

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 :

DEFENDANT-INTERVENOR'S BRIEF IN SUPPORT OF
MOTION TO DISMISS
PLAINTIFF'S SECOND AMENDED 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 moves this Court to issue an Order dismissing Plaintiff's Second Amended Complaint in its entirety with prejudice.

I. INTRODUCTORY STATEMENT

In its lengthy twelve count Second Amended Complaint, Plaintiff sets forth numerous claims involving its alleged rights concerning its oil and gas development operations in Lots 7, 8 and 9 and Warrant 3672 (collectively, "Parcels") in the Allegheny National Forest ("ANF"). 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)).¹ 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)).² Although Plaintiff 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, Plaintiff alleges that "the economically-burdensome provisions imposed by the notices to proceed issued by the USFS" for each of the Parcels violates Plaintiff's legal rights. (Second Amended Complaint, ¶ 56).

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

² Id.

Defendant-Intervenor joins Defendants' Brief in Support of Motion to Dismiss in its entirety, including its response to Plaintiff's claims in Counts IX, X and XI of its Second Amended Complaint. Moreover, in this brief, Defendant-Intervenor expands upon the issue raised by Defendants that Plaintiff failed to exhaust its administrative remedies and offers additional grounds for dismissing Plaintiff's claims in Counts I-VIII and XII. Defendant-Intervenor, therefore, respectfully requests that the Court dismiss Plaintiff's Second Amended Complaint in its entirety and with prejudice on the grounds that this Court lacks subject matter jurisdiction because Plaintiff failed to exhaust its administrative remedies with regards to the claims it raises in Counts I-VIII and XII and for the reasons put forth by the Defendants in its Brief in Support of Motion to Dismiss with regard to all of Plaintiff's claims.

Plaintiff did not plead that it filed administrative appeals for any of the claims it raises in Counts I-VIII and XII in its Second Amended 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 Plaintiff 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 (3rd 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’s Second Amended 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 (3rd 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 (3rd Cir. 1995)).

III. ARGUMENT

A. This Court lacks subject matter jurisdiction because Plaintiff did not 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.³ Plaintiff, however, chose to rush into this Court and ask it 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 Plaintiff to now ask this Court for relief when it failed to exhaust its administrative remedies. Plaintiff's failure to submit such a legally required appeal deprives this court of jurisdiction to consider all of Plaintiff's claims in Counts I-VIII and XII 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 it raised claims in the complaint that differed significantly from the claims raised in the administrative appeal. In regards to Counts I-VIII and XII, the Court need not even consider the differences between the issues raised at the administrative appeal stage with the issues raised in the complaint

³ Defendant-Intervenor does not direct this argument at Counts IX, X and XI because it appears that the alleged actions or inactions about which plaintiffs 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 IX, X and XI fail for the reasons set forth in Defendants' Brief in Support of Motion to Dismiss.

because Plaintiff 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-VIII and XII. 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, 200 (3rd Cir. 1999)) (citing New Jersey v. Hufstedler, 724 F.2d 34, 36 n.1 (3rd 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, 207 (3rd 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;⁴ see also, Western Radio Services v. United States Forest Service, 2008 U.S. Dist. Lexis 11203, *16 (D. Or. February 12, 2008)).

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

Almost all of Plaintiff's claims, specifically Counts I-VIII and XII, 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's submitted Surface 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. The Plaintiff acknowledges that it is indeed the Notice to Proceed that is the source for nearly all of its claims:

Defendants Morse, Fallon, Scardina, Stovall and Marten, and their subordinates on their instructions, have expressly stated to Duhring and other owners of OGM rights in the ANF that they may not commence OGM development activities until the District Ranger of the Ranger

District in which the property to be developed is located issues a notice to proceed...

(Second Amended Complaint, ¶ 31).

Plaintiff contends that each “Notice to Proceed:”

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

(Second Amended Complaint, ¶¶ 33, 41, 48).⁵

1. Permits and agreements regarding mineral materials

Plaintiff 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.” (Second Amended Complaint, ¶¶ 60(g), 64(g), 67(g), 70(g), 73(g), 76(g), 80(g), 84(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

⁵ Plaintiff’s second amended complaint at ¶ 48 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.

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).

Plaintiff 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. Plaintiff, 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. Plaintiff, however, did not appeal Defendants' Notices to Proceed for Lots 7 and 9 and Warrant 3672.

B. Plaintiff's Claims in its Second Amended Complaint must be dismissed

1. Plaintiff failed to exhaust its administrative remedies in Counts I, II, V and VIII

Plaintiff alleges numerous "failures" of the Defendants in Counts I and II. (Second Amended Complaint, ¶¶ 58, 62). All of these allegations stem from Defendants' issuance of the Notices to Proceed and attached Operating Plans, which Plaintiff references in the very next paragraph of each count.⁶ Plaintiff's frustration with these alleged failures was not conveyed to the Defendants in an administrative appeal. As a result, Counts I and II must be dismissed since Plaintiff failed to exhaust its administrative remedies. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101).

Regarding Counts V and VIII, Plaintiff alleges that Defendants' "interference" by requiring a Notice to Proceed before Plaintiff can use the surface estate unlawfully discriminates against Plaintiff. (Second Amended Complaint, ¶¶ 72-73, 82-83). Plaintiff did not raise this in an administrative appeal even though it could have after the issuance of the Notices to Proceed. As a result, both Counts V and VIII must be

⁶ "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." (Second Amended Complaint, ¶¶ 59, 63)

dismissed since Plaintiff failed to exhaust its administrative remedies. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101).

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

Plaintiff 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. (Second Amended Complaint, ¶¶ 67 and 76). Plaintiff 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. Plaintiff failed to exhaust its administrative remedies in Counts IV and VII

Plaintiff claims in counts IV and VII that the Defendants' "execution of the aforementioned decisions has substantially interfered with" Plaintiff's oil and gas drilling operations. (Second Amended Complaint, ¶¶ 69 and 78). Plaintiff 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 IV and VII must be dismissed. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101).

4. **Plaintiff failed to exhaust its administrative remedies in Count XII**

Plaintiff claims the road use fee of \$14,092.70 is “unreasonably high.” (Second Amended Complaint, ¶ 109) Plaintiff alleges that the Defendants demanded the road use fee as part of the Notices to Proceed before oil and gas drilling operations could commence in Lots 7, 8 and 9. (Second Amended Complaint, ¶ 52). Plaintiff alleges that it “notified the USFS of its objections to the amount charged.” (Second Amended Complaint, ¶ 53). There is no record, however, that Plaintiff filed an administrative appeal raising this claim. As a result, Count XII must be dismissed. (Kleissler, 183 F.3d at 207; 36 CFR § 251.101).

5. **Plaintiff’s claims in Counts IX, X and XI should be dismissed**

Defendant-Intervenor joins Defendants’ Brief in Support of Motion to Dismiss Plaintiff’s claims in Counts IX, X and XI of its Second Amended Complaint.

IV. **CONCLUSION**

All of Plaintiff’s claims in Counts I-VIII and XII arise from its displeasure with Defendants’ Notices to Proceed and attached Surface Use Plans of Operations for each of the four Parcels. Plaintiff, 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.

Plaintiff's failure to submit such a legally required appeal deprives this court of jurisdiction to consider all of Plaintiff's claims and requires that Counts I-VIII and XII 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 in its entirety, including its response to Plaintiff's claims in Counts IX, X and XI of its Second Amended Complaint.

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

Respectfully submitted,

QUINN, BUSECK, LEEMHUIS, TOOHEY &
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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 25th day of August, 2008:

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