

3rd Circuit approves Allegheny Forest drilling

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By Shannon P. Duffy, The Legal Intelligencer

The U.S. Forest Service overstepped its authority when it imposed a ban on oil and gas drilling in the Allegheny National Forest, according to a federal appeals court ruling issued last week.

The ruling is a setback for environmental groups that had sought to delay or prevent drilling in the 512,000-acre forest, where the surface area is owned by the federal government, but 93 percent of the below-ground mineral rights are privately owned.

The 1911 law that established the forest gives the government rights only to the surface while preserving access to the land for owners of privately held mineral rights, a unanimous three-judge panel of the 3rd U.S. Circuit Court of Appeals found.

The dispute erupted when the Forest Service struck a settlement with two environmental groups that significantly changed its process for approving drilling by suspending all approvals while it conducted a multiyear, forest-wide environmental impact study.

Mineral rights owners, joined by oil and gas companies, filed suit and won an injunction that ordered the Forest Service to return to its previous policy of managing drilling in a "cooperative process" that allowed mineral rights owners to give the agency 60 days' notice of drilling plans.

In his 2009 injunction, U.S. District Judge Sean McLaughlin of the Western District of Pennsylvania concluded that the Forest Service's settlement with the environmental groups triggered a "sea change" in the agency's policy and amounted to a de facto ban on drilling that was likely to last several years.

Now the 3rd U.S. Circuit Court of Appeals has upheld the injunction after finding that the drilling ban would irreparably harm the mineral rights owners.

"The Service does not have the broad authority it claims over private mineral rights owners' access to surface lands," U.S. Circuit Judge Jane R. Roth wrote in her 38-page opinion in *Minard Run Oil Co. v. U.S. Forest Service*.

Judge Roth, who was joined by Judges Julio M. Fuentes and Michael A. Chagares, found that the lower court had "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."

Environmental groups had urged the 3rd Circuit to lift the injunction, arguing that the recent boom in drilling is seriously damaging the forest and that the government acted properly by opting to study the impact.

In their appellate brief, the Sierra Club and the Forest Service Employees for Environmental Ethics said the number of oil wells in the Allegheny National Forest "is huge and growing," and that the areas between drilling "are not feasibly usable by the public for other uses."

Attorney Marianne Dugan of Eugene, Ore., who argued the appeal for the environmental groups, said in her brief that "piecemeal planning risks serious environmental damage to the public's lands."

The forest "already bears the scars" of environmental damage, Ms. Dugan argued, "due to processing oil and gas proposals without looking at the big picture."

Marcellus Shale drilling, Ms. Dugan said, is on the horizon and "will use millions of gallons of water per week instead of tens of thousands; and requires larger pads and creates larger amounts of liquid waste."

But lawyers for the mineral rights owners argued that the Forest Service's change in policy was illegal for several reasons.

Attorneys R. Timothy McCrum, J. Michael Klise and Daniel W. Wolff of Crowell & Moring in Washington, D.C., argued that the Forest Service had a long history of settled legal relationships with the mineral rights owners, and that the injunction was designed to restore the status quo.

In the opinion, Judge Roth traced the history of the forest from the 19th century, when all the land was privately owned, through a series of early 20th century laws that established federal forest reservations.

Until recently, Judge Roth said, the Forest Service routinely granted a "notice to proceed," or NTP, when mineral rights owners said they wanted to drill. And the agency did not consider drilling a "major federal action" requiring environmental analysis under the National Environmental Policy Act because "the government's rights as surface owner were so limited."

The Forest Service "viewed itself as a resource management agency negotiating use of jointly owned land, not as a regulatory agency issuing permits," Judge Roth wrote.

But the settlement with the environmental groups marked a significant policy change, Judge Roth found, that effectively converted the issuance of NTPs into a permitting process.

By doing so, the Forest Service overstepped its authority because "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 Allegheny National Forest does not impose a permit requirement."

Judge Roth found the lower court had properly concluded that the policy change would irreparably harm the mineral rights owners because of a key feature of Pennsylvania law.

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, Judge Roth noted.

The Pennsylvania courts have held that an adjoining owner's only remedy against such drainage is to "go and do likewise," Judge Roth said -- meaning time is of the essence.

The Forest Service's moratorium on new drilling "deprives mineral owners in the Allegheny National Forest of this remedy and will cause them to lose oil and gas to other landowners drilling on private lands adjoining the forest which are not subject to the moratorium," Judge Roth wrote.

As a result, the moratorium "causes irreparable injury to mineral rights owners by depriving them of the unique oil and gas extraction opportunities afforded them by their mineral rights."

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