

# Key Partner or Potential Adversary?

The Bureau of Land Management's Role in the Leasing and  
Development of the Wayne National Forest

***Ohio State Bar Association Oil and Gas Update  
Columbus, Ohio  
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# Overview in Pictures

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# Pictures

## Lake Vesuvius in the Ironton Unit



# Pictures

## Fishing in the Wayne, Lake Timbre Ridge



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# Pictures

## Bow hunting in the Wayne



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# Pictures

## Oil drilling in the Wayne



# Where are we going?

- Introductions
- History of the BLM – Creature of Statute
- Jurisdiction
- Role in Energy
- Leasing in General and Process
- BLM in Ohio
- Leasing in the Wayne National Forest
- Servient v. Dominant Estates

# History of the Bureau of Land Management

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- 1812 – the footprint of the United States was expanding and congress established the General Land Office (within the Treasury Department) to oversee the settlement of federal lands purchased from Spain, France, and other countries
- 1920 – Congress attempts to tap into the value of federal lands passing the Mineral Leasing Act of 1920
- 1934 – Taylor Grazing Act established the U.S. Grazing Service to manage the use of federal lands for livestock grazing
- 1946 – General Land Office and the U.S. Grazing Service merge to form the Bureau of Land Management (part of the Department of the Interior)
- 1976 – Congress passes the Federal Land Policy and Management Act which, in addition to the Mineral Leasing Act of 1920 and other more topic specific legislation, provides the Bureau of Land Management with its legislative mandate and goals
- Definition of “creature of statute”

# BLM's Jurisdiction and Missions

- **Energy**
  - Manages public lands used or useable for renewable energy, including solar, wind, geothermal, and biomass
  - Manages federal onshore oil, gas, and coal operations
- **Fire**
  - Provides national direction, leadership, and oversight to ensure the proper and safe management of wildfires
- **Grazing**
  - Administers permits and leases allowing for the grazing of livestock on federal lands
- **Planning**
  - Conducts extensive land use planning to ensure that the “best use” is made public lands and related resources
- **Recreation**
  - Provide and manage the use of federal lands for camping, hunting, fishing, hiking, boating, and wildlife viewing, and more
- **National Conservation Lands**
  - Safeguard and preserve the natural and cultural legacy of National Monuments, Wilderness Areas, National and Scenic and Historic Trails, etc.
- **Wild Horses & Burros**
  - Protects and manages wild horses and burros under the “Wild Free-Roaming Horses and Burros Act of 1971,” including offering wild horses and burros for adoption in order to better manage overpopulation in certain areas

# BLM's Jurisdiction and Missions

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Yes, you too can become the proud owner of a  
wild horse!



or burro...



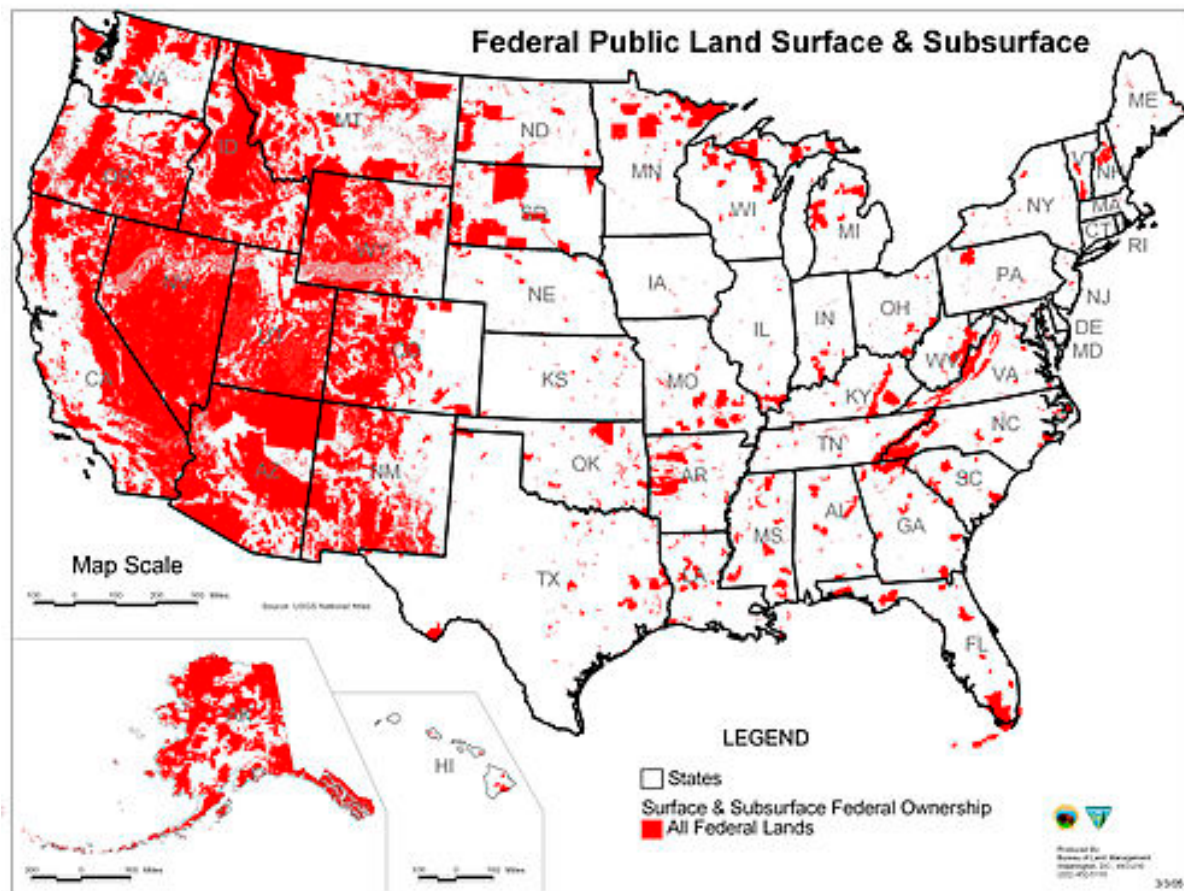
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- BLM manages more federal land than any other agency
- Administers leasing of 700 million acres
  - 258 million acres which are managed by the BLM
  - 57 million surface acres where the minerals are federally owned, but the surface is not (split estate)
  - 385 million acres whose surface is managed by other federal agencies
- Current estimate is that half of the 700 million acres contain oil and/or natural gas

# BLM's Role in Energy

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# BLM's Role in Energy:

## Authority and Guidelines

- Mineral Leasing Act of 1920 and Mineral Leasing Act for Acquired Lands of 1947
- Leasing regulations – Groups 3000 and 3100 of the Code of Federal Regulations
- “[T]o ensure that development of mineral resources is conducted in an environmentally responsible manner.”
- “...encourages the sustainable development ... reduces the dependence ...on foreign sources of energy...”
- Has been part of oil and gas leasing in Western states for better part of a century
- Statutes providing their authority are quite broad, but...

# BLM's Role in Energy:

## Not without limits

- *Wyoming v. United States Dept. of Int.*, 2016 U.S. Dist. LEXIS 82132 (Dist. Wyom. June 21, 2016)
  - May 2012 – BLM issued proposed fracking rule; received 177,000 public comments
  - 2013 – BLM issued revised proposed fracking rule; received over 1.35 million public comments
  - March 26, 2015 – BLM issue final fracking rule regulating hydraulic fracturing on federal and Indian lands
  - States of Wyoming, Colorado, North Dakota, and Utah, as well as energy groups and the UTE Indian Tribe challenged the fracking rule in federal court

# BLM's Role in Energy

## Not without limits



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# BLM's Role in Energy:

## Not without limits

- Plaintiffs argued that the fracking rule was arbitrary, not in accordance with law, and exceeded BLM's authority
- Court said its initial task was to determine whether the rule was within the statutory authority granted to BLM or Department of Interior (DOI)
- BLM/DOI argued that they had broad, general authority to promulgate rules regulating oil and gas development based on several statutes, including the Mineral Leasing Act of 1920 (MLA) and the Federal Land Policy and Management Act of 1976 (FLPMA)

# BLM's Role in Energy:

## Not without limits

- Court pointed out that these statutes did not provide BLM with the power to regulate hydraulic fracturing above and beyond the agency's existing regulations about monitoring and obtaining approval for fracking that would cause surface disturbance
- Court also used a 2005 Congressional action to support that Congress specifically intended prevent federal agencies from regulating fracking
  - Congress amended the Safe Drinking Water Act in 2005 to specifically remove EPA's authority to regulate hydraulic fracturing
- Court held that "Congress has not delegated to the Department of the Interior the authority to regulate hydraulic fracturing," and that "[t]he BLM's effort to do so through the Fracking rule is in excess of its statutory authority and contrary to law."

# Leasing and Development Process

- Identification and Analysis
  - Lands available for leasing are identified by BLM or other agency who manages acreage
  - Individual or entity makes an informal request in the form of an Expressions of Interest (EOI) is made to BLM OR bureau motions for certain lands to be offered for lease
- Federal Ownership Confirmed
- BLM conducts Environmental Assessment(s) (EA)
  - May seek input of other agencies
  - Draft EA released for public comment

# Leasing and Development Process

- Leasing
  - Once approved for leasing, BLM publishes a Notice of Competitive Lease Sale identifying parcels to be lease
    - 90 days before sale
    - Specifies lease stipulations which will be applicable to that acreage
    - Sale notice may be obtained from local BLM state office
  - BLM conducts oral auction for oil and gas lease of the acreage
    - “Must be present to win.”
    - “Bring your checkbook.”
      - Day of sale costs: administrative fee, 1<sup>st</sup> year’s advance rental (\$1.50 per acre or fraction thereof), and minimum \$2.00 per acre bonus (may vary based on your bid)
      - Balance of bonus bid due within 10 working days of the auction – or you forfeit your deposit and your lease office will be rejected
  - Land which is not bid on at auctions over a two year period may become available for non-competitive leasing
    - Offers for non-competitive leases must be submitted on a BLM approved form and include the administrative fee, and the first year’s advance rental of \$1.50 per acre.
    - Priority is first come, first serve

# Leasing and Development Process

- Leasing, cont.
  - Basic terms of standard lease
    - Maximum acreage
      - Competitive lease – 2,560 acres (5,760 acres in Alaska)
      - Non-competitive lease – 10,240 acres (all states)
    - 10 year primary term
    - Secondary term for so long as
      - A well on the leasehold acreage is capable of producing in paying quantities, or
      - The lease receives an allocated share of production from a well off the leasehold which is capable of production in paying quantities
      - Drilling operations are ongoing
    - Delay rental is \$1.50 per acre, per year (first 5 years) and \$2.00 per acre, per year (after the first 5 years), paid in advance
    - Royalties of 12.5% paid to the Office of Natural Resources Revenue (ONRR)
    - Surface use may only be conducted after obtaining approval from BLM
    - Lease assignments or transfers must be submitted to and approved by BLM

# Leasing and Development Process

- Permitting
  - Submit an Application for a Permit to Drill (APD) and a Surface Use Plan of Operation (SUPO) to BLM
    - APD and SUPO may have to be approved by other federal agencies involved with the property as well
    - Public comment period (30 days)
    - This is in addition to any permit applications which must be completed at the state or local level
- Drilling
  - BLM reviews, approves, and regulates all drilling and completion operations
  - BLM may be onsite during drilling, especially if “non-routine” fracturing is being completed or if other abnormal conditions develop
- Production
  - Begins only if there is a market for the oil and gas and it can be transported to that market
- Abandonment and Reclamation
  - Use of previously stock-piled topsoil is preferred
  - BLM provides recommendations on final seed mixtures, cover plants, and other reclamation plans

# Have you had enough alphabet soup yet?

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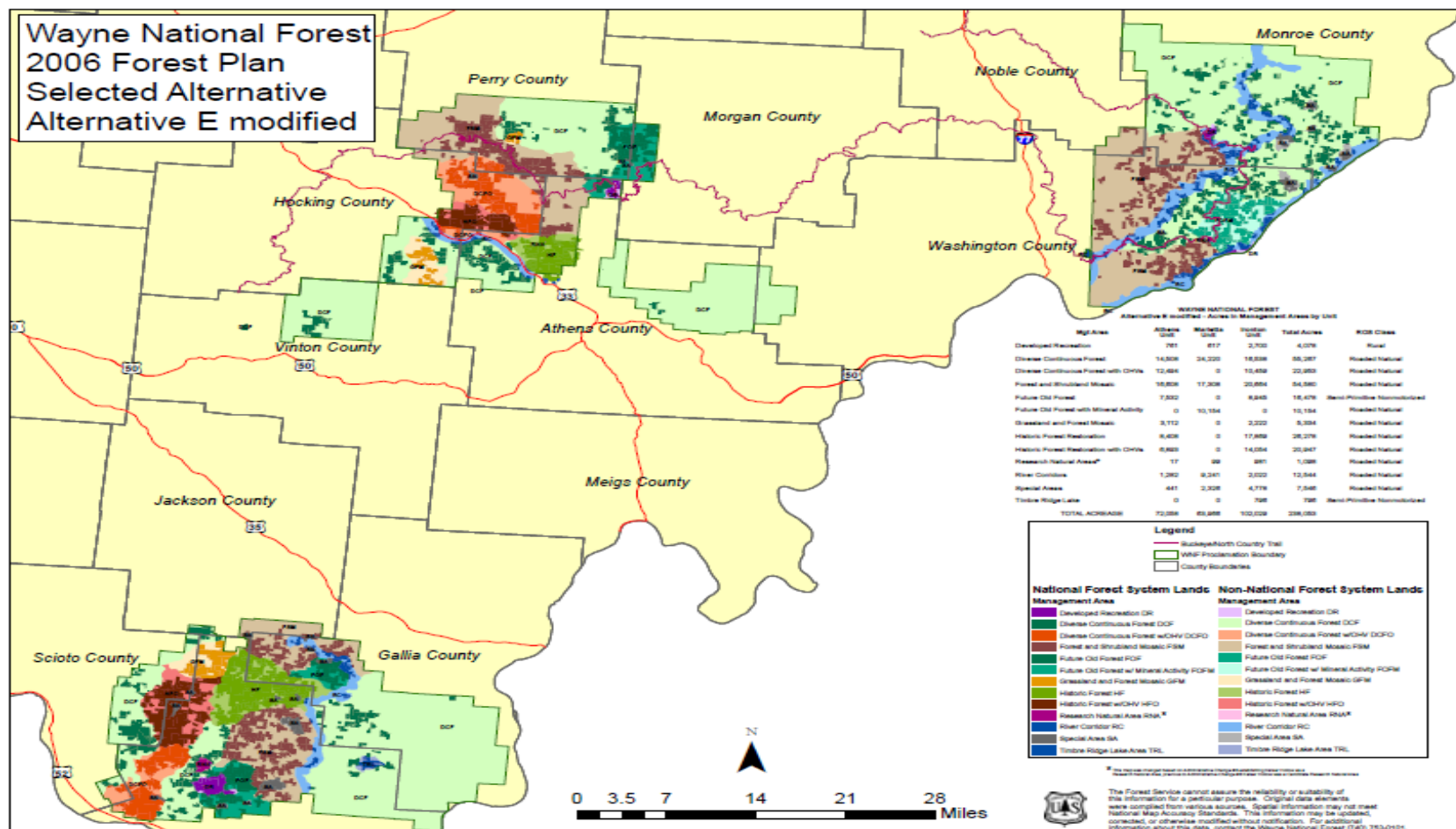
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# BLM in Ohio – the Wayne National Forest

- Wayne National Forest (WNF)
  - Located in the foothills of Appalachia across 12 different counties in Southeast Ohio
  - Boundaries of WNF enclose 875,000 acres
    - 238,000 of these acres are owned and managed by the federal government
  - Only federally owned acreage in Ohio which is currently being considered for oil and gas leasing

- WNF's 2006 Forest Plan was developed to guide management and use of WNF and its resources for the next 10 to 15 years
  - Goal 10.1 of the 2006 Forest Plan states "Provide a supply of mineral commodities for current and future generations, while protecting the long-term health and biological diversity of ecosystems. Facilitate the orderly exploration, development, and production of mineral and energy resources on land open to these activities."
  - 2006 Forest Plan planned for 272 acres of surface disturbance for exploration and production (151 of which would eventually be reclaimed)
  - In the Marietta Unit – planned for 110 vertical well pads and 135 acres of surface disturbance
- WNF's Supplemental Information Report (SIR) completed in 2012 focused on the changing methods of oil and gas development and how the use of horizontal and high-volume hydraulic fracturing would affect the WNF's resources and wildlife
  - Plans for 10 horizontal wells in the Marietta Unit, using 55 acres of surface



# Leasing and Development of WNF

- Where are we in the process?
  - **Identification and Analysis – completed**
  - **Leasing – coming soon to a forest near you!**
  - Permitting...
  - Drilling...
  - Production...
  - Abandonment and Reclamation...

- Identification and Analysis
  - Bureau has proposed that 40,000 federally-owned acres of minerals be made available for leasing
    - Acreage is all in Athens Ranger District, Marietta Unit in Monroe, Noble and Washington Counties
  - More than fifty EOIs were filed for about 18,000 total acres within the Marietta Unit
  - Complex mineral ownership in WNF – split estates are the norm
    - Oil and gas underlying 59% of WNF are privately owned
    - Remaining 41% are federally owned
    - Federal government owns all minerals under 10,000 acres and part of the minerals in another 8,200 acres

# Leasing and Development of WNF

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## 2006 Forest Plan Wayne National Forest Athens Ranger District Marietta Unit

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# Leasing and Development of WNF

- Environmental Assessment
  - Draft EA was released in April of 2016
  - Public comment was sought
  - EA reviewed several areas to determine how they would be affected by the leasing of WNF lands:
    - Air Resources – No direct impacts
    - Plant and Animal Habitat/Populations – No direct impacts
    - Geology and Mineral Resources – No direct impacts
    - Soils – No direct impacts
    - Water Resources/Quality – No direct impacts
    - Wastes, Hazardous or Solid – No direct impacts
    - Recreation, Land Use, Noise – No direct impacts
    - Cultural Resources/Paleontology/Native American Religious Concerns – No direct impact
    - Visual Resources/Scenic Quality – No direct impacts
    - Socioeconomics and Environmental Justice – Leasing would generate revenues that will be shared with counties
    - Cumulative Impacts – Minor cumulative impacts overall

## ■ EA items of note

- Purpose of offering the acreage for leasing is “to support the development of oil and natural gas resources that are essential to meeting the nation’s future needs for energy.”
- Proposed leasing meets Goal 10.1 of the WNF 2006 Forest Plan and is in compliance with that plan
- Amounts of acreage up for lease and location of the acreage are also in compliance with the 2012 SIR

# Leasing and Development of WNF

- Examples of specific lease provisions for WNF leases used as needed for specific sites and areas
  - Operator required to comply with 2006 Forest Plan
  - Must refrain from disturbing cultural artifacts and resources
  - Protection of Endangered or Threatened Species
  - Various no surface use restrictions or controlled surface use restrictions for “Future Old Forest,” research, administrative, developed recreation, cultural, and wildlife areas

# Comparison: BLM Lease vs. a Market Lease

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Lease Terms and Conditions	BLM Lease	Market Lease
Production Requirements	Once a well has been in production on a lease, <b><i>even if that well is plugged</i></b> , the lease will remain open because it is “capable of production”	Generally, a lease is held by production in paying quantities when quantities of oil or gas sufficient to yield a profit, even small, to the lessee over operating expenses; even though the drilling costs, or equipping costs, are not recovered, and even though he undertaking as a whole may thus result in a loss
Royalty Rate and Payment	12.5% and may be paid value or take in kind. When paid in value, royalties must be paid on the last day of the month following the month in with production occurs.	Royalty rates and payment dates may differ greatly between leases
Rental Payments	Annual payments will continue as to the land outside of the unit.	Generally, rental payments cease once the well has been drilled.
Assignment of Lease	Yes, is assignable with approval from the BLM. Lessee responsible for all lease obligations until BLM approval.	Yes, generally assignable once lessee provides notice to the proper party.

# Comparison: BLM Lease vs. a Market Lease

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Lease Terms and Conditions	BLM Lease	Market Lease
Unitization and Pooling	Requires an operator to file an application for consolidation to the BLM, and the BLM may approve the consolidation of leases if there is sufficient justification, and it is in the public interest.	Yes, however maybe subject to contractual size limitations.
Suspension of operations (Force Majeure)	Operator must file an application for any suspension with the BLM, and provide information showing the necessity of such relief.	Yes, conditions generally spelled out in the lease.
Reporting Requirements	Federal leases follow federal law which requires reporting each month on specific forms. (Remember 18 U.S.C. 1001)	Reporting is based on state laws.

- Once a lease is obtained an operator should
  - Understand the particularities of the lease
    - Several items and mis-steps may be minor under normal leases but cause automatic termination under BLM leases
  - Understand the points in the process where BLM must be involved
    - Permitting
    - Drilling
    - Production
    - Abandonment and Reclamation
  - Get started! Red tape and delay are inevitable, especially given how new BLM leases and procedures are in this part of the country

# Other Ohio Specific Issues:

## Mandatory Pooling & Unitization

- Sections 1509.27 and 1509.28 of the Ohio Revised Code set forth a process by which an operator can pool and unitize acreage without the permission of one or more landowners
- Application to ODNR is approved if
  - It is needed to protect correlative rights,
  - It is needed to provide for the effective development, use and conservation of oil and gas
  - There is no obvious alternative placement for the unit
  - At least 65% of the landowners agree to the unit
  - The operator/lessee has made reasonable attempts (on just and equitable terms) to lease the acreage and/or voluntarily pool the acreage with the refusing landowners
  - Operator complies with other laws and regulations involving spacing

# Other Ohio Specific Issues:

## Mandatory Pooling & Unitization

- BLM leases allow for unitization, and can be held by production from a unit well located on non-federally owned lands
- Federal law contains its own guidelines and requirements for creating units which include 10% or more of federal land
- The unit itself must be approved by BLM. Criteria for approval are:
  - Serves the public interest of conservation of natural resources
  - Size of unit (negotiated with BLM) encompasses lands necessary for proper development
  - Five year term (which may be extended)
  - Typically all depths (but specific formations may also be unitized with BLM's permission)
  - Obligation to drill an initial well within 6 months of the agreement's effective date
  - Obligation to drill at least 1 well every 6 months until production in paying quantities is obtained
  - BLM makes determination of whether well is paying
  - Each well must be a "paying well" or the acreage of the unit may be revised
- The unit agreements and unit operating agreements are between the operator, BLM, and landowners
- Operator must have approval of 85% of the landowners (determined by acreage)
- Operator must show that they've made a reasonable effort to obtain consent and participation from all landowners

# Other Ohio Specific Issues: Mandatory Pooling & Unitization

What if your planned unit includes federal land,  
but BLM will not approve the unit?

Can you still force them in under the Ohio  
statutes? Or is federal land exempt?

# Other Ohio Specific Issues:

## Split Estates

- Reminder – split estates are the norm in WNF
  - Oil and gas underlying 59% of WNF are privately owned
  - Remaining 41% are federally owned
  - Federal government owns all minerals under 10,000 acres and part of the minerals in another 8,200 acres
- Ohio differs from some other states in how it deals with split estates and use of the surface

# Other Ohio Specific Issues:

## Split Estates

- Example: *Minard Run Oil Co. v. United States Forest Serv.*, 670 F.3d 236 (2011)
  - 3<sup>rd</sup> Circuit, out of Western District of PA
  - In PA, where the Allegheny National Forest is located, the oil and gas estate is dominant and the surface estate is servient
    - Limited only by the oil and gas owner's duty to act with "due regard" for the surface owner and his/her rights
      - i.e. do the minimum amount of damage necessary to extract the oil and gas
    - The oil and gas owner has an absolute right to access their minerals for extraction, with or without the consent of the surface owner. *Belden & Blake Corp. v. Pennsylvania*, 969 A.2d 528 (Pa. 2009).
  - Oil company, joined by others, sued the U.S. Forest Service for enforcing a moratorium on use of surface lands for drilling (even though the minerals were privately owned) until an assessment was completed under the National Environmental Protection Act (NEPA)
  - Lower court held (and circuit court agreed) that, while reasonable restrictions and notifications procedures were acceptable, the Forest Service lacked the authority to unilaterally halt drilling, even on surface lands owned by the federal government

# Other Ohio Specific Issues:

## Split Estates

- Two reasons why challenges to BLM's leasing authority of land in Ohio may lead to a different result than *Minard Run*:
- Cornerstone: *Quarto Mining Co. v. Litman*, 42 Ohio St. 2d 73 (1975): the “reasonably necessary” standard; overhead coal conveyor belt.
  1. Ohio law does not support that one estate is dominant over the other, but rather that “neither has full ownership” and “[e]ach has rights that are subject to the rights of the other.” *Snyder v. Ohio Dep't of Natural Res.*, 140 Ohio St. 3d 322 (2014). Another coal case.
    - Ohio cases have generally focused on a “reasonable use” of the surface by an oil and gas owner which is narrowly tailored to fit the oil and gas owner's needs while avoiding interference with the surface owner's rights (unless there is language in the severance deed indicating otherwise)

# Other Ohio Specific Issues:

## Split Estates

- Example: *J.R. Operating Co., Inc. v. Lindsay*, 1997 Ohio App. LEXIS 2999 (1997) – Court held that the lessee under an oil and gas lease had the right to access its well on the lessor's property, but that the right of access was limited to use of the access road only as necessary for its operations
- Example: *Chartiers Oil Co. v. Curtiss*, 1911 Ohio Misc. LEXIS 241 (1911) – Court held that the oil and gas owner had the right of ingress and egress across the surface of the property only to the extent necessary to drill and maintain wells on the property, storage rights were limited to that which was necessary to “immediate production and marketing,” and that certain surface damages may still require payment to the surface owner

# Other Ohio Specific Issues:

## Split Estates

### ■ Key Takeaways:

- Conduct thorough title analysis to determine what minerals may be privately held
- For leases with private mineral owners in the WNF, operators are cautioned to engage in the surface use process early despite operator's right to use so much of the surface as may be reasonably necessary; not unfettered access, federal government owns the surface
- Complete necessary Application for Permit to Drill and Surface Use Plan for everything from pad site to roads
- Contrast with *Minard Run*, WNF has already completed an Environmental Assessment under NEPA (2016) with conclusive findings of “no direct impact”

# Questions

# Thank you for attending.





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John R. Seeds is a principal in the Energy and Real Estate Groups with Dickie, McCamey & Chilcote, P.C., resident in Pittsburgh. Mr. Seeds advises E&Ps on the strategic consolidation and divestiture of assets, due diligence investigations relating to oil and gas leasehold and mineral fee acquisition, and certification of drilling and division order title for unit operations in the Appalachian Basin. Additionally, he represents several operators in Ohio state and federal courts defending leasehold interests and acreage positions in a variety of litigation contexts for producers operating in the Appalachian Basin. Mr. Seeds received his J.D. from the University of Pittsburgh School of Law and B.A. from the College of William & Mary. He is admitted in Pennsylvania, Ohio, and Illinois.

