Management of Oil and Gas Development on Commonwealth of Pennsylvania Land: Nearly Comprehensive

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Abstract: This paper reviews the Commonwealth of Pennsylvania's efforts to regulate oil and gas exploration, production and transmission upon Commonwealth-owned lands.[1] Pennsylvania's lengthy history of oil, gas and mineral extraction and the state's scattershot acquisition of the former privately held lands that today constitute state-owned real estate combine to present an obstacle to a unified approach to regulation of oil and gas activities on Commonwealth-owned lands. Where the Commonwealth owns the surface and oil, gas and mineral estate, detailed leases, comprehensive oil and gas development plans, and a relatively strong regulatory regime provide the Commonwealth with power to control the intensity, location and in some cases the methods of drilling and exploration. Where, however, the oil and gas estate has been severed from the surface estate, courts have determined that the Commonwealth has minimal ability to control access to and use of the surface, leaving the Commonwealth to rely on indirect authorities exercised by its sister agency, the Pennsylvania Department of Environmental Protection, or the voluntary efforts of owners of the oil, gas and mineral estate to manage its right to access the surface estate in a reasonable manner.

1. Introduction:

In 2011, the Commonwealth legislature undertook an inventory of state-owned lands in part to determine with relative accuracy acreage that the state owns or controls that also

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[1] Pennsylvania is one of four states (Massachusetts, Virginia and Kentucky are the others) known as a "Commonwealth." Hence the fact that this paper uses the term "Commonwealth" and "State" interchangeably, the intent is to improve the readability of the paper in the interests of the common weal.

overlays the Marcellus and Utica Shale oil and natural gas formations.[2] Although the State-owned Frackville Correctional Institution is not within the Marcellus and Utica shale "fairways," millions of acres of state-owned land lies atop some of the richest deposits of natural gas in the world.[3] That geologic coincidence has resulted in a great economic boon for the state, while raising concerns whether the state has the tools necessary to minimize and/or to remediate the impacts to be caused by widespread oil and gas drilling and extraction programs on state-owned or controlled land. Such concerns were heightened when, on February 6, 2014, Governor Thomas Corbett announced his proposed budget for 2014-15. The Governor vowed to rescind a 2010 Executive Order signed by his predecessor, Ed Rendell, so that the Commonwealth could generate increased revenues from additional oil and gas leases on state forestland. Governor Rendell's order had banned all new oil and gas exploration on more than 2 million acres of state land administered by the Pennsylvania Department of Conservation and Natural Resources.[4] Generally, Governor Rendell's order found that DCNR lands could not host additional oil and gas development without compromising the ecological, recreational, and environmental values of the land.[5]

Governor Corbett's budget plan, however, sought to placate concerns of adverse impacts to the state forest because it would not include any new drilling from the surface of state forest land, but rather permit exploration and production companies to access oil and gas beneath state forest land by running horizontal well bores onto state land from adjacent private land.[6]

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2 *An Inventory of State-owned Real Property and Subsurface Mineral Rights,* Legis. Budget and Finance Committee, Pennsylvania General Assembly http://lbfc.legis.state.pa.us/reports/2011/58.PDF (October 2011)(the "2011 Report"). While more than two years old, it is not believed that the findings of the 2011 Report with respect to oil and gas exploration on state-owned lands have changed significantly because of a self-imposed moratorium and an overall lull in new drilling in the Commonwealth during that time period.

3 *Id.*, at 18.

4 See, 4 Pa. Code § 1.561, *Executive Order 2010-05* (October 26, 2010) http://www.pabulletin.com/secure/data/vol40/40-47/40_47_gv.pdf.

5 *Id.*

6 *Governor Thomas Corbett's 2014-15 Budget Address,* http://www.pa.gov/Pages/NewsDetails.aspx?agency=Budget&item=1524, *passim.*

Opponents of modern drilling techniques such as horizontal drilling and hydraulic fracturing immediately took to the Internet to express their displeasure; although the Governor's proposal for new leasing contemplated that the new development would nibble around the edges of state forest. Even those in favor of tapping the vast oil and natural gas resources in the Utica and Marcellus Shale formations expressed displeasure, noting that private landowners could be knocked out of competition for lucrative oil and gas leases. Generally, oil and gas production companies will favor the ability to amass large areas of contiguous acreage through state leasing programs to take advantage of economies of scale in both the extraction of the resource, and the delivery to market.

The Governor attempted to ease concerns by noting the Commonwealth's ability to exercise control over the time, place and manner of oil and gas operations across the surface of the state-owned lands. Moreover, the Governor noted that the revenues to be raised by the expanded leasing program would provide much needed funds for education, infrastructure repair and a host of other underfunded essential government programs.[7]

Opponents did not challenge the need for more money for education and infrastructure. Instead they expressed concern that the ability of the Commonwealth to preserve and protect the state-owned acreage would be compromised by the sheer volume of state lands already opened or proposed to be open for oil and gas development as well as the Commonwealth's lack of ownership or control over large percentages of oil and gas rights underlying state lands. This paper focuses upon the tools available to the Commonwealth to protect and preserve such acreage, and important limitations on that authority that will make it very difficult absent legislative intervention for the state to implement a uniform program of preservation and protection across publicly owned lands.

2. The Commonwealth's Leasing Program

[7] *Governor Thomas Corbett's 2014-15 Budget Address,* http://www.pa.gov/Pages/NewsDetails.aspx?agency=Budget&item=1524, *passim.* Note that Pennsylvania is the only significant oil and gas producing state that does not have a state-level severance tax on resource extraction. The State does, however, charge impact fees on gas production that generally are earmarked for the areas that have seen extensive oil and gas development. Hence, the impact fee by and large is not used to fund general state budgetary appropriations.

The 2011 Report found that the state owns or controls more than 4 million acres. The largest component is 2.2 million acres of State forestlands managed by the Department of Conservation and Natural Resources ("DCNR").[8] The Pennsylvania Game Commission ("PGC") administers another 1.4 million acres for hunting and related recreational use.[9] State park lands, also administered by the DCNR, make up another 300,000 acres.[10] The remainder of state-owned land includes the beds of "navigable" waterways (river, stream and surface water bodies), the state's highway, prison and education systems account, and miscellaneous developed real estate holdings (office buildings, agency headquarters etc.).[11] To illuminate the issues confronted by the Commonwealth in managing oil and gas activities on these large holdings, this paper focuses primarily on the state park, forest and game lands.

The principal issue on any of these lands is the extent to which the Commonwealth can control oil and gas activities across every acre of state-owned land where the Commonwealth does not also own or control oil, gas and mineral rights across each acre identified by the 2011 Report. Largely because of the manner in which the state lands were obtained and aggregated, others own significant amounts of the oil, gas and minerals underlying state lands. It is not difficult to understand how this may have occurred. To the extent the Commonwealth purchased the land constituting the state forests, it either did not have the authority, or the budget, to pay extra to obtain the subsurface rights.[12] Prior to such purchases, the subsurface rights may already have been severed from the surface by previous conveyances. Where state parkland was donated, the donor may have reserved the oil and gas rights by deed.

The 2011 Report noted that across the state forestland owned by the Commonwealth, the Commonwealth, private parties own or control approximately 15 percent of

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8 2011 Report, at 19.

9 *Id.*

10 *Id.*

11 2011 Report, at 20-23.

12 2011 Report, *passim.*

the oil and gas rights (approximately 330,000 acres).[13] Private parties own about 80 percent of the oil and gas rights underlying state parks.[14] As described below, the efforts to impose the moratorium over such privately held lands would be difficult. The PGC owns outright only 25 percent of its 1.4 million acres, leaving approximately 1.05 million acres of oil and gas rights in private ownership and control.

In many cases, the Commonwealth does not fully understand the nature of the subsurface ownership at all. This appears to be particularly the case with state forestlands. With respect to the state game lands, however, in general it is well-known that the Commonwealth acquired much of the state game land property in resource-rich north central and northeast portion of the Commonwealth (Potter, Lycoming, Tioga, Bradford, Sullivan, Susquehanna Counties) without oil, gas and mineral rights that had been reserved by industrialists involved in the leather tanning business that predominated in that area in the late 1800s when they sold the surface to lumber companies and other concerns.[15] Nevertheless, as title ownership in oil, gas and minerals stretches back more than a hundred years in most cases, the task of sorting out which private concerns or individuals would be gigantic, and probably cost-prohibitive. The 2011 Report acknowledged the need for such inventorying, but did not propose a method to fund the work. As a consequence, the Commonwealth may not find about private ownership of oil or gas until the lessee of private sub-surface rights on in the state forests or state game lands apply for a well drilling permit from the PADEP.[16]

Currently, about 675,000 acres of State Forest lands have been leased.[17] The DCNR has leased approximately 385,000 acres through its leasing program while private oil and gas estate holders have leased the remainder for development.[18] Leasing on state game lands has

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13 2011 Report, at 19.

14 *Id.*

15 James W. Adams, Jr., Harry Weiss, and J.C. Wilkinson, III, Pennsylvania Oil and Gas Law and Practice [§ 8 *et seq.*] (George T. Bisel Company, Inc. 2012).

16 *Id.*

17 2011 Report, at 26.

18 *Id.*

been spotty, although the 2011 Report noted that the PGC had entered into 102 leases with 54 different oil and gas extraction companies.[19]

DCNR and the PGC approach the leasing of agency lands in somewhat dissimilar fashion. Both agencies invite oil and gas development companies to propose areas, or plats, for development. The agencies then take such designations into account in making determinations of where drilling should take place. During lease formation, however, the DCNR is less willing to take on production risk, demanding and receiving a large up-front per-acre bonus rental payment in exchange for accepting less of a share of the production royalties if and when a well is put into production.[20] The PGC, however, will accept less up-front guaranteed payment in exchange for a larger percentage of production revenues as demonstrated by demanding and receiving some of the largest royalty percentages of any landholder in the Commonwealth.[21]

3. State Control of oil and gas activities.

The DCNR and its predecessor agencies have had had the authority to lease state forestland for oil, gas and mineral development since 1947.[22] As a consequence, the DCNR is the leader among the state agencies in developing policy, programs and regulations, so the remainder of this paper will focus on the practices of the Commonwealth's largest holder of public lands.

(a) Oil, Gas and Mineral Estate owned by the State.

DCNR utilizes several tools to manage oil and gas activities on state land where the state owns both the surface and sub-surface rights. In areas where oil and gas exploration is allowed, the toolbox includes the Commonwealth's permitting requirements overseen by the PADEP for oil and gas activities, the Department's own set of best management practices ("BMPs") provided in its "Guidelines for Administering Oil and Gas Activity on State Forest

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19 2011 Report, at 26-27.

20 2011 Report at 28.

21 2011 Report, at 28-29.

22 2011 Report, at 25.

Lands (the "Guidelines"),[23] including required setbacks and a commitment to comprehensive planning, and a standard Lease that includes pages and pages of surface use limitations and restrictions.[24]

(i) Permitting Requirements.

Like everywhere else in the Commonwealth, the lessee of oil and gas rights seeking to explore for and extract the oil and gas resources must first obtain a well permit from the PADEP.[25] These permits generally incorporate regulations promulgated pursuant to the Pennsylvania Oil and Gas Act, related to methods of drilling and well-pad and well construction, access road construction, management of produced water and other wastes, and minimizing damage from surface disturbance and storm water discharges across the well-pad area.[26] The regulations also provide operational restrictions, such as how and where fluids may be stored at the site, whether and when flaring could be allowed and numerous spill, revenue and production monitoring and reporting requirements.[27] Additionally the permit, in conjunction with the regulations, can include provisions related to lessee's rights of access to, and the manner of use over, the surface, as well as requirements related to remediation as a result of unintended property damage and restoration of the surface once a producing well is established.[28] The

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23 http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20028601.pdf.

24 For purposes of this discussion, the paper focuses on an actual DCNR Lease at http://contracts.patreasury.gov/Admin/Upload/91880_M-110027-12.pdf. For comparison purposes, a form PGC Lease may be found at http://www.thefriendsvillegroup.org/PGC_Lease.pdf.

25 25 Pa. Code § 78.11.

26 *Pennsylvania Oil and Gas Act*, 58 P.S. § 601.101 *et seq.*, see also, 25 Pa. Code § 78.1 *et seq.*(regulations promulgated pursuant to Oil and Gas Act).

27 25 Pa. Code § 78.1 *et seq., passim.*

28 *Id.*

permit also requires the operator to close and cap the well after production ceases, and requires that the operator post financial assurance to ensure that the well is plugged.[29]

(ii) The Lease.

In exchange for obtaining the rights to drill for oil and gas on large, contiguous plots of state forestland, oil and gas exploration and production companies face very specific and non-negotiable, surface use restrictions and controls. All operators must comply with the BMPs included in the Guidelines.[30] The controls may be very specific (i.e., prescriptive setbacks from sensitive areas for oil and gas activities) or more general (i.e., requirements that the lessee comply with various state forest rules and guidance).

For example, no drilling or well-site clearing is permitted within:[31]

- 200 feet of any building;
- 200 feet of any stream or body of water;
- 300 feet of any stream, wetland or surface water designated by the PADEP as being of high or exceptional value;
- 300 feet of any designated vista and
- 600 feet of a state park or designated wild and natural areas.

Lessees may seek waivers from these requirements, but according to the DCNR Guidelines, waiver requests are not likely to be granted unless the applicant can establish that it implementation of the waiver will provide more, not less, environmental protection.[32]

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29 *Id.* The Commonwealth's status as the original oil and gas state has left it with a legacy of abandoned and unplugged wells across much of the western half of the state. There has been much speculation concerning whether the existence of these abandoned wells serves as a preferential pathway for methane and drilling fluids from modern drilling efforts to reach freshwater aquifers. State lands are not immune to this problem. A portion of the PADEP's well permitting fee is set aside for a fund earmarked to identify and to plug these wells.

30 http://www.dcnr.state.pa.us/cs/groups/public/documents/document/dcnr_20028601.pdf.

31 Guidelines, at 17.

More generally, the lease incorporates by reference the Guidelines, as well as the following state forest guidance:

- Stipulations for Protection and Conservation of State Forest Lands;
- Invasive Plants and Revegetation Guidelines for State Forest Lands; and
- Oil and Gas Lease Access Road Specifications for State Forest Lands.

With respect to ancillary infrastructure such as installation of gathering pipelines, the Leases provide very specific requirements for excavation, backfilling and re-vegetation using native species.[33]

(iii) Comprehensive Drilling Plan.

Before any well may be drilled under the Lease, the Lessee is required to engage with the Department in a planning process requiring the Department to consent to the location of each well and related infrastructure such as gathering pipelines, compressor stations and utilities. It is through this process that the Department coordinates its stated mission of protecting the state forest ecosystem while permitting orderly resource extraction. The goal is to maximize the most efficient extraction of the resources while minimizing the impact to the surface. The Department and the lessee are expected to engage in a Comprehensive Development Planning process that requires landscape level planning across the plot to be leased.[34] A cornerstone of the process is a requirement that the Lessee engage in an ecological assessment of the leasehold to identify sensitive receptors such as wetlands, threatened or endangered species habitat or areas where drilling activity could present a serious conflict with other forest uses, such as timbering, hunting, camping, snowmobiling and hiking.[35] Geographic concerns apply with equal force, and

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32 Guidelines, at 17.

33 Guidelines, *passim*.

34 DCNR's process may be the closest that any oil and gas producing state has come to requiring Comprehensive Development Plans as a pre-condition to exploration and drilling. Colorado has a voluntary program. Maryland, which does not yet permit drilling of unconventional oil and gas wells, is considering making such plans mandatory.

35 Guidelines, *passim.*

areas with excessive grade are generally off limits. Aesthetic concerns also apply, such as view-shed values.[36]

Hence, lessees are expected to use existing disturbances such as existing access roads, right of way corridors, and cleared areas to avoid habitat fragmentation.[37] The leases also include command and control requirements that augment PADEP requirements for well-pad construction, well-bore completions, erosion and sedimentation control plans, well plugging and site security and restoration.

(b) Private Party Ownership of Oil, Gas and Mineral Estate.

The state's control of surface activities, and thus the ability to impose requirements to minimize damages to the surface of state-owned land is considerably limited where the State does not own or control the subsurface. As noted above, the Commonwealth does not own or otherwise control the oil and gas estate underlying 15 percent of state forest land, 80 percent of state park land and nearly 75 percent of oil and gas rights underlying state game lands. That fact, combined with the history of oil and gas development in the Commonwealth, changes the Commonwealth's status from surface use regulator to a mere landowner. As a landowner of surface rights only, the Commonwealth finds the contents of its toolbox largely empty, as do private landowners who own and control only the surface. Unlike other oil and gas producing jurisdictions, the Commonwealth also has not enacted a Surface Owners Protection Act.[38] As a consequence, the Commonwealth's authority to control the scope,

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36 *Id.*

37 *Id.*

38 Surfaces Owners Protection Act or "SOPAs" generally are intended to protect the interests of the surface owner, particularly where the surface owner is not in privity with the lessee of the oil, gas and mineral estate. Typical provisions would include requirements that the surface owner be involved in well-site location and development decisions, the ability of the surface owner to obtain damages for interference to the surface owners use and enjoyment of the property, as well as reimbursement for damages to crops, timber and other resources. While the scope and benefits of SOPAs vary from jurisdiction to jurisdiction, their use is widespread in a number of traditional oil and gas

manner and location of oil and gas exploration and production activities over Commonwealth-owned land largely is dependent upon the common law doctrine of "reasonable accommodation." Indeed, DCNR's Forestry Bureau acknowledges its lack of authority in the Guidelines. Where it does not own or control the subsurface, DCNR is encouraged to work with private landowners in a cooperative fashion with the hope that the private landowners will voluntarily agree to follow the Guidelines.[39]

(i) Doctrine of Reasonable Accommodation.

In general, the doctrine provides that the surface owner must reasonably accommodate the needs of the oil and gas estate owner (and its lessees) to access the surface estate and drill for and to extract the resource.[40] At the root of this doctrine is more than 100 years of jurisprudence that has prioritized the need for the Commonwealth to provide for the efficient extraction of the state's natural resources. [41] The basic principles of *Chartiers* have been refined over the last decade to make it clear that the "parties should attempt to reach a reasonable accommodation so that each may reasonably enjoy his respective property rights."[42]

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producing jurisdictions. The list includes Illinois, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, West Virginia, and Wyoming.

39 Guidelines, at 5 ("It is paramount that Bureau Staff recognize and understand the rights of private subsurface owners and not require specific actions; rather they should . . . strive to make decisions which are reasonable…").

40 James W. Adams, Jr., Harry Weiss, and J.C. Wilkinson, III, Pennsylvania Oil and Gas Law and Practice [§ 3.1.3] (George T. Bisel Company, Inc. 2012)

41 *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 296, 25 A. 597, 598 (Pa. 1893)(the mineral estate owner or lessee inherently has broad rights of access to the mineral estate, the right to operate it and remove the mineral must be exercised "with due regard to the owner of the surface.")

42 *United States of America v. Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570 at * 14 (W.D. Pa. 1980).

Application of this doctrine has led the courts over the years consistently to find that the oil and gas estate owner holds a dominant easement over the surface.[43] Hence, in Pennsylvania where the oil and gas estate has been severed from the surface estate, the surface owner cannot ban the activity across the surface.[44] The surface owner may have some input into the location of oil and gas extraction infrastructure (e.g., it would not be considered reasonable to locate a drill rig in the back yard or in the living room of the family home), the time such operations may proceed, and the right to present a claim for property damages to the extent that the use that resulted in the damage was unreasonable.

Though modern surface owners may scoff at *Chartiers*' vitality since the decision is over a century old, the Commonwealth is not among the group of scoffers. In 2009, the Pennsylvania Supreme Court affirmed the fundamental finding of the 1893 *Chartiers* court, rebuffing DCNR's effort to regulate surface use atop oil and gas interests DCNR did not own.[45] In *Belden & Blake*, DCNR owned the surface estate, and Belden & Blake controlled the oil and gas estate, on three parcels within a state park.[46] Belden & Blake complied with the PADEP permitting requirements, but filed a lawsuit for injunctive relief when the DCNR attempted to impose additional surface use requirements on the operator.[47]

Note that the proposed surface use conditions proposed by DCNR in *Belden & Blake* were among the roster of surface use restrictions the Commonwealth obtains as a matter of course where it has unity of title (through the lease or through application of the DCNR's BMPs). Notwithstanding that ability, and the state agency's (arguably constitutional) public trust duty to conserve and maintain parklands, the Pennsylvania Supreme Court found that the operator had

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43 *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259, 264 n. 9 (Pa. 1970); *see also Clearfield Bank & Trust Co. v. Shaffer*, 553 A.2d 455 (Pa. Super. 1989) (mineral owner does not need consent of surface owner to enter).

44 *Id.*

45 *Belden & Blake v. Dep't of Conservation & Natural Resources*, 969 A.2d 528, 531–32 (Pa. 2009).

46 *Id.*, at 529.

47 *Id.*

the right under *Chartiers* to make reasonable use of the surface.[48] Furthermore, the Supreme Court reaffirmed that the surface owner, and not the oil and gas production company, must go to court to obtain a finding that the oil and gas estate holder's proposed use would not be reasonable.[49]

DCNR is not the only governmental authority to be frustrated by application of the doctrine. In Pennsylvania, even the federal government cannot be "unreasonable" when it comes to managing the surface of its property that is underlain by oil and gas owned by private interests.[50] In Minard Run 1, a federal court rejected the United States Forest Service's early efforts to "unreasonably" regulate unconventional drilling in the Allegheny National Forest ("ANF"). In that case, the USFS filed a complaint for a declaratory judgment, damages and injunctive relief, including a request for a preliminary injunction, arising from the defendant allegedly operating oil and gas wells in the ANF without prior notice.[51] Unfortunately for the USFS, private parties owned or controlled approximately 97 percent of the subsurface rights under the ANF.[52]

After discussing *Chartiers* and its progeny, the District Court ruled in 1980 that "it is obvious that the United States in this situation has no greater rights than any other landowner having acquired title to the surface subject to the mineral rights beneath."[53] Thus the USFS was subject to the same standards of reasonable accommodation as every other surface owner in Pennsylvania where the oil and gas estate had previously been severed from the surface. The District Court did determine that damage had been done to the surface absent any cooperative planning between the parties, and therefore imposed limited prior notice obligations on the defendant, including an obligation to identify a designated field representative, a map, a

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48 *Id.,* at 531-33.

49 *Id.*

50 *United States of America v. Minard Run Oil Co.,* 1980 U.S. Dist. LEXIS 9570 at * 14 (W.D. Pa. 1980)("Minard Run 1").

51 *Id.*, at *1-2.

52 *Id.*, at *14-15.

53 *Id.*, at 16.

plan of operations, a plan of erosion and sediment control, and proof of ownership of the mineral title.[54] The Court did not believe these "minor restrictions" would "seriously hamper the extraction of oil or gas."[55]

The 1984 ANF Handbook incorporated the requirements outlined in *Minard Run I*. The Handbook indicated that these requirements were standard operating procedures, and from 1981 through approximately 2008, the Forest Service and private oil and gas estate developers harmoniously co-existed. The Forest Service would review the drilling proposal and ascertain its impact on the surface estate; working cooperatively with drillers prior to issuing a Notice to Proceed. Drilling requests were generally processed within 60 days. The ruling in *Minard Run I*, however, occurred well before the advent of modern drilling techniques. The development of modern methods like horizontal drilling and hydraulic fracturing after 2000 set the stage for another attempt by the USFS to exercise more control over surface activities on the ANF.[56] Once again, the doctrine, as augmented by the ruling in *Minard Run I*, frustrated those efforts.[57]

In *Minard II*, several environmental advocacy groups filed a lawsuit against the USFS, alleging that the Notices to Proceed were being issued contrary to the National Environmental Policy Act ("NEPA"). While the lawsuit was pending, USFS ceased processing and issuing Notices to Proceed. Despite the intervention of industry groups in that action, the case was dismissed after the environmental groups and the USFS entered a settlement agreement without the participation of the oil and gas companies seeking to begin unconventional drilling operation over the ANF. Pursuant to the settlement agreement, the USFS agreed to comply with NEPA when it issued Notices to Proceed with drilling operations in the ANF. Significantly, the

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54 *Id.*

55 *Id.*

56 Historically, the ANF has seen intensive oil and gas drilling for more than 100 years given its location atop the oil and gas reservoirs first exploited by Colonel Drake in 1857, and then later by the Rockefeller interests.

57 See *Minard Run Oil Co. v. United States Forest Service*, No. 1:09-CV-00125-SJM, slip op. at 11 (W.D. Pa. Dec. 15, 2009)("Minard Run II").

USFS issued a moratorium on unconventional drilling pending completion of an estimated 2-year-long environmental impact study.[58]

Minard Run and other extraction companies commenced their own action challenging the settlement agreement and related "Marten Statement"— a related public statement by an employee of the Forest Service that all pending and future proposals to drill in ANF would be subject to NEPA. Minard Run and its co-plaintiffs obtained a preliminary injunction that enjoined USFS from requiring a NEPA document as a precondition to exercising oil and gas rights, prohibited USFS from enforcing a drilling ban it imposed prior to completion of the NEPA study, and re-instated the prior notification requirements from *Minard Run I.*[59] In granting the preliminary injunction, the federal district court judge determined it was likely that the plaintiffs would prevail on the merits of their action -- i.e., that NEPA would be found to be inapplicable to the ANF Notices to Proceed and that Pennsylvania "split-estates" common law was relevant to the scope of the USFS' authority to regulate drilling in the ANF.[60] The USFS appealed the order granting the preliminary injunction.[61]

On September 20, 2011, the Third Circuit Court of Appeals affirmed the District Court's decision "in all respects."[62] In rejecting jurisdictional challenges, the Third Circuit quickly dispensed with the Forest Service's contention that the new drilling moratorium was analogous to a procedural or jurisdictional determination that had only an incidental effect on delaying agency proceedings. The Circuit Court instead adopted the District Court's finding that "the moratorium represents a 'sea change' in the Service's policy regarding mineral rights that

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58 *Id.,* at 12.

59 *Id.,* at 52-53.

60 *Id.*

61 Notice of Appeal, *Minard Run Oil Company v. U.S. Forest Service*, Case No. 1:09CV125 (W.D. Pa. May 6, 2010).

62 *Minard Run Oil Co. v. United States Forest Service*, 670 F.3d 236, 242 (3d Cir. 2011).

directly prohibits mineral rights owners from engaging in new drilling, under threat of criminal penalties."[63]

Turning to the dispositive question on whether the preliminary injunction was appropriate, the Court found that holders of mineral interests under federal lands in Pennsylvania are not required to obtain the approval of the Service, in the form of a [Notice to Proceed], before drilling in the ANF.[64] Analyzing the Forest Service's authority under federal statutes governing the creation and the operation of the USFS, and relying on *Belden & Blake*, the Court found that "the Service does not have the broad authority it claims over private mineral rights owners' access to surface lands."[65] The Court rejected the requirement that NEPA be followed, and confirmed that if the USFS and an extraction company could not come to agreement on surface use over the ANF, then the activity could proceed absent the USFS coming to Court and obtaining a judgment that the activity violated the reasonable accommodation doctrine.[66]

(ii) Regulatory Imposed Restrictions.

Despite the application of the Reasonable Accommodation Doctrine, the Commonwealth is not completely powerless to impose surface use restrictions as a mere surface owner. Oil and gas well operators must have a permit in order to lawfully drill and operate wells. To obtain a permit for an oil or gas well from the PADEP, an applicant must provide notice of its permit application by providing surface owners with a copy of the plat developed for the proposed well.[67] The surface owner will have the right to file objections to the well that are

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63 *Id.*, at 248.

64 *Id.*, at 250.

65 *Id.*, at 250-54.

66 *Id.*

67 25 Pa. Code. § 78.21.

based on violations of § 601.205 or that information in the application is untrue.[68] Any such objection must be made within 15 days from the receipt of the plat.[69]

PADEP rules also provide any party "aggrieved" by the outcome of a permitting decision to appeal to the Pennsylvania Environmental Hearing Board. From there, a losing appellant may appeal to the Commonwealth Court, where the review would be de novo, but where the Court would leave the PADEP decision alone unless the decision was arbitrary and capricious or violated state law.

4. Conclusion.

The inability of the Commonwealth to control in all meaningful respects oil and gas development across more than a million acres of public lands presents a challenge to the mission of agencies like the DCNR that are charged with the preservation and conservation of such lands in the public trust. In the absence of uniform statutory reform, such as the enactment of a SOPA, or the voluntary efforts of industry, there will continue to be two versions of state regulatory control of oil and gas operations on state-owned land in Pennsylvania. What that means for the ability of the Commonwealth to meet its mission for the safe and efficient extraction of natural resources on state land, while at the same time protecting the public's interest in preserving the state's natural areas will, continue to unfold with the rapid growth of the extraction of unconventional oil and gas reserves across the state.

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68 *Id.*

69 *Id.*