WHAT THE FRACK ARE MY RIGHTS? PRIVATE MINERAL ESTATE OWNER RIGHTS WITHIN NATIONAL FORESTS AND MONUMENTS IN WEST VIRGINIA

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I. INTRODUCTION

Generally, the public misunderstands the relationship between individual property rights and government owned national forests and monuments. This is the result of a confusing area of law, combined with an increasing number of national forest proclamations and national monument designations. For example, President Obama has designated eleven national monuments during his term of office and enlarged two.[1] Out of all the national monuments, twelve have been converted from national forests.[2] National forests are a great source of recreation as well as resources. Therefore, it is common to designate areas within national forests as national monuments to immortalize the recreational and resource capacity.

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1 NAT'L PARKS CONSERVATION ASS'N, LIST OF PROCLAIMED NATIONAL MONUMENTS (2014), *available at* http://www.npca.org/news/media-center/fact-sheets/2013-Antiquities-Act-monument-list-updated.pdf. For comparison, President Theodore Roosevelt proclaimed eighteen national monuments; President Franklin D. Roosevelt proclaimed eleven national monuments and enlarged seventeen; and President Clinton proclaimed nineteen and enlarged three. *Id.*

2 *See Facts and figures on National Monuments in and out of the National Park System*, NAT'L PARKS TRAVELER (Apr. 11, 2013), http://www.nationalparkstraveler.com/2013/04/facts-and-figures-national-monuments-and-out-national-park-system23042.

Due to West Virginia's mountainous terrain and geography, it is no wonder that over one million acres of the state lie within national forests.[3] However, no national monuments currently exist within the state's vast quantities of national forest land. Currently, a proposal to create the Birthplace of Rivers National Monument is in the works. The proposed monument area consists of over 120,000 acres in the southern Monongahela National Forest, but the boundary has yet to be finalized.[4] As to be expected, the proposed monument has met some resistance from local residents.[5] One common concern West Virginia residents share, as well as those outside the state with interest in national monument property, is the continued use of their property rights.

When an individual owns the minerals of a tract but not the surface, the mineral rights owner is entitled to reasonable use of the surface to recover the minerals.[6] An issue arises when the government purchases the surface to create a national forest or monument, but the individual seller reserves the minerals. The mineral estate owner's reasonable use of the surface to recover the minerals may contradict the purpose of the national forest or monument. In response, the Third Circuit explained that the United States Forest Service cannot limit the mineral estate owner's reasonable use of the surface to claim the minerals within a national forest.[7]

This article argues that the Third Circuit's decision should extend to West Virginia national forests and monuments in order to provide clarity to a muddied area of law. Part II first provides an overview of national forests and monuments, and explains how they are established. Part III begins with an overview of the Third Circuit's decision and why it should extend to national forests located in West Virginia. Part III then

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[3] Jefferson National Forest is 18,526 acres and the George Washington National Forest is 104,858 acres. *George Washington & Jefferson National Forests Learning Center*, U.S. DEP'T OF AGRIC. FOREST SERV., http://www.fs.usda.gov/main/gwj/learning. The Monongahela National Forest contains over 919,000 acres. *Monongahela National Forest About the Forest*, U.S. DEP'T OF AGRIC. FOREST SERV., http://www.fs.usda.gov/main/mnf/about-forest.

[4] *See* BIRTHPLACE OF RIVERS NATIONAL MONUMENT, http://www.birthplaceofrivers.org/about.html (last visited Feb. 9, 2015) (stating that the monument area consists of the Cranberry Wilderness Area combined with roughly 75,000 additional acres surrounding the wilderness area); *Cranberry Wilderness*, U.S. DEP'T OF AGRIC. FOREST SERV. http://www.fs.usda.gov/recarea/mnf/recreation/recarea/?recid=12368 (last visited Feb. 9, 2015) (stating that the Cranberry Wilderness Area consists of 47,815 acres).

[5] *See generally* Jerome Heinemann, *Fifteenth Order of Business – No Birthplace of Rivers National Monument!*, THE POCAHONTAS CRIER (May 12, 2014), http://crier88.blogspot.com/2014/05/fifteenth-order-of-business-no.html; Linda D. Ordiway, *Birthplace of Rivers National Monument (BRNM)*, RUFFED GROUSE SOCIETY, *available at* https://www.ruffedgrousesociety.org/UserFiles/File/FANs/BRNM%20Alert%20Ordiway.pdf (last visited Feb. 9, 2015); *Action Alert: STOP the Birthplace of Rivers National Monument: Backdoor Attempt around the Forest Plan Process*, WEST VIRGINIA STATE CHAPTER NAT'L WILD TURKEY FED'N, http://wvstatechapternwtf.com/ActionAlerts/Actionalterts_STOP_the_Birthplace_of_Rivers_National_Monument.html (last visited Feb. 24, 2015).

[6] *See* Whiteman v. Chesapeake Appalachia, L.L.C., 729 F.3d 381, 387–88 (4th Cir. 2013) (citing Marvin v. Brewster Iron Mining Co., 55 N.Y. 538 (1874), and Adkins v. United Fuel Gas Co., 61 S.E.2d 633 (W. Va. 1950)).

[7] Minard Run Oil Co. v. United States Forest Service (*Minard II*), 670 F.3d 236 (3d Cir. 2011).

addresses whether the Third Circuit's decision will extend to national monuments converted from national forests. Part IV concludes with the recommendation that when designating future national monuments in West Virginia, the designating instrument needs to clarify a mineral estate owner's rights in relation to the federally owned surface of the monument. If the government does not wish to be burdened by the mineral estate owner's rights under the national monument, then "just compensation" must be given under the Fifth Amendment.

II. ESTABLISHING NATIONAL FORESTS AND MONUMENTS

When establishing a national forest or national monument, conflicts may arise with personal property rights. Part II.A. of this section begins with the process of establishing a national forest. A brief overview of The Weeks Act of 1911 is given as well as the issues it raises in the Monongahela National Forest. Part II.B. then explores the creation of national monuments along with the issues created for private property owners.

A. National Forests and Private Property Rights

National forests were originally established to prevent destructive floods caused by deforestation.[8] Congress initially wanted a bill "for the preservation of the forests of the national domain adjacent to the sources of navigable rivers and other streams of the United States."[9] In doing so, Congress directed the Commissioner of Agriculture to produce reports on the state of America's forestland.[10] Congress then passed the Forest Reserve Act of 1891, authorizing the President, through the Secretary of Agriculture, to set aside and reserve public lands "covered with timber or undergrowth."[11] In 1905, Congress transferred authority over national forests to the United States Department of

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[8] 3 Pub. Nat. Resources L. section 35:2 (2nd ed.) (citing Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 202–04 (1985)). This notion was reaffirmed by Congress in 16 U.S.C. § 475. The code states:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

16 U.S.C. § 475 (2013).

[9] H.R. 2075, 44th Cong., 1st Sess., 4 CONG. REC. 1070 (1876).

[10] *See* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 15–16 (1985) (citing Act of Aug. 15, 1876, ch. 287, 19 Stat. 143, 167).

[11] Forest Reserve Act of 1891, ch. 561, § 24, 26 Stat. 1103 (repealed 1979).

Agriculture ("USDA").[12] The Secretary of Agriculture then created the USDA Forest Service to operate and regulate the national forests.[13]

Congress originally focused its attention on establishing national forests in the western part of the country. However, its attention soon turned to the east coast and the continuous problem of deforestation in the Appalachian Mountains and New Hampshire forests.[14] Therefore, Congress passed The Weeks Act of 1911 to protect the watersheds of navigable streams and rivers.[15]

1. The Weeks Act of 1911

The Weeks Act of 1911 gave the Secretary of Agriculture the authority to purchase lands in the eastern United States in order to protect watersheds of navigable streams and rivers.[16] The Act "established funding and procedures for acquiring the privately held property interests that became the [Alleghany National Forest] and other eastern national forests."[17] The Secretary of Agriculture purchased lands from individuals where timber had been harvested.

The Weeks Act created the problem of federal/private split estates. The federal government would purchase the surface only, and leave the grantor the mineral rights.[18] As a result, private individuals hold much of the land underneath the surface of national forests in the eastern United States. In fact, when a split estate exists, the federal government rarely owns the mineral rights; the federal government usually owns the surface while the private party owns the mineral rights.[19]

The Secretary of Agriculture, using the Weeks Act, acquired land to create West Virginia's largest national forest, the Monongahela National Forest.[20] As a result, much of the mineral estate underlying the forest was either reserved or outstanding upon acquisition under the Weeks Act. Private mineral owners are generally allowed to drill

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12 16 U.S.C. § 472 (2013).

13 *See* 36 C.F.R. §§ 200.1, 200.3 (2014).

14 *See The Lands Nobody Wanted*, THE FOREST HISTORY SOC'Y, http://www.foresthistory.org/ASPNET/Policy/WeeksAct/LandsNobody.aspx (last visited Feb. 9, 2015).

15 61 Cong. Ch. 186, 36 Stat. 961 (March 1, 1911) (codified at 16 U.S.C. § 563 (2013)).

16 16 U.S.C. § 563.

17 Minard Run Oil Co. v. U.S. Forest Serv., C.A. No. 09-125, 2009 WL 4937785 (W.D. Pa. Dec. 15, 2009) (citing 16 U.S.C. §§ 511–21 (2013)).

18 Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND & WATER L. REV. 419, 426 (1998).

19 *Id.*

20 *Monongahela National Forest About the Forest*, U.S. DEP'T OF AGRIC. FOREST SERV., http://www.fs.usda.gov/main/mnf/about-forest (last visited Aug. 31, 2014); *see Monongahela National Forest*, POCAHONTAS COUNTY WEST VIRGINIA, http://www.pocahontascountywv.com/monongahela-national-forest (last visited Feb. 5, 2015).

for oil and gas within the national forest.[21] The Forest Service is limited in its ability to regulate owners' recovery.[22] An issue may arise when recovering privately owned minerals if areas within West Virginia's national forests are converted to national monuments.[23]

B. Proclaiming and Designating National Monuments

National monuments are created either through presidential proclamation or Congressional statute. The Antiquities Act of 1906 gives the President the power to establish national monuments through presidential proclamation.[24] However, Congress limited the President's authority to establish national monuments. First, the Act requires that the president only proclaim "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" as national monuments.[25] Second, monuments must be situated on land already owned by the government.[26] Finally, land must be "confined to the smallest area compatible with the proper care and management of the objects to be protected."[27]

While there are currently no national monuments in West Virginia, plans are in motion to establish a national monument within the Monongahela National Forest. The proposed Birthplace of Rivers National Monument encompasses a large portion within the southern part of the Monongahela National Forest, including all of Cranberry Wilderness Area.[28] Its purpose is to "guarantee that this special landscape will always be available for the enjoyment of future generations."[29] The promoters of the national monument are currently working with federal legislators to introduce a bill in Congress. There exists "[a] common concern [] that monument designation potentially could result

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21 *See* U.S. DEP'T OF AGRIC., FOREST SERV., MONONGAHELA NATIONAL FOREST: LAND AND RESOURCE MANAGEMENT PLAN, at II-1 (2006) (last updated 2011), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5330420.pdf.

22 *See id.*

23 Private owners of minerals underlying national monuments controlled by the National Parks Service must comply with 36 C.F.R. §§ 9.30–9.52 (2014). However, no regulations speak directly to rights of private owners of minerals underlying national monuments controlled by the Forest Service.

24 16 U.S.C. § 431 (2013), *repealed by* Pub. L. No. 113-287, 128 Stat. 3094, 3259 (to be codified at 54 U.S.C. § 320301(a)).

25 *See* § 320301(a), 128 Stat. at 3259; Cameron v. United States, 252 U.S. 450, 456 (1920) (describing President's Roosevelt's declaration of the Grand Canyon National Monument as a "great natural wonder[]").

26 § 320301(a), 128 Stat. at 3259. This limitation makes national forests a prime location for establishing national monuments.

27 *Id.* § 320301(b).

28 BIRTHPLACE OF RIVERS NATIONAL MONUMENT, http://www.birthplaceofrivers.org/about.html (last visited Aug. 31, 2014).

29 *Id.*

in new constraints on development of existing mineral and energy leases, claims, and permits."[30]

III. THE ARGUMENT FOR *MINARD RUN II*

The U.S. Forest Service does not have any control over private mineral owners' use of their property underlying national forest property in West Virginia.[31] However, it is unclear whether the same rule applies when national forest land is converted to a national monument. As a result, the designating statute or proclamation must clearly define the rights of mineral owners. This section introduces the Third Circuit's decision in *Minard Run II* and how it extends to the Monongahela National Forest. Furthermore, this section argues that *Minard Run II* should extend to national monuments within West Virginia, but that the designating statute or proclamation will ultimately decide whether mineral right owners are protected.

A. The Forest Service Should Not Limit Private Mineral Owners in West Virginia

The Third Circuit, in *Minard Run Oil Co. v. United States Forest Service* (*Minard Run II*),[32] held that the U.S. Forest Service lacks regulatory authority over Alleghany National Forest lands acquired under the Weeks Act of 1911.[33] While *Minard Run II* is the main case controlling on this issue, it has been covered in great detail in other works, and this Article will only provide a brief snapshot of the case.[34]

Minard Run II arises out of the issue described in Part II.A.1. The Alleghany National Forest property was purchased from individual owners under the Weeks Act of 1911.[35] However, the government only purchased the surface and the private sellers reserved the mineral rights.[36] The Weeks Act generally requires that the mineral rights owner use only the amount of surface that is reasonably necessary in recovering their mineral rights.[37] Furthermore, the Act did not require mineral rights owners to obtain a permit from the Forest Service before developing the subsurface minerals.[38]

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30 CAROL HARDY VINCENT & KRISTINA ALEXANDER, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 7 (2010), *available at* http://fas.org/sgp/crs/misc/R41330.pdf.

31 *See* LAND AND RESOURCE MANAGEMENT PLAN, *supra* note 21, at II-1.

32 670 F.3d 236 (3d Cir. 2011).

33 *Id.*

34 *See* Johnathan Thrope, Note, Minard Run Oil Co. v. United States Forest Service, 36 HARV. ENVTL L. REV 567 (2012).

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

36 *Id.* at 242–43.

37 *Id.* at 243.

38 *Id.*

Up until 2008, the Forest Service required a sixty day notice from mineral rights owners before mineral development could begin.[39] After receiving the notice, the Service would then issue a Notice to Proceed ("NTP").[40] The Forest Service Employees for Environmental Ethics ("FSEEE") and the Sierra Club filed suit against the Forest Service, arguing that the Service did not adhere to the National Environmental Protection Act when issuing NTPs.[41] The FSEEE and Sierra Club argued that the Forest Service must perform an environmental assessment and file an environmental impact study before issuing an NTP.[42] As a result, the Forest Service put a hold on issuing NTPs.[43]

The Third Circuit in *Minard Run II* held that the Forest Service could not regulate mineral right owners in federal lands acquired under the Weeks Act.[44] However, the court held that the Service is entitled to notice from the private mineral estate owners before beginning mineral development.[45] Although the Service is entitled to notice, the Service's "approval is not required for surface access."[46]

The Third Circuit distinguished *Minard Run II* from decisions in the Fifth and Eighth Circuits. In *Dunn-McCampbell Royalty Interest, Inc. v. National Park Service*,[47] the Fifth Circuit held that mineral estate owners are not permitted to ingress and egress on Padre Island National Park in Texas.[48] The court found that the Enabling Act,[49] authorizing the creation of Padre Island National Seashore, did not protect mineral estate owners from acquiring their minerals.[50] Similarly, the Eighth Circuit, in *Duncan Energy Co. v. U.S. Forest Service* (*Duncan I*),[51] held that private mineral rights owners are subject to Forest Service regulation in a national forest acquired under the Bankhead-Jones Farm Tenant Act.[52] Again the Third Circuit differentiated between the Bankhead-Jones Farm Tenant Act and the Weeks Act of 1911, finding that the Weeks Act's language is different from that of the Bankhead-Jones Act.[53] The court in *Minard Run II*

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39 *Id.* at 242.

40 *Id.* The NTP is issued by the Forest Service and "acknowledge[s] receipt of notice and memorialize[s] any agreements between the Service and the mineral owner about drilling operations." *Id.*

41 *Id.* at 245.

42 *Id.*

43 *Id.* at 245.

44 *Id.* at 254.

45 *Id.*

46 *Id.*

47 630 F.3d 431 (5th Cir. 2011).

48 *Id.* at 442.

49 16 U.S.C. §§ 459d–459d-7 (2013).

50 *Dunn-McCampbell*, 630 F.3d at 440.

51 50 F.3d 584 (8th Cir. 1995).

52 *Id.* at 591; *see also Minard Run II*, 670 F.3d at 253.

53 *Minard Run II*, 670 F.3d at 253.

further distinguished the present case from *Duncan I* because Pennsylvania property law is different from North Dakota property law.[54] The Forest Service asserted authority that "was consistent with the rights of mineral owners under North Dakota property law."[55] In comparison, the Service was asserting authority that was inconsistent with Pennsylvania property law in *Minard Run II*.[56]

The Forest Service's management plan for the Monongahela National Forest states that the Forest Service "cannot usurp [reserved mineral] rights unless claimants or property owners are willing to negotiate for just compensation."[57] It also provides directions as to how oil and gas exploration should be regulated by the Service.[58] The national forests located within West Virginia were both acquired under the Weeks Act, like the Alleghany National Forest in *Minard Run II*.[59] Furthermore, Pennsylvania property law and West Virginia property law are similar with respect to subsurface mineral rights.[60] Both states permit mineral right owners to burden surface owners' property no more than reasonably necessary to acquire the minerals.[61] As a result, the *Minard Run II* decision should extend to disputes within West Virginia's national forests. The Forest Service is entitled only to notice from oil and gas developers prior to mineral operations.[62] However, the Forest Service should not be able to permit or regulate the activities of the mineral developer besides what has already been "memorialized [in] any agreements between the Service and the mineral owner about the drilling operations."[63] Typically, "the Forest Service has some degree of ability to limit the mineral owners use of the surface, but that ability is typically the same as that of a private surface owner under the law of the given state."[64]

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54 *Id.*

55 *Id.*

56 *Id.*

57 LAND AND RESOURCE MANAGEMENT PLAN, *supra* note 21, at II-1.

58 *Id.*

59 The two national forests within West Virginia's borders are the Monongahela National Forest and the George Washington and Jefferson National Forest.

60 *Compare* Buffalo Mining Co. v. Martin, 267 S.E.2d 721 (W. Va. 1980), *with* Belden & Blake Corp. v. Commonwealth, Dep't of Natural Res., 969 A.2d 528 (Pa. 2008).

61 *See id.*

62 United States v. Minard Run Oil Co. (*Minard Run I*), No. 80-129, 1980 U.S. Dist. LEXIS 9570, at *19–20 (W.D. Pa. Dec. 16, 1980).

63 *Minard Run II*, 670 F.3d 236, 242 (3d Cir. 2011).

64 L. Poe Leggette et al., *U.S. Forest Service Attempts To Delay Hydraulic Fracturing on Private Mineral Estates*, 33 ENERGY & MIN. L. FOUND. § 22.16 (2012).

B. National Monuments Are Subject to Valid Existing Rights

The same rights of mineral owners to encumber the surface of a national forest may not extend to national monuments. This is because establishing national monuments is inherently different than establishing national forests. Therefore, owners of private mineral estates under national monument lands are subject to the designating language of the proclamation or statute.[65]

In *Tulare County v. Bush*,[66] the D.C. Circuit Court of Appeals held that President Clinton's proclamation of the Grand Sequoia National Monument did not violate any "valid existing rights."[67] President Clinton's proclamation converted a portion of the Sequoia National Forest into a national monument.[68] The plaintiffs alleged that the proclamation violated the Antiquities Act, the Constitution, the National Forest Management Act, the National Environmental Protection Act, and existing rights established in a previous settlement agreement.[69] Two of the plaintiffs, Sierra Forest Products and High Desert Multiple-Use Coalition, entered into a mediated settlement agreement with the Forest Service in order to continue commercial logging in a specific region of the national forest.[70]

The court dismissed the case because the complaint lacked subject matter jurisdiction and failed to state a claim for which relief could be granted.[71] In addressing allegations in the complaint, the court explained that converting the national forest to a national monument would not impede on the valid existing rights.[72] However, the court's explanation is due to the fact that President Clinton expressly stated in the proclamation that "the establishment of this monument is subject to valid existing rights."[73]

For the most part, national monument proclamations include the language "valid existing rights."[74] The Supreme Court has interpreted "valid" in the context of national monuments to "give[] to the the claimant certain exclusive possessory rights."[75] In order to have a valid mineral deposit, the Court concluded that there must be valuable and workable deposits of minerals.[76] However, "[t]here are fears that mineral activities may

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65 *See* Tulare County v. Bush, 306 F.3d 1138, 1143 (D.C. Cir. 2002).

66 *Id.*

67 *Id.* at 1143.

68 *Id.* at 1140.

69 *Id.*

70 *Id.* at 1143.

71 *Id.* at 1140.

72 *Id.* at 1143.

73 *Id.*

74 VINCENT & ALEXANDER, *supra* note 30, at 7.

75 Cameron v. United States, 252 U.S. 450, 460 (1920).

76 *Id.* at 457 (citing the Secretary of the Interior's decision on the valid mining claim).

have to adhere to a higher standard of environmental review, and will have a higher cost of mitigation, to ensure compatibility with the monument designation."[77]

Because the Weeks Act controls the split estate dichotomy within the Monongahela National Forest, the designating statute will control mineral estate holders' rights. As a result, special language should be drafted into the statute that purports congressional intent of whether mineral owners can retrieve their property within the monument area. The drafters must keep in mind that if they want the monument surface to remain unencumbered by mineral right exploration, then the mineral right owners may require just compensation under the Fifth Amendment.[78] In conclusion, if left ambiguous, neither the Forest Service nor the mineral owners will know how to proceed. Tensions will rise between already polarized groups of people. The statute or proclamation establishing the monument needs specificity with regards to the valid existing rights of mineral right owners.

IV. CONCLUSION

The Third Circuit's decision in *Minard Run II* should extend to West Virginia. Much like the facts in *Minard Run II*, the national forests in West Virginia were both acquired under the Weeks Act and should therefore be controlled by their conveying deed. Similarly, both West Virginia and Pennsylvania use the "reasonably necessary" standard when determining the extent of the surface a mineral owner may use. The Forest Service should only be entitled to reasonable notice of development. However, the holding in *Minard Run II* may not as easily extend to future national monuments in West Virginia. While most monuments are subject to "valid existing rights," the designation should explicitely include to what extent the surface can be encumbered by the mineral estate owner.

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77 VINCENT & ALEXANDER, *supra* note 30, at 7.

78 U.S. CONST. amend. V.