

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

DUHRING RESOURCE COMPANY,	:	CIVIL ACTION NO. 07-314
Plaintiff	:	
	:	Judge McLaughlin
and	:	
	:	Electronically Filed
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	:	

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I. INTRODUCTION

Of the twelve counts presented in Duhring's Second Amended Complaint, Plaintiff Duhring and Plaintiff-Intervenor POGAM seek partial summary judgment on just one: quiet title (Count II). Plaintiffs' argue that the Quiet Title Act (QTA) provides that 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..." 28 U.S.C. § 2409a; Memorandum in Support of Plaintiffs' Joint Motion for Partial Summary Judgment, p. 13. Plaintiffs' claim that the "disputed title" in which "the United States claims an interest" relates to Duhring's "easement" across the surface lands of the ANF for purposes of accessing and developing it mineral estate in Lot 9. Memo in Supp. of Plaintiffs' Motion for Partial Summary Judgment, p. 13.

Plaintiffs' motion for partial summary judgment on Count II fails for a variety of reasons that do not require this Court to even address the merits of Plaintiff's claims. There are many disputed facts that Plaintiffs' raise that are conclusory, argumentative, or just plain wrong. Moreover ADP requests discovery pursuant to FRCP 56 (f) regarding certain disputed material facts. As ADP stated in its motion to dismiss, the Plaintiffs' seek relief that cannot be granted under the limited waiver of sovereign immunity provided by the Quiet Title Act. 28 U.S.C. § 2409a. The Plaintiffs' also failed to raise these concerns in the context of an administrative appeal. As for POGAM's claim to "Quiet Title", it fails for the additional reason that POGAM simply has no property interest in the real property at issue. It therefore lacks standing and cannot state a claim for relief. POGAM cannot seek to quiet title when it has no alleged title or other interest, quiet or loud, in the real property at issue.

On the merits, Plaintiffs' motion for partial summary judgment also fails because it is abundantly clear, under binding U.S. Supreme court precedent, that the Forest Service, as the federal sovereign, has the authority to regulate Duhring's access to federally-owned property, the surface estate of the Allegheny National Forest ("ANF"). This regulation in no way prohibits Duhring from exercising its subsurface oil and gas rights – it simply provides direction for how Duhring's access to the ANF in pursuit of those rights will proceed in a reasonable manner so that the federally-owned surface resources are protected. As ADP establishes in its own Statement of Facts, those surface resources likely need some protection in light of Duhring's existing oil and gas operations in the ANF.

Plaintiffs' Joint Motion for Partial Summary Judgment on their Quiet title claims (Count II) should be denied because 1) the relief Plaintiffs' are seeking (injunction or compelling agency action) cannot be granted under the limited waiver of sovereign immunity provided by the QTA, 2) Plaintiffs' failed to exhaust their administrative remedies, 3) POGAM has no interest in the title at issue, 4) ADP is entitled to discovery regarding disputed material facts and 5) the Forest Service has authority to regulate Duhring's access to the federal surface and has exercised that authority reasonably with regard to Lot 9.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should not be granted where genuine issues of material fact exist as to the matter upon which defendant seeks summary judgment, as in this case. Fed. R. Civ. P. 56(c). Rule 56(c) states that a party is entitled to summary judgment in its favor only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Facts and reasonable inferences are construed in the light most favorable to the

nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. STATEMENT OF DISPUTED FACTS

A. Disputed Issues Regarding Plaintiffs' Statement of Material Facts (¶ 1)

POGAM claims that it is committed to the economical and environmentally responsible development, production, and use of Pennsylvania's crude oil and natural gas resources. Duh. Stmt of Matrl. Fact ¶ 1. It would follow that since Duhring is a member of POGAM that it adheres to this same principle of "environmentally responsible development, production, and use of Pennsylvania's crude oil and natural gas resources." The photographs contained in Exhibits E and H, however, reveal that Duhring's existing oil and gas development operations in Lot 9 could hardly be described as "environmentally responsible."

For example, numerous photographs reveal oil and gas equipment haphazardly strewn about the ANF. Exh. E at pp. 2-5. Perhaps this is why the Forest Service told Duhring that "[n]o long term equipment storage, such as unused storage tanks, vehicles, machines, pipeline, or other staging materials, is allowed." Duh. Stmt of Mat. Facts. ¶ 17. The ANF is not a private storage yard for Duhring, or any oil and gas operator, to store their equipment indefinitely.

B. Disputed Issues Regarding Plaintiffs' Statement of Material Facts (¶ 5)

Plaintiffs' state "the Forest Service has determined that as of 2007, approximately 1.4 percent of the ANF land base had been disturbed by oil and gas development activities including associated roads." Plaintiffs' Statement of Material Facts in Support of Motion for Partial Summary Judgment, ¶ 5. Plaintiffs' rely on the Forest Service's Final Environmental Impact Statement (FEIS) for the revised 2007 Land and Resource Management Plan (i.e., Forest Plan), which was released in March 2007. The FEIS, however, is unreliable in at least three respects,

therefore putting Plaintiffs' statement of fact in dispute. Defendant-Intervenor believes that the Forest Service is dramatically underestimating the surface disturbance of the ANF by oil and gas development.

First, the Forest Service's Draft Environmental Impact Statement (DEIS) for the revised Forest Plan, released in May 2006, stated:

There are presently approximately 8,000 oil and gas wells, along with an estimated 1,250 miles of associated access roads on the ANF. It is estimated that utility and pipeline rights-of-way and oil and gas clearing (including associated roads) currently occupy 2.1 percent of the ANF land base.

Exh. J at p. 2. *See also:*

http://www.fs.fed.us/r9/forests/alleggheny/projects/forest_plan_revision/DEIS-LRMP/Final%20ANF%20DEIS%20for%20web.pdf

Nearly a year later, in March 2007, the Forest Service released its FEIS for the approved revised Forest Plan. The Forest Service noted that 985 new oil and gas wells were drilled in fiscal year 2006. Exh. A at p. 6 *See also:*

http://www.fs.fed.us/r9/forests/alleggheny/projects/forest_plan_revision/FEIS-LRMP/FEIS_Appendix_F.pdf

Despite the fact that nearly 1,000 oil and gas wells were drilled and accounted for by the Forest Service between the release of the Forest Plan's DEIS and FEIS, the Forest Service stated in its FEIS:

There are presently approximately 8,000 oil and gas wells, along with an estimated 1,250 miles of associated access roads on the ANF. It is estimated that oil and gas clearing (including associated roads) currently occupy 1.4 percent of the ANF land base.

Exh. A at p. 4. *See also:*

http://www.fs.fed.us/r9/forests/alleggheny/projects/forest_plan_revision/FEIS-LRMP/Final_ANF_FEIS.pdf

Thus, while the number of wells drilled increased substantially between 2006-2007, the Forest Service actually decreased the percentage of the ANF's land base that has been disturbed by oil and gas development.

Second, the oil and gas road figures used in both the DEIS and FEIS for the revised Forest Plan were based on an outdated 2003 Forest Wide Roads Analysis that stated there were "an estimated 1,200 miles of OGM roads on the ANF." Exh. C at p. 4. *See also:*

http://www.fs.fed.us/r9/forests/alleggheny/projects/analysis/Forest_Wide_Roads_Analysis/Final_Report.pdf

It is not reasonable to conclude that only 50 miles of new oil and gas roads were constructed between 2003-2007 when during that same period an additional 2,196 new oil and gas wells were drilled. Exh. A at p. 7. *See also:*

Defendant-Intervenor requested updated oil and gas road figures in early 2008 and on May 13, 2008 the Forest Service responded to this request in a document stating that "an estimated 800 miles of new OGM roads [were constructed] since the [Forest Wide Roads Analysis Project] was published[.]" Exh. G at p. 5. On March 12, 2008, Defendant Anthony Scardina sent an email to ADP Board President Bill Belitskus stating:

Since 2003, it is estimated that oil and gas operators constructed an additional 800 miles of roads increasing the mileage of non-system, oil and gas roads to approximately 2,100. During this same duration, the Forest Service constructed less than 10 miles of new roads.

From 1986 to 2005, oil and gas operators drilled on average approximately 225 new wells per year. Since 2005, the average of new wells drilled per year has increased

significantly to 1,000. As a result, oil and gas operators are constructing approximately 250 miles of new roads per year on the ANF.”

Belitskus Dec. ¶ & Exh. G at p. 1.

Finally, on April 24, 2007, one month after the Forest Service approved its revised Forest Plan, it produced a document that stated, “an estimated 50,000 to 60,000 acres of the Forest have oil and gas developments on the surface.” Exh. D at p. 3. This amount would be about 9.7% - 11.6% of the ANF surface occupied by oil and gas development, a far higher percentage than the Forest Plan FEIS and Plaintiffs’ claim.

The number of new oil and gas wells that have been drilled in the ANF has increased approximately 44% from the release of the proposed revised Forest Plan in May 2006. This goes to the heart of Plaintiffs’ argument that the Defendant is somehow delaying and/or impeding its ability to operate in the ANF.

C. Disputed issues regarding Plaintiffs’ Statement of Material Facts (¶ 16)

Plaintiffs’ claim the Forest Service has “continued to delay, refusing to concur with Duhring’s plan of operation within 60 days of Duhring’s submission of its revised plan of operation.” Statement of Material Facts in Support of Motion for Partial Summary Judgment, ¶ 16. In the very next sentence, however, Duhring admits that it received “a so-called Notice to Proceed for Lot 9 [on] November 9, 2007.” *Id.* Plaintiffs’ claims are based on an improper construction of the Forest Service’s regulatory authority over outstanding mineral rights.

Plaintiffs’ are clearly wrong in the assertion that the Forest Service “continued to delay, refusing to concur with Duhring’s plan of operation within 60 days of Duhring’s submission of its revised plan of operation.” Plaintiffs’ ignore the fact that the Forest Service is stretched thin with the dramatic increase in oil and gas development proposals submitted for its review over the

last few years. In fact, this was expressly conveyed in a letter to another oil and gas operator on December 19, 2007 stating that, “with the current staffing level, we do not have this additional time due to the high volume of oil and gas applications being processed on the District.” Exh. F at p. 2. Additionally, on May 8, 2007 the Forest Service produced a document flatly stating, “the forest is currently not staffed to administer this dramatic increase in well drilling.” Exh. D at p. 1. In other words, what Plaintiffs’ suggest as delaying tactics on the part of the Forest Service is more likely simply the Forest Service’s inability to keep up with the dramatic increase in drilling activity.

D. Disputed issues regarding Plaintiffs’ Statement of Material Facts (¶ 17)

One would think when reading Plaintiffs’ filings in this case that the Forest Service had requested that Duhring part the Red Sea in order to obtain its permission to proceed with oil and gas drilling on Lot 9. The reality, however, is that Duhring’s dissatisfaction rests with what amounts to common sense requests from the federal surface owner.

For instance, Duhring complains that the Forest Service required it to “complete and obtain a commercial road use permit and pay a road use fee.” Duh. Stmt of Matrl Fcts, ¶ 17. Duhring also complains that the Forest Service required that, “[n]o long term equipment storage, such as unused storage tanks, vehicles, machines, pipeline, or other staging materials, is allowed.” *Id.* Both of these requirements however are long-standing Forest Service policies.

Regarding the requirement for a commercial road use permit and fee, ANF Forest Supervisor Leanne Marten told Duhring that, “[t]he need for a commercial road use permit is a long-standing requirement of Forest Service regulation and policy which the Forest Service will continue to apply and enforce.” Duh. Exh. A at p. 00374. While it is true that this letter was sent after the commencement of this action, the evidence to support Ms. Marten’s statement is

obvious and well-known to Duhring. First, the 2007 LRMP explicitly stated that “[f]orest road use permits will be required for use of Forest Service jurisdiction roads.” Exh. B at p. 3. Also, the 1986 LRMP explicitly stated that “[u]se of Forest Service roads will require a Road Use Permit, with payment of maintenance fees.” Exh. K at p. 6. This has been standard policy for at least the last 22 years.

Duhring complains that the Forest Service required that “equipment must be stored, serviced and fueled in upland areas away from transport pathways and all aquatic habitats.” Duh. Stmt of Matrl Facts ¶ 17. Again, this is just a common sense requirement to protect the surface and water resources of the ANF that in no way prohibits Duhring from exercising its mineral rights. Nor does it conflict in any way with Pennsylvania law.

Duhring bristles about “further conditions” that include the requirement that “[d]isturbed 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.” *Id.* This was a forest plan standard, however, at the time the Notice to Proceed was issued on November 9, 2007. Exh. B at p. 4. *See also*, FSM 2832.1(3). Again, this does not prohibit Duhring from exercising its mineral rights. All this asks is that once the area is disturbed by drilling operations, that Duhring take minimal steps to restore the area, a perfectly reasonable condition in Duhring’s access to and across the federal surface.

Duhring’s objects to the statement that “cross culverts to drain ditch water should be at least 18 inch diameter corrugated metal pipes...[.]” Duh. Stmt of Mat Facts 17. Once again, this is consistent with forest plan direction at the time the Notice to Proceed was signed. The forest plan stated that “[r]oads constructed for OGM development shall meet Forest Service standards

for local roads (reference Forest Service Manual and Handbook 7700 – Transportation System). *Id.* See also, Forest Service Handbook (FSH) 7709.56b § 9.02(1): “construct bridge and culvert structures in a safe and efficient manner.”

The requirement that “[a]t least 6 inch[es] of stone will be applied to all roads intended for permanent access” is consistent with forest plan direction: “Surface disturbing activities (i.e., road locations, well pads, etc.) will be negotiated between the ANF and the OGM operator prior to marking timber for removal.” Exh. B at p. 4. See also, FSM 7721.02: “[I]ocate, design, and construct facilities that provide the stability and durability appropriate for their intended service life and uses.”

Perhaps the most absurd complaint that Duhring mounts pertain to two Forest Service conditions regarding threatened, endangered, or sensitive species. For instance, Duhring complains about a “prescriptive condition” advising that “[a]ll 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.* The operative words here are “should” and “if.” This so-called “prescriptive condition” hardly requires anything of Duhring and it most certainly does not prohibit Duhring from exercising its mineral rights. Moreover these conditions are clearly in Duhring’s best interests. The Endangered Species Act applies to private parties like Duhring as well as the Forest Service. “Taking” an endangered species is expressly prohibited and could be a crime. 16 USC Sec. 1538-1540. The Forest Service is simply trying to comply with clearly applicable law and to protect both it and Duhring from violations of federal law. Duhring also grumbles about being asked to “[f]ollow 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.* What would the alternative to this be? Should the Forest Service tell Duhring to *ignore* federal law and the terms and conditions in its regulatory permits and other official project authorizations so that Duhring can proceed to violate that binding law and “take” endangered species?

Duhring claims that, “these conditions reflect the one-sided approach which the Forest Service took with respect to its regulation of Duhring’s surface access rights.” *Id.* These requirements and guidance, however, are clearly reasonable and, more important, lawful oversight of Duhring’s access across the federal surface in Lot 9. The Forest Service, as a federal agency, would be remiss not to request that those operating on its surface follow the law to protect the surface and water resources, and threatened, endangered, and sensitive species and their habitat on the ANF.

If anything, the Forest Service is not doing nearly enough to regulate private oil and gas drilling operations on the ANF. For instance, as the ANF Handbook for Oil & Gas Administration (“OGM Handbook”) states,

The Forest Service must review all proposals and prepare an Environmental Assessment of the surface disturbance activity regardless of the mineral ownership.

Exh. L at p. 13. This includes proposals to exercise outstanding mineral rights:

The significant difference between reserved and outstanding mineral rights is that (rights reserved) are addressed by the Secretary of Agriculture’s Rules and Regulations, and outstanding rights are not. The review process is, however, the same for both.

Id. Indeed, this is the practice on the Ottawa National Forest (“ONF”) in Michigan. For example, in December 2007 the ONF released a Revised Environmental Assessment for the Trans Superior Resources, Inc. Private Minerals Exploration in the Matchwood Tower Road Area. Exh. I. This private minerals exploration project on the ONF included reserved and

outstanding minerals, similar to this case. Talbott Dec. ¶ 18 Exh. I at p. 2. Importantly, this revised Environmental Assessment emphatically states,

Federal actions such as permitting and/or authorizing access and surface occupancy for the exercise of private mineral rights must be analyzed to determine potential environmental consequences pursuant to the National Environmental Policy Act of 1969 (NEPA).

Talbott Dec. ¶ 19 & Exh. I at p. 2. In this case, however, the Forest Service did not prepare an Environmental Assessment and this issue is not now before this Court.

E. Disputed issues regarding Plaintiffs' Statement of Material Facts (¶¶ 18 and 20)

Pursuant to FRCP 56(f), ADP requests discovery regarding the unsupported “facts” in Paragraph 18 of Plaintiffs' Statement of Material Facts since Duhring's “evidence” regarding these “facts” appears to be based on hearsay from individuals with incomplete personal knowledge. ADP requests discovery regarding Paragraph 20 of Plaintiffs' Statement of Material Facts since Plaintiffs' submit no evidence other than the Stewart Declaration's conclusory assertions that so-called delayed timing of the Forest Service's issuance of the Notice to Proceed and the so-called burdensome conditions of that Notice jeopardized Duhring's ability to comply with its well-drilling contractual obligations to third parties or its ability to produce mineral resources from existing wells and to plug other existing wells. Nor do Plaintiffs' offer any other evidence that the Forest Service's conduct has increased Duhring's operating expenses, damaged Duhring's business reputation, or prevented Duhring from availing itself of other business opportunities. See ADP's Statement in Resp. ¶ 20 and the Talbott Dec. ¶ 23. Duhring's motion should be ruled upon until ADP has had the opportunity to request reasonable discovery regarding these disputed factual issues.

IV. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED

A. THE RELIEF PLAINTIFFS' SEEKS CANNOT BE GRANTED UNDER THE LIMITED WAIVER OF SOVEREIGN IMMUNITY PROVIDED BY THE QTA

ADP incorporates by reference its arguments set forth in its Motion to Dismiss Count II.

See ADP Motion to Dismiss, at pp. 12-13.

B. PLAINTIFFS' FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES

As we state in our Motion to Dismiss, this Court lacks subject matter jurisdiction because Plaintiffs' failed to exhaust their administrative remedies. The claims in Count II could have been raised in an administrative appeal pursuant to 36 CFR § 251.82(a) when the Defendants issued the Notice to Proceed for Lot 9. Plaintiffs' did not file an administrative appeal, however, thereby depriving the Defendants' an opportunity to address these claims first. Thus, it is premature and inappropriate for Plaintiff to now ask this Court for relief when it failed to exhaust its administrative remedies.

As the Third Circuit has noted:

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. Hufstедler*, 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 Third Circuit 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. (36 CFR §§ 215.21, 251.101; see also, *Western Radio Services v. United States Forest Service*, 2008 U.S. Dist. Lexis 11203, *16 (D. Or. February 12, 2008)).

All of Plaintiffs’ claims in Count II 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:

(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” regarding Duhring’s claims in Count II is the “Notice to Proceed” and stipulations attached thereto for Plaintiffs’ submitted Surface Use Plan 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 the National Forest System lands for exercise of reserved and/or outstanding mineral rights. Duhring acknowledges that it is indeed the Notice to Proceed that is the source for 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).

Duhring 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).¹

With regard to Lot 9 (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 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’ Notice to Proceed for Lot 9. As a result, Plaintiffs’ Motion for

¹ Duhring’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.

Partial Summary Judgment on Count II must be denied because Plaintiffs' failed to exhaust their administrative remedies. (*Kleissler*, 183 F.3d at 207; 36 CFR § 251.101).

C. POGAM DOES NOT HAVE STANDING AND CANNOT STATE A CLAIMS FOR QUIET TITLE.

In addition to the problems identified above regarding both Duhring and POGAM's Quiet Title claims, POGAM claims also fail for a number of additional reasons. Duhring 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) Duhring 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 regarding Lot 9 and it introduces no evidence regarding such an interest in support of its summary judgment motion. Instead, it points to the same parcels identified by Duhring, notes that Duhring 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 allegations and absent evidence of an actual and specific real property interest at issue, POGAM does not have Article III standing to seek relief regarding the specific, real property interests of its members, it cannot state valid claims for such relief under the substantive law, and POGAM is not entitled to any sort of Quiet Title judgment under FRCP 56.

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).

POGAM is a Pennsylvania non-profit corporation that serves as the trade association of Pennsylvania’s independent oil and gas producers and promotes the general welfare of Pennsylvania’s crude oil and natural gas exploration and production industry. Plaintiffs’ Statement of Material Fact in Support of Motion for Partial Summary Judgment, ¶ 1. This is not a sufficient claim in interest relating to Duhring’s property that is the subject of this action.

POGAM does not have a legally protected interest whatsoever in Duhring’s property and cannot state claims on its behalf simply because Duhring is a member company of POGAM.

In *Tudor v. Members of the Arkansas State Parks, Recreation and Travel Commission*, the court considered a Quiet Title Act claim in which the Plaintiffs sought to quiet title to the Defendant state commission that had conveyed land to the United States. 83 F.R.D. 165; 1979 (W.D. Ark. 1979) While the court noted the unusual relief requested by the Plaintiffs, it nonetheless explicitly stated that:

[w]here [] the plaintiffs are relying solely upon a federal statute to confer standing to litigate a particular issue,[] they must meet a two-fold burden. First, the plaintiffs must allege that they have been injured in fact by the challenged action.

Id. at 169.

The court noted that the “[i]t is undisputed that the plaintiffs have no color of title, right or interest in the land conveyed by the Commission other than that generally enjoyed by the

citizens of the State of Arkansas.” *Id.* The court ruled that, “such an interest is insufficient to confer standing to litigate issues of title under the provisions of 28 U.S.C.A § 2409a.”

In a case such as this where POGAM is asserting a claim to quiet title (POGAM Compl. Count II), a claim 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 Count II and that claim must be dismissed to the extent that they demand such relief.

2. POGAM Cannot State A Claim For Relief

Even if POGAM had standing to assert the claim in Count II, that claim also fails under the applicable substantive law. In Counts II, POGAM purports to bring a claim under the Quiet Title Act, 28 USC Sec. 2409a. Such a claim, however, requires 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. POGAM also has not produced any evidence showing that it has such an interest. POGAM’s motion for summary judgment on Count II must be denied and Counts II must be dismissed.

D. THE FOREST SERVICE HAS AUTHORITY TO REGULATE DUHRING’S ACCESS TO THE FEDERAL SURFACE

For the reasons set forth above, ADP believes that this Court should deny Duhring and POGAM’s motion for partial summary judgment without the need to address the factual or legal merits of that claim. If, however, the Court were to determine that it is appropriate or necessary

to address the factual and legal merits of Duhring's motion for partial summary judgment on its Quiet Title Claim, Count II, ADP still believes and requests that Duhring's motion be denied. Duhring essentially is arguing that the US Forest Service, a federal agency, only has the rights of a private owner of the surface estate regarding Lot 9 and that the Forest Service's regulation of Duhring's access to the surface estate was both illegal and unreasonable. Duhring is simply wrong legally regarding the scope of a federal agency's authority over federal government property and its submissions fail to establish any unreasonable regulation by the Forest Service.

1. Duhring's Motion is Premature and ADP is Entitled to Conduct Discovery

Duhring has chosen to bring this motion before the Forest Service or ADP has answered its complaint and before any discovery has occurred. Duhring's motion fails to support several of its asserted undisputed material facts with sufficient evidence, including in particular the "facts" regarding precisely how the Forest Service has supposedly imposed unreasonable restrictions on Duhring's access to the surface estate of Lot 9. See, e.g., ADP's Response to Duhring's Undisputed Facts 18 & 19. Pursuant to FRCP 56(f), ADP believes it is entitled to discovery regarding these and other material issues which involve interactions between Duhring and the Forest Service to which ADP was not privy and requests that Duhring's motion be denied until ADP has had the opportunity to conduct such basic factual discovery regarding the scope, manner and reasonableness of the Forest Service's regulation and any alleged harm caused to Duhring because of that regulation. See Talbott Dec. ¶ 23. If the Court nevertheless chooses, despite ADP's lack of any factual discovery, to address the legal merits of Duhring's Quiet Title claim, ADP offers the following argument to demonstrate that Duhring's legal claim has no merit.

2. Duhring's Argument That the Forest Service Has No Legal Right to Regulate Duhring Oil and Gas Operations on Forest Service Property Has No Merit.

Before addressing the specifics of Duhring's legal argument, ADP would like to first establish what legal issues are and are not in dispute.

First, the Forest Service clearly has never claimed or asserted that Duhring's "peculiar easement" is preempted by the Forest Service's legal rights and obligations under federal law. That "peculiar easement" gives Duhring certain rights to the surface estate of Lot 9 in order to gain access to its leasehold mineral estate; however, those rights are not absolute. See *US v. Minard Run*, 1980 US Dist. Lexis 9570, *12-14 (W.D. PA 1980). The Forest Service merely seeks to reasonably regulate that access in order to protect federally-owned surface resources. Most of the restrictions and conditions requested by the Forest Service are obviously designed and intended to protect surface soil, water and wildlife resources from permanent impairment. In light of the recent, unprecedented level of oil and gas development in the ANF and the documented history of environmental damage caused by such development (see discussion above and Talbott Decl. at ¶¶ 7-8; Belitskus Decl. at ¶¶ 2-8), those conditions are entirely reasonable and at best the minimum necessary in order for the Forest Service to fulfill its trust obligations regarding the publicly-owned surface estate. (see ADP Fact Statement, ¶ 23 & Talbott Dec. ¶ 23). Other requirements, such as road use fees and payments for harvested timber are simply non-discriminatory conditions imposed on all businesses that conduct operations in the ANF. This represents completely reasonable regulation of Duhring's "peculiar easement" and is in no way a preemption of that easement or an unconstitutional "taking" of Duhring's

leasehold oil and gas property interest.² Duhring itself admits that the Commonwealth of Pennsylvania, acting as a sovereign and using its well-established police powers, can and has imposed conditions on Duhring's access to the surface estate that did not exist at common law. Duhring SJ. Brief at 24. The US Forest Service, acting in its capacity as the sovereign over federal property, simply has imposed additional, reasonable conditions that are not inconsistent with the state's conditions. The additional federal conditions merely serve to compliment the state regulation and to protect the unique federal interest involved in managing public property that is subject to a multiple use mandate.

Second, rather than complaining about the actual alleged preemption of its "peculiar easement" or unreasonable regulation that effectively denies Duhring access to its oil and gas leasehold, Duhring's motion argues that the Forest Service does not have any sovereign right to regulate what occurs on the federally-owned surface estate. According to Duhring the US Forest Service's rights as the owner of the surface estate are only those of a private owner and the Forest Service must rely entirely on state law and state authorities to protect its surface estate. Far from avoiding Constitutional issues, as Duhring insists this Court must do, Duhring's legal argument turns the U.S. Constitution on its head and twists federal authority under the Supremacy and Property Clauses of that Constitution, and other applicable federal laws, beyond all recognition. Duhring's cited authorities offer no support for such a cramped reading of

² Duhring has certainly not been deprived of all economic use of its property interest and the Forest Service's exercise of standard police power regulatory authority does not even come close to the level of excessive regulation that could under certain circumstances be considered a "taking". See generally *Lucas v. S. Carolina Coastal Comm.*, 505 US 1003 (1992). If that were Duhring's claim, it needs to offer far more proof of its damages and ADP is entitled to discovery regarding this issue as well.

federal authority over federal property, and other binding case law clearly rejects Duhring's legal position.

3. The Forest Service is Required and Allowed by Federal Law to Protect National Forest Surface Resources From Impairment.

The Multiple Use and Sustained Yield Act, 16 USC Secs. 528, 531, requires that our national forests be managed for multiple uses and that specific decisions regarding how and when such uses occur must be made "without impairment of the productivity of the land..." To achieve that goal, the National Forest Management Act, 16 USC Sec. 1604, requires that the Secretary of Agriculture prepare management plans for our national forests and develop regulations regarding the preparation of those plans that require terms for the "protection of forest resources". 16 USC Sec. 1604(g) (3)(A).

To that end the U.S. Forest Service promulgated regulations in 1982 that the Forest Service used when preparing the initial Land and Resource Plan for the ANF in 1986 and the revised LRMP in 2007. See 36 CFR Part 219 (1999). Exh. B at p. 2. Those Planning Regulations specifically required that LRMP's contain mandatory provisions for the protection of national forest surface resources, including soil, water and wildlife resources. See 36 CFR Sec. 219.19, 219.27(a); see also 36 CFR Sec. 251.50 (requiring permits for "special uses" of National forest Land). To that end, and because oil and gas development can have adverse impacts on surface resources, both the ANF 1986 Plan and the 2007 Revised Plan contain standards and guidelines for regulating oil and gas development in order to protect the ANF's surface resources. Exh. K at pp. 3-8; Exh. B at pp. 3-5. The conditions imposed by the Forest Service on Duhring's access to the surface of Lot 9 are clearly based upon these standards and guidelines. Thus the conditions

about which Duhring complains are based on and required by federal statutes, regulations, and LRMP provisions.

4. Federal Court Case Law Fully Supports the Authority of Federal Agencies to Regulate the Use of the Federally-Owned Surface Estate.

In 1976, the state of New Mexico challenged the authority of federal agencies, pursuant to a federal law, to protect wild horses and burros on federally-owned property. Traditionally, the regulation of wildlife had been considered to be the exclusive domain of the states. But the US Supreme Court, citing to federal authority under the Property Clause, upheld the federal regulatory scheme regarding wild horses. *Kleppe v. New Mexico*, 426 US 529 (1976). The Property Clause provides that, “Congress shall have the power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States.”

US Const. Art. IV, Sec. 3, Cl. 2. The unanimous Court in *Kleppe*, explained that:

[T]he Clause, in broad terms, gives Congress the power to determine what are “needful” rules “respecting” the public lands....[W]e have repeatedly observed the ‘[the]power over the public land thus entrusted to Congress is without limitations.’...Congress exercises the powers both of a proprietor and of a legislature over the public domain....[W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State’s consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress’ powers under the *Property Clause*. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the *Property Clause*...and when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the *Supremacy Clause*.... A different rule would place the public domain of the United States completely at the mercy of state legislation.

Kleppe, 426 US at 539-543 (citations omitted, emphasis in original). Although *Kleppe* would support Forest Service regulation that conflicted with state law, in this case, the federal regulation at issue merely compliments and adds to existing state regulation. That is also fully consistent with the federal authority recognized in the decision.

In *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), the Eighth Circuit applied *Kleppe* and upheld reasonable federal regulation over state property that adjoined federal property. The appellate court explained that under case law preceding and adopted by *Kleppe*, “it is clear the regulations under the *Property Clause* may have some effect on private lands not otherwise under federal control... so long as such power is directed solely to (the public lands’) own protection.” 660 F.2d at 1248-1249, citing and quoting *Kleppe* and *Camfield v. US*, 167 US 518 (1897). Moreover, the Eighth Circuit also explained how *Kleppe* had clarified the extent of federal authority over federal property: “Prior to *Kleppe*, language in Supreme Court opinions supported the argument that Congress’ power over federally-owned property did not exceed “the rights of an ordinary proprietor”.... The Court in *Kleppe*, however, rejected any narrow construction of the *property clause*, holding that Congress possessed full legislative/police power over activity occurring on federal property. In other words, any conduct taking place on United States land may be subject to congressional authority, regardless of its relationship to that land.” 660 F.2d at 1248, n. 16 (citations omitted).

Kleppe and *Block* thus completely reject Duhring’s argument that the Forest Service only has the same rights over its surface estate as would any private property owner under Pennsylvania law. Moreover, both *Block* and *Kleppe* recognize that valid federal regulation to protect federal property interests can even restrict conduct on nearby or adjacent private property. Thus in this case the Forest Service’s reasonable regulation of Duhring’s actions on the federally-owned surface estate are a completely valid exercise of federal authority, even if that regulation has limited and incidental impacts on Duhring’s underlying private oil and gas property interests. Indeed, that is exactly what the Eighth Circuit concluded in *Duncan Energy v. US Forest Service*, 50 F.3d 584 (8th Circuit 1995).

In *Duncan* the holder of outstanding oil and gas rights sought to access those rights using the federally-owned surface estate, part of a national grassland administered by the Forest Service in North Dakota. The Forest Service was unable to process its application within 60 days and sought to impose certain conditions quite similar to those at issue here. The oil and gas developer brought suit arguing that the Forest Service was limited to its rights under North Dakota law and pursuant to earlier Forest Service guidance documents and the unpublished decision in *US v. Minard Run*, 1980 US Dist. Lexis 9570 (W.D. PA 1980). In other words the plaintiff in *Duncan* made essentially the same arguments as does *Duhring* in this case. The Eighth Circuit rejected those arguments, citing *Kleppe and Block*, and noting that, “Congress has given the Forest Service broad power to regulate Forest Service land.” 50 F.3d at 589. Moreover, the *Duncan* court found that the Forest Service was not bound by its earlier guidance documents or the decision in *Minard Run*, especially when it was basing its authority on different circumstances and regulations not at issue in that case. The Court concluded that, “the Forest Service has the limited authority it seeks here; that is, the authority to determine the reasonable use of the federal surface.” 50 F.3d at 589-591. This Court should reach the same conclusion as the Eighth Circuit in *Duncan*.

In their brief, *Duhring* attempts to distinguish *Duncan* by arguing that in this case the Forest Service obtained the surface estate at issue pursuant to the Weeks Act, while in *Duncan*, the Forest Service obtained the surface estate under a different law. The failure of that argument is that nothing in the Weeks Act prohibits the Forest Service’s reasonable regulation of outstanding mineral rights. See 16 USC Sec. 518. Moreover as the Supreme Court noted in *Kleppe*, how the federal government obtained a specific piece of property has no bearing on its authority to regulate under the *Property Clause*. See 426 US at 542-43. *Duhring* also places

much reliance on the unpublished decision in *Minard Run*, but in addition to the *Duncan* court's grounds for refusing to follow that case, it is clear from the opinion in *Minard Run* that the Forest Service in that case "specifically disclaimed any intention of proceeding as a sovereign in regulating the use of the surface for the purpose of the Allegheny National Forest," *Minard Run* at *15, and the 1982 Planning Regulations, 36 CFR Part 219 (1999), which imposed specific duties on the Forest Service to protect surface resources were not in effect when *Minard Run* was decided. Here the Forest Service clearly appears to be regulating the surface estate pursuant to its authority recognized under *Kleppe* as the "federal sovereign".³

Duhring also relies on the decision in *US v. Srnsky*, 271 F.3d 595 (4th Cir. 2001) and certain 1992 federal legislation, EPAAct, 30 USC Sec. 226(o). Neither authority offers Duhring support for its position before this court. In *Srnsky* Forest Service was insisting that federal law had completely preempted the plaintiffs' alleged implied easement over national forest land that allowed the plaintiffs to access their private inholding. The Fourth Circuit could find no federal law that allowed for such a complete preemption of an implied, reserved right, and remanded for a determination of the plaintiffs' alleged implied easement under state common law. In this case, in marked contrast, no one is arguing that federal law allows for the complete preemption of Duhring's "peculiar easement" which allows it limited access to the surface estate in order to exploit its outstanding oil and gas rights. Instead the Forest Service is simply seeking to place reasonable conditions on that easement, which are necessary to protect federal surface resources from permanent impairment. The Forest Service's right to do so is made clear by *Kleppe*, *Block and Duncan*, and simply was not at issue in *Srnsky*.

³ If for whatever reason the Forest Service in this case were to disclaim its right to exercise regulatory authority as the federal sovereign, ADP would like discovery regarding how it could do that consistent with its obligations under NFMA and the planning regulations.

Duhring also insists that the 1992 Energy Policy Act, 30 USC Sec. 226(o) somehow limits how the Forest Service can regulate Duhring's activities on the federal surface estate. Although that law clearly does require that certain requirements or conditions be imposed by the Forest Service on those seeking to drill on the ANF, ADP can find nothing in that statute which says that the Forest Service can impose no other reasonable and necessary conditions. The conditions imposed by the Forest Service on Duhring with regard to Lot 9 are entirely consistent with this law.

Finally, Duhring argues that allowing the Forest Service to regulate its surface activities on the ANF may require the Forest Service to comply with the National Environmental Policy Act ("NEPA"), 42 USC Sec. 4332, and that such compliance would somehow prejudice Duhring's interests. The Forest Service in fact did not prepare any NEPA analysis when it was deciding how to authorize Duhring's drilling activities on Lot 9, so Duhring's arguments seem speculative at best. ADP does believe that the Forest Service's decisions regarding how to regulate oil and gas activities do trigger NEPA requirements and the Forest Service should comply with NEPA when it issues similar authorizations on other National Forests. See Talbott Dec. At 18-19. However, as is noted above this potential legal dispute between ADP and the Forest Service has absolutely nothing to do with Duhring's current claim under Count II.

V. CONCLUSION

For all the reasons set forth above and in ADP's Statement in response to plaintiffs' Statement of Material facts, ADP requests that Plaintiffs' motion for partial summary judgment be denied and that their Count II claims be dismissed. In the alternative ADP requests that

Plaintiffs' motion be denied under FRCP 56(f) so that ADP can conduct reasonable discovery regarding plaintiffs' claims.

Respectfully submitted,

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

DUHRING RESOURCE COMPANY,	:	CIVIL ACTION NO. 07-314
Plaintiff	:	
	:	Judge McLaughlin
and	:	
	:	
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	:	

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 29th day of October, 2008:

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