

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

DUHRING RESOURCE COMPANY, : CIVIL ACTION NO. 07-314  
Plaintiff :  
and : Judge McLaughlin  
PENNSYLVANIA OIL AND GAS, :  
Plaintiff-Intervenor :  
v. :  
THE FOREST SERVICE, RANDY :  
MOORE, KATHLEEN M. MORSE, :  
ROBERT T. FALLON, ANTHONY V. :  
SCARDINA, ROBERT A. STOVALL, :  
KENT P. CONNAUGHTON, :  
LEANNE M. MARTEN, ROBERT :  
GYDUS, JASON J. HABERBERGER :  
and PHILIP MICKLE, :  
Defendants :  
and :  
ALLEGHENY DEFENSE PROJECT, :  
Defendant-Intervenor :

**ALLEGHENY DEFENSE PROJECT'S BRIEF IN SUPPORT**  
**OF MOTION TO DISMISS**  
**PLAINTIFF-INTERVENOR'S COMPLAINT**

AND NOW, comes the Defendant-Intervenor, the Allegheny Defense Project, Inc. (hereinafter "ADP"), by and through its attorneys, Quinn, Buseck, Leemhuis, Toohey & Kroto, Inc., and, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules

of Civil Procedure, respectfully move this Honorable Court to issue an Order dismissing Plaintiff-Intervenor's Complaint in its entirety with prejudice.

## **I. INTRODUCTORY STATEMENT**

In its lengthy eight count Complaint, Plaintiff-Intervenor, the Pennsylvania Oil and Gas Association (hereinafter "POGAM"), sets forth numerous claims involving its alleged rights concerning Plaintiff's oil and gas development operations in Lots 7, 8 and 9 and Warrant 3672 (collectively "Parcels"). Lot 8 contains reserved mineral rights that are mineral rights retained by a grantor in a deed conveying land to the United States. (Forest Service Manual 2830.5(2))<sup>1</sup> Lots 7 and 9 and Warrant 3672 are outstanding mineral rights where the 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. (FSM 2830.5(4))<sup>2</sup> Although POGAM offers a variety of creative legal theories for each claim, almost all of those claims arise from the same discrete final agency action taken by Defendants in the form of a written "Notice to Proceed" for each of the Parcels. Specifically, POGAM alleges that "the economically-burdensome provisions imposed by the notices to proceed issued by the USFS" for each of the Parcels violates Plaintiff's and POGAM's legal rights. (Complaint, ¶ 57)

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<sup>1</sup> <http://www.fs.fed.us/geology/2830.html>

<sup>2</sup> Id.

Defendant-Intervenor joins the Defendants' Brief in Support of Motion to Dismiss POGAM's Complaint. In addition, Defendant-Intervenor respectfully requests that the Court dismiss POGAM's Complaint in its entirety on the grounds that this Court lacks subject matter jurisdiction because POGAM does not have standing, cannot state claims for relief, and, even if it could state claims for relief, failed to exhaust its administrative remedies for the claims in Counts I-VI. POGAM, in fact, is only seeking to state claims regarding specific real property interests purportedly held by Plaintiff Duhring or other generalized and unspecified real property interests purportedly held by unidentified POGAM members. Legally, POGAM has no protectable rights in Duhring's real property interests and its general assertions regarding the property interests of its members are equally insufficient to give it standing or to state claims for relief. Moreover, if POGAM did have legally protectable interests, it was required to exhaust its administrative remedies before coming before this Court to protect those alleged property rights.

POGAM did not plead that it filed administrative appeals for any of the claims it raises in Counts I-VI of its Complaint. Defendant-Intervenor filed a Freedom of Information Act (FOIA) request with Defendants on June 25, 2008, requesting all documents "related to any administrative appeal filed since June 25, 2003, pursuant to 36 CFR part 215, part 251, or any other applicable regulations by Duhring Resources and/or the Pennsylvania Oil and Gas Association including, but not limited to, any administrative appeals filed regarding Duhring Resources' oil and gas operations located in" the four Parcels at issue here. On July 30, 2008, Defendants responded by

letter stating “Leanne Marten, Allegheny NF Supervisor, verified that a search for responsive records was completed and no records were found responsive to your FOIA request.” Thus, it is clear that POGAM failed to exhaust its administrative remedies before bringing this action.

## II. LEGAL STANDARDS

### A. Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1)

When a court considers a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), it must first determine whether the challenge to jurisdiction questions the complaint as deficient facially or whether the motion questions the existence of jurisdiction in fact. Poling v. K. Hovnanian Ent., 99 F.Supp.2d 502, 515 (D.N.J. 2000), appeal dismissed, 32 Fed.Appx. 32, 2002 WL 521705 (3<sup>rd</sup> Cir. 2002). If it is a facial challenge, then the court must consider all of the allegations in the complaint as true. If a defendant challenges subject matter jurisdiction in fact, however “no presumptive truthfulness attaches to plaintiff’s allegations and the Court may weight the evidence to satisfy itself that subject matter jurisdiction exists in fact.” Id. The burden of establishing jurisdiction lies with the plaintiff. Id. In the instant matter, Defendant-Intervenor challenges certain of the allegations in Plaintiff-Intervenor’s Complaint in fact. Therefore, no presumption of truthfulness attaches to such allegations.

**B. Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)**

In Morse v. Lower Merion School District, 132 F.3d 902, 906 (3<sup>rd</sup> Cir. 1997), the Court stated, “[a] Rule 12(b)(6) motion should be granted if it appears to a certainty that no relief could be granted under any set of facts which could be proved.” Additionally, “if plaintiff fails either to plead a cause of action or to demonstrate that damages are appropriate as a matter of law, the complaint is dismissed under Federal Rule of Civil Procedure 12(b)(6).” United States v. Stanley, 483 U.S. 669, 692, n.7 (1987). Although courts reviewing Rule 12(b)(6) motions generally consider only the allegations in the complaint, courts are free to examine any exhibits attached thereto, other undisputed documents plaintiff relied upon, other items appearing in the case record, and matters of public record. Raines v. Haverford College, 849 F. Supp. 1009, 1010 (E.D. Pa. 1994); Indeed, if a court could not consider such documents, “a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document upon which [he] relied.” Interfaith Community Org. v. Allied Signal, Inc., 928 F.Supp. 1339, 1345 (D.N.J. 1996) (quoting Dykes v. Southeastern Pa. Trans. Auth., 68 F.3d 1564, 1567, n.3 (3<sup>rd</sup> Cir. 1995)).

### III. ARGUMENT

#### A. POGAM does not have standing and cannot state claims for relief

In addition to the problems identified in the Federal Defendants' motion to dismiss, POGAM's claims also fail for a number of additional reasons. Plaintiff is seeking relief based on its allegations that it has certain privately owned property rights regarding the oil and gas resources underlying four parcels that it specifically identifies in its pleadings. (Second Amended Complaint, ¶¶ 16-19) Plaintiff also identifies certain actions or decisions by Defendants that are targeted on its specific alleged property interests. (Second Amended Complaint, ¶¶ 33, 41, 48) POGAM's complaint, in contrast, alleges no specific property interest that it owns. Instead, it points to the same parcels identified by Plaintiff, notes that Plaintiff is a member of POGAM, and also alleges that its other members own other, unspecified oil and gas rights that may be impacted by other unspecified actions or decisions by the federal Defendants. (E.g., Complaint, ¶ 2) Under such alleged facts, POGAM does not have Article III standing to seek relief regarding the specific, real property interests of its members and it cannot state valid claims for such relief under the substantive law.

**1. POGAM does not have standing**

Federal courts recognize associational standing, the ability of an organization to pursue claims on behalf of its members, when certain requirements have been met. One of those requirements is that (absent some specific statutory authorization which does not exist here) “neither the claim presented nor the relief requested requires the participation of individual members in the lawsuit.” Comm. For Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F.Supp.2d 1146, 1161 (D.Nev. 2005), quoting, Hunt v. Wash. State Apple Adver. Comm., 432 US 333, 343 (1977). In a case such as this where POGAM is asserting claims like common law trespass and to quiet title (POGAM Compl. Counts II, III, VI, VII and VIII), claims that clearly turn on the specific facts and scope of the real property interests at issue, an organization does not have associational standing to assert such claims on behalf of its members. See Lake Tahoe, 365 F.Supp. 2d at 1163-1164. Thus, POGAM does not have standing to assert its members interests under Counts II, III, VI , VII and VIII and those claims must be dismissed to the extent that they demand such relief.

**2. POGAM cannot state claims for relief**

Even if POGAM had standing to assert the claims in its Complaint, each of those claims also fail under the applicable substantive law.

i. **POGAM's APA claims must be dismissed**

POGAM purports to assert six of its eight claims under the APA. See POGAM Compl. Counts I, III, IV, V, VI, and VII. Under each of those claims, POGAM purports to seek relief regarding certain actions by the Defendants that allegedly harm the specific private property interests claimed by Duhring. See, e.g., Count I, Request for Relief (a). POGAM, however, also seeks relief regarding unspecified actions by the Federal Defendants regarding the private property of other unspecified POGAM members. See, e.g., Count III, Request for Relief (b). Under the APA, a plaintiff can only seek relief if it has been adversely affected or aggrieved by specific, final agency action. POGAM itself has no property right or interests in the Duhring oil and gas rights put at issue by Plaintiff Duhring's claims. As ADP addresses in more detail below, POGAM, therefore, has not been aggrieved within the meaning of the APA by any specific actions by the Federal Defendants regarding Duhring's alleged property rights. As for POGAM's attempt to state claims under the APA regarding unspecified actions and unspecified property interests, those claims also fail under the APA. As the Supreme Court explained in Lujan v. National Wildlife Federation, 497 US 871, 892 (1990), "the flaws in an entire 'program' consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members." POGAM here is seeking exactly what the Supreme Court prohibited in

Lujan--to obtain judicial review of a whole series of actions, including future actions, based on how the federal defendants have acted in a few specific circumstances that directly impact only one party, Duhring. Such “programmatic” relief is simply not available under the APA. For the reasons set forth above, Counts I, III, IV, V, VI and VII must be dismissed.

ii. **POGAM’s APA/trespass claims require an actual property interest**

Under Counts III, VI and VII , POGAM purports to state APA claims based on common law trespass. Trespass claims, however, can only be pursued by a plaintiff who has an actual interest in the property at issue. See, e.g., Hennigan v. Atlantic Refining Co., 282 F.Supp. 667, 679 (E.D.PA 1967). POGAM has no protectable property interest in Duhring’s oil and gas interests or in the private property interests of any of its members. Counts III, VI and VII, therefore, fail to state claims for relief and must be dismissed.

iii. **A quiet title claim also requires an alleged interest in the property at issue**

In Counts II and VIII, POGAM purports to bring claims under the Quiet Title Act, 28 USC Sec. 2409a. Such claims, however, require an actual alleged title or ownership interest in the real property at issue. 28 USC Sec 2409a(d); Borough of

Maywood v. US, 679 F.Supp. 413, 418 (D.N.J. 1988); Landow v. Carmen, 555 F.Supp. 195, 197 ( D.MD. 1983). POGAM has not alleged any such interest in the Duhring oil and gas interests or in any other property interest owned by its members. Counts II and VIII, therefore, also fail to state a claim and must be dismissed.

**B. This Court lacks subject matter jurisdiction because Plaintiff did not exhaust its administrative remedies**

Finally, if POGAM had legally protectable interests regarding the decisions by the Federal Defendants that are specifically identified in it and Duhring's Complaints, its claims regarding such agency decisions must be dismissed because POGAM failed to exhaust its administrative remedies.

Almost all of the alleged misconduct by the Defendants could have been raised in administrative appeals pursuant to 36 CFR § 251.82(a) when the Defendants issued the Notice to Proceed for each of the Parcels.<sup>3</sup> POGAM, however, chose to bypass the established appellate process and ask this Court to address issues that could have been, and legally should have been, addressed or resolved by the Defendants in the context of a legally mandatory administrative appeal. Thus, it is premature and inappropriate for POGAM to now ask this Court for relief when it failed to exhaust its administrative remedies. POGAM's failure to submit such a legally required appeal deprives this

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<sup>3</sup> Defendant-Intervenor does not direct this argument at Counts VII and VIII because it appears that the alleged actions or inactions about which Plaintiff-Intervenors are complaining may have occurred after the Notices to Proceed had been issued and any opportunity for an administrative appeal had passed. In any case, Counts VII and VIII fail for the reasons set forth in Defendants' Brief in Support of Motion to Dismiss.

court of jurisdiction to consider all of its claims in Counts I-VI and requires that those claims be dismissed pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(1) and (6) with prejudice.

In Kleissler v. United States Forest Service, the Third Circuit found that Plaintiff failed to exhaust his administrative remedies when he raised claims in the complaint that differed significantly from the claims raised in the administrative appeal. In regards to Counts I-VI of POGAM's Complaint, the Court need not even consider the differences between the issues raised at the administrative appeal stage with the issues raised in the complaint because POGAM did not even file an administrative appeal for any of the claims for which it now seeks relief with the appropriate reviewing officer of the Defendants' agency for Counts I-VI. The Third Circuit emphatically stated that:

It is axiomatic that we cannot review issues that have not been passed on by the agency...whose action is being reviewed.

(Kleissler v. United States Forest Service, 183 F.3d 196 (3<sup>rd</sup> Cir. 1999)) (citing New Jersey v. Hufstedler, 724 F.2d 34, 36 n.1 (3<sup>rd</sup> Cir. 1983), rev'd on other grounds, 470 U.S. 632, 105 S.Ct. 1555 (1985). (internal quotes omitted). Additionally,

[t]he plain language of the applicable statutes and Code of Federal Regulations precludes an objector to a forest management project from bringing a claim to federal court without first exhausting all administrative remedies. Forest Service regulations mandate that all concerns be placed in writing and submitted to the appropriate reviewing officer. We are not at liberty to relax these standards.

(Kleissler v. United States Forest Service, 183 F.3d 196 (3<sup>rd</sup> Cir. 1999))

The applicable regulations for this court to consider are found at 36 CFR Part 251, subpart C. These regulations mirror the appeal regulations found at 36 CFR Part 215

that the court relied on in Kleissler in that both appeal regulations explicitly state that “any filing for Federal judicial review” is both “premature and inappropriate” unless the plaintiff has first sought to resolve the dispute by invoking and exhausting the procedures of the appropriate subpart. (See, 36 CFR §§ 215.21, 251.101);<sup>4</sup> see also, Western Radio Services v. United States Forest Service, 2008 U.S. Dist. Lexis 11203, \*16 (D. Or. February 12, 2008)).

Almost all of POGAM’s claims, specifically Counts I-VI, are governed by 36 CFR § 251.82(a) as they relate to Defendants’ “written instruments to occupy and use National Forest System lands.” Specifically, the regulations state:

The rules of this subpart govern appeal of written decisions of Forest Service line officers related to issuance, denial, or administration of the following written instruments to occupy and use National Forest System lands, including but not limited to:

- (6) Permits and agreements regarding mineral materials (petrified wood and common varieties of sand, gravel, stone, pumice, pumicite, cinder, clay and other similar materials) under 36 CFR 228, subpart C.
- (7) Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR part 251, subpart A.
- (11) Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(36 CFR § 251.82(a))

The “written instrument” for each of the four Parcels at issue is the “Notice to Proceed” and stipulations attached thereto for Plaintiff Duhring’s submitted Surface

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<sup>4</sup> In Kleissler, the Court cited 36 CFR § 215.20. The applicable regulation governing judicial proceedings, however, is 36 CFR § 215.21.

Use Plans of Operations. Indeed, the Notice to Proceed, with an attached final Surface Use Plan of Operations approved by the Forest Service, provides the conditions that constitute reasonable access across National Forest System lands for the exercise of reserved and/or outstanding mineral rights. POGAM acknowledges that it is indeed the Notice to Proceed that is the source for nearly all of its claims:

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' ...

(Complaint, ¶ 32)

POGAM contends that each "Notice to Proceed:"

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.

(Complaint, ¶¶ 34, 42, 49.)<sup>5</sup>

## 1. Permits and agreements regarding mineral materials

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<sup>5</sup> Plaintiff-Intervenor's Complaint at ¶ 49 distinguishes Lot 8 (reserved) from Warrant 3672 (outstanding) in the part of its claims regarding the failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

POGAM implores this court to “enjoin the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations.” (Complaint, ¶¶ 62(g), 66(g), 71(g), 75(g), 79(g), and 83(g))

The use of stone from pits located on National Forest System land is authorized through the use of a “contract or permit” pursuant to 36 CFR § 228.43. These regulations require the authorized officer to ensure that an environmental analysis is conducted for all planned disposals of mineral materials (§ 228.43(a)(3)), that such disposals conform to approved land and resource management plans (§ 228.43(a)(4)), and that mineral materials may be disposed of only if the authorized officer determines that the disposal is not detrimental to the public interest (§ 228.43(c)).

The “contract or permit” governing the use of stone pits in the context of Plaintiff’s oil and gas development operations in the four Parcels is the “Notice to Proceed” authorizing Plaintiff’s access to and surface occupancy of the Allegheny National Forest. The regulations clearly state:

Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR part 251, subpart C.

(36 CFR § 228.14)

POGAM did not appeal Defendants’ stipulations regarding the use of stone from pits on the Allegheny National Forest in any of the Notices to Proceed or attached Surface Use Plans of Operations for the four Parcels.

**2. Permits authorizing exercise of mineral rights reserved in conveyance to the United States**

With regard to Lot 8, which are reserved mineral rights, 36 CFR § 251.15 governs the exercise of mineral rights reserved in conveyances to the United States:

None of the lands in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for authorized programs of the Forest Service until the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall have applied for and received a permit authorizing such use, occupancy, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the reserved rights.

(36 CFR § 251.15(a)(2)(i))

Additionally, as already stated, the appeal regulations apply to:

Permits authorizing exercise of mineral rights reserved in conveyance to the United States issued under 36 CFR part 251, subpart A.

(36 CFR § 251.82(a)(7))

The “permit” in this instance is the “Notice to Proceed” authorizing the exercise of Plaintiff’s reserved mineral rights. POGAM, however, did not appeal Defendants’ Notice to Proceed for Lot 8.

**3. Approval/non-approval of Surface Use Plans of Operations**

With regards to Lots 7 and 9 and Warrant 3672, which are outstanding mineral rights, Forest Service Manual 2832 governs the exercise of outstanding mineral rights.

The mineral owner or lessee:

[m]ust provide the Forest Supervisor with 60 days advance written notice of surface occupancy by submitting a proposed operating plan.

(FSM 2832.2)

The appeal regulations apply to:

Approval/non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area.

(36 CFR § 251.82(a)(11))

The “approval” in these instances is, again, the “Notice to Proceed” related to the authorized use and occupancy of a particular site or area on the Allegheny National Forest. POGAM, however, did not appeal Defendants’ Notices to Proceed for Lots 7 and 9 and Warrant 3672.

**C. POGAM’s claims in its Complaint must be dismissed**

**1. POGAM failed to exhaust its administrative remedies in Counts I, II and V**

POGAM alleges numerous “failures” of the Defendants in Counts I and II. (Complaint, ¶¶ 59, 64) All of these allegations stem from Defendants’ issuance of the Notices to Proceed and attached Operating Plans, which POGAM references in the very next paragraph of each count.<sup>6</sup> POGAM’s frustration with these alleged failures was

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<sup>6</sup> “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 [by Duhring and other POGAM members].” (Complaint, ¶¶ 60, 65)

not conveyed to the Defendants in an administrative appeal. As a result, Counts I and II must be dismissed since POGAM failed to exhaust its administrative remedies.

(Kleissler, 183 F.3d at 207; 36 CFR § 251.101)

Regarding Count V, POGAM alleges that Defendants' "interference" by requiring a Notice to Proceed before Plaintiff can use the surface estate unlawfully discriminates against Plaintiff. (Complaint, ¶¶ 78-79) POGAM did not raise this in an administrative appeal even though it could have after the issuance of the Notices to Proceed. As a result, Count V must be dismissed since POGAM failed to exhaust its administrative remedies. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101)

**2. POGAM failed to exhaust its administrative remedies in Counts III and VI**

POGAM claims in Counts III and VI that the Defendants' "execution of the aforementioned decisions has unreasonably interfered with" Plaintiff's oil and gas drilling operations. (Complaint, ¶¶ 69 and 82) POGAM did not raise this issue in the context of an administrative appeal even though it could have after the issuance of the Notices to Proceed. As a result, both Counts III and VI must be dismissed. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101)

**3. POGAM failed to exhaust its administrative remedies in Count IV**

POGAM claims in Count IV that the Defendants' "execution of the aforementioned decisions has substantially interfered with" Plaintiff's oil and gas drilling operations. (Complaint, ¶ 73) POGAM did not raise this issue in the context of an administrative appeal even though it could have after the issuance of the Notices to Proceed. As a result, Count IV must be dismissed. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101)

**4. POGAM claims in Counts VII and VIII should be dismissed**

Defendant-Intervenor joins Defendants' Brief in Support of Motion to Dismiss POGAM's claims in Counts VII and VIII of its Complaint.

**IV. CONCLUSION**

All of POGAM's claims in Counts I-VI arise from its displeasure with Defendants' Notices to Proceed and attached Surface Use Plans of Operations for each of the four Parcels. POGAM, however, failed to file an administrative appeal for any of the claims for which it now seeks relief from this Court with respect to these Counts. POGAM's failure to submit such a legally required appeal deprives this court of jurisdiction to consider all of its claims and requires that Counts I-VI be dismissed pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(1) and (6) with prejudice.

Defendant-Intervenor joins Defendants' Brief in Support of Motion to Dismiss  
POGAM's claims in Counts VII and VIII of its Complaint.

WHEREFORE, the Defendant-Intervenor respectfully requests that the Court issue an Order dismissing, with prejudice, POGAM's Complaint in its entirety.

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY &  
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and PHILIP MICKLE, :  
Defendants :  
and :  
ALLEGHENY DEFENSE PROJECT, :  
Defendant-Intervenor :

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon the following by electronic mail on the 24<sup>th</sup> day of September, 2008:

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*S/ Paul F. Burroughs*

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Paul F. Burroughs