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Natural Gas Case Law Brief

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

C.A. No. 09-125; 2009 U.S. Dist. LEXIS 116520 (W.D. Pa. Dec. 15, 2009)

Summary prepared by Michael Magee on June 4, 2010

The plaintiffs in this case sought a preliminary injunction to prevent the defendant, the United States Forest Service (Forest Service), from being required to prepare an environmental impact statement (EIS) for lands in the Allegheny National Forest (ANF) before the owners of mineral rights could drill to access their minerals. The EIS requirement was at issue in an earlier case: *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.* 2009 U.S. Dist. LEXIS 40055 (W.D. Pa. 2009). In *Forest Serv. Employees*, the plaintiffs alleged that the Forest Service was failing to perform its duties by allowing drilling in the ANF before preparing an EIS as required under the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(c). The parties in *Forest Serv. Employees* settled by agreeing that all future drilling in the ANF would be allowed only after preparing an EIS. This effectively placed a ban on all non-commenced drilling in the ANF for an indeterminate period during which an EIS would be prepared.

Among the plaintiffs in this case were Minard Run Oil Company (Minard Run), the Pennsylvania Oil and Gas Association (POGAM), the Allegheny Forest Alliance (AFA), and Warren County. POGAM was made up of many gas companies with ANF mineral rights. AFA was a coalition of school districts, municipalities, and businesses with interests in ANF resources. Warren County held ANF mineral rights in trust. Gas company officials testified on the financial struggles their companies faced due to the drilling ban. The plaintiffs' argued that the drilling ban unreasonably burdened their property rights.

The issues were as follows: (1) *does the Court have jurisdiction over this matter?*, and if so, (2) *should a preliminary injunction against the enforcement of the drilling ban be granted*?

The District Court ruled that it had jurisdiction over the claims of Minard Run and POGAM, but not over the claims of AFA and Warren County. Jurisdiction requires the plaintiffs to have standing, and it also requires that the alleged injury suffered is the result of a "final agency action." Standing requires three elements: (1) the plaintiff(s) must have suffered an "injury in fact," (2) the injury must be proximately caused by the defendant's action, and (3) judgment for the plaintiffs will likely compensate for the injury suffered. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Minard Run's and POGAM's claims met these elements, but AFA's claims and Warren County's claims both failed as overly speculative. A settlement agreement may constitute a final agency action if the agency "exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations" in agreeing to the settlement. *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008). As the Court's reasoning on the second issue shows, the Forest Service's agreement to the settlement exceeded its legal authority.

A preliminary injunction ending the ANF drilling ban was granted. Granting a preliminary injunction in the Third Circuit required the following: (1) the plaintiffs will likely win on the merits; (2) the plaintiffs will suffer irreparable harm without the injunction; (3) an injunction will do more good than harm to the parties' combined interests; and (4) an injunction will benefit the public. *Kos Pharms. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

The Court determined that the plaintiffs were likely to win their case on the merits. The governing standard for the relationship between the Forest Service and mineral owners was established in *United States v. Minard Run Oil Co.* 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980) (*Minard Run I*). In *Minard Run I*, the Court held that because the subsurface estate is dominant, the subsurface owner's "right of absolute access is constrained only by the obligation to exercise "due regard" for the surface owner, an obligation the surface owner may enforce by seeking judicial review." *Id.* *Minard Run I* established the status quo that parties desiring to access their minerals in the ANF must give the Forest Service at least sixty-days notice. The Forest Service argued that *Minard Run I* should be trumped by NEPA, which required the performance of an environmental review anytime federal agencies undertake major affirmative acts. *Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). The Court disagreed because no affirmative agency acts were needed when subsurface owners wished to obtain their minerals.

Furthermore, the plaintiffs were likely to win on the merits for procedural reasons. Requiring an EIS constituted the adoption of a new legislative rule, and notice of potential rule

changes must be published in the Federal Register. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992). The Forest Service failed to meet this requirement.

Minard Run and POGAM both demonstrated that they would suffer irreparable harm if the preliminary injunction sought was not granted. The Court considered several precedents: "Where the economic loss involved would be so great as to threaten [the] destruction of the moving party's business, a preliminary injunction should be issued to maintain the status quo." *See N.W. Controls v. Outboard Marine Corp.*, 317 F. Supp. 698, 703 (D. Del. 1970). And "when 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).

The Court also found that the injuries which would be suffered by the plaintiffs without a preliminary injunction were greater than those which would be suffered by the Forest Service by returning to the *Minard Run I* status quo. The preliminary injunction could save the plaintiffs from failing, and the Forest Service could still conduct an EIS while the plaintiffs are drilling.

Lastly, it was in the public's interest that the preliminary injunction be granted. The plaintiffs' property rights could be respected and the ANF protected concurrently.

The Forest Service was preliminarily enjoined from being required to observe the NEPA requirements as a precondition to the exercise of private mineral owners' rights, the enforcement of the forest-wide drilling ban in the ANF was preliminarily enjoined, the *Minard Run I* standard was reinstated, and further implementation of the *Forest Serv. Employees* settlement agreement was preliminarily enjoined. The claims of AFA and Warren County were dismissed.