

**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
COMPLAINT IN INTERVENTION**

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

The Pennsylvania Oil and Gas Association (“POGAM”) brings this action as Plaintiff-Intervenor pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, the Quiet Title Act, 28 U.S.C. § 2409a, and 28 U.S.C. §§ 1331 and 1367, against Defendants the U.S. Forest Service; Kent P. Connaughton, Regional Forester of the Eastern Region of the Forest Service, in his official capacity; Leanne M. Marten, Forest Supervisor of the Allegheny National

Forest, in her official capacity; Robert T. Fallon, District Ranger of the Marienville Ranger District of the Allegheny National Forest, in his official capacity; Anthony V. Scardina, District Ranger of the Bradford Ranger District of the Allegheny National Forest, in his official capacity; Robert A. Stovall, Deputy District Ranger of the Bradford Ranger District of the Allegheny National Forest, in his official capacity; Robert Gydu, Uniformed Law Enforcement Officer of the Forest Service, in his official capacity; Jason J. Haberberger, Uniformed Law Enforcement Officer of the Forest Service, in his official capacity; and William Mickle, Uniformed Law Enforcement Officer of the Forest Service, in his official capacity.

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

Parties

1. Plaintiff-Intervenor Pennsylvania Oil and Gas Association ("POGAM") is a Pennsylvania non-profit corporation, with its principal place of business at 240 North Third Street, Harrisburg, Pennsylvania. POGAM is the trade association of the Commonwealth's independent oil and gas producers. POGAM promotes the general welfare of Pennsylvania's crude oil and natural gas exploration and production industry. POGAM and its members are committed to the economical and environmentally responsible development, production, and use of the Commonwealth's crude oil and natural gas resources.

Response: ADP admits the allegations in the first and second sentences of paragraph 1. ADP denies the allegations of the third and fourth sentences of Paragraph 1.

2. POGAM's membership includes corporations, individuals, and other business entities that own oil, gas, and mineral ("OGM") rights, both reserved and outstanding, within the Allegheny National Forest ("ANF"). Plaintiff Duhring Resource Company is a member of POGAM. As the owners of OGM rights within the ANF, POGAM's members have easements for the use of the surface estate that are dominant to the surface estate, giving POGAM's members the right under the federal and state law to the reasonable use of the surface estate to develop their OGM resources. POGAM's members have a direct, vested economic interest in their OGM rights within the ANF, and are injured by the unlawful actions undertaken by Defendant U.S. Forest Service and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect their OGM rights within the ANF.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in the first and fourth sentences of paragraph 2 and therefore denies those allegations. ADP admits the allegations in the second sentence of Paragraph 2. ADP denies the allegations in the third sentence of Paragraph 2 to the extent that those allegations purport to set out the full extent of POGAM's members' alleged rights and the right of the USFS to regulate use of the federally owned surface estate.

3. Defendant U.S. 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 3.

4. Defendant Kent P. Connaughton is the Regional Forester of the Eastern Region of the USFS, whose office is located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, and against whom this action has been brought in his official capacity.

Response: ADP admits the allegations in the first sentence of Paragraph 4. ADP further states that allegations against defendant Connaughton as an individual are now irrelevant after the Court's March 5th order.

5. Defendant Leanne M. Marten is the Forest Supervisor of the ANF, whose office is located at 222 Liberty Street, Warren, Warren County, Pennsylvania 16365, and against whom this action has been brought in her official capacity.

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

6. Defendant Robert T. Fallon 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 official capacity.

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

7. Defendant Anthony V. Scardina is the District Ranger of the Bradford Ranger District of the ANF, whose office is located at 29 Forest Service Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his official capacity.

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

8. Defendant Robert A. Stovall 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 official capacity. Defendant Stovall 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 in the first sentence of Paragraph 8. ADP further states that allegations against defendant Stovall as an individual are now irrelevant after the Court's March 5th order.

9. Defendant Robert Gyduis 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 official capacity.

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

10. Defendant Jason J. Haberberger 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 official capacity.

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

11. Defendant William Mickle 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 official capacity.

Response: ADP admits the allegations in the first sentence of Paragraph 11. ADP further states that allegations against defendant Mickle as an individual are now irrelevant after the Court's March 5th order.

Subject Matter Jurisdiction

12. 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 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 ("APA"), 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 APA, 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 against in Counts III, VI, and VII 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, and V, 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 APA, 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 APA, 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.

c. This Court has subject matter jurisdiction over the claims asserted in Counts II and VIII 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 has claimed or asserted an interest.

Response: ADP admits that this Court has subject matter jurisdiction over POGAM'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 POGAM's failure to exhaust its administrative remedies regarding any of those claims, or any of the other affirmative defenses set forth below, 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 are now irrelevant after the Court's March 5th Order.

Venue

13. 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 Connaughton, Marten, Fallon, Scardina, Stovall, Gydus, Haberberger, and Mickle are officials or 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 the property that is the subject of this action is located in this district.

Response: ADP admits the allegations of Paragraph 13.

14. 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 Duhring Resource Company (“Duhring”) resides in Warren County, Pennsylvania.

Response: ADP admits the allegations of Paragraph 14.

Cause of Action

15. 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 Plaintiff 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 15 and therefore denies those allegations.

16. 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 or information sufficient to form a belief regarding the truth of the allegations of Paragraph 16 and therefore denies those allegations.

17. 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 17. ADP further states that the allegations of Paragraph 17 are now irrelevant after the Court's March 5th Order.

18. 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 18 and therefore denies those allegations.

19. 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 (“NFMA”), 16 U.S.C. §§ 1600, *et seq.*

Response: ADP admits in part and denies in part the allegations of Paragraph 19. 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.

20. 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 20 because the common law of Pennsylvania is not the only applicable or controlling law regarding plaintiff's rights in the Parcels.

21. OGM estates in the ANF and other national forests, including estates held by Duhring and other members of Plaintiff-Intervenor POGAM, 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 21 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 21.

22. 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 22 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.

23. 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 23.

24. Section 2832 of the U.S. Forest Service Manual of Defendant USFS provides that the owner of outstanding OGM rights must furnish the Forest Supervisor of the particular national forest with 60 days' advance written notice of surface occupancy by submitting a proposed operating plan and other documents. Chapter 2, Section 2 of the Defendant USFS's 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 24 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.

25. The 60-day advance-notice procedure appearing in the Forest Service Manual and the ANF Handbook stems from a preliminary injunction issued by this Court in the *United States v. Minard Run Oil Co.*, No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980). That decision was based on Pennsylvania common law and 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 25 and therefore denies the allegations.

26. 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, Pub. L. No. 102-482, § 2508(a), 106 Stat. 3108-09 (1992) (codified in 30 U.S.C. § 226(o)) (“EPAAct”).

Response: ADP denies the allegations of Paragraph 26.

27. The *Minard Run* opinion did not require the OGM estate owner to first obtain Forest Service approval of a plan of operations or a notice to proceed, nor did it give the Forest Service the ability to extend discussions beyond the 60-day notice period. As ANF Forest

Supervisor Wright stated at a 1991 legislative oversight hearing, if negotiations do not produce a mutually-acceptable compromise in the 60-day period, the owner of the dominant OGM estate may proceed with development and make reasonable use of the USFS surface estate, subject to the federal surface owner's ability to contest in court that the operations are causing unnecessary damage.

Mr. Kostmayer. How much authority do you think you have to control the impact of access?

Mr. Wright. As a result of the Minard Run decision, we have got considerably more control than we had prior to that. And the way we go about that is that we work with the operator to renegotiate the relocation....

Mr. Wright. We do not give people permission to drill. That is their right. It is not a Federal action.

Mr. Kostmayer. You do not have to approve a plan?

Mr. Wright. No, sir. We review the plan and negotiate a plan with them. We do not approve a plan.

Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania, Oversight Hearing Before the Subcomm. on Energy and Env't of the House Comm. on Interior and Insular Affairs, 102d Cong., 1st Sess. 75-79, 113 (1991).

Response: ADP denies the allegations of Paragraph 27 to the extent those allegations purport to state legal conclusions regarding the court opinion or the partial quotation set forth therein. ADP admits the accuracy of that partial quotation.

28. The 1992 EPAct provisions confirm the regulatory role of the Commonwealth of Pennsylvania regarding oil and gas development in the ANF by stating: "Nothing . . . shall be

construed to affect the authority of any State in which the lands are located to impose any requirements with respect to such oil and gas operations.” 108 Stat. 3108.

Response: ADP denies the allegations of Paragraph 28.

29. While the 1980 *Minard Run* opinion was an interpretation of the Pennsylvania common law, that judge-made law has now been supplemented by Pennsylvania statutory law. 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* and codified in the EPAct. 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 29. ADP denies the allegations in the first, second and third sentences of Paragraph 29. ADP admits the allegations in the fourth sentence of Paragraph 29.

30. 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), 601.202(a).

Response: ADP admits the allegations of Paragraph 30.

31. The Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the *Minard Run* decision, the common law of Pennsylvania, the EPAct, 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 31.

32. Defendants Fallon, Scardina, Stovall, and Marten, their subordinates on their instructions, and Defendant Marten's predecessor in office (Kathleen S. Morse) 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 USFS District in which the property to be developed is located issues a "notice to proceed"; and, on multiple occasions, those Defendants and/or their subordinates have threatened criminal prosecution should holders of OGM rights 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 32 and therefore denies the allegations.

33. 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 EPAct. 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 33 and therefore denies the allegations.

34. The USFS notice to proceed with respect to Lot 7 contained economically burdensome provisions that violate, and exceed the USFS's authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPAct, and POGA, and that 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 34 and therefore denies the allegations.

35. 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 35 and therefore denies the allegations.

36. 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 36 and therefore denies the allegations.

37. 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 37 and therefore denies the allegations.

38. The USFS refused to reduce the amount of the invoice; refused to remove the timber itself; refused to offer the timber for sale to a third party by public auction or otherwise; 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 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 38 and therefore denies the allegations.

39. It was not until February 22, 2008 that the USFS gave its express permission to Duhring to cut the timber, provided that Duhring “cut and stack” the marked trees. Thereafter the USFS withdrew its permission to “cut and stack” as set forth more fully at paragraph 47 below

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 39 and therefore denies the allegations.

40. 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 EPAct. 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 40.

41. 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 41 and therefore denies the allegations.

42. The notice provided with respect to Lot 9 contained economically burdensome provisions that violate, and exceed the USFS's authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPOGA, and POGA, and that 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 42.

43. 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 EPAct. 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 43 and therefore denies the allegations.

44. 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 44 and therefore denies the allegations.

45. The USFS refused to reduce the amount of the invoice; refused to remove the timber itself; refused to offer the timber for sale to a third party by public auction or otherwise; 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 would not compensate Duhring for its removal of the

timber to decking sites sought by the USFS. In addition, 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 45 and therefore denies the allegations.

46. 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 46 and therefore denies the allegations.

47. 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 47 and therefore denies the allegations.

48. 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 48 and therefore denies the allegations.

49. 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, and exceed the USFS’s authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPAct, and POGA, and that 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 49 and therefore denies the allegations.

50. 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, and in excess of the USFS's authority under, the NFMA, 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, EPAct, 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 50 and therefore denies the allegations.

51. 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 51 and therefore denies the allegations.

52. 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 52 and therefore denies the allegations.

53. 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 53 and therefore denies the allegations.

54. 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 54 and therefore denies the allegations.

55. Preventing OGM operations on February 8 through February 11, 2008 on Lots 7, 8, and 9 under these circumstances violated, and exceeded the USFS's authority under, the Weeks Act, the EPAct, the POGA, the NFMA, 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 55 and therefore denies the allegations.

56. 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 EPAact, 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 56 and therefore denies the allegations.

57. 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 and the OGM rights of other POGAM members, to their substantial financial detriment.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 57 and therefore denies the allegations.

Count I

POGAM v. USFS, 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

58. The averments of paragraphs 1 through 57 of this Complaint are incorporated herein by reference.

Response: In answer to Paragraph 58, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

59. The failure of the USFS to acknowledge POGAM member 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 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 59 and therefore denies the allegations.

60. The aforementioned decisions and the execution of those decisions have as their basis a determination on the part of Defendants to unlawfully discourage the development of OGM resources in the ANF by Duhring and other POGAM members.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 60 and therefore denies the allegations.

61. The aforementioned conduct by Defendants is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "in excess of statutory jurisdiction,

authority, or limitation,” and constitutes agency action “unlawfully withheld or unreasonably delayed,” within the meaning of the APA, 5 U.S.C. § 706.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 61 and therefore denies the allegations.

62. The positions of Defendants Fallon, Scardina, Stovall, Connaughton, and Marten 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-Intervenor POGAM respectfully requests that the Court issue an order directing 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 56 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 OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

(c) concerning operations Duhring or other similarly situated POGAM members may undertake in the future, compelling the Defendants to acknowledge such companies’ right to proceed with operations permitted under POGA within 60 days after

notices of intent to conduct OGM development operations are provided by the holders of such rights;

(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 or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, 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 any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's

officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator'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 an OGM operator 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 the OGM operator 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, an OGM operator'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 negotiate cooperative use agreements in good faith with OGM operators concerning the use and maintenance of roads in the ANF that are maintained by the USFS or the OGM operator and used by the USFS and the OGM operator;

(k) enjoining the Defendants from conditioning OGM operations in the ANF on the OGM operator's payment of a road use fee unilaterally determined by the USFS and on the USFS's subsequent issuance of a road use permit to the operator; and

(1) declaring that the Defendants' prevention of OGM operations unless the OGM operator 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.

Response: ADP admits the allegations of in the first sentence of Paragraph 62 but denies that POGAM is entitled to any of the relief requested in Paragraph 62. 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

POGAM v. USFS

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

Count II (Paragraphs 63-66) of POGAM's Complaint in Intervention 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

67. The averments of paragraphs 1 through 66 of this Complaint are incorporated herein by reference.

Response: In answer to Paragraph 67, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

68. 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 the owner of the dominant estate, including holders of OGM rights.

Response: ADP denies the allegations of Paragraph 68 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.

69. 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.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 69 and therefore denies the allegations.

70. The aforementioned decisions and the execution of those decisions have as their basis a determination on the part of 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 70 and therefore denies the allegations.

71. The aforementioned conduct by Defendants is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” and “in excess of statutory jurisdiction, authority, or limitation,” and constitutes agency action “unlawfully withheld or unreasonably delayed,” within the meaning of the APA, 5 U.S.C. § 706.

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS 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 56 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 OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

(c) concerning operations Duhring or other similarly situated POGAM members may undertake in the future, compelling the Defendants to acknowledge such

companies' right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by the holders of such rights;

(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 or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, 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 any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's

officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator'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 an OGM operator 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 the OGM operator 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, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by the OGM operator.

(j) compelling the Defendants to negotiate cooperative use agreements in good faith with OGM operators concerning the use and maintenance of roads in the ANF that are maintained by the USFS or the OGM operator and used by the USFS and the OGM operator;

(k) enjoining the Defendants from conditioning OGM operations in the ANF on the OGM operator's payment of a road use fee unilaterally determined by the USFS and on the USFS's subsequent issuance of a road use permit to the operator; and

(1) declaring that the Defendants' prevention of OGM operations unless the OGM operator 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 the operator.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 71 and therefore denies the allegations ADP further denies that POGAM is entitled to any of the relief requested in Paragraph 71.

Count IV

POGAM v. USFS

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

Procedural Due Process

72. The averments of paragraphs 1 through 71 of this Complaint are incorporated herein by reference.

Response: In answer to Paragraph 72, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

73. Duhring and other POGAM members have legal right to the use and enjoyment of their OGM Parcels under Pennsylvania law, and the execution of the aforementioned decisions has substantially interfered with that use and enjoyment, diminishing the value of their OGM

rights and diminishing their profits by way of increasing their operational expenses and decreasing its gross revenue.

Response: ADP denies the allegations in the first clause of Paragraph 73 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 73 and therefore denies the allegations.

74. Defendant USFS's interference with POGAM members' use and enjoyment of these Parcels was accomplished in the past and will be accomplished in the future without affording any procedural due process to the holders of OGM rights.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the remaining allegations of Paragraph 74 and therefore denies the allegations.

75. Defendant USFS's interference with POGAM members' use and enjoyment of these Parcels constitutes agency action "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS 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 56 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 OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

(c) concerning operations Duhring or other similarly situated POGAM members may undertake in the future, compelling the Defendants to acknowledge such companies' right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by the holders of such rights;

(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 or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, 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 any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator’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 an OGM operator 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 the OGM operator 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, an OGM operator’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, 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 Defendants to negotiate cooperative use agreements in good faith with OGM operators concerning the use and maintenance of roads in the ANF that are maintained by the USFS or the OGM operator and used by the USFS and the OGM operator;

(k) enjoining the Defendants from conditioning OGM operations in the ANF on the OGM operator's payment of a road use fee unilaterally determined by the USFS and on the USFS's subsequent issuance of a road use permit to the operator; and

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator 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.

Response: ADP denies the allegations of Paragraph 75. ADP further denies that POGAM is entitled to any of the relief requested in Paragraph 75.

Count V

POGAM v. USFS

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

Substantive Due Process

76. The averments of paragraphs 1 through 75 of this Complaint are incorporated herein by reference.

Response: In answer to Paragraph 76, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

77. Defendant USFS's interference with the use and enjoyment of the Parcels by Duhring and other POGAM members 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 77 and therefore denies the allegations.

78. Defendant USFS's actions in preventing Duhring and other POGAM members from using the surface estate in the ANF in the absence of the issuance of a notice to proceed or a permit unlawfully discriminates against Duhring and other POGAM members and denies them substantive due process, 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.

Response: ADP denies the allegations of Paragraph 78.

79. Defendant USFS's actions in preventing Duhring and other POGAM members from using the surface estate in the ANF in the absence of the issuance of a notice to proceed or

a permit constitutes agency action “contrary to constitutional right, power, privilege, or immunity” within the meaning of the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS 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 56 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 OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

(c) concerning operations Duhring or other similarly situated POGAM members may undertake in the future, compelling the Defendants to acknowledge such companies’ right to proceed with operations permitted under POGA within 60 days after notices of intent to conduct OGM development operations are provided by the holders of such rights;

(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 or other similarly situated POGAM members when the Forest

Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, 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 any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator'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 an OGM operator 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 the OGM operator 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, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, 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 Defendants to negotiate cooperative use agreements in good faith with OGM operators concerning the use and maintenance of roads in the ANF that are maintained by the USFS or the OGM operator and used by the USFS and the OGM operator;

(k) enjoining the Defendants from conditioning OGM operations in the ANF on the OGM operator's payment of a road use fee unilaterally determined by the USFS and on the USFS's subsequent issuance of a road use permit to the operator; and

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator 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.

Response: ADP denies the allegations of Paragraph 79. ADP further denies that POGAM is entitled to any of the relief requested in Paragraph 79.

Count VI

**POGAM v. 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 80-83) of POGAM’s Complaint in Intervention was dismissed by the Court’s March 5th Order.

Count VII

POGAM v. USFS

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

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

Count VII (Paragraphs 84-89) of POGAM’s Complaint in Intervention was dismissed by the Court’s March 5th Order.

Count VIII

POGAM v. USFS

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

90. The averments of paragraphs 1 through 89 of this Complaint are incorporated herein by reference.

Response: In answer to Paragraph 90, ADP incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

91. Defendant 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 the owner of the dominant estate, including holders of OGM rights.

Response: ADP denies the allegations of Paragraph 91 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.

92. Defendant USFS has on multiple occasions in the past used well locations, tank batteries and roads constructed, installed, owned or used by an OGM operator (“OGM Operator Facilities”).

Response: 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. Defendant USFS has used the OGM Operator Facilities to conduct its own operations, including timber removal operations and materials storage, without prior notice to OGM operator of its intent to conduct those operations, resulting in unreasonable interference with the OGM operator’s enjoyment of the servitude, diminishing the value of its OGM rights,

clouding its title thereto 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 93 and therefore denies those allegations.

94. In view of this USFS past practice, it is likely that the USFS will use OGM Operator 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 the OGM operator will result in unreasonable interference with the OGM operator's enjoyment of the servitude, 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-Intervenor POGAM respectfully requests that the Court issue an order (1) compelling Defendant USFS to provide OGM operators with 60 days advance written notice of its use of OGM Operator Facilities by submitting a proposed USFS operating plan that includes the following information: (a) the location of the OGM Operator 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 negotiate modifications in the operating plan in good faith should the OGM operator object to the plan; (2) enjoining Defendant USFS from using OGM Operator Facilities without submitting an operating plan and negotiating modifications in the event of OGM operator objections; and (3) declaring that failing to submit an operating plan and negotiate modifications in the event of OGM operator objections is inconsistent with the

operator's private property rights recognized in accordance with the statutory, common law, and other authorities incorporated herein.

Response: ADP lacks knowledge or information sufficient to form a belief regarding the truth of the allegations of Paragraph 94 and therefore denies those allegations. ADP further denies that POGAM is entitled to any of the relief requested in Paragraph 94.

THE ALLEGHENY DEFENSE PROJECT'S AFFIRMATIVE DEFENSES

1. POGAM's claims in whole or in part are barred because POGAM 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. POGAM's claims under the APA fail because it is not seeking relief for itself regarding discrete agency actions. See *Norton v. SUWA*, 542 U.S. 55 (2004).
3. POGAM's claims should be dismissed because its allegations fail to state claims upon which relief can be granted.
4. POGAM lacks standing to assert claims under the APA because it has failed to allege and cannot show any final discrete agency action that adversely affects or aggrieves POGAM.
5. POGAM had no right to intervene and should not have been allowed to intervene as a plaintiff under FRCP 24 because POGAM itself has no legally protected interests that are put at issue by this litigation and that could entitle it to its own judgment, and, to the extent it had such interests, those interests are already adequately represented by the plaintiff Duhring.

6. To the extent POGAM is seeking a judgment or ruling from this Court regarding the rights held by those with interests in real property, POGAM is not entitled to such a judgment or ruling because it alleges no such ownership interest by it, and POGAM in fact does not itself hold or own any such interest in any real property in the Allegheny National Forest.
7. To the extent POGAM is seeking any equitable relief, that relief is barred by POGAM's or its member's unclean hands to the extent that POGAM's or its members' actions or inactions have unnecessarily, unreasonably, or unlawfully harmed or polluted the federally-owned surface estate and nearby or adjacent air and water resources.