

Service (“Forest Service”) on behalf of the United States. The principal relief sought under the Quiet Title Act claims is a declaration of the parties’ respective property rights, which is exactly the type of relief the Quiet Title Act was designed to provide. The APA claims stem from the manner in which the Forest Service conducted its affairs with respect to Duhring and Duhring’s property interests. The principal relief sought under those APA claims is a declaration that the Forest Service has acted arbitrarily, capriciously, and unlawfully, which is the type of relief provided for by the APA.

In their respective motions to dismiss, the Defendants raise various arguments as to why the Complaint in Intervention should be dismissed. Their arguments are largely the product of their own mischaracterizations of POGAM’s Complaint in Intervention (and Duhring’s Second Amended Complaint), their lack of appreciation for the principle of “notice pleading” as incorporated into federal practice by Rule 8 of the Federal Rules of Civil Procedure, and their misunderstanding of the legal tenets of the defenses they raise.

Because they raise overlapping legal issues, POGAM is filing this combined opposition to both of the motions for the sake of judicial convenience and efficiency, and to avoid redundancy. Because the motions to dismiss are not supported by principles of law, they should be denied.

LEGAL STANDARD

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. *See Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir.1998). The motion must

be denied unless the factual allegations giving rise to the right of action are no more than speculative. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007).

BACKGROUND

As the Court is aware, this lawsuit was brought by Duhring – a POGAM member company – to dispute the legality of the official conduct of the Forest Service and various agency officials in connection with Duhring’s efforts to access and develop oil and gas from specifically identified privately-owned mineral estates underlying the ANF. POGAM, a Pennsylvania trade association of oil and gas exploration and production companies, intervened in this case to support Duhring and also, in the words of Fed. R. Civ. P. 24(a)(2), because the Court’s disposition of this action “may as a practical matter impair or impede” the ability of POGAM’s members to protect their interests in mineral estates that, like Duhring’s, underlie the ANF. POGAM’s Complaint in Intervention poses essentially two disputed questions for judicial resolution: (1) what is the scope of Duhring’s easement across the land surface of the ANF to access the private mineral estates (and, by implication, the scope of easements and mineral estates held by similarly situated POGAM members)?; and (2) did the Forest Service act arbitrarily, capriciously, or otherwise not in accordance with law by impeding, and imposing certain conditions on, Duhring’s access of its mineral estates across the surface of the ANF?

The first question requires an examination of the ownership interest taken by the United States when it acquired the surface estate, including an examination of all outstanding property interests that encumbered the surface estate at the time. The Court’s examination of those outstanding interests necessarily encompasses easements that existed for purposes of accessing the already-severed underlying mineral estate, along with the nature of such easements and

mineral estates. The Quiet Title Act was designed by Congress specifically for resolving this type of issue.

The second question requires an examination of (i) the various actions taken by the Forest Service and its officials directed at Duhring in its efforts to access and develop its mineral estates, and (ii) certain instances when the Forest Service was required to act but failed to act, and asking whether in taking or not taking those actions, as the case may be, the Forest Service acted arbitrarily, capriciously, or otherwise not in accordance with law. *See* 5 U.S.C. § 706(1), (2)(a).

The agency actions and inactions called into question in the Complaint in Intervention include (but are not limited to): (1) failing to permit Duhring to proceed with mineral development at Lot 7 within 60 days of Duhring providing the Forest Service with its notice of intent to conduct mineral development activities there, March 17, 2007 (Compl. in Interv. ¶ 33); (2) issuing a “Notice to Proceed” for Lot 7 that contained *ultra vires* restrictions and conditions on Duhring’s proposed activities (*id.* ¶ 34); (3) failing to permit Duhring to proceed with mineral development at Lot 9 within 60 days of Duhring providing the Forest Service with its notice of intent to conduct mineral development activities there, March 20, 2007 (*id.* ¶ 40); (4) issuing a “Notice to Proceed” for Lot 9 that contained *ultra vires* restrictions and conditions on Duhring’s proposed activities (*id.* ¶ 42); (5) failing to permit Duhring to proceed with mineral development at Warrant 3672 within 60 days of Duhring providing the Forest Service with its notice of intent to conduct mineral development activities there, June 4, 2007 (*id.* ¶ 49); (6) issuing a “Notice to Proceed” for Warrant 3672 that contained *ultra vires* restrictions and conditions on Duhring’s proposed activities (*id.*); (7) notifying Duhring that the Forest Service will not permit the timely extraction and use of stone for access road construction purposes located below the land surface

of Warrant 3672 (*id.* ¶ 50); and (8) demanding the payment of road use fees before permitting mineral development activities to take place (*id.* ¶ 53). The APA was designed specifically to resolve disputes over these types of agency action or inaction.

SUMMARY OF ARGUMENT

None of the arguments posed by the Forest Service and ADP has merit. The Quiet Title Act claims (Counts II and VIII) are valid because the real property in dispute has been identified, a dispute over ownership interests in that property has been alleged, and the remedy sought is a clarification of the ownership rights. That is precisely the type of question the Quiet Title Act was designed to permit courts to address.

The Forest Service is also misguided in its attempt to re-characterize certain of the APA claims (Counts III, VI, VII) as tort claims and assert the defense of sovereign immunity. The APA holds government agencies accountable for taking action “not in accordance with law.” Longstanding principles of property law that govern the rights and liabilities of two parties to a property dispute inform the “law” to which the agency must conform its conduct under the APA. Thus, where an agency’s action violates those principles, the conduct is actionable under the APA. Moreover, the Forest Service is wrong that POGAM has failed to allege a “final” agency action that triggers review for the other APA claims (Counts I, IV, V). As noted above in the Background section, multiple agency actions – all of which are “final” for APA purposes – have been alleged. Indeed, even ADP acknowledges that this is true (*see* ADP Motion to Dismiss (“ADP Br.”) at 2 (observing the Notices to Proceed constitute “final agency action”)).

The Defendants’ contention that POGAM has failed to exhaust administrative remedies is also wrong. None of the claims raised poses a question that must be raised first in an agency review proceeding, nor has the Forest Service even developed a review process for the questions

raised here. Finally, the idea that POGAM lacks standing is way off the mark. As an intervenor, the standing test cited by ADP does not even apply. Even if it did, it would not prevent POGAM from being party to this case. And, in any event, the Court has already granted POGAM's intervention, and that is the law of the case.

ARGUMENT

In its Second Amended Complaint, Duhring properly pled claims under the Quiet Title Act and the APA. POGAM asserted substantially the same claims in its Complaint in Intervention. Those claims were pled in accordance with the governing statutory provisions providing the rights of action and the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. Moreover, POGAM's Complaint in Intervention was filed to satisfy the requirement of Fed. R. Civ. P. 24(c) that a motion to intervene be accompanied by "a pleading that sets out the claim or defense for which the intervention is sought." The collective arguments raised by the Defendants shall be addressed seriatim.

I. POGAM HAS PROPERLY STATED A CLAIM UNDER THE QUIET TITLE ACT.

The Quiet Title Act says:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest....

The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

28 U.S.C. § 2409a(a).

The Forest Service contends that POGAM "has failed to allege facts sufficient to show that there is disputed title to real property in which the United States claims an interest." Federal Defendants' Motion to Dismiss ("Govt. Br.") at 6. The Forest Service is mistaken.

With respect to Count II, POGAM alleges in relevant part in its Complaint in Intervention (“Interv. Compl.”) that Duhring (a POGAM member company) owns specific identified mineral property interests underlying the Allegheny National Forest (“ANF”). Interv. Compl. ¶¶ 15-19. POGAM further alleges that the United States is the owner of the ANF surface estate. *Id.* ¶ 19. POGAM then alleges that, as the holder of a mineral interest, Duhring owns an easement across the surface estate owned by the United States. *Id.* ¶ 20. Finally, POGAM alleges that the United States is unlawfully interfering with Duhring’s right to traverse the surface to access its mineral estates. *Id.* ¶¶ 33-57. Indeed, if any further specificity were needed – which it is not, under the notice pleading standard of Rule 8 – the notices of intent to conduct mineral development provided to the Forest Service by Duhring, which were made part of the Complaint in Intervention by reference (*see* Interv. Compl. ¶¶ 33, 36, 40, 43),¹ make it plain that Duhring intended to construct typical gravel roads across the land surface of the ANF to access the specifically identified mineral estates. The entire thrust of the Complaint in Intervention, and Duhring’s underlying Second Amended Complaint, is the dispute over competing ownership interests in the surface estate.

The complaint thus alleges a bona fide title dispute to the surface estate of the ANF. The United States has an ownership interest in that property, and has not to date disclaimed any such interest (nor should we expect it to do so, given its National Forest status). It is well accepted that the Quiet Title Act extends to disputes over easements and mineral rights. *See U.S. v. Bedford Assocs.*, 657 F.2d 1300, 1316 (2d Cir. 1981) (stating Quiet Title Act applies to disputes over easements and mineral rights); *Kinscherff v. U.S.*, 586 F.2d 159, 161 (10th Cir. 1978)

¹ The notice of intent to conduct operations relating to Duhring’s Lot 9 mineral estate was attached to the Declaration of Arthur J. Stewart, which was submitted with Plaintiffs’ Joint Motion for Partial Summary Judgment (*see* Exh. A, pp. 00135-00138).

(interest in an implied easement can give rise to Quiet Title Act action). *See, e.g., Roth v. U.S.*, 326 F. Supp. 2d 1163 (D. Mont. 2003) (granting summary judgment to plaintiff against United States and quieting title to plaintiffs' easement across federal lands). There can be no question, then, that Count II is properly stated under the Quiet Title Act.

It is possible that some of the requested relief, as stated, seeks more than what can be awarded on Quiet Title Act grounds alone, but in its essence Count II simply seeks a declaration of the respective property interests in the land at issue. That relief unquestionably lies under the Quiet Title Act; to the extent other relief that cannot be granted under the Quiet Title Act is sought, the Court need not address it – it does not affect the fact that a Quiet Title Act claim otherwise has been stated properly.

The same is true of Count VIII, which also focuses on the nature of the competing rights to the ANF surface estate. The thrust of Count VIII is the Forest Service's own use of the surface in a manner that interferes with Duhring's surface right of access to its underlying mineral estate. As with Count II, the essence of the claim is a request for a declaration of the competing property interests in the ANF surface estate. For current purposes, the Court need not dwell on the merits of each specific request for relief; if the Quiet Title Act dispute is properly alleged – as it is – the claim is cognizable under the Quiet Title Act and any relief sought that is not available under the Quiet Title Act can simply be ignored.²

The cases cited by the Forest Service are completely consistent with the Quiet Title Act claims raised by the plaintiffs here. For example, it cites *McKay v. U.S.*, 516 F.3d 848, 850 (10th

² The relief requested does not change the character of the cause of action. *See, e.g., Crumpacker v. Andrus*, 516 F. Supp. 286, 290 (D. Ind. 1981) (“Plaintiffs' additional requests for injunctive and monetary relief do not alter the essential character of this [Quiet Title Act] suit.”).

Cir. 2008), for that court's recognition that "[t]he QTA is not a broad authorization to sue the government on any claim somehow relating to property; a QTA complaint must assert some cognizable 'right, title, or interest ... in the real property.'" POGAM agrees, and it has done just that. As noted above, POGAM's Complaint in Intervention alleges a dispute between competing real property interests in the ANF surface estate, pitting the United States' ownership interest in the surface against Duhring's easement across that surface. This dispute over the contours of Duhring's easement and mineral estate easily comes within the ambit of the Quiet Title Act. *See U.S. v. Bedford Assocs.*, 657 F.2d at 1316; *Kinscherff*, 586 F.2d at 161; *Roth*, 326 F. Supp. 2d at 1166.

Indeed, had the Forest Service mined *McKay* a bit deeper, past the superficial quotations, it would have found that the court was presented in that case with a garden variety *contract dispute*, concerning the interpretation of rights granted in an earlier settlement agreement. *See McKay*, 516 F.3d at 851-52. No question of title or ownership or other real property interests was raised in the complaint. Moreover, on appeal, the aggrieved plaintiff asserted an alternative common law right of access across the United States' surface estate on the ground that he held rights to the mineral estate. *See id.* at 852-53. The court acknowledged the plaintiff's right to raise such a common law property claim, but observed that the claim had not been stated in his complaint and that he had made no effort to amend his complaint in response to the government's motion to dismiss. *See id.* at 853 ("noting "plaintiff did not assert this common law right of access in his complaint or seek to add such a claim in response to the government's motion to dismiss"). Because the plaintiff had asserted nothing more than a claim that was "in essence one for breach of contract," the court of appeals easily concluded that the Quiet Title Act did not apply. *Id.*

Here, of course, a Quiet Title Act claim has been properly pled: Duhring has identified mineral estates and associated easements across the United States' surface estate with which the United States is interfering. That is a cognizable Quiet Title Act claim, which the *McKay* court would have recognized.

The Forest Service also asserts that POGAM is seeking greater relief under the Quiet Title Act than the statute offers, citing *LaFargue v. U.S.*, 4 F. Supp. 2d 580, 588 (E.D. La. 1998), for proposition that injunctive relief is not available under the Quiet Title Act. The Forest Service overstates its position, because it fails to appreciate what POGAM is seeking.

POGAM concurs that the relief available under the Quiet Title Act is a declaration of ownership rights, or title rights, to real property or an interest in real property. *See* 28 U.S.C. § 2409a(a); *Block v. N. Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 (1983); *LaFargue*, 4 F. Supp. 2d at 588. That is all POGAM and Duhring seek under the Quiet Title Act. It is true, as noted, that the pleadings refer to other relief sought, but that is in the nature of general pleading and to foster consistency throughout the Complaint in Intervention. Parsed in the common sense manner it should be, the Complaint in Intervention seeks nothing more *under the Quiet Title Act* than a declaration of Duhring's easement right across the land surface of the ANF (for purposes of accessing its mineral estate). To the extent other relief is sought, it can be considered under the other counts, namely those arising under the APA, and need not be addressed under the Quiet Title Act.

LaFargue is not inconsistent. The plaintiff in *LaFargue* sought alternative remedies. First and foremost, it sought a declaration of ownership rights in servitudes that had been used to facilitate the construction and maintenance of a petroleum pipeline by the United States. This declaration of ownership rights, the court said, "is exactly what the QTA was meant to provide."

Id. at 588. Alternatively, the plaintiff sought injunctive relief that would have required the court to direct the United States to remove the pipeline from the affected property. It was this latter relief that the court held was not available under the Quiet Title Act. *See id.* Because POGAM and Duhring seek only a declaration of Duhring's mineral estate and easement interest in the ANF surface estate, *LaFargue* is inapposite on the point for which the government refers to it. Finally, as explained below, the Quiet Title Act is not subject to an exhaustion of administrative remedies defense.

II. POGAM HAS PROPERLY PLED CLAIMS UNDER THE APA THAT ARE NOT REQUIRED TO BE BROUGHT AS TORT CLAIMS.

POGAM has asserted claims against the Forest Service under the APA in Counts III, VI, and VII of its Complaint in Intervention. Among other things, the APA permits a court to set aside agency actions that are “not in accordance with law.” 5 U.S.C. § 706.

The Forest Service contends that the allegations of these counts “remain premised in tort” and that they are not actionable under the APA. Govt. Br. at 8. The Forest Service overlooks the nature of these claims – these APA claims are not “premiered in tort” as depicted by the agency. Rather, the common law regarding real property of Pennsylvania provides the “law” with which the Forest Service – on behalf of the United States – must comply when conducting its affairs and taking agency actions in a manner that affects competing property interests. This Court's own ruling in *United States v. Minard Run Oil Co.*, No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980), recognized that the common law property rights of mineral estate owners place important constraints on the Forest Service. Further, Congress has essentially recognized these common law constraints in the 1992 Energy Policy Act. Pub. L. No. 102-486, § 2508(a), 106 Stat. 3108-09 (1992) (codified in 30 U.S.C. § 226(o)). *See also United States v. Srsnsky*, 271 F.3d 595 (4th Cir. 2001) (holding that state common law of real property

defined legal relationship between United States and private owner of common law easement with respect to land purchased by United States under the Weeks Act, and rejecting argument of Forest Service that common law was preempted by a host of federal statutes).³

In Count III, for example, POGAM alleges that the United States, acting through the Forest Service, has interfered with Duhring's property interests in an arbitrary and capricious manner, or a manner "not in accordance with law." The agency action manifesting this unlawful conduct was made known to Duhring through several Notices to Proceed – written documents purporting to authorize Duhring to proceed with the development of its mineral estates, albeit subject to several significant restrictions. Under the common law of Pennsylvania, such conduct would have amounted to a trespass or other actionable infringement on real property interests. But POGAM is not alleging common law trespass here, and the Court is not called upon to decide whether the United States, acting through the Forest Service, is liable for "trespass" per se. Instead, the Court is being asked to refer to the Pennsylvania common law of property rights for purposes of determining whether the Forest Service has comported itself "in accordance with law." If it has not, the remedy is not damages as it would be in a true trespass suit; rather, it is the relief made available under the APA (*e.g.*, the agency action should be set aside).

As noted in *Minard Run*, with respect to its affairs of managing the ANF, the Forest Service stands in the shoes of a private party, and is thus subject to the same common law constraints as any other surface owner. *See* 1980 U.S. Dist. LEXIS 9570, at *15. This was the position of the United States in *Minard Run*, which this Court adopted. While this does not

³ Indeed, the federal courts frequently refer to state common law in determining real property rights at issue in Quiet Title Act disputes. *See, e.g., Bank One Tex. v. U.S.*, 157 F.3d 397, 403 (5th Cir. 1998); *Harrell v. U.S.*, 13 F.3d 232, 234-35 (7th Cir. 1993); *Fulcher v. U.S.*, 696 F.2d 1073, 1076 (4th Cir. 1982).

mean the United States waives sovereign immunity for common law tort suits, it does demonstrate why the common law is part of the “law” to which the United States must conform its behavior for purposes of APA-review of its conduct. To the extent the Forest Service departs from this governing law, it must at least “articulate a satisfactory explanation for its action,” which it has not done. *CBS Corp. v. F.C.C.*, 535 F.3d 167, 174 (3d Cir. 2008) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Because the APA waives the United States’ sovereign immunity for causes of action seeking relief from arbitrary or unlawful conduct – though not for purposes of awarding damages – Counts III, VI, and VII are properly pled under the APA.

III. POGAM HAS ALLEGED THE AGENCY ACTION TRIGGERING APA REVIEW.

Regarding Counts I, IV, and V, the Forest Service argues that POGAM has failed to identify any final agency action for which it seeks the Court’s review under the APA. Govt. Br. at 10-12. Similarly, ADP contends that all six APA claims (Counts I, III, IV, V, VI, and VII) must be dismissed because they seek relief for “unspecified actions.” ADP Br. at 8. These arguments should be rejected.

The threshold, or “jurisdictional” (*see* Govt. Br. at 12), question for this Court in deciding Defendants’ motions to dismiss is whether the Forest Service has in fact carried out a final agency action of which POGAM seeks review. The test for “finality” was stated in *Bennett v. Spear*, 520 U.S. 154 (1997): An agency action is final if the agency has reached the “consummation” of the decision-making process, and the decision is one by which “rights or obligations have been determined” or from which “legal consequences will flow.” *Id.* at 177-78. Courts following *Bennett v. Spear* have recognized that the essence of that case, and thus the

question for determining finality, is whether the agency action has a binding effect. *See, e.g., Center for Auto Safety v. NHTSA*, 452 F.3d 798, 807-09 (D.C. Cir. 2006).

By any measure, POGAM has identified a final agency action in its Complaint in Intervention: among other things, the various Notices to Proceed contain the statement of the agency actions of which POGAM now complains. In fact, as observed in the ADP's separate motion to dismiss, POGAM's and Duhring's claims stem from "the same discrete final agency action taken by Defendants in the form of a written 'Notice to Proceed'...." ADP Br. at 2. For example, in the Notice to Proceed that is the subject of Plaintiffs' Joint Motion for Partial Summary Judgment, the Forest Service demanded that Duhring complete and obtain a "Commercial Road Use Permit" issued by the Forest Service and pay a road use fee determined unilaterally by the Forest Service, notwithstanding Duhring's vested easement rights. *See* Declaration of Arthur J. Stewart, Exh. A at p. 283, attached to Plaintiffs' Joint Motion for Partial Summary Judgment. Moreover, a Forest Service "Operating Plan" accompanied the Notice to Proceed which imposed additional prescriptive conditions on Duhring's operations. That plan required that:

All work should stop immediately if any federally proposed or listed species are found or observed on the project site during implementation. . . . In addition, the operator should contact the District if any stick nests are found near or adjacent to any work location prior to development.

Id. at p. 293 (Operating Plan, Section A ¶ 2) (emphasis added). The Operating Plan further directed:

Follow all terms and conditions in regulatory permits and other official project authorizations to eliminate or reduce the adverse impacts to endangered, threatened, or sensitive species.

Id. (Section A ¶ 4). Additional prescriptive conditions included the following:

Disturbed areas must be stabilized within 30 days following construction and successfully revegetated within 60 days following construction or within 60 days of the

beginning of the first growing season following construction that occurs in late fall or winter. Revegetation is achieved when there is 70 percent coverage of perennial vegetation as measured by transect.

Cross culverts to drain ditch water should be at least 18 inch diameter corrugated metal pipes (CMPs) or 15 inch diameter casings and installed diagonally with outlet downhill and a 6 inch drop per 10 feet of running width.

Id. (Section B ¶¶ 1 and 2). The Forest Service Operating Plan required that “[a]t least 6 inch[es] of stone will be applied to all roads intended for permanent access.” *Id.* at 295 (Section C ¶ 2) (emphasis added). Regardless of the property rights governed by the individual mineral severance deeds, the Operating Plan further dictated: “Equipment must be stored, serviced and fueled in upland areas away from transport pathways and all aquatic habitats. *No long term equipment storage, such as unused storage tanks, vehicles, machines, pipeline, or other staging materials, is allowed.*” *Id.* (Section C ¶ 5) (emphasis added). In addition, the Operating Plan stated: “You are required to obtain a Forest Service permit from the Forest Service for any ATV [All Terrain Vehicle] used on this or any other lease.” *Id.* at 297 (Section J ¶ 2).

Each Notice to Proceed thus manifests an agency action affecting Duhring’s property rights which sought to bind Duhring in a legal sense, at least as far as the Forest Service was concerned in these particular instances. Review of these actions is proper under the APA.

Review of the Forest Service’s various noted inactions (*see, e.g.*, Compl. in Interv. ¶¶ 33, 40, 49) – when it was required to act – is also available under the APA. *See* 5 U.S.C. § 706(1) (authorizing the reviewing court to “compel agency action unlawfully withheld or unreasonably delayed”). As explained in thorough detail in the Plaintiffs’ Joint Motion for Partial Summary Judgment, the crux of this dispute is the Forest Service’s attempt to impede and delay Duhring’s (and, implicitly, other similarly situated mineral owners’) access to its mineral estate through the creation of a permitting authority over the exercise of the mineral rights, and in a manner that is inconsistent with controlling law. *See* Pls.’ Mot. for Part. Summ. Judg. at 14-34. One of the

controlling legal tenets – recognized by this Court in *Minard Run* – is that the Forest Service may not hold up mineral development activities beyond the traditional 60-day notice period which the mineral owner is obligated to give the surface owner. *See Minard Run*, 1980 U.S. Dist. LEXIS 9570, at *12-23. As the Complaint in Intervention explains, the Forest Service routinely has delayed acting in a timely manner as required by law, and those delays continue to the present. These delays are actionable under the APA. Indeed, as an unpublished district court decision cited by ADP states, “plaintiffs complain of delay and inaction on the part of defendants in processing Western Radio’s application for sidehill antennas, *complaints that the APA was specifically crafted to redress.*” *W. Radio Servs. Co. v. U.S.F.S.*, 2008 U.S. Dist. LEXIS 11203, at *11 (D. Ore. Feb. 12, 2008) (emphasis added).

Thus, the specifically alleged agency inactions, too, are actionable under the APA.⁴

Finally, ADP’s contention that POGAM is seeking “programmatic” review of the sort rejected in *Lujan v. Nat’l Wildlife Federation*, 497 U.S. 871, 892 (1990), is just not accurate. In *Lujan*, the plaintiffs sought judicial review of what they called the U.S. Bureau of Land Management’s entire “land withdrawal review program.” *Id.* at 875. The alleged land withdrawal review program at issue actually consisted of numerous individual actions affecting millions of acres of federal lands in multiple western states. The Court held that the plaintiffs’ challenge to an entire ongoing “program” was not justiciable, inasmuch as it did not seek review of a “final agency action” as the APA requires. *Id.* at 893-94. Here, in contrast, Duhring and POGAM have identified discrete final agency actions, precisely as ADP admits. ADP Br. at 2 (“almost all of [POGAM’s] claims arise from the *same discrete final agency action* taken by

⁴ POGAM reserves its right to direct the Court’s attention to other related agency actions and inactions when the time comes for the Court to consider the merits of the allegations.

Defendants”) (emphasis added). The problem of which POGAM complains is straightforward: may the Forest Service, under existing legal authority, regulate Duhring’s surface access to specific underlying mineral estates, or is its involvement in the access rights of Duhring limited to the narrow set of obligations already imposed on the mineral owner *by existing law* (as recognized in *Minard Run*)? Thus, unlike in *Lujan*, POGAM does not care (for present purposes) and is not complaining about the Forest Service’s special-use permit program or any other land-use program the Forest Service administers. Rather, it is challenging specific final agency actions the Forest Service has taken, and unlike in *Lujan* (*see* 497 U.S. at 890-91), discrete agency actions have been taken against Duhring that trigger review under the APA. POGAM’s complaint is with the Forest Service’s underlying legal position – as manifested in the discrete actions it has directed at Duhring – that it (the agency) may impose a regulatory scheme on POGAM’s members in the first instance.

IV. POGAM WAS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES.

The Forest Service summarily contends that POGAM has failed to *allege* that it has exhausted administrative remedies. Govt. Br. at 12. ADP, for its part, spends considerable space arguing that POGAM was required, but failed, to exhaust its administrative remedies. ADP Br. at 10-17. Neither argument – that POGAM was required to *allege* exhaustion, and that POGAM was required to in fact exhaust its remedies – has merit.

A. Exhaustion Is Not A Pleading Requirement.

The Forest Service’s argument can be dispensed with easily enough by observing that exhaustion is not a pleading requirement of a plaintiff. Rather, exhaustion is an *affirmative defense* that the *defendant* “bears the burden of pleading and proving.” *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *Bowden v. U.S.*, 106 F.3d 433, 437 (D.C. Cir. 1997). The Forest

Service's complaint that POGAM has not alleged that it exhausted its administrative remedies is therefore of no moment.⁵ On this basis alone, this Court should deny the motion to dismiss on this issue.

B. Further Exhaustion Was Not Required.

In *Darby v. Cisneros*, 509 U.S. 137 (1993), the Supreme Court made it clear that an APA cause of action against the United States is triggered when the agency action is "final," and there is no additional requirement *under the APA* for further exhaustion of the issue before the agency. *See id.* at 144. The Court then went farther, and held that the APA supersedes any application of a *prudential* exhaustion requirement. *Id.* at 146-47. Thus, if exhaustion is to apply, it can only be because it is required by some other law or the agency's own regulations. *See id.* at 147; 5 U.S.C. § 704(c).

Neither the Forest Service nor ADP points to any statute or regulation that requires exhaustion of the claims raised by POGAM and Duhring.

1. Quiet Title Act Claims Are Never Subject to Exhaustion.

The Quiet Title Act claims, by their nature, cannot be subject to principles of exhaustion. As the Supreme Court has made clear, the Quiet Title Act is the exclusive remedy as to title disputes. *Block v. N. Dakota*, 461 U.S. 273, 286 (1983). The Forest Service thus has no authority over the basic question of real property ownership, and could not impose an

⁵ It appears as if the Forest Service conflates principles of "final agency action" and "exhaustion," Govt. Br. at 12, but these two concepts are distinct. "Final agency action" refers to whether the agency decision-maker has reached a definitive position that is binding on the affected party, whereas the exhaustion doctrine "generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193 (1985)).

administrative process for deciding title disputes even if it tried (which it has not). Based upon diligent research of the hundreds of reported cases under the Quiet Title Act – all of which involve the United States as a defendant – there is no precedent for an exhaustion of remedies requirement under the Quiet Title Act. Further, the imposition of such a requirement would be wholly inequitable to the private property owner who is entitled to a neutral adjudication by a federal court of a property dispute with the U.S. government, as the Quiet Title Act provides.

2. The APA Claims Are Not Subject to Exhaustion.

The APA claims are also not subject to the exhaustion concerns raised by the Forest Service and ADP. While ADP cites a number of Forest Service regulations, not one of them applies to the asserted claims. As discussed at length in Plaintiffs' Joint Motion for Partial Summary Judgment, the question presented in this case is whether the Forest Service may restrict a mineral owner's right of access to its mineral estate beyond the very narrow scope of surface-owner protections available under the common law of Pennsylvania, as observed by this Court in *Minard Run*, and as further reflected in the 1992 Energy Policy Act, 30 U.S.C. § 226(o). This is not a matter of discretion for the agency, for which the Forest Service could devise an agency review process.

But even if the agency *could* develop a review process for all issues arising from the Notices to Proceed or its various failures to act, it has not done so to date, and the outcome would thus be controlled by *Darby*, which establishes the very sensible principle that an agency cannot fairly assert "failure to exhaust" as a defense in litigation when it has taken no steps to provide for non-discretionary administrative review.

Kleissler v. U.S.F.S., 183 F.3d 196 (3d Cir. 1999), cited by ADP for support of its exhaustion argument, is inapposite on this score. That case concerned Forest Service discretionary decisions related to authorizing individual timber cutting projects in the ANF

having nothing to do with the exercise of vested private property rights. Plaintiffs – including members of ADP – pursued administrative appeals of those decisions. Having failed to obtain the relief they sought by the Forest Service, plaintiffs filed brand new challenges in federal court alleging violations of the National Forest Management Act (“NFMA”) and the National Environmental Policy Act (“NEPA”). In substance, the federal court claims were clearly within the bailiwick of the Forest Service, clearly related to issues for which the Forest Service had in fact specifically established an administrative review process, and had clearly not been presented in the first instance to the agency as part of the plaintiff’s earlier administrative appeals process. As the court noted, the Department of Agriculture Reorganization Act of 1994 required that “a person shall exhaust all *administrative appeal procedures established by the Secretary or required by law*” before filing a lawsuit in court. *Kleissler*, 183 F.3d at 201 (citing 7 U.S.C. § 6912(e)) (emphasis added). For its part, the pertinent agency regulation said that a lawsuit would be deemed by the agency to be “premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures *available under this part.*” *Id.* (citing 36 C.F.R. § 215.20) (emphasis added).

There was no question that the plaintiff in *Kleissler* was asserting claims that were required by *administrative appeal procedures* to be first reviewed through additional agency channels. Indeed, the plaintiffs did not argue otherwise; on the contrary, their position was that their NFMA and NEPA claims were sufficiently related to the grievances for which they had already exhausted their administrative appeals, such that the court should have deemed their judicial claims likewise exhausted. *See id.* at 202, 205. Here, in contrast, the *Darby* principle applies, *i.e.*, the existing agency regulations do not require further exhaustion *of the types of*

claims raised by POGAM (and Duhring). In short, there is nothing to exhaust, even if the Forest Service has as-of-yet untapped authority to require exhaustion.

It is telling that the government identifies no specific applicable administrative appeal requirements. It is also telling that the Forest Service's Notices to Proceed at issue here did not set forth any applicable administrative appeal procedures. *See* Plaintiffs' Joint Motion for Partial Summary Judgment, Stewart Declaration, Exh. A at pp. 283-284. In contrast, ADP refers to the exhaustion provision at 36 C.F.R. § 251.101 (requiring exhaustion of disputes resolvable administratively under part 251) and § 251.82(a) (listing types of disputes subject to administrative exhaustion). But those provisions apply to *written decisions* addressing permits and special-use authorizations and the like. The issuance or non-issuance of discretionary special-use permits is not the issue here. The scope of *easement and mineral rights in real property are the central issue*, the existence of which – at least in the majority of the affected locations (Lots 7 and 9, and Warrant 3672) – pre-dates the United States' ownership of the surface. The Forest Service's regulations do not cover agency appeals of decisions affecting the exercise of such easement rights. Indeed, they cannot – the Forest Service has no authority to regulate common law easements encumbering lands at the time those lands were acquired. *See Srmsky*, 271 F.3d at 601-02.

Moreover, the manner by which the Forest Service conveyed its decisions to Duhring is not covered by § 251.82. That provision begins:

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: **** [Emphasis added.]

There are several reasons why this provision, on its face, cannot possibly be applicable to the claims raised by POGAM. *First*, in the enumeration of “written instruments” that follows the

introductory paragraph, “Notice to Proceed” is never mentioned. Thus, while a “Notice to Proceed” may be a “written instrument,” it is not one addressed by § 251.82. *Second*, this provision clearly applies to circumstances where there is a need for a “written instrument to occupy and use National Forest System lands ...” which the Forest Service may choose to issue or not issue in its sovereign capacity. Because Duhring (and other similarly situated POGAM members) has a legal right to enter onto Forest Service lands to access and develop its mineral estates, the discretionary written instruments referred to in § 251.82 do not apply. *Third*, § 251.82 is inapplicable in all cases to agency *inaction*; by its terms, it applies only to *written decisions*. Therefore, to the extent POGAM’s APA claims are premised on agency inaction (*i.e.*, required action that was withheld or unreasonably delayed), the agency appeal process cited by ADP is not applicable.

ADP cites several specific types of “written instruments” that are at issue: (i) permits and agreements regarding mineral materials issued under 36 C.F.R. part 228, subpart C (listed at § 251.82(a)(6)); (ii) permits authorizing exercise of mineral rights reserved in conveyance to the United States under 36 C.F.R. part 251, subpart A (listed at § 251.82(a)(7)); and (iii) the approval or non-approval of Surface Use Plans of Operations related to the authorized use and occupancy of a particular site or area (listed under § 251.82(a)(11)). ADP contends that all three of these types of written instruments are embodied in the Notices to Proceed issued to Duhring. ADP Br. at 13. In addition to the general infirmities to ADP’s argument, noted above, ADP is wrong with respect to these more specific contentions for the following reasons.

Regarding permits and agreements related to mineral materials, ADP cross-references § 228.43, which states the Forest Service’s policy for disposing of mineral materials “on National Forest lands,” which is authorized by “contract or permit.” ADP contends that the

Notices to Proceed issued to Duhring constitute a “contract or permit” for the disposal of stone that Duhring has sought to use for the construction of its access roads. Referring to various paragraphs in POGAM’s Complaint in Intervention seeking to enjoin the Forest Service from preventing the use of subsurface stone for purposes of developing mineral estates underlying the ANF, ADP argues that this issue, too, was required to be appealed through administrative channels before being raised in federal court. *See* ADP Br. at 15 (citing 36 C.F.R. § 228.14 (requiring appeals of decisions under part 228 to be brought under part 251)).

Part 228 is not applicable in this case. ADP’s mistake is in assuming that the stone which Duhring claims (and which other similarly situated POGAM members claim) a right to use is owned by the United States “on National Forest lands.” The extent of the scope of the private mineral estate is a disputed issue of law in this case. Obviously, if the stone is owned by Duhring (and others similarly situated), then the stone is not “on National Forest lands” at all, and the Forest Service has no more right to regulate its use than it does to regulate a mineral owner’s access to its mineral estate. Nothing in part 228 speaks to the Forest Service’s authority to decide whether a particular mineral material is in fact on National Forest lands. Such an issue is a legal question for this Court. *See, e.g., N. Illinois Steel Supply Co. v. Sec’y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002) (scope of agency’s regulatory jurisdiction is a legal question for the court to decide *de novo*).

Indeed, it is difficult to reconcile ADP’s position with that of the Forest Service itself in its recent dealings with another POGAM member, PAPCO, Inc. (“PAPCO”), which is currently in a dispute with the Forest Service on a stone-ownership issue similar to Duhring’s. As the attached declaration of PAPCO attorney Matthew L Wolford (also counsel for POGAM in this case) and exhibit A to the Wolford declaration demonstrate, just this past year the Forest Service

took the position in a December 18, 2007 letter that to the extent a mineral owner disagrees with the Forest Service's ownership of the stone, the remedy is to file suit under the Quiet Title Act.⁶ The Forest Service identified no applicable administrative appeal procedures. *Id.* See Wolford Declaration ¶ 3 and Exh. A at p. 2. ADP's exhaustion defense should therefore be rejected.

The agency actions affecting Duhring's "reserved" mineral rights at Lot 8 are also not subject to further administrative review, as ADP contends (at page 16). The permit scheme related to *reserved* mineral rights (as compared to *outstanding* mineral rights) is found at § 251.15. That standard was promulgated in 1963. The Forest Service clarifies in its Manual that for all mineral reservations pre-dating 1963 – which would include all of the relevant mineral rights at issue in this case – § 251.15 does not apply. Rather, earlier rules (issued in 1911, 1937, and 1947, respectively) would have applied as incorporated into the deed by which the United States acquired the surface estate. *See* FSM § 2830.1. The terms of such deeds that shed light on the relevant interests and obligations related to Lot 8 have not been put before the Court by the Forest Service or ADP and are not grist for a motion to dismiss in any event. What is clear is that § 251.15 does not apply in this instance, and § 251.82(a)(7) is therefore irrelevant.

Finally, regarding ADP's attempt to maneuver its way into part 251 by arguing that the Notice to Proceed constituted the "approval" of Duhring's "Surface Use Plans of Operations" for work at certain mineral lots, and that such approvals come within the enumeration of "written instruments" in § 251.82, ADP again gets it wrong.

⁶ It bears noting that in recent cases involving similar "mineral materials" ownership disputes, the United States has taken the position that such materials *were* part of the mineral estate – directly at odds with the position it takes here. *See Sunrise Valley, LLC v. Kempthorne*, 528 F.3d 1251 (10th Cir. 2008); *New W. Materials LLC v. Interior Bd. of Land Appeals*, 398 F. Supp. 2d 438, 447 (E.D.Va. 2005), *aff'd*, No. 05-2362, 2007 WL 446729 (4th Cir. Feb. 8, 2007), *cert. denied*, 128 S.Ct. 863 (2008).

The “plans of operations” submitted to the Forest Service by Duhring concern Duhring’s mineral development operations at its various mineral estates. These plans of operations were not submitted for approval or disapproval by the Forest Service. Rather, they were submitted to the Forest Service consistent with this Court’s decision in the *Minard Run* case. Indeed, the Forest Service has no authority to “approve” or “disapprove” of these plans of operations per se; they are submitted only to comply with the mineral estate owner’s common law duty to provide *notice* to the surface owner of planned development operations. Contrary to what ADP says about it (at pages 16-17), therefore, § 251.82 is not concerned with the plan of operations for the development of a private mineral estate. Indeed, the Forest Service states as much in its Manual: “*The Secretary’s rules and regulations do not apply to the administration of outstanding mineral rights....*” FSM § 2830.1 (emphasis added).⁷

V. POGAM’S STANDING IS NOT AT ISSUE.

ADP contends that POGAM does not have standing because, as ADP states it, the claims raised are peculiar to “the specific facts and scope of the real property interests” of POGAM’s individual members, and each such affected member – here, Duhring – is therefore a necessary party. Citing case authority, ADP says that an association cannot pursue claims on behalf of their members where “the participation of individual members” is required. ADP Br. at 7 (citing *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg. Planning Agency*, 365 F. Supp. 2d 1146, 1161 (D. Nev. 2005)). In taking the position that POGAM cannot assert the interests of its members in this case, ADP misses the point of the cases it cites and the role of POGAM in this litigation.

⁷ For further discussion of this point, *see* pages 30-34 of Plaintiffs’ Joint Motion for Partial Summary Judgment.

POGAM is an intervening plaintiff; it does not come before this Court as the putative real party in interest. The test for whether a party may intervene in the Third Circuit is not whether it has *standing* but, rather, whether it has an interest “relating to the property or transaction that is the subject of the action.” Fed. R. Civ. P. 24(a)(2). See *Kleissler*, 157 F.3d at 969; see *id.* at 971 (disagreeing with cases equating intervention with standing – “[s]uch a wooden standard minimizes the flexibility and spirit of Rule 24”). See also 6 MOORE’S FEDERAL PRACTICE § 24.03[2][d] at 24-40 (3d ed. 2007) (“Proof of standing is not a prerequisite for intervention in the Third Circuit”). Therefore, whether POGAM would have standing to bring Duhring’s case on its behalf pursuant to the “associational standing” doctrine on which the case authority cited by ADP is based is irrelevant.

The Ninth Circuit recently addressed a similar claim in *U.S. v. Carpenter*, 526 F.3d 1237 (D.C. Cir. 2008). The issue in that case was whether certain environmental groups were entitled to raise objections to the terms of a proposed settlement agreement between the United States and a Nevada county, arising out of a Quiet Title Act case. Both of the real parties in interest – the United States and Elko County, Nevada – took the position that the environmental groups were not entitled to participate in the settlement of the Quiet Title Act claim because they did not have their own interests in the property. *Id.* at 1238. While not addressed as a “standing” issue, the point raised was the same. The court rejected that argument, holding that the district court was required to “permit the intervenors to participate as parties in advocating their position in the Quiet Title Act action.” *Id.* at 1242.

The Tenth Circuit addressed this same issue squarely in *San Juan County v. U.S.*, 503 F.3d 1163, 1200 (10th Cir. 2007), holding that a conservation group did not need to claim a

property interest in the subject property in order to intervene in a Quiet Title Act case. The court said there:

We recognize that SUWA does not claim that it has title to Salt Creek Road, even though this is a quiet-title suit. But Rule 24(a)(2) does not speak of “an interest in the property”; rather, it requires only that the applicant for intervention “claim[] an interest *relating to* the property or transaction which is the subject of the action.” Fed.R.Civ.P. 24(a)(2) (emphasis added). The SI concurrence appears to suggest that Rule 24 would not warrant SUWA’s intervention because SUWA could not qualify as a party bringing a quiet-title claim regarding the road. *See* SI concurrence at 1210-11. An intervenor, however, need not so qualify. Indeed, as the Seventh Circuit has observed, “[T]he strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit.” *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 101 F.3d 503, 507 (7th Cir. 1996). To add just one example, in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 92 S. Ct. 630, 30 L.Ed.2d 686 (1972), the Supreme Court determined that a union member could intervene on the side of the Secretary of Labor in the Secretary’s action to set aside a union election even though the member could bring no claim himself because the governing statute made suit by the Secretary the exclusive post-election remedy.

Id. at 1200-01. *San Juan County* and the cases cited therein thus plainly reject the notion that an intervenor must itself have “standing” to assert the original pleading. Rather, the intervenor’s pleading (in POGAM’s case, a Complaint in Intervention) is filed as an adjunct to the motion to intervene for the purpose of identifying the claims on which intervention is sought. *See* Fed. R. Civ. P. 24(c).

As these recent appellate decisions addressing the Quiet Title Act show, it is not necessary to be the real party to a property dispute in order to have a sufficient interest in the outcome of the case to participate as an intervenor. Standing is not at issue.

Moreover, this Court has already granted POGAM’s motion to intervene. That is the law of the case. *See, e.g., Carpenter*, 526 F.3d at 1240 (“To the extent that the United States is arguing that intervenor-appellants lack any interest in the quiet title action, we believe that

position is foreclosed by our prior opinion, in which we held that the intervenors were entitled to intervene...”). ADP’s argument is therefore untimely – the time to object to POGAM’s involvement in this matter is past.

Finally, nothing in the cases cited by ADP says anything that contradicts POGAM’s intervention here. The element of associational standing on which ADP stakes its position is the requirement that it need not be necessary for the aggrieved member to itself bring the case. But that aggrieved member in this case – Duhring – *is already* a plaintiff in the case. So even if the cases were apposite, the standard is satisfied.⁸ ADP does not cite any case for the proposition that an association cannot *intervene* in a case filed in the first instance by one of the association’s members.⁹

CONCLUSION

For the reasons stated, the motions to dismiss filed by the Federal Defendants and ADP should be dismissed.

⁸ By contrast, in the *Committee for Reasonable Regulation of Lake Tahoe* case, an association representing homeowners around Lake Tahoe brought a lawsuit by itself in a representational capacity. The court found that liability would turn on considerations peculiar to individual homeowners. See 365 F. Supp. 2d at 1163-64. And the cases on which that decision was based, *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333 (1977); *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003), also addressed situations in which an association by itself brought the action on behalf of its members.

⁹ See *Hennigan v. Atlantic Refining Co.*, 282 F. Supp. 667 (E.D. Pa. 1967) (cited by ADP at page 9); *Borough of Maywood v. U.S.*, 679 F. Supp. 413 (D.N.J. 1988) (cited by ADP at page 10); *Landow v. Carmen*, 555 F. Supp. 195 (D. Md. 1983) (cited by ADP at page 10).

Respectfully submitted,

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