Testimony Dearald "Bud" W. Shuffstall, II
National Association of Royalty Owners,

U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Energy and Mineral Resources

Legislative Hearing: Split Estate Issues in the Allegheny National Forest
Tuesday April 26, 2016

Chairman Lamborn, Ranking Member Lowenthal, members of the Committee, it's an honor to speak with you today regarding this important issue. Thank you for the invitation.

I am Bud Shuffstall from Meadville, Pennsylvania. I work for Northwest Bank, headquartered in the same city as the Allegheny National Forest's headquarters (Warren, PA). Like many of our customers and bank staff I am a regular visitor to the Allegheny National Forest and value and appreciate it deeply.

I speak today as a member of the National Association of Royalty Owners (NARO). NARO has members in all 50 states and educates and advocates for the rights of an estimated 8.5 to12 million citizens who receive royalty income from the production of their private property – specifically from production of their oil, natural gas and minerals.

The average NARO member is 60 years old, a widow and makes less than $500 per month in royalty income. About 70 percent of the mineral estate in the lower 48 states is owned by individual citizens. In 2012, Montana State University conducted a study that estimated roughly 77 percent of oil and 81 percent of natural gas produced onshore was produced on private property. NARO is pleased to address this committee on the issue of development of private (severed) oil, gas and mineral interests that underlie the Allegheny National Forest, as the protection of our private property rights in all 50 states is paramount to millions of private mineral owners.

Of all the wells ever drilled around the world, the vast majority have been drilled in the United States – a nation that values private ownership of oil, gas and minerals and that also

encourages both risk and the pursuit of profit. The United States is the only former colony that, upon achieving independence, awarded the ownership of minerals to private citizens instead of to the state. This uniquely American model was suggested by Thomas Jefferson. His concept has helped make us a strong nation and it today is enabling America's rise to become the world's dominant energy producer.

The Allegheny National Forest lies in the heart of Pennsylvania's oil and gas region. It is only 40 miles (64 km) from the site of the first commercial oil well in the United States at Titusville, Pennsylvania. Indeed, some of the earliest severances of subsurface oil and gas rights occurred in the late 1850's and early 18060's near or upon land that would eventually become part of the Allegheny National Forest.

The Allegheny National Forest was created pursuant to the provisions of the Weeks Act of 1911. **In 1923 the Federal Government purchased only the surface estate in what was to become the Allegheny National Forest (the subsurface rights being too valuable and cost prohibitive to acquire at the time). In doing so the federal government took title to the surface only, and subject to the rights of all prior exceptions and reservations of subsurface oil and gas rights**. In many cases the oil and gas rights underlying the property had been long severed from the surface before the creation of the Allegheny National Forest.

It is a well-established point of law in all jurisdictions of the United States, including Pennsylvania, that the rights of the subsurface estate are dominant over the rights of the surface estate. The law's recognition of the subsurface estate as dominant has been found to be essential, lest it be subrogated to any other property rights thereby risking its devaluation. Absent a taking by the government of subsurface property rights, this legal principle precludes the federal government as surface estate owner of the Allegheny National Forest from interfering with the development of those subsurface property rights still owned by others.

Existing Forest Service regulations recognize this fact and maintain that Service operations should not be "applied so as to contravene or nullify rights vested in holders of mineral interests on refuge lands." 50 C.F.R. § 29.32. The Service's manual states that it must

"[p]rovide for the exercise of non-federal oil and gas rights while protecting [USFWS] resources to the maximum extent possible." 612 FWS Manual 2.4.B.

Subject to State and Federal law, the subsurface rights owners have the legal authority to develop oil and gas reserves. It is this group of people that NARO represents. Just as the Forest Service has the authority to manage the public surface estate, NARO members have a dominant legal authority to access and develop their private sub-surface estate. Also, the Forest Service may not unreasonably restrict access to the subsurface estate in a way that makes the development thereof uneconomic or unprofitable.

Courts have held that federal agencies cannot impose stipulations or conditions of approval (COAs) that violate this tenet. See *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979); see also *Conner v. Burford*, 848 F.2d 1441, 1449-50 (9th Cir. 1988). Concurrent with courts' decisions discussing the dominance of the subsurface estate is a requirement that a holder of oil, gas or mineral rights adhere to the accommodation doctrine, which provides that a mineral owner or lessee may "use as much of the surface as reasonably necessary to extract and produce the minerals" as long as that use is reasonable. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248-49 (Tex. 2013).

Therefore, the government must be held to a reasonable set of regulatory management controls that does not unduly burden private oil, gas or mineral owners. For example, an excessive fee structure for access onto, or across, federally owned lands will negatively affect the value of the sub-surface estate and the economic viability of development of that estate. The government must not develop regulatory management tools and fees that provide a regulatory avenue to develop in theory but which creates an economic firewall to development in reality.

It is important to note that expenses incurred in the development of oil, gas and minerals come in many forms. A monetary fee charged by the surface estate owner would be another such expense. All of the other costs incurred by the oil and gas developer as a result of requirements by the surface estate owner also should be taken into consideration when calculating a fair and reasonable fee structure. These other costs could include the cost and time

of preparation of Environmental Impact Statements and reports unique to the federal surface estate, rights-of-way fees for pipelines and roads, and lease maintenance and operational drilling and service costs associated with lengthy application processes.

The third basic tenet which NARO feel should be considered in this process is that the government may not unreasonably restrict oil and gas development to the point of requiring a "no net impact" on the environment as it seeks to mitigate surface impacts.

The National Environmental Policy Act (NEPA) "does not require agencies to elevate environmental concerns over other appropriate considerations." *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1022 (10th Cir. 2002). Instead, NEPA is a procedural statute and does not mandate particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As explained by the Interior Board of Land Appeals (IBLA), "NEPA does not bar actions which affect the environment, even adversely. Rather, the process assures that decision-makers are fully apprised of likely effects of alternative courses of action so that selection of an action represents a fully informed decision." Biodiversity Conservation Alliance, 174 IBLA 1, 13-14 (2008) (citing the *Vermont Yankee* U.S. Supreme Court case).

As the IBLA observed in *Oregon Natural Resources Council*, NEPA does not direct that federal agencies prohibit action even where environmental degradation is inevitable. 116 IBLA 355, 361 n.6 (1980). NEPA only mandates a full consideration of the environmental impact of a proposed action before undertaking it. *Nat'l Wildlife Federation*, 169 IBLA 146, 164 (2006).

The government may not improperly elevate environmental concerns over other appropriate considerations or seek to create a set of regulations that restricts all environmental impacts on the subject lands. Any environmental NEPA analysis must also include the economic impacts to the orderly development of oil and gas within the forest. This includes a socioeconomic analysis that details the negative impacts any restrictions will have on state and private subsurface development and the impacts to local and state economies and taxes.

In conclusion, NARO wishes to emphasize that the government must:

- recognize the rights of the subsurface estates, and that such rights are dominant over the rights of the surface estate;
- allow economic and profitable access to, and development of, the subsurface estate;
- balance environmental concerns with the economic development of oil, gas and minerals; and
- avoid the costly taking that inevitably results from activists utilizing the agencies of the federal government to prevent or deny the development of our private mineral property without the "just compensation" that the U.S. Constitution guarantees.

Thank you for the opportunity to present the collective views of millions of private property oil, gas and mineral owners. If we may provide any additional information or be of service or assistance to the Committee please let us know.