

Committee on Natural Resources

Rob Bishop Chairman
Mark-Up Memorandum

June 13, 2016

To: Natural Resource Committee Staff

From: Majority Committee Staff
Subcommittee on Energy and Mineral Resources (x5-9297)

Markup: H.R. 3881 (Rep. Glenn Thompson), To amend the Mineral Leasing Act to repeal provisions relating only to the Allegheny National Forest.
June 14 & 15, 2016 in the 1324 Longworth HOB

H.R. 3881 (Rep. Glenn Thompson), “Cooperative Management of Mineral Rights Act of 2015”

Summary of the Bill

H.R. 3881 was introduced on November 5, 2015 by Rep. Glenn Thompson (R-PA). The bill repeals provisions specific to the Allegheny National Forest in the Mineral Leasing Act and the Energy Policy Act of 1992 which the U.S. Forest Services has cited as providing authority to apply restrictive federal regulations on privately-held mineral rights. This hearing will focus on legislation to prevent the U.S. Forest Service from further promulgating regulations restricting private mineral rights.

Cosponsor: Rep. LaMalfa (R-CA)

Background

The Allegheny National Forest (ANF) is located in Northwestern Pennsylvania, encompassing 517,000 acres in Elk, Forest, McKean and Warren counties. The ANF is located roughly 15 miles away from the first commercial oil well drilled in the United States, the Drake Well, drilled in 1859 by Edwin Drake and sparking our nation’s first oil boom. The passage of the Weeks Act in 1911 authorized and appropriated \$9 million dollars for the Department of Agriculture to purchase six million acres of land in the east coast to manage as national forests.¹

Due to the oil boom in the region in the previous century, both the lands and the subsurface mineral rights for much of the land in the ANF were privately owned. When the federal government acquired property to establish the ANF in 1923, most of the acquisition by the Department of Agriculture was of surface rights for the land – leaving most of the subsurface

¹ <http://www.fs.fed.us/land/staff/weeks-act.html>

mineral rights in private ownership. This is often referred to as “split-estate” – when the surface rights and subsurface rights are owned by different parties.

The acquisition by the federal government of surface rights for lands where mineral rights were privately held, or “reserved” was expressly allowed by the Weeks Act, which states:

“Such 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 Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered...”²

Ninety-three percent (93%), or 478,283 acres of the ANF subsurface mineral estate is privately-owned, leaving just 7%, or 35,000 acres federally-owned.

Private mineral rights owners have a property right to develop their interests, including reasonable use of the surface in order to develop the subsurface minerals – which includes access on the surface in order to develop such minerals. It is important to note that just because the mineral rights are privately held does not mean they are not regulated. In the case of the ANF, the subsurface mineral estate owners are still subject to state regulations. Prior to 2008, private mineral rights owners worked cooperatively with the Forest Service to develop oil and natural gas – with mineral rights holders providing the Forest Service with a 60-day notification of their drilling plans and the Forest Service issuing a “Notice to Proceed” or NTP.

In 2007, a memorandum originating from the Forest Service’s Office of General Counsel concluded that the issuance of an NTP was considered a “major federal action” subject to the National Environmental Policy Act (NEPA). Consequently in 2008, the Sierra Club, Allegheny Defense Project, and the Forest Service Employees for Environmental Ethics filed suit against the Forest Service, arguing that no notices should be issued without a NEPA analysis.

In 2009, the Forest Service settled³ with the environmental groups – agreeing to put a moratorium on issuing Notices to Proceed until it had conducted a forest-wide environmental analysis,⁴ thereby banning oil and gas development in the ANF. In April 2009, Forest Supervisor Leanne Marten issued a statement explaining that all pending and future oil and gas proposals would require full NEPA analysis as a result of the settlement and acknowledging the “...impact this will have on families and businesses, especially at a time when our nation is facing such a difficult economic downturn.”⁵

In response, industry interests filed suit against the Forest Service and environmental groups and the case came before Federal Judge Sean McLaughlin in August of 2009. On

² 16 U.S.C. §518

³ <http://www.fs.usda.gov/detailfull/allegheny/home?cid=STELPRDB5065985&width=full>

⁴ <https://www.federalregister.gov/articles/2009/06/22/E9-14545/allegheny-national-forest-pennsylvania-transition-eis>

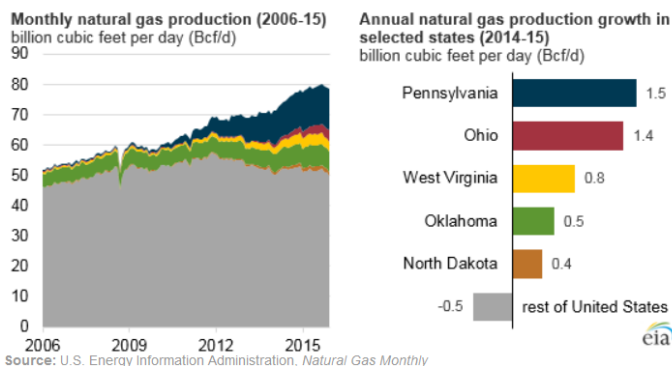
⁵ http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5066006.pdf

December 15, 2009, the U.S. District Court for the Western District of Pennsylvania issued a preliminary injunction enjoining the Forest Service from requiring the preparation of a NEPA document as a precondition to the exercise of private oil and gas rights in the ANF. This action overturned the Forest Service ban on oil and gas development in the ANF. The Forest Service and environmental groups appealed the preliminary injunction and litigation continued through 2013 – with the federal courts repeatedly and definitively ruling that the U.S. Forest Service lacked the regulatory approval authority over the exercise of private mineral estates.⁶

Throughout the litigation, the sole authority claimed by the Forest Service and environmental groups for promulgation of regulations to exercise regulatory authority over private mineral estate was Section 2508 of the Energy Policy Act of 1992, codified in the Mineral Leasing Act 30 U.S.C. § 226 (o). This section applies only to the Allegheny National Forest, and called for the Secretary to follow specific procedures for oil and gas activities in the ANF where the subsurface was not owned by the federal government – allowing the Secretary to promulgate regulations related to the specified procedures.

Despite the law being enacted in 1992, the Department of Agriculture never issued regulations, and instead worked cooperatively with private mineral owners as mentioned above for decades. Nonetheless, this antiquated statute is what the Forest Service used over a decade later to promulgate far-reaching

regulations that were eventually struck down by the courts – with costly impacts not only to the American taxpayer and to the families and businesses operating in the ANF region. More importantly, the 2008 regulations proposed by the Forest Service would have applied to 11,000,000 acres of split estate on National Forest System lands beyond those located in Pennsylvania – lands in North Dakota, Ohio, Michigan, West Virginia, and Kentucky. According to a report issued on April 15, 2016 by the Energy Information Administration (EIA), U.S. Natural Gas production reached record a record high in 2015 – with production from Pennsylvania, Ohio, West Virginia, Oklahoma, and North Dakota accounting for 35% of total U.S. natural gas production. The greatest production growth occurred in Pennsylvania.⁷



U.S. natural gas production reached a record high level of 79 billion cubic feet per day (Bcf/d) in 2015, an increase of 5% from the previous year, even as natural gas prices remained relatively low. Production from five states — Pennsylvania, Ohio, West Virginia, Oklahoma, and North Dakota—was responsible for most of this growth, offsetting declines in much of the rest of the United States.

⁶ <https://www.crowell.com/NewsEvents/AlertsNewsletters/Environment-Energy-Resources-Law-Alert/Third-Circuit-Affirms-Final-Declaratory-Relief-to-Energy-Resource-Producers-in-Marcellus-Shale-Region-Vacating-Harmful-US-Forest-Service-Sierra-Club-Settlement/pdf>

⁷ <http://www.eia.gov/todayinenergy/detail.cfm?id=25832>

Echoing the decisions of the courts, H.R. 3881 definitively repeals this rulemaking authority from statute for the ANF – thus preventing any future possibility for the Forest Service to again liberally interpret statutory authority to infringe upon private property rights.

Cost

This legislation would not affect direct spending.

Administration Position

The Administration has not put out a formal statement on H.R. 3881. The Forest Service testified in opposition to this bill.

Effect on Current Law (Ramseyer): [text to be deleted bracketed and highlighted in blue]

Mineral Leasing Act

Section 17 (30 U.S.C. 226)

§226. Lease of oil and gas lands

* * * * *

(o) Certain outstanding oil and gas deposits

(1) Prior to the commencement of surface-disturbing activities relating to the development of oil and gas deposits on lands described under paragraph (5), the Secretary of Agriculture shall require, pursuant to regulations promulgated by the Secretary, that such activities be subject to terms and conditions as provided under paragraph (2).

(2) The terms and conditions referred to in paragraph (1) shall require that reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities.

(3) Advance notice under paragraph (2) shall include each of the following items of information:

(A) A designated field representative.

(B) A map showing the location and dimensions of all improvements, including but not limited to, well sites and road and pipeline accesses.

(C) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.

(D) A plan of erosion and sedimentation control.

(E) Proof of ownership of mineral title.

Nothing in this subsection shall be construed to affect any authority of the State in which the lands concerned are located to impose any requirements with respect to such oil and gas operations.

(4) The person proposing to develop oil and gas deposits on lands described under paragraph (5) shall either-

(A) permit the Secretary to market merchantable timber owned by the United States on lands subject to such activities; or

(B) arrange to purchase merchantable timber on lands subject to such surface disturbing activities from the Secretary of Agriculture, or otherwise arrange for the disposition of such merchantable timber, upon such terms and upon such advance notice of the items referred to in subparagraphs (A) through (E) of paragraph (3) as the Secretary may accept.

(5)(A) The lands referred to in this subsection are those lands referenced in subparagraph (B) which are under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following), but does not have an interest in oil and gas deposits that may be present under such lands. This subsection does not apply to any such lands where, under the provisions of its acquisition of an interest in the lands, the United States is to acquire any oil and gas deposits that may be present under such lands in the future but such interest has not yet vested with the United States.

(B) This subsection shall only apply in the Allegheny National Forest.]

Energy Policy Act of 1992 (Public Law 102-486)

[SEC. 2508. CERTAIN OUTSTANDING OIL AND GAS.]

(a) IN GENERAL- Section 17 of the Mineral Leasing Act (30 U.S.C. 226) is amended by adding the following new subsection after subsection (n):

(o) CERTAIN OUTSTANDING OIL AND GAS- (1) Prior to the commencement of surface-disturbing activities relating to the development of oil and gas deposits on lands described under paragraph (5), the Secretary of Agriculture shall require, pursuant to regulations promulgated by the Secretary, that such activities be subject to terms and conditions as provided under paragraph (2).

(2) The terms and conditions referred to in paragraph (1) shall require that reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities.

(3) Advance notice under paragraph (2) shall include each of the following items of information:

(A) A designated field representative.

(B) A map showing the location and dimensions of all improvements, including but not limited to, well sites and road and pipeline accesses.

(C) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.

(D) A plan of erosion and sedimentation control.

(E) Proof of ownership of mineral title.

Nothing in this subsection shall be construed to affect any authority of the State in which the lands concerned are located to impose any requirements with respect to such oil and gas operations.

(4) The person proposing to develop oil and gas deposits on lands described under paragraph (5) shall either--

(A) permit the Secretary to market merchantable timber owned by the United States on lands subject to such activities; or

(B) arrange to purchase merchantable timber on lands subject to such surface disturbing activities from the Secretary of Agriculture, or otherwise arrange for the disposition of such merchantable timber, upon such terms and upon such advance notice of the items referred to in subparagraphs (A) through (E) of paragraph (3) as the Secretary may accept.

(5)(A) The lands referred to in this subsection are those lands referenced in subparagraph (B) which are under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the Act of March 1, 1911 (36 Stat. 961 and following), but does not have an interest in oil and gas deposits that may be present under such lands. This subsection does not apply to any such lands where, under the provisions of its acquisition of an interest in the lands, the United States is to acquire any oil and gas deposits that may be present under such lands in the future but such interest has not yet vested with the United States.

(B) This subsection shall only apply in the Allegheny National Forest.

(b) REGULATIONS- Within 90 days after the enactment of this Act the Secretary of Agriculture shall promulgate regulations to implement the amendment made by subsection (a).