” which under NEPA must be preceded by an appropriate environmental analysis. [42 U.S.C. § 4332\(C\)](#). We have * * * [held 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.” *N.J. Dept of Env't'l Prot. and Energy v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994); *see also Sierra Club v. Penfold*, [857 F.2d 1307, 1310 \(9th Cir.1988\)](#). Accordingly, the dispositive question is whether mineral owners are required to obtain the approval of the Service, in the form of an NTP, before drilling in the ANF. We conclude that such approval is not necessary.

The Service points out that Congress has broad authority under the Property Clause of the Constitution to regulate land owned by the federal government as well as use of private land that affects federal land. Congress has also authorized the Service to regulate use of national forests. The Organic Act authorizes the Service “to make such rules and regulations ... as will insure the objects of [forest] reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.” [16 U.S.C. § 551](#). “Special use regulations” promulgated under the Act provide that “all uses of National Forest System land ... are designated ‘special uses’ and must be approved by an authorized officer.” [36 C.F.R. § 251.50\(a\)](#). The Service argues that drilling by mineral owners in the ANF is a “special use” subject to its approval. *See Duncan Energy v. U.S. Forest Service*, [50 F.3d 584, 589 \(8th Cir.1995\)](#) (*Duncan I*) (special use regulations apply to mineral owners' access to land purchased under the Bankhead–Jones Farm Tenant Act).

We disagree. As a preliminary matter, we note that the Service's regulatory authority over Weeks Act land is not as straightforward as it claims. The Organic Act's grant of regulatory authority applies to “the public forests and national forests which may have been set aside or which may be hereafter set aside under [section 471](#) of this title.” [16 U.S.C. § 551](#). [Section 471](#) (now repealed) authorized the President to designate already owned federal lands as national

forests, but did not authorize the purchase of private land, including land with reserved or outstanding rights. When the Organic Act was passed, the regulation of “occupancy and use” did not contemplate the regulation of access by a cotenant.

The Weeks Act was the first law to authorize federal acquisition of private land for forest preservation. It provides that land acquired under the Act “shall be permanently reserved, held, and administered as national forest lands under the provisions of [section 471](#) of this title,” [16 U.S.C. § 521](#). This provision “arguably requires treating such land as if it had been reserved under [section 471](#)” and could therefore be subject to the Service's regulatory authority under the Organic Act. *United States v. Srnsky*, [271 F.3d 595, 601 \(4th Cir.2001\)](#). However, even if Congress meant by this language to subject Weeks Act land to the Service's regulatory authority under the Act, it intended [**eds. in original; query whether the court meant “did not intend”**] to authorize the Service to regulate the exercise of reserved or outstanding rights by a joint owner of Weeks Act land.

Indeed, section 9 of the Weeks Act suggests that this was not Congress's intent. Section 9 governs the acquisition of forest land, and provides:

Such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of this Act. Such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and *such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States*; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed.

[16 U.S.C. § 518](#) (emphasis added). Thus, under section 9, reserved rights—“rights of way, easements, and reservations retained by the owner from whom the United States receives title”—are subject to the regulations “expressed in and made part of the written instrument conveying title to the lands to the United States.” *Id.*

The Service points out that nothing in this provision provides that reserved mineral rights are subject *only* to regulations in the instrument of conveyance—it is possible that reserved rights are subject to the Service regulations contained in the written instrument of conveyance *and* to other regulations not contained in the instrument. There are two problems with this interpretation. First, it renders the provision superfluous: Congress would not have mandated the inclusion of regulations in deeds with reserved rights if those rights were subject to all generally applicable Service regulations—the general regulatory authority granted under the Organic Act would have been sufficient. * * *

Second, as the Fourth Circuit noted in *Srnsky*, the regulatory authority claimed by the Service “has no logical stopping point” and would therefore raise difficult constitutional questions. [271](#)

[F.3d at 604](#). For example, on the Service's view, it would have the authority to require any holder of reserved rights of any kind—even an easement or right of way—to obtain a permit prior to exercising their rights. This would effectively “wipe the National Forest System clean of any and all easements, implied or express” and dramatically reduce the value of reserved mineral and timber rights. *Id.* We do not believe that this is what Congress intended, and, like the Fourth Circuit, we are reluctant to construe the Weeks 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.’ ” *Id.* (quoting *United States v. Security Indus. Bank*, [459 U.S. 70, 82 \(1982\)](#)). The better reading of the Weeks Act is that it “require[s] that any rules or regulations that the Secretary wishes to apply to easements reserved by the grantor must be ‘expressed in and made part of’ the instrument of conveyance.” *Srnsky*, [271 F.3d at 602](#).

These considerations apply with even greater force to outstanding rights. Although the Weeks Act contains no limiting language regarding the regulations applicable to outstanding rights, this is because outstanding rights are created prior to conveyance to the United States and there is no opportunity to limit these rights by inserting regulations into the instrument defining these rights. Moreover, the language of the Weeks Act indicates that Congress expected the United States to be bound by the terms of outstanding rights—purchase of land with outstanding rights is permitted only where such rights “from their nature will, in the opinion of the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of this Act.” [16 U.S.C. § 518](#). This limitation only makes sense if the Service is bound by the terms of outstanding rights and cannot simply invoke its regulatory authority to override any private use of outstanding rights that it considers inconsistent with the purposes of the Weeks Act. Additionally, as with reserved rights, we are reluctant to construe the Weeks Act in a manner raising difficult constitutional takings questions absent a clear indication of congressional intent.³

* * * *Duncan Energy Co. v. U.S. Forest Service*, [50 F.3d 584 \(8th Cir.1997\)](#) (*Duncan I*) does not support the Service's broad claim of regulatory authority.⁴ In *Duncan I*, the Eighth Circuit held that a private mineral rights owner seeking to drill in a national forest acquired under the Bankhead–Jones Farm Tenant Act, 50 Stat. 525 (1937) (BJFTA), *codified as amended at* [7](#)

³ The Service's construction of the Weeks Act and the Organic Act as conferring regulatory authority over outstanding rights is not entitled to deference. This interpretation was adopted in a 2007 General Counsel opinion, not in a formal adjudicatory or rulemaking proceeding, and thus is not entitled to *Chevron* deference. Even *Skidmore* deference is unwarranted here, because the Service's current interpretation is an unexplained departure from its longstanding view that its regulations do not apply to outstanding mineral rights. See *Wyeth v. Levine*, [555 U.S. 555, \(2009\)](#)

⁴ The Fifth Circuit's recent decision in *Dunn–McC Campbell Royalty Interest, Inc. v. National Park Service*, [630 F.3d 431 \(5th Cir.2011\)](#), is also inapposite. That case considered land acquired [by the U.S. under a 1962 statute establishing the Padre Island National Seashore], [16 U.S.C. §§ 459d–459d–7](#), not under the Weeks Act, and the question presented by the case was whether a Texas statute consenting to federal acquisition of the land protected both reserved and outstanding rights. The Fifth Circuit found that the plain language of the consent statute extended only to reserved rights, but not outstanding rights. Because the language of the Texas statute is different from the relevant provision of the Weeks Act, this case is not relevant.

[U.S.C. § 1010](#), *et seq.*, was required to obtain authorization from the Service before beginning mining operations. The court acknowledged that the mineral rights owner had a right under state law to reasonable use of the surface estate and thus the Service did not have “veto authority” over mineral rights owners' surface use. But the Service's “special use regulations” governed surface use by mineral rights owners and empowered it to determine whether an owner's proposed surface use was reasonable. To respect the rights of the mineral owner, the Service was required to process requests for surface use within a reasonable time—generally 60 days. *Id.*; *see also Duncan Energy Co. v. U.S. Forest Serv.*, [109 F.3d 497, 499 \(8th Cir.1997\)](#) (*Duncan II*) (clarifying that an inflexible 60–day limit was not required). The court found that this rule was consistent with [North Dakota law](#).

Duncan I is inapposite for several reasons. First, the land at issue in *Duncan I* was not acquired under the Weeks Act, but under BJFTA, which does not contain the limiting language of the Weeks Act discussed above. Second, *Duncan I* found that the authority asserted by the Service was consistent with the rights of mineral owners under North Dakota property law. Here, by contrast, Pennsylvania law is flatly inconsistent with the authority asserted by the Service. In a case very similar to this one, the Pennsylvania Supreme Court rejected a claim by the Pennsylvania Department of Conservation of Natural Resources that, as surface owner, it could “impose conditions restraining those exercising their rights to the subsurface.” *Belden & Blake Corp.*, [969 A.2d at 532](#). The Court explicitly held that a surface owner has no right to determine what constitutes reasonable use in the first instance, and a mineral rights owner is under no obligation to obtain the surface owner's approval prior to accessing the surface to extract mineral rights. *Id.* Third, the Service's multi-year moratorium on new drilling could not be justified even under the Eighth Circuit's rulings in *Duncan I* and *Duncan II*. In *Duncan II*, the Eighth Circuit held that the Service must be accorded some flexibility in issuing permits and could not be held to a strict, 60–day limit. 109 F.3d at 501. But the indefinite suspension of NTPs for several years goes far beyond the type of delay contemplated in *Duncan II*. *See* 109 F.3d at 500 n. 1 (mineral rights owner's applications for surface access were processed in 61, 74, and 90 days and that owner had improperly taken unilateral action when application had not been processed for 100 days).⁵

In sum, the Service does not have the broad authority it claims over private mineral rights owners' access to surface lands. Its special use regulations do not apply to outstanding rights and the limited regulatory scheme applicable to the vast majority of reserved rights in the ANF does not impose a permit requirement.⁶ Although the Service is entitled to notice from owners of these mineral rights prior to surface access, and may request and negotiate accommodation of its state-

⁵ Because we find that the Service does not have the regulatory authority it claims under the Organic Act and Weeks Act, we need not consider the Service's arguments that federal common law would govern the United States' property rights or that federal law preempted state property law. In any case, the Service waived these arguments when it conceded before the District Court that Pennsylvania law was not preempted and argued that its new drilling moratorium was consistent with Pennsylvania law. *Minard Run II*, [2009 WL 4937785](#), at *13.

⁶ The vast majority of the reserved mineral rights in the ANF are 1911 rights, which the District Court found do not impose a permit requirement or empower the Service to unilaterally determine what constitutes reasonable surface use * * * [and it] did not commit clear error in [so] finding * * *.

law right to due regard, its approval is not required for surface access. An NTP is an acknowledgment that memorializes any agreements between the Service and a mineral rights owner, but it is not a permit. Accordingly, on the record before it, the District Court properly concluded that issuance of an NTP is not a “major federal action” under NEPA and an EIS need not be completed prior to issuing an NTP. *See Sierra Club v. Penfold*, [857 F.2d 1307, 1310 \(9th Cir.1988\)](#); *Long Island Power Auth.*, [30 F.3d at 417](#). The court therefore correctly determined that appellees were likely to succeed on their claim that NEPA does not require the Service to conduct an environmental analysis prior to issuing an NTP. * * *

[The court also found that the plaintiffs were likely to succeed on their claim that the Settlement Agreement and the Marten Statement are substantive rules that must be promulgated pursuant to the notice and comment procedures of the Administrative Procedure Act.]

B. Irreparable Harm

The District Court found that the Service's moratorium on new drilling irreparably harmed appellees because it infringed their property rights and threatened bankruptcy or closure for some businesses. The Service argues that the District Court's finding that some businesses would suffer temporary economic losses and might go bankrupt was insufficient to establish irreparable harm. We disagree. As a general matter, “a purely economic injury, compensable in money, cannot satisfy the irreparable injury requirement,” *Frank's GMC Truck Ctr., Inc. v. GMC*, [847 F.2d 100, 102 \(3d Cir.1988\)](#), but “an exception exists where the potential economic loss is so great as to threaten the existence of the movant's business.” *Vaqueria Tres Monjitas, Inc. v. Irizarry*, [587 F.3d 464, 485 \(1st Cir.2009\)](#). * * * Here, the District Court carefully considered and ultimately credited the testimony of several business owners that the new drilling moratorium had dramatically affected their business and would probably cause them to shut down or go bankrupt if it continued.

Additionally, where “interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest.” *RoDa Drilling Co. v. Siegal*, [552 F.3d 1203, 1210 \(10th Cir.2009\)](#). This is particularly true of the mineral rights at stake in this case. Under Pennsylvania law, oil and gas resources are subject to the “rule of capture,” which permits an owner to extract oil and gas even when extraction depletes a single oil or gas reservoir lying beneath adjoining lands. *Barnard v. Monongahela Natural Gas Co.*, [216 Pa. 362, 65 A. 801 \(Pa.1907\)](#). The adjoining owner's only remedy against such drainage is to “go and do likewise.” *Id.* The Service's moratorium on new drilling deprives mineral owners in the ANF of this remedy and will cause them to lose oil and gas to other landowners drilling on private lands adjoining the ANF, which are not subject to the moratorium.⁷ Therefore, the moratorium also causes irreparable injury to mineral rights owners by depriving them of the unique oil and gas extraction opportunities afforded them by their

⁷ Because the ANF is not a single continuous piece of land—the forest is dotted with numerous private holdings (J.A. 155–56, 2258, 2260)—this concern is not limited to mineral rights located on the periphery of the forest.

mineral rights. See *Siegal*, [552 F.3d at 1210](#) (finding irreparable injury where interference with property rights caused loss of unique opportunities).

NOTES AND QUESTIONS

1. The recent boom in interest in hydraulic fracturing (“fracking”) to release oil and gas from tight shale formations in the east and elsewhere is fueling much interest in these split estates. Consider the difference between “reserved” and “outstanding” mineral rights. Does the federal land management agency have the same amount of regulatory authority over each? Is the former subject to statutory limitation, while the latter is not? Is the former created by contract with the U.S., and the authority of the United States defined by that contract, as a matter of federal law? Is it clear the latter is controlled solely by state law? See paragraph #4, below.

2. Same result regarding the reserved mineral rights if Section 9 of the Weeks Act had not contained the language (italicized in the court’s opinion on p. 7, *supra*) requiring the conveyance to incorporate the rules the Forest Service prescribes for the “occupation, use, operation, protection, and administration” of the reserved mineral interests?

3. Would requiring a permit from the Forest Service before exercising rights reserved in the conveyance necessarily “wipe [out]” those rights or “dramatically reduce” their value, as the court here finds? Might the permit process be defended as simply a suitable way to channel the exercise of the Forest Service’s authority as surface owner, to make sure its interests got the “due regard” they were entitled to under Pennsylvania state law? Or to make sure that the requirements of the 1911 regulations applicable to reserved rights (see footnote 1 in the court’s opinion) are met?

4. Should the Forest Service have conceded away the possibility that federal law might trump Pennsylvania state law (see footnote 5)? Compare the material on the dormant property clause, or the use of federal common law to preempt state law that interferes with a federal program, Casebook, pp. 198-200. (Pennsylvania state law here may be contrasted with less mining-friendly state laws in some other states; see paragraph 4 on p. 681.)

5. Would delaying the exercise of the reserved mineral rights for a year or two raise a serious “takings” question? See *Tahoe-Sierra*, Casebook, pp. 338, 342 (many-months-long interruption in the exercise of property rights not a *per se* taking, but measured under the Penn Central standard). On the other hand, is the possibility of a taking from the delay magnified by the fact that Pennsylvania follows a rule of capture for oil and gas, as explained in the last paragraph of the edited opinion?

6. Did the Forest Service make a mistake in deciding to do an environmental impact statement and institute a moratorium on new permitting (which promised a lengthy delay) in implementing the settlement of the FSEEE litigation? Same result if the settlement agreement had not incorporated NEPA, but simply beefed up Forest Service oversight of the exercise of reserved mineral interests? And did the Forest Service err in not doing a rulemaking embodying its

General Counsel's opinion asserting more regulatory authority over reserved and outstanding mineral interests, to claim deference from the courts?

7. At the time when the reserved and outstanding mineral interests under eastern national forests were created, technology was not generally available to mine coal by stripping the surface. Therefore, it is likely that the creators of these mineral interests were contemplating underground mining. (The 1911 regulations in footnote 1 seem to bear that out, speaking of "tunnels and shafts," and allowing use of "only so much of the surface as is necessary for mining operations.") Now giant earthmoving machines are capable of stripping off whole mountains to get at coal underneath, which can wreak havoc with surface values, including watershed protection which was the original impetus for acquiring these lands into federal ownership in the first place. See Casebook, pp. 123, 135-36. Could the Forest Service argue that, given this original understanding and the language of the 1911 regulations, it can prohibit strip mining of reserved or outstanding coal interests, at least where underground mining is feasible, even if it is much more expensive than surface or "mountaintop removal" mining?