One oft-overlooked aspect of the Weeks Act has to do with who owns the subsurface mineral rights of land purchased under the act. This issue, recently the focus of a federal lawsuit, reminds us that the Weeks Act will have an impact on land management for years to come. It also serves as a reminder that the eastern national forests have management issues rarely encountered on the western national forests established from the public domain.

SURFACE AND MINERAL RIGHTS

AND THE WEEKS ACT

The Weeks Act of 1911 and the establishment of the eastern national forests may seem like ancient history, but the U.S. Forest Service has recently been reminded that the wording of the act is just as important today as it was 100 years ago.

On September 20, 2011, the U.S. Court of Appeals for the Third Circuit[1] determined that the Forest Service was misinterpreting its authority over development of private mineral rights beneath the surface of lands acquired by purchase under the Weeks Act. The Forest Service had argued that the Organic Act of 1897 gave the Forest Service the authority to require mineral owners to get approval prior to development. The court disagreed and confirmed earlier decisions that the Organic Act applied to lands reserved from the public domain (mainly western national forests) and not to lands acquired by purchase pursuant to the Weeks Act.

When the Weeks Act was written, the purchase of surface rights only, with the mineral estate remaining in private ownership, was an issue that needed to be addressed. Many of the lands in the East were either known to have oil, gas, coal, and stone or had high potential for mineral development. Parcels were sold to the Forest Service under different arrangements. The seller (the fee owner) might convey both the land and the minerals beneath ("surface and mineral estate"), or he might convey only the surface, having reserved the subsurface rights to himself or having sold them to a third party ("reserved mineral rights"). Section 9 of the Weeks Act specifically allowed "reservation" of the mineral estate and mandated that any rules regarding the removal of those minerals be expressed in the deed. However, in some cases, the surface was sold with no contractual relationship between a third-party mineral estate owner and the new surface owner ("outstanding mineral rights").

Whether the mineral rights were reserved or outstanding, prior to purchase of the surface, the Forest Service and the National Forest Reservation Commission, which approved all purchases, had to determine that the exercise of private mineral

BY DAVE FREDLEY

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Cleared location for pressure plant on the Allegheny National Forest, taken in 1939. With more than 8,000 oil wells on the national forest, industrial structures like this are not an uncommon sight.

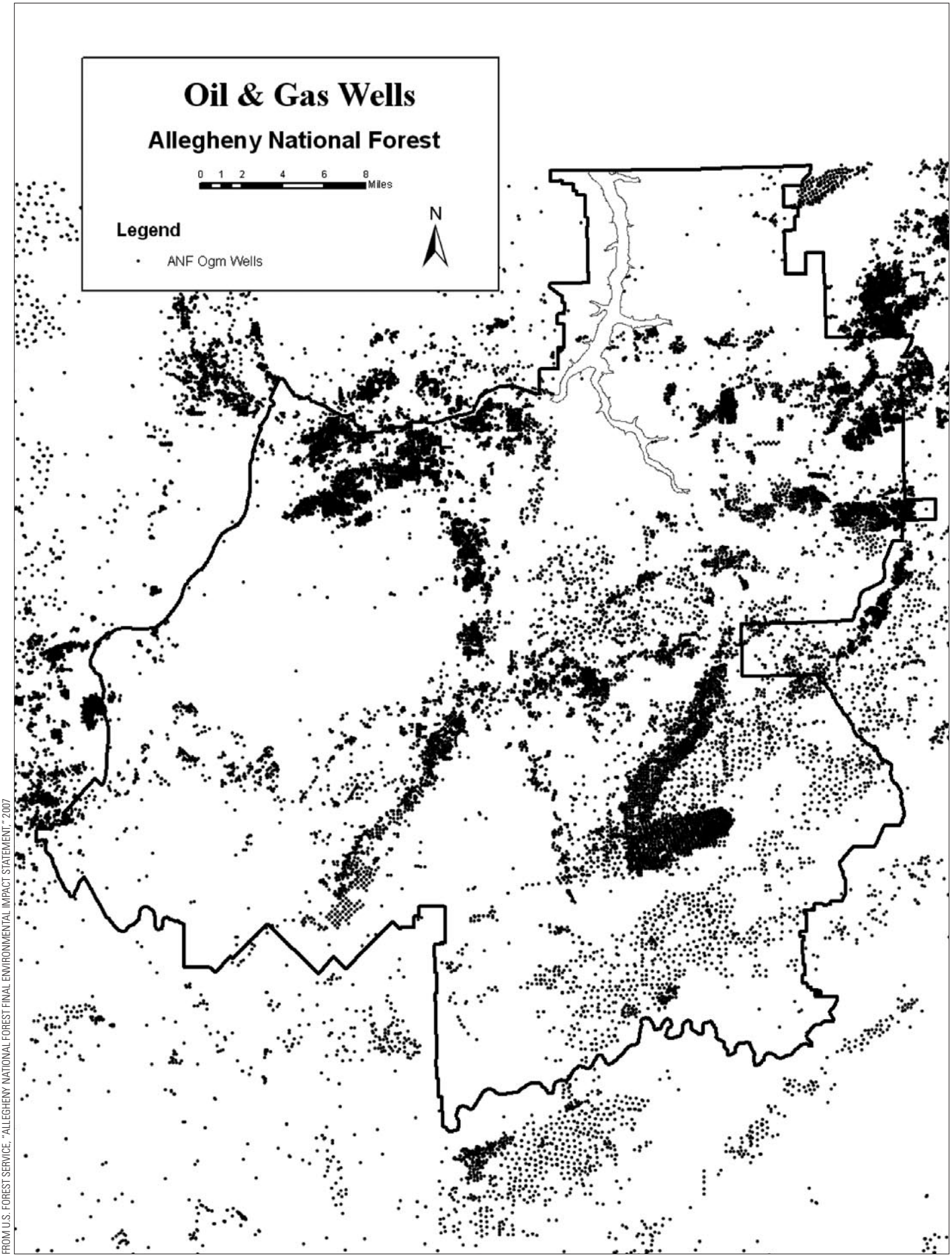
rights would not substantially impair the value of the surface estate for national forest purposes. Congress specifically stated in a 1913 amendment to the Weeks Act that "acquisition by the United States shall in no case be defeated because of located or defined rights-of-way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of the Act."

PUBLIC LANDS VERSUS PRIVATE RIGHTS

Over the past century, the Forest Service acquired approximately 21 million acres under the Weeks Act in the eastern United States. Owners reserved minerals in about 13 percent of the area, and minerals are outstanding in about 20 percent more.[2] This divided ownership arrangement has created management challenges for the Forest Service. One example is the Allegheny National Forest, in northwestern Pennsylvania.[3] It contains two designated wilderness areas, a national recreation area, and two Wild and Scenic Rivers on its 517,000 acres. But oil was being produced on or near the lands acquired for the Allegheny for a half-century before the Weeks Act passed. The national forest is so oil-rich that 93 percent of the acquired surface is underlain by private mineral estate, and roughly 8,000 oil wells are currently operating. Minard Oil Company, the oldest continuously operating oil driller in the world and the first to drill in America, is just one of the many companies, and it was also the lead appellant in the September 2011 circuit court case.[4]

For decades the Allegheny managers dealt with private mineral owners almost on a handshake, a cooperative approach that goes back to the instructions in the Forest Service's first *Use Book*, published in 1905.[5] Because drilling or mining activity might involve clearing timber or building roads, private mineral owners would provide at least 60 days' notice of intent, and the agency would issue a notice to proceed. As a result of a settlement with environmental groups in 2009, however, the Forest Service changed its policy and postponed issuance of the go-ahead notices until a forest-wide environmental impact study, which might take several years, could be completed. The moratorium, the appellants said, caused irreparable injury to owners by depriving them of "unique oil and gas extraction opportunities." Forest Service employees who testified stated that individualized assessment of drilling and mining applications had "hindered forest management, resulting in duplicative roads or development facilities for adjoining pieces of land, and unnecessary clearing of the forest." The environmental groups that were party to the suit asserted that the natural beauty of the Allegheny had been impaired. The district court issued a preliminary injunction against the Forest Service; the Third Circuit required the agency to return to its prior process. Both courts ruled that the agency's approval was not required for surface access.[6]

Private mineral estate also exists in wilderness areas where the surface was acquired pursuant to the Weeks Act. According to a 1984 report of the General Accounting Office (GAO), the Boundary Waters Canoe Area Wilderness on the Superior National Forest has 640,000 acres of private mineral estate; in the Otter Creek Wilderness on the Monongahela National Forest, 96 percent of the mineral estate is privately owned; and in the Cranberry Wilderness on the Monongahela, 90 percent of the mineral estate is privately owned. Moreover, Congress designated



FROM U.S. FOREST SERVICE, "ALLEGHENY NATIONAL FOREST FINAL ENVIRONMENTAL IMPACT STATEMENT," 2007

Oil and gas wells drilled on the Allegheny since 1986. Each dot represents a single well.

the Beaver Creek Wilderness on the Daniel Boone National Forest even though 99 percent of the mineral estate was privately owned and evidence of previous uses included several abandoned deep coal mines, a cemetery, a bridge, and roads. Thus the Forest Service faces a quandary in management of wilderness areas. Does the agency allow the mineral owners development of their constitutionally protected property rights, or does it purchase those mineral rights? GAO found that 23 eastern wilderness areas contained private mineral rights and estimated it would cost hundreds of millions of dollars to purchase them.[7]

DEVELOPMENT OF FEDERALLY OWNED MINERALS

The majority of Weeks Act lands were acquired in fee, with the mineral estate acquired by the federal government. In 1916 Congress authorized the secretary of Agriculture to permit the prospecting, development, and utilization of those acquired mineral resources.[8] The first Forest Service regulations provided for prospecting permits, preference rights upon the discovery of a valuable mineral deposit, and mining permits. An annual fee for rental was required.[9] Both the preamble to the 1917 regulations and their 1932 revision specifically excluded their application to "mineral rights reserved by the grantors." This exclusion applied as well to outstanding mineral rights, those owned by third parties. Since 1917, nothing has changed in the law to suggest that Forest Service regulations regarding prospecting permits and leases for mineral resources acquired by the federal government have any applicability to reserved or outstanding mineral estates. Private mineral rights remain regulated and governed, as they have since the Weeks Act was passed, by state law. A recent controversy concerned whether common sandstone was a reserved mineral estate subject to development by a private mineral owner and whether the Forest Service regulations and instructions applied to the reserved or outstanding mineral estates.[10] The court determined that sandstone was a mineral that could be developed by the subsurface owner, and that the Forest Service regulations were not applicable.

Further complicating management of the Weeks Act national forests is the sharing of authority with the Department of the Interior. The authority to allow the development of federal oil and gas, coal, oil shale, and other resources was modified in 1947 by the Mineral Leasing Act for Acquired Lands, which gave the secretary of the Interior the responsibility to develop regulations to lease minerals acquired pursuant to the Weeks Act.[11] Today there are 2,517 leases on 1.6 million acres of Weeks Act–acquired minerals on eastern national forests.[12] Authority to lease hardrock minerals (gold, copper, nickel, lead) was transferred from the secretary of Agriculture to the secretary of the Interior in 1946.[13]

Mineral exploration and development on Weeks Act lands have been continuous for the 100 years since the act was passed. Because Weeks Act lands provide the nation with oil, gas, coal, stone, and other valuable minerals, the Forest Service will, as it did on the Allegheny National Forest, have to find a way to balance public opinion and forest management goals with private rights, and do so within the existing historical and legal framework.

Respect for the private property rights of subsurface mineral was part of the Weeks Act, as was direction to the Forest Service to cooperate with forest users. Soon after the act took effect, Congress gave authority to the Forest Service to allow development of the mineral estate that had been acquired, and that authority was later transferred to the secretary of the Interior. Active mineral leasing, exploration, and development continue today on those federally acquired minerals.

Language penned 100 years ago still speaks loud and clear to us today. On April 15, 1910, while reviewing the final version of the Weeks Act, the House Committee on Agriculture noted: "It will be observed from this review of the provisions of the bill that the interests of the people are carefully safeguarded at every point beyond any possibility of invasion, except by collusion of highest officials of the legislative, executive, and administrative branches of the Government."[14] □

Dave Fredley is a federally certified mineral examiner and a former assistant director of Minerals and Geology for the U.S. Forest Service. *The author expresses appreciation to Craig Mayer, General Counsel, Pennsylvania General Energy, for his contributions to and review of this paper.*

NOTES

1. *Minard Run Oil Company, et al., v. United States Forest Service, et al.*, 2011 WL 4389220 (C.A.3 Pa.), September 20, 2011.
2. "Minerals Considerations in Weeks Law Purchases and Exchanges, A Report to the National Forest Reserve Commission," U.S. Forest Service, January 1972.
3. Under the Weeks Act, it was the policy of the Forest Service to discount the purchase price of lands subject to a mineral reservation by 25 cents per acre. U.S. Forest Service, Forest Service Manual Regulation and Instructions, 81-L, 1926. The Allegheny National Forest was established in 1926.
4. The Minard Oil Company still operates the Drake oil well, the oldest continuously operating well in the world, which is located near the Allegheny.
5. The 1905 *Use Book* states that forest officers are servants of the people, that the administration of forest reserves is not for the benefit of the government, but of the people, and that they must be prompt and courteous in the conduct of reserve business. This direction was continued in subsequent versions. Associate Forester E. A. Sherman stated in 1926, "A man who fails to cultivate a friendly, helpful, cooperative spirit in his relations with those who are endeavoring to develop the mineral wealth of our mountains has no place in the Forest Service" (E. A. Sherman, "Mining in National Forests," paper read at a meeting of the Western Division of the American Mining Congress, the American Institute of Mining and Metallurgical Engineers, the American Petroleum Geologists, and the American Silver Producers Associations, September 1926).
6. *Minard Run Oil Company, et al.*, 14–15.
7. *Private Mineral Rights Complicate the Management of Eastern Wilderness Areas*, GAO/RCED-84-101, July 26, 1984.
8. Act of August 11, 1916 (39 Stat. 446, 462), and Act of March 4, 1917, PL 64-390 (39 Stat. 1149).
9. Rules and Regulations, Permitting Prospecting, Development and Utilization of the Mineral Resources of Lands Acquired under the Act of March 1, 1911 (36 Stat. 961), 1917. On public domain lands, prior to the 1920 Mineral Leasing Act, minerals such as oil, gas, potash, and sulfur were regulated under the 1872 Mining Law.
10. *PIOGA, et al. v. U.S. Forest Service, et al.*, Case 1:08-CV-00162-SJM, filed May 27, 2008. Federal District Court, Western District of Pennsylvania. See also *PAPCO v. United States of America and the U.S. Forest Service*, Civil Action 08-253 Erie, U.S. District Court for the Western District of Pennsylvania, decided August 30, 2011. In this case, the court found that sandstone was a reserved mineral.
11. Act of August 7, 1947 (PL-80-382). The Oil and Gas Leasing Reform Act of 1987, 30 USC 181, requires Forest Service "consent" prior to leasing.
12. Personal communication with Bureau of Land Management's Eastern States Office, September 26, 2011.
13. Section 4 of Reorganization Plan No. 3, of July 16, 1946 (60 Stat. 1097, 1099; 5 USC Appendix).
14. House Report 1036, Committee on Agriculture, April 15, 1910, to accompany HR 11798, 2.