

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DUHRING RESOURCE COMPANY,)	
)	
Plaintiff,)	
)	
and)	
)	
PENNSYLVANIA OIL AND GAS ASSOCIATION,)	
)	
Plaintiff-Intervenor,)	Case No. 1:07-CV-00314-GLL
)	
v.)	Electronically Filed
)	
THE FOREST SERVICE, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
)	
ALLEGHENY DEFENSE PROJECT,)	
)	
Defendant-Intervenor.)	

**ALLEGHENY DEFENSE PROJECT’S ANSWER
TO SECOND AMENDED COMPLAINT**

Defendant-Intervenor Allegheny Defense Project (“ADP”) for its Answer and affirmative defenses, to the Second Amended Complaint hereby admits, denies and alleges as follows:

Plaintiff Duhring Resource Company respectfully submits this Second Amended Complaint against defendants the Forest Service, an Agency of the United States Department of Agriculture; Randy Moore, Regional Forester of the Pacific Southwest Region of the USDA Forest Service, in his individual capacity; Kathleen S. Morse, Forest Supervisor of the Lassen National Forest, in her individual capacity; Robert T. Fallon, District Ranger of the Marienville

Ranger District of the Allegheny National Forest, in his individual capacity; Anthony V. Scardina, District Ranger of the Bradford Ranger District of the Allegheny National Forest, in his individual capacity; Robert A. Stovall, Deputy District Ranger of the Bradford Ranger District of the Allegheny National Forest, in his individual capacity; Kent P. Connaughton, Regional Forester of the Eastern Region of the Forest Service, in his individual capacity; Leanne M. Marten, Forest Supervisor of the Allegheny National Forest, in her individual capacity; Robert Gydus, Uniformed Law Enforcement Officer of the Forest Service, in his individual capacity; Jason J. Haberberger, Uniformed Law Enforcement Officer of The Forest Service, in his individual capacity; and William Mickle, Uniformed Law Enforcement Officer of the Forest Service, in his individual capacity.

Response: The allegations in the first un-numbered paragraph characterize Plaintiff's Complaint. To the extent a response is required, the allegations are denied.

Parties

1. Plaintiff Duhring Resource Company ("Duhring") is a business corporation organized and existing under the laws of the Commonwealth of Pennsylvania, its principal place of business being located at 203 Center Street, Sheffield, Warren County, Pennsylvania 16347. Duhring is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations in paragraph 1.

2. Defendant the Forest Service (“USFS”) is an agency of the United States Department of Agriculture (“USDA”), organized by the USDA under the laws of the United States of America, whose national office is located at the Auditors Building, 1400 Independence Avenue, SW, Washington, District of Columbia 20250. Defendant USFS is a citizen of the District of Columbia.

Response: ADP admits the allegations of Paragraph 2.

3. Defendant Randy Moore is an adult individual, who is the Regional Forester of the Pacific Southwest Region of the USFS, whose office is located at 1323 Club Drive, Vallejo, Solano County, California 94592, and against whom this action has been brought in his individual capacity. Defendant Moore is a citizen of the State of California and was the Regional Forester of the Eastern Region of the USFS at all times material to the cause of action asserted in this Amended Complaint prior to the appointment of defendant Kent P. Connaughton as Regional Forester in that region of the USFS.

Response: ADP admits the allegations in the first sentence of Paragraph 3. ADP lacks knowledge of information sufficient to form a belief regarding the truth of the allegations in the second sentence of Paragraph 3 and therefore denies the allegations. ADP further states that allegations against defendant Moore as an individual are now irrelevant after the Court’s March 5th order.

4. Defendant Kathleen S. Morse is an adult individual, who is the Forest Supervisor of the Lassen National Forest, whose office is located at 2550 Riverside Drive, Susanville, Lassen County, California 96130, and against whom this action has been brought in her individual capacity. Defendant Morse is a citizen of the State of California and was the Forest Supervisor of the Allegheny National Forest (“ANF”) at all times material to the cause of action asserted in this Amended Complaint prior to the appointment of defendant Leanne M. Marten as Forest Supervisor of the ANF.

Response: ADP admits the allegations in the first sentence of Paragraph 4. ADP lacks knowledge of information sufficient to form a belief about the truth of the allegations in the second sentence of Paragraph 4 and therefore denies the allegations. ADP further states that the allegations against defendant Morse as an individual are now irrelevant after the Court’s March 5th order.

5. Defendant Robert T. Fallon is an adult individual, who is the District Ranger of the Marienville Ranger District of the ANF, whose office is located at HC 2, Marienville, Forest County, Pennsylvania 16239, and against whom this action has been brought in his individual capacity. Defendant Fallon is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of Paragraph 5. ADP further states that the allegations against defendant Fallon as an individual are now irrelevant after the Court’s March 5th order.

6. Defendant Anthony V. Scardina is an adult individual, who is the District Ranger of the Bradford Ranger District of the ANF, who assumed that position in June 2007, whose office is located at 29 Forest Service Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his individual capacity. Defendant Scardina is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of Paragraph 6. ADP further states that the allegations against defendant Scardina as an individual are now irrelevant after the Court's March 5th order.

7. Defendant Robert A. Stovall is an adult individual, who is a Deputy District Ranger of the Bradford Ranger District of the ANF, whose office is located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his individual capacity. Defendant Stovall is a citizen of the Commonwealth of Pennsylvania and was the Acting District Ranger of the Bradford Ranger District of the ANF at all times material to the cause of action asserted in this Complaint prior to the appointment of defendant Scardina to the District Ranger position in that district of the ANF.

Response: ADP admits the allegations of Paragraph 7. ADP further states that allegations against defendant Stovall as an individual are now irrelevant after the Court's March 5th order.

8. Defendant Kent P. Connaughton is an adult individual, who is the Regional Forester of the Eastern Region of the USFS, who assumed that position in November 2007, whose office is located at 626 East Wisconsin Avenue, Milwaukee, Milwaukee County,

Wisconsin 53202, and against whom this action has been brought in his individual capacity. Defendant Connaughton is a citizen of the State of Wisconsin.

Response: ADP admits the allegations of Paragraph 8. ADP further states that the allegations against defendant Connaughton as an individual are now irrelevant after the Court's March 5th order.

9. Defendant Leanne M. Marten is an adult individual, who is the Forest Supervisor of the ANF, who assumed that position in January 2008, whose office is located at 222 Liberty Street, Warren, Warren County, Pennsylvania 16365, and against whom this action has been brought in her individual capacity. Defendant Marten is citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of Paragraph 9. ADP further states that the allegations against defendant Marten as an individual are now irrelevant after the Court's March 5th order.

10. Defendant Robert Gydus is an adult individual, who is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his individual capacity. Defendant Gydus is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of Paragraph 10. ADP further states that the allegations against defendant Gydus as an individual are now irrelevant after the Court's March 5th order.

11. Defendant Jason J. Haberberger is an adult individual, who is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his individual capacity. Defendant Gydus is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of the first sentence of Paragraph 11 and admits the allegations in the second sentence of Paragraph 11 to the extent those allegations were intended to allege facts regarding defendant Haberberger. ADP further states that the allegations against defendant Haberberger as an individual are now irrelevant after the Court's March 5th order.

12. Defendant William Mickle is an adult individual, who is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his individual capacity. Defendant Gydus is a citizen of the Commonwealth of Pennsylvania.

Response: ADP admits the allegations of the first sentence of Paragraph 12 and admits the allegations in the second sentence of Paragraph 12 to the extent those allegations were intended

to allege facts regarding defendant Mickle. ADP further states that the allegations against defendant Mickle as an individual are now irrelevant after the Court's March 5th order.

Subject Matter Jurisdiction

13. This Court has subject matter jurisdiction over the claims asserted against defendants as follows:

a. This Court has subject matter jurisdiction over the claims asserted against the USFS in Counts I, IV and V pursuant to the Federal Question Act, 28 U.S.C. §1331, since the claims asserted therein arise under the laws of the United States and the United States Constitution. Section 702 of the Administrative Procedure Act, 5 U.S.C. §702, constitutes a waiver of sovereign immunity with respect to those claims, since they seek relief other than money damages and state claims that a federal agency and employees thereof acted and failed to act in an official capacity or under color of legal authority, and Section 703 of the Administrative Procedure Act, 5 U.S.C. §703, permits such an action to be brought against the United States, the agency by its official title or the appropriate officer.

b. This Court has subject matter jurisdiction over the claims asserted in Counts II and XI pursuant to the Quiet Title Jurisdiction Act, 28 U.S.C. §1346(f), the Quiet Title Act, 28 U.S.C. §2409a, having waived sovereign immunity with respect to those claims, which seek the adjudication of title to real property in which the United States claims an interest.

c. This Court has subject matter jurisdiction over the claims asserted against the USFS in Counts III and X pursuant to the Supplemental Jurisdiction Act, 28 U.S.C.

§1367, since the claims asserted therein are so related to the claims made in Counts I, IV, V, VII, IX and XII, which are within the original jurisdiction of this Court, that they form a part of the same case or controversy under Article III of the United States Constitution. Section 702 of the Administrative Procedure Act, 5 U.S.C. §702, constitutes a waiver of sovereign immunity with respect to those claims, since they seek relief other than money damages and state claims that a federal agency and employees thereof acted and failed to act in an official capacity or under color of legal authority, and Section 703 of the Administrative Procedure Act, 5 U.S.C. §703 permits such an action to be brought against the United States, the agency by its official title or the appropriate officer.

d. This Court has subject matter jurisdiction over the claims asserted against the individual defendants in Counts I, VII and VIII pursuant to the Federal Question Act, 28 U.S.C. §1331, since the claims asserted therein arise under the laws of the United States and the United States Constitution. Since Count I is limited to nonmonetary claims, Sections 702 and 703 of the Administrative Procedure Act, 5 U.S.C. §§702-703, permit the assertion of the nonmonetary claims in this Court.

e. This Court has subject matter jurisdiction over the claims asserted against the individual defendants in Count VI pursuant to the Supplemental Jurisdiction Act, 28 U.S.C. §1367; since the claims made therein are limited to nonmonetary claims, they may asserted in this Court pursuant to Sections 702 and 703 of the Administrative Procedure Act, 5 U.S.C. §§702-703.

f. This Court has subject matter jurisdiction over the claims asserted against the USFS in Counts IX and XII pursuant to the Little Tucker Act, 28 U.S.C. §1346(a)(2),

which statute also constitutes a waiver of the sovereign immunity of the United States with respect to those claims.

Response: ADP admits that this Court has subject matter jurisdiction over the plaintiff's claims that survived the Court's March 5th Order, under 28 U.S.C. Secs. 1331 and 1346, except to the extent that the plaintiff's failure to exhaust its administrative remedies regarding any of those claims deprives this Court of such jurisdiction. ADP denies any remaining, unnecessary allegations in Paragraph 13. ADP further states that the allegations regarding Count I, to the extent it is asserted against the individual federal defendants, and Counts II, VI, VII, VIII and XI are now irrelevant after the Court's March 5th Order.

Venue

14. Venue lies in this district pursuant to 28 U.S.C. §1391(e) in that defendant USFS is an agency of the United States and defendants Moore, Morse, Fallon, Scardina, Stovall, Connaughton, Marten, Gydus, Haberberger and Mickle are employees of the USFS who at all times relevant to the subject matter of this action acted as employees of the USFS under color of legal authority; a substantial part of the events or omissions giving rise to this action occurred in this district; and all of the property that is the subject of this action is located in this district.

Response: ADP admits the allegations of Paragraph 14.

15. This action belongs on the Erie calendar of this Court pursuant to W.D.PA.LR 3.1, since the causes of action arose in Warren and Forest Counties of the Commonwealth of Pennsylvania and plaintiff resides in Warren County, Pennsylvania.

Response: ADP admits the allegations of Paragraph 15.

Cause of Action

16. On March 1, 2007 the subsurface (oil, gas and mineral or “OGM”) rights in real property located in Warren County, Pennsylvania and described in a lease dated December 20, 2004 and recorded in the Warren County Recorder’s Office in Book 1439, Page 298 (“Lot 7”), were assigned to Duhring in an assignment of that date, recorded in the Warren County Recorder’s Office in Book 1693, Page 170.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 16 and therefore denies those allegations.

17. On June 15, 2004 the OGM rights in certain real property located in Warren County, Pennsylvania were assigned to Duhring, which property is described in Annexure 1 to the June 15, 2004 assignment, which assignment was recorded in the Warren County Recorder’s Office in Book 1385, Page 233 (“Lot 8”).

Response: ADP lacks knowledge of information sufficient to form a belief regarding the truth of the allegations of Paragraph 17 and therefore denies those allegations.

18. On May 10, 2004 the OGM rights in certain real property located in Warren County, Pennsylvania and described in a lease dated January 30, 1990, a Memorandum of Lease Agreement relating thereto being recorded in the Warren County Recorder's Office in Book 294, Page 132 ("Lot 9"), were assigned to Duhring by order of the United States Bankruptcy Court of the District of Arizona at Case No. 02-17432-CGC, which order was recorded in the Warren County, Pennsylvania Recorder's Office in Book 1375, Page 263.

Response: ADP admits the allegations of Paragraph 18. ADP further states that the allegations of Paragraph 18 are now irrelevant after the Court's March 5th Order.

19. On December 15, 2006 the OGM rights in certain real property located in Forest County, Pennsylvania, being a square of land containing 150 acres in the northeast corner of Warrant 3672 and associated wells, as described in a December 15, 2006 assignment, which was recorded in the Forest County Courthouse on December 22, 2006 ("Warrant 3672"), were assigned to Duhring.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 19 and therefore denies those allegations.

20. Lots 7, 8 and 9, and Warrant 3672 (collectively, "Parcels"), are located in the ANF, which is part of the National Forest System; the surface estate of the Parcels is owned by

the United States of America and managed by the USFS pursuant to the National Forest Management Act.

Response: ADP admits in part and denies in part the allegations of Paragraph 20. ADP admits that Lots 7, 8, and 9, and Warrant 3672 are located in the ANF, which is part of the National Forest System. ADP admits that the surface estate of the Parcels is owned by the United States of America and managed by the USFS pursuant to the National Forest Management Act. ADP denies, however, that the National Forest Management Act is the only law under which the ANF is managed.

21. Duhring, as the owner of the rights to develop the OGM resources in the Parcels, has an easement for the use of the surface estate that is dominant to the surface estate, giving Duhring the right under the common law of Pennsylvania to the reasonable use of the surface estate to develop the OGM resources.

Response: ADP denies the allegations of Paragraph 21 because the common law of Pennsylvania is not the only applicable or controlling law regarding plaintiff's rights in the Parcels.

22. OGM estates in the ANF and other national forests are of two general types under the Weeks Law of March 1, 1911 ("Weeks Act"), the General Exchange Act of March 20, 1922, the regulations of the Secretary of Agriculture and the common law of the Commonwealth of Pennsylvania: "reserved" and "outstanding." Reserved OGM rights are rights retained by a

grantor in a deed conveying land to the United States, while outstanding mineral rights are those rights owned by a party other than the surface owner at the time the surface was conveyed to the United States.

Response: ADP denies the allegations in Paragraph 22 to the extent those allegations purport to fully set forth the meaning of “reserved” and “outstanding” rights under applicable, controlling federal law. ADP admits any remaining allegations in Paragraph 22.

23. The exercise of reserved OGM rights by the owner of the reserved OGM estate is subject to the regulations of the Secretary of Agriculture as stated in the deed conveying the surface estate to the United States, while the exercise of outstanding OGM rights is not subject to those regulations of the Secretary of Agriculture.

Response: ADP denies the allegations in Paragraph 23 to the extent those allegations assert that the Secretary of Agriculture cannot reasonably regulate any or all OGM rights in order to protect the federal surface estate.

24. The OGM rights of Duhring in Lots 7 and 9, and in Warrant 3672, are outstanding, while those in Lot 8 are reserved.

Response: ADP admits the allegations of Paragraph 24.

25. Section 2832 of the Forest Service Manual of the USFS provides that the owner of outstanding OGM rights must furnish the Forest Supervisor of the particular national forest with 60 days of advance written notice of surface occupancy by submitting a proposed operating plan and other documents, while Chapter 2, Section 2 of the ANF Handbook provides that all OGM developers must provide USFS with a “[m]inimum 60 days written notice on intent to develop,” along with other documents.

Response: ADP denies the allegations of Paragraph 25 to the extent that those allegations purport to set out the full authority of the USFS to regulate the use of the federally owned surface estate.

26. The 60-day advance-notice procedure appearing in the Forest Service Manual and the ANF Handbook is the result of the unreported decision of this Court in the case of *United States of America v. Minard Run Oil Company*, Civil Action No. 80-129 Erie (W.D.Pa. April 24, 1981), which decision was based on Pennsylvania common law and which was adopted by the USFS in its Forest Service Manual and in the ANF Handbook, in which owners of reserved and outstanding OGM rights in the ANF acquiesced as reasonable advance notice of their use of the surface estate to develop the OGM resources. This mutual recognition of the 60-day advance-notice procedure became a matter of custom and practice among the USFS and owners of OGM rights in the ANF after April 24, 1981.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in Paragraph 26 and therefore denies the allegations.

27. On October 24, 1992 the 60-day advance-notice procedure first set forth in *Minard Run* became a matter of federal statutory law with the enactment of the Energy Policy Act of 1992, 42 U.S.C. §13201 and 30 U.S.C. §226(o) (“EPA”).

Response: ADP denies the allegations of Paragraph 27.

28. The Pennsylvania Oil and Gas Act, 58 P.S. §601.101, et seq. (“POGA”), adopted in 1984 and amended in 2001, provides for regulatory control over private OGM development in Pennsylvania by the Pennsylvania Department of Environmental Protection (“DEP”). POGA retains the dominance of the mineral estate, and the surface owner’s right to some advance notice of OGM development, both as understood in *Minard Run*. Under POGA the surface owner has 15 days from receipt of notice to object to the DEP; the DEP must issue or deny the OGM owner’s permit application within 45 days of the submission, which time period can be extended to a total of 60 days for cause shown. 58 P.S. §601.201(e).

Response: ADP admits in part and denies in part the allegations of Paragraph 28. ADP denies the allegations in the first and second sentences of Paragraph 28. ADP admits the allegations in the third sentence of Paragraph 28.

29. The surface owner’s grounds for objection are limited under POGA and must be based either on the assertion that the well location violates POGA or that information in the application is untrue in some material respect. 58 P.S. §§601.201(b) and 601.202(a).

Response: ADP admits the allegations of Paragraph 29.

30. The Weeks Act, the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the *Minard Run* decision, the common law of Pennsylvania, the EPA and POGA do not require USFS approval of OGM operations before those operations can be commenced by OGM operators in the ANF. If any objections by the USFS not within the purview of POGA to those operations are not resolved by agreement within 60 days of notice to the USFS by the OGM operator, the sole recourse of the USFS is to initiate an action in a court of competent jurisdiction seeking appropriate legal relief.

Response: ADP denies the allegations of Paragraph 30.

31. Defendants Morse, Fallon, Scardina, Stovall and Marten, and their subordinates on their instructions, have expressly stated to Duhring and other owners of OGM rights in the ANF that they may not commence OGM development activities until the District Ranger of the Ranger District in which the property to be developed is located issues a notice to proceed and, on multiple occasions, they and their subordinates have threatened criminal prosecution should OGM owners commence their use of the surface estate in the absence of the issuance of a notice to proceed or use the surface estate in violation of its provisions after it has been issued.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 31 and therefore denies the allegations.

32. On March 17, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 7, at the same time providing the USFS with all documents required by the EPA, and it was not until September 12, 2007 that the USFS provided Duhring with a notice to proceed.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 32 and therefore denies the allegations.

33. The notice provided with respect to Lot 7 contained economically burdensome provisions that violate the Weeks Act, the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPA and POGA, and which were unilaterally imposed by the USFS in violation of those same laws, including a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 33 and therefore denies the allegations.

34. The USFS retained control of the removal of timber on Lot 7 and did not remove that timber in a timely manner, producing further delay in the OGM development operations of Duhring.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 34 and therefore denies the allegations.

35. On March 19, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 8, at the same time providing the USFS with all documents set forth in the regulations of the Secretary of Agriculture, the Forest Service Manual and the ANF Handbook; the USFS determined to sell the timber to Duhring, but it was not until October 15, 2007 that the USFS provided Duhring with an invoice for the sale of timber on Lot 8.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 35 and therefore denies the allegations.

36. After October 15, 2007 Duhring determined that the dollar amount of the invoice provided by the USFS with respect to the sale of the timber on Lot 8 was in excess of the fair market value of the timber, and Duhring declined to purchase the timber for that amount.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 36 and therefore denies the allegations.

37. The USFS refused to reduce the amount of the invoice, it refused to remove the timber itself, it refused to offer the timber for sale to a third party by public auction or otherwise, it would not permit the cutting of the timber by Duhring without the prior express permission of the USFS, threatening criminal prosecution unless Duhring received that permission on terms unilaterally determined by the USFS, and it would not compensate Duhring for its removal of the timber to decking sites sought by the USFS.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 37 and therefore denies the allegations.

38. It was not until February 22, 2008 that the USFS gave its express permission to Duhring to cut the timber, provided that it “cut and stack” the marked trees. Thereafter the USFS withdrew its permission to “cut and stack” as set forth more fully at paragraph 46 hereinafter.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 38 and therefore denies the allegations.

39. On March 20, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 9, at the same time providing the USFS with all documents required by the EPA, and it was not until November 13, 2007 that the USFS provided Duhring with a notice to proceed and, further, the USFS did not properly comply

with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

Response: ADP denies the allegations of Paragraph 39.

40. The delay associated with the issuance of the notice to proceed concerning Lot 7 produced additional delay with respect to Lot 9 since the well locations on Lot 7 had to be completed before the well locations on Lot 9 could be commenced.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the allegations of Paragraph 40 and therefore denies the allegations.

41. The notice provided with respect to Lot 9 contained economically burdensome provisions that violate the Weeks Act, the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPA and POGA, and which were unilaterally imposed by the USFS in violation of those same laws, including a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

Response: ADP denies the allegations of Paragraph 41.

42. On June 4, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Warrant 3672, at the same time providing the

USFS with all documents required by the EPA; the USFS determined to sell the timber to Duhring, but it was not until November 6, 2007 that the USFS provided Duhring with an invoice for the sale of timber on Warrant 3672 and, further, the USFS did not properly comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 42 and therefore denies the allegations.

43. After November 6, 2007 Duhring determined that the dollar amount of the invoice provided by the USFS with respect to the sale of the timber on Warrant 3672 was in excess of the fair market value of the timber and Duhring declined to purchase the timber for that amount.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 43 and therefore denies the allegations.

44. The USFS refused to reduce the amount of the invoice, it refused to remove the timber itself, it refused to offer the timber for sale to a third party by public auction or otherwise, it would not permit the cutting of the timber by Duhring without the prior express permission of the USFS, threatening criminal prosecution unless Duhring received that permission on terms unilaterally determined by the USFS, it would not compensate Duhring for its removal of the timber to decking sites sought by the USFS., and the Forest Supervisor refused to meet with Duhring in violation of Section 2832.2 of the Forest Service Manual.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 44 and therefore denies the allegations.

45. It was not until February 22, 2008 that the USFS gave its express permission to Duhring to cut the timber, provided that it “cut and stack” the marked trees, and the USFS has not properly complied with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 45 and therefore denies the allegations.

46. On March 26, 2008, in contravention of its earlier stated “cut and stack” position, the USFS informed Duhring that if Duhring cut the timber upon Lot 8 and Warrant 3672, it must also “skid and deck” the timber at its own cost pursuant to terms and conditions of a written agreement; on April 3, 2008 the terms of that agreement, in a form prepared by the USFS, were presented to Duhring, which terms included a waiver of Duhring’s right to be compensated for the cost of cutting, skidding and decking.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 46 and therefore denies the allegations.

47. On April 21, 2008 the USFS agreed to revise the agreement “in this instance only ... given the particular legal controversy that currently exists” to provide for the reimbursement of Duhring of the costs of cutting, skidding and decking if “directed to do so by a court of competent jurisdiction and last resort,” which revised agreement was executed by Duhring and the USFS with respect to Lot 8 and Warrant 3672 on May 1, 2008.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 47 and therefore denies the allegations.

48. On May 5, 2008 the USFS provided Duhring with a notice to proceed with respect to Lot 8, and on May 8, 2008 the USFS provided Duhring with a notice to proceed with respect to Warrant 3672, which notices contained economically burdensome provisions that violate the Weeks Act, the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPA and POGA, and which were unilaterally imposed by the USFS in violation of those same laws, including (as to Warrant 3672) a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 48 and therefore denies the allegations.

49. The USFS has notified Duhring that it will not permit the timely mining or use of stone located below the surface of Warrant 3672 in the course of Duhring's OGM development operations thereon, in violation of the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, the Weeks Act, EPA and POGA. Duhring has the right to mine that stone as part of its OGM estate or to use it as part of its right to the reasonable use of the surface estate to develop the OGM resources.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 49 and therefore denies the allegations.

50. The delay of the USFS as described above has imperiled the ability of Duhring to comply with its contractual obligations to third parties to drill new wells, produce OGM resources from existing wells and plug other existing wells, and it has dramatically increased Duhring's operating expenses. It has damaged Duhring's business reputation, interfered with the efficient conduct of its business operations and prevented it from taking advantage of otherwise available business opportunities by diverting the attention of its officers and employees from its business operations and substantially reducing its working capital.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 50 and therefore denies the allegations.

51. From and including February 8, 2008 through February 11, 2008 defendants Scardina, Gydus, Haberberger and Mickle, acting with the knowledge and permission, and on the instructions, of defendants Connaughton and Marten, prevented Duhring and its subcontractors from conducting OGM operations on Lots 7, 8 and 9 by physically blocking access to wells on those parcels and by threat of arrest and criminal prosecution.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 51 and therefore denies the allegations.

52. The stated basis for preventing OGM operations of Lots 7, 8 and 9 was that Duhring had not yet paid the road use fee demanded by the USFS and, therefore, a road use permit had not been issued by the USFS to Duhring, which payment and permit issuance were requirements of the notice to proceed issued to Duhring with respect to certain OGM operations conducted on those parcels.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 52 and therefore denies the allegations.

53. Prior to February 8, 2008 Duhring notified the USFS of its objections to the amount charged by the USFS for said road maintenance and requested that the USFS discuss the appropriateness of that amount, which the USFS failed and refused to do; on February 11, 2008 Duhring paid the fees demanded under duress, and under protest of the amount and the manner of enforcement of payment.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 53 and therefore denies the allegations.

54. Preventing OGM operations on February 8 through February 11, 2008 on Lots 7, 8 and 9 under these circumstances violated the Weeks Act, the EPA, the POGA, the National Forest Management Act, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook and the common law of the Commonwealth of Pennsylvania.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 54 and therefore denies the allegations.

55. On May 8 and May 12, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM development operations on Lot 9; on May 10, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM operations on Lot 8; and on May 12, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM development operations on Warrant 3672. The documents set forth under the EPA, the Forest Service Manual, and the ANF Handbook accompanied those notices.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 55 and therefore denies the allegations.

56. The economically-burdensome provisions imposed by the notices to proceed issued by the USFS, the recurrent unlawful conduct of defendants and consequent delay, and the determination on the part of the defendants to unlawfully discourage the development of OGM resources in the ANF, demonstrate that there is a real threat of future multiple violations of Duhring's legal rights to its substantial financial detriment.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 56 and therefore denies the allegations.

Count I

Duhring v. USFS, Moore, Morse, Fallon, Scardina, Stovall, Connaughton and Marten

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

**Violation of National Forest Management Act, the Weeks Act, USDA Regulations,
USFS Directives and Energy Policy Act of 1992**

57. The averments of paragraphs 1 through 9 and 16 through 56 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 57, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

58. The failure of the USFS to acknowledge Duhring's right to proceed with operations permitted under POGA within 60 days of its written notice of surface occupancy in the case of the Parcels, its delay in removing timber from Lot 7, its refusal to provide reasonably-

priced invoices for the sale of timber on Lot 8 and Warrant 3672, to remove the timber and to compensate Duhring for its removal of the timber to decking locations desired by the USFS, its unilateral imposition of unlawful provisions on Duhring's OGM development operations on the Parcels, its failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual, its refusal to permit Duhring to timely mine or use stone below the surface of Warrant 3672, preventing OGM operations on Lots 7, 8 and 9 until the road use fees demanded were paid and a road use permit was issued, and its threats of arrest and criminal prosecution, have been the result of decisions made by the individual defendants, and they have diminished the value of Duhring's OGM rights, and diminished its profits by way of increasing its operational expenses and decreasing its gross revenue.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 58 and therefore denies the allegations.

59. The aforementioned decisions and the execution of those decisions have as their basis a determination on the part of the individual defendants to unlawfully discourage the development of OGM resources in the ANF.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 59 and therefore denies the allegations.

60. The positions of the individual defendants within the USFS are such that their decisions in this regard can fairly be said to be those of the USFS.

WHEREFORE, in respect of the Statutes and directives hereinabove cited and incorporated, plaintiff Duhring Resource Company respectfully requests that the Court issue an order directing the named defendants as follows:

- a) compelling the defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 55 hereof;
- b) enjoining the defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other operations Duhring may undertake in the future;
- c) concerning operations Duhring may undertake in the future, compelling the defendants to acknowledge Duhring's right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by Duhring;
- d) compelling the defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;
- e) compelling the defendants to promptly meet, consult and negotiate in good faith with plaintiff when the Forest Service has concerns about OGM development operations proposed by plaintiff;
- f) compelling the defendants to remove timber from plaintiff's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by Duhring, or, when the OGM operator is willing to purchase the timber compelling the defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of

“cutting, skidding and decking” the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

g) enjoining the defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

h) enjoining the defendants from threatening Duhring with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendants;

i) declaring: that the failure to acknowledge Duhring’s right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the defendants to meet, consult and negotiate in good faith with Duhring regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate Duhring for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendants, are violations of the Federal Statutes and directives hereinabove incorporated;

j) compelling the defendants to in good faith negotiate cooperative use agreements with Duhring concerning the use and maintenance of roads in the ANF that are maintained by the USFS or Duhring and used by the USFS and Duhring;

k) enjoining the defendants from preventing Duhring's OGM operations in the ANF unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit to Duhring;

l) declaring that the defendants' preventing Duhring's OGM operations unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is a violation of the Federal Statutes and directives hereinabove incorporated.

Plaintiff also respectfully requests that the Court award attorneys' fees in Duhring's favor and against defendant the Forest Service.

Response: ADP admits the allegations of in the first sentence of Paragraph 60 but denies that Duhring is entitled to any of the relief requested in Paragraph 60. ADP further states that the allegations regarding Count I, to the extent they are asserted against the individual federal defendants, are now irrelevant after the Court's March 5th Order.

Count II

Duhring v. USFS

Violation of Property Rights Under Quiet Title Act, 28 U.S.C. §2409a

Count II (Paragraphs 61-64) of Duhring's Second Amended Complaint was dismissed by the Court's March 5th Order.

Count III

Duhring v. USFS

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

65. The averments of paragraphs 1 through 2, 16 through 56 and 58 through 60 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 65, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

66. The USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by Duhring, the owner of the dominant estate.

Response: ADP denies the allegations of Paragraph 66 to the extent that those allegations purport to set out the full authority of the USFS to regulate the use of the federally owned surface estate.

67. The execution of the aforementioned decisions has unreasonably interfered with the enjoyment of the servitude by Duhring and will, in the future, unreasonably interfere with its enjoyment thereof by Duhring, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court issue an order directing defendant the Forest Service as follows:

- a) compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 55 hereof;
- b) enjoining the defendant from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other operations Duhring may undertake in the future;
- c) concerning operations Duhring may undertake in the future, compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by Duhring;
- d) compelling the defendant to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling defendant to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;
- e) compelling the defendant to promptly meet, consult and negotiate in good faith with plaintiff when the Forest Service has concerns about OGM development operations proposed by plaintiff;
- f) compelling the defendant to remove timber from plaintiff's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by Duhring, or, when the OGM operator is willing to purchase the timber compelling the defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

- g) enjoining the defendant from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;
- h) enjoining the defendant from threatening Duhring with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendants;
- i) declaring that the failure to acknowledge Duhring's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the defendants to meet, consult and negotiate in good faith with Duhring regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate Duhring for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendant, are unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by Duhring.
- j) compelling the defendant to in good faith negotiate cooperative use agreements with Duhring concerning the use and maintenance of roads in the ANF that are maintained by the USFS or Duhring and used by the USFS and Duhring;
- k) enjoining the defendant from preventing Duhring's OGM operations in the ANF unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit to Duhring;

l) declaring that the defendant's preventing Duhring's OGM operations unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by Duhring.

Plaintiff also respectfully requests that the Court award attorneys' fees in Duhring's favor and against defendant the Forest Service.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 67 and therefore denies the allegations. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 67.

Count IV

Duhring v. USFS

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

Procedural Due Process

68. The averments of paragraphs 1 through 2, 16 through 56 and 58 through 60 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 68, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

69. Duhring has a legal right to the use and enjoyment of the Parcels under Pennsylvania law and the execution of the aforementioned decisions has substantially interfered

with that use and enjoyment, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

Response: ADP denies the allegations in the first clause of Paragraph 69 to the extent that those allegations purport to set out the full scope of plaintiff's rights and the rights of the USFS to regulate the use of the federally owned surface estate. ADP lacks knowledge or information sufficient to form a belief regarding the truth of the remaining allegations of Paragraph 69 and therefore denies the allegations.

70. The interference of with the use and enjoyment of the Parcels by Duhring was accomplished in the past and will be accomplished in the future without affording any procedural due process to Duhring.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court issue an order directing defendant the Forest Service as follows:

- a) compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 55 hereof;
- b) enjoining the defendant from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other operations Duhring may undertake in the future;

- c) concerning operations Duhring may undertake in the future, compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by Duhring;
- d) compelling the defendant to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling defendant to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;
- e) compelling the defendant to promptly meet, consult and negotiate in good faith with plaintiff when the Forest Service has concerns about OGM development operations proposed by plaintiff;
- f) compelling the defendant to remove timber from plaintiff's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by Duhring, or, when the OGM operator is willing to purchase the timber compelling the defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;
- g) enjoining the defendant from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;
- h) enjoining the defendant from threatening Duhring with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendants;
- i) declaring that the failure to acknowledge Duhring's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure

of the defendants to meet, consult and negotiate in good faith with Duhring regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate Duhring for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendant, are violations of the right to procedural due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

j) compelling the defendant to in good faith negotiate cooperative use agreements with Duhring concerning the use and maintenance of roads in the ANF that are maintained by the USFS or Duhring and used by the USFS and Duhring;

k) enjoining the defendant from preventing Duhring's OGM operations in the ANF unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit to Duhring;

l) declaring that the defendant's preventing Duhring's OGM operations unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is a violation of the right to procedural due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Plaintiff also respectfully requests that the Court award attorneys' fees in Duhring's favor and against defendant the Forest Service.

Response: ADP denies the allegations in the first sentence of Paragraph 70. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 70.

Count V

Duhring v. USFS

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

Substantive Due Process

71. The averments of paragraphs 1 through 2, 16 through 56, 58 through 60 and 69 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 71, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

72. The interference with the use and enjoyment of the Parcels by Duhring in the past and future was and will be outrageous and arbitrary.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 72 and therefore denies the allegations.

73. Preventing Duhring's use of the surface estate in the ANF in the absence of the issuance of a notice to proceed or a permit unlawfully discriminates against Duhring, since defendant USFS does not require the issuance of notices to proceed or road use permits prior to use of the surface estate of the ANF by others with easements for the use of the surface estate in

the ANF, such as owners and operators of rail lines, electrical transmission lines and natural gas transmission lines.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court issue an order directing defendant the Forest Service as follows:

- a) compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 55 hereof;
- b) enjoining the defendant from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other operations Duhring may undertake in the future;
- c) concerning operations Duhring may undertake in the future, compelling the defendant to acknowledge Duhring's right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by Duhring;
- d) compelling the defendant to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling defendant to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;
- e) compelling the defendant to promptly meet, consult and negotiate in good faith with plaintiff when the Forest Service has concerns about OGM development operations proposed by plaintiff;
- f) compelling the defendant to remove timber from plaintiff's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by Duhring, or, when the OGM operator is willing to purchase the timber compelling the defendants to provide timely

invoices for the sale of timber, or compelling the Forest Service to pay for the added value of “cutting, skidding and decking” the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

g) enjoining the defendant from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

h) enjoining the defendant from threatening Duhring with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendants;

i) declaring that the failure to acknowledge Duhring’s right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the defendants to meet, consult and negotiate in good faith with Duhring regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate Duhring for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, Duhring’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by defendant, are violations of the right to substantive due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

j) compelling the defendant to in good faith negotiate cooperative use agreements with Duhring concerning the use and maintenance of roads in the ANF that are maintained by the USFS or Duhring and used by the USFS and Duhring;

k) enjoining the defendant from preventing Duhring's OGM operations in the ANF unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit to Duhring;

l) declaring that the defendant's preventing Duhring's OGM operations unless Duhring first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is a violation of the right to substantive due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Plaintiff also respectfully requests that the Court award attorneys' fees in Duhring's favor and against defendant the Forest Service.

Response: ADP denies the allegations of the first sentence of Paragraph 73. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 73.

Count VI

**Duhring v. Moore, Morse, Fallon, Scardina, Stovall, Connaughton, Marten,
Gydus, Haberberger and Mickle**

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

Count VI (Paragraphs 74-76) of Duhring's Second Amended Complaint was dismissed by the Court's March 5th Order.

Count VII

**Duhring v. Moore, Morse, Fallon, Scardina, Stovall, Connaughton, Marten
Gydus, Haberberger and Mickle**

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706 and Bivens Action

Procedural Due Process

Count VII (Paragraphs 77-80) of Duhring's Second Amended Complaint was dismissed by the Court's March 5th Order.

Count VIII

**Duhring v. Moore, Morse, Fallon, Scardina, Stovall, Connaughton, Marten
Gydus, Haberberger and Mickle**

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706 and Bivens Action

Substantive Due Process

Count VIII (Paragraphs 81-84) of Duhring's Second Amended Complaint was dismissed by the Court's March 5th Order.

Count IX

Duhring v. USFS

Little Tucker Act, 28 U.S.C. §1346(a)(2)

Pennsylvania Common Law – Breach of Contract

Repair and Maintenance of Surface

85. The averments of paragraphs 1 through 2 and 21 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 85, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

86. During 2006 and 2007 the USFS harvested timber from the ANF on land located in Sheffield Township, Warren County, Pennsylvania, adjacent to Henry's Mill Road ("Henry's Mills Project").

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 86 and therefore denies those allegations.

87. At the time of these USFS timber operations, and at the present time, Duhring owned and owns the OGM rights in certain real property located in the vicinity of the Henry's Mills Project in the ANF ("Duhring HMP Parcels").

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 87 and therefore denies those allegations.

88. Prior to the commencement of the Henry's Mills Project by the USFS, well locations and roads ("Duhring Facilities") were constructed for OGM operations and maintained by Duhring on the Duhring HMP Parcels for use by Duhring to develop its OGM resources in the Duhring HMP Parcels.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 88 and therefore denies those allegations.

89. During the course of the USFS Henry's Mills Project timber operations the USFS used the Duhring Facilities, subjecting them to wear and tear, and it damaged a pipeline maintained by Duhring for the transportation of OGM resources developed by Duhring from the Duhring HMP Parcels, resulting in a loss of natural gas owned by Duhring and a consequent loss of profits by Duhring.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 89 and therefore denies those allegations.

90. In August 2007, while the USFS was making repairs to Forest Road 148, a road maintained by the USFS, the USFS repeatedly struck and damaged pipelines owned by Duhring and used by Duhring to transport OGM resources developed by Duhring from Lots 8 and 9 ("Forest Road Pipeline"), resulting in a loss of natural gas owned by Duhring and a consequent loss of profits by Duhring.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 90 and therefore denies those allegations.

92. While the USFS as the owner of the servient surface estate has a right to use the surface estate, it also has the duty to have due regard for the rights of Duhring as the owner of the dominant estate. That is, the USFS has the duty to make reasonable contribution to the maintenance of the surface improvements maintained by Duhring when the USFS uses those surface improvements.

Response: Duhring's Second Amended Complaint is missing Paragraph 91. To the extent a response is necessary, the allegations are denied. ADP states that the allegations of Paragraph 92 are so vague and generalized that ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 92 and therefore denies those allegations.

93. The USFS demands payment from OGM operators for their use of roads constructed and maintained by the USFS, to compensate the USFS for the wear and tear of those roads, at a rate determined by the USFS and based on the miles of use of those roads by OGM operators as reported to the USFS by OGM operators ("USFS Rate").

Response: ADP admits the allegations of Paragraph 93, except for the word "demands". ADP states that the USFS is entitled to such payments.

94. On July 23, 2007 Duhring requested that the USFS inform ~~it~~ Duhring of the extent of ~~it's~~ the USFS's use of the roads on the Duhring HMP Parcel so that Duhring could determine the payment required of the USFS based on the USFS Rate. The USFS failed and refused to provide that information to Duhring and to otherwise compensate Duhring for its use of those roads.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 94 and therefore denies the allegations.

95. Duhring has incurred costs to repair the Forest Road Pipeline in the amount of \$2,184.20 and, on September 5, 2007, it requested reimbursement of those costs by the USFS, but the USFS failed and refused to reimburse Duhring in any amount for those repairs.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 95 and therefore denies the allegations.

96. The USFS has also failed and refused to reimburse Duhring for the cost of repair to the pipeline damaged by the USFS on the Duhring HMP Parcel and the cost of maintenance and repair of the well locations that were part of the Duhring Facilities related to the use of those well locations by the USFS.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court enter judgment in its favor and against defendant The Forest Service in an amount equal to the cost of maintenance and repair of the Duhring Facilities attributable to its use thereof, the cost of

repair of the pipelines damaged by the the Forest Service on the Duhring HMP Parcel and the cost of repair of the Forest Road Pipeline, which amounts are less than \$10,000.00.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of in the first sentence of Paragraph 96 and therefore denies those allegations. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 96.

Count X

Duhring v. USFS

Section 706 of the Administrative Procedure Act, 5 U.S.C. §706

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

97. The averments of 1 through 2 and of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 97, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

98. The USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by Duhring, the owner of the dominant estate.

Response: ADP denies the allegations of Paragraph 98 to the extent they purport to set out the full extent of the USFS and Duhring's right and obligations regarding the federally owned surface estate.

99. Defendant USFS has on multiple occasions in the past used well locations, tank batteries and roads constructed, installed, owned or used by Duhring ("Duhring Facilities").

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 99 and therefore denies the allegations.

100. The USFS has used the Duhring Facilities to conduct its own operations, including timber removal operations and materials storage, without prior notice to Duhring of its intent to conduct those operations, resulting in unreasonable interference with the enjoyment of the servitude by Duhring, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 100 and therefore denies the allegations.

101. It is likely that the USFS will use the Duhring Facilities in the future to conduct its operations, including timber removal operations and materials storage, and that its failure to provide prior notice of the same to Duhring will result in unreasonable interference with the

enjoyment of the servitude by Duhring, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court issue an order (1) compelling defendant The Forest Service to provide Duhring with 60 days advance written notice of its use of Duhring Facilities by submitting a proposed operating plan that includes the following information: (a) the location of the Duhring Facilities to be used, (b) the nature of the use by the USFS and (c) the time periods during which the use will occur, and requiring the USFS to in good faith negotiate modifications in the operating plan should Duhring object to the plan; (2) enjoining defendant The Forest Service from using Duhring Facilities without submitting an operating plan and negotiating modifications in the event of Duhring objections; and (3) declaring that failing to submit an operating plan and negotiate modifications in the event of Duhring objections constitutes unreasonable interference with the enjoyment of the servitude by Duhring.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 101 and therefore denies the allegations. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 101.

Count XI

Duhring v. USFS

Violation of Property Rights Under Quiet Title Act, 28 U.S.C. §2409a

Count XI (Paragraphs 102-106) of Duhring's Second Amended Complaint was dismissed by the Court's March 5th Order.

Count XII

Duhring v. USFS

Little Tucker Act, 28 U.S.C. §1346(a)(2)

Pennsylvania Common Law – Breach of Contract

Repair and Maintenance of Surface

107. The averments of 1 through 2, 21, and 51 through 53 of this Second Amended Complaint are incorporated herein by reference.

Response: In answer to Paragraph 107, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

108. While Duhring as the owner of the dominant subsurface estate has a right to use the surface estate, it also has the duty to have due regard for the rights of the USFS as the owner of the dominant estate. That is, Duhring has the duty to make reasonable contribution to the maintenance of the surface improvements maintained by the USFS when Duhring uses those surface improvements.

Response: ADP denies the allegations of Paragraph 108 to the extent that those allegations purport to set out or summarize the legal relationship between plaintiff and the USFS with regard to the federally owned surface estate.

109. The road use fee of \$14,092.70 is unreasonably high and even utilizing the USFS formula for calculating maintenance fees is several thousand dollars greater than the maintenance fee that should have been requested by the USFS.

WHEREFORE, plaintiff Duhring Resource Company respectfully requests that the Court enter judgment in its favor and against defendant The Forest Service in an amount equal to the difference between the amount of \$14,092.70 paid by Duhring under duress to the USFS and the actual cost of the maintenance commensurate with Duhring's planned use of the roads maintained by the USFS, which amount is less than \$10,000.00.

Response: ADP denies the allegations of Paragraph 109. ADP further denies that Duhring is entitled to any of the relief requested in Paragraph 109.

ALLEGHENY DEFENSE PROJECT'S AFFIRMATIVE DEFENSES

1. Plaintiff's claims in whole or in part are barred because plaintiff failed to exhaust its administrative remedies. ADP acknowledges that the Court's March 5th Order rejected this defense, but ADP reasserts it here solely to protect its right to pursue this defense in subsequent proceedings, including any appeal.
2. Plaintiff's claims under the APA fail to the extent it is not seeking relief regarding discrete, final agency actions. See *Norton v. SUWA*, 542 U.S. 55 (2004).

3. Plaintiff's claims should be dismissed because its allegations fail to state claims upon which relief can be granted.
4. Plaintiff lacks standing to assert claims under the APA to the extent it has failed to allege and cannot show any final discrete agency action that adversely affects or aggrieves plaintiff.
5. To the extent plaintiff is seeking any equitable relief, that relief is barred by plaintiff's unclean hands to the extent that plaintiff's actions or inactions have unnecessarily, unreasonably, or unlawfully harmed or polluted the federally-owned surface estate and nearby or adjacent air and water resources.