

Officer of the Forest Service, in his official capacity; and William Mickle, Uniformed Law Enforcement Officer of the Forest Service, in his official capacity.

Parties

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

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

3. Defendant U.S. Forest Service (“USFS”) is an agency of the United States Department of Agriculture (“USDA”), organized by the USDA under the laws of the United States of America, whose national office is located at the Auditors Building, 1400 Independence

Avenue, SW, Washington, District of Columbia 20250. Defendant USFS is a citizen of the District of Columbia.

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

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

6. Defendant Robert T. Fallon is the District Ranger of the Marienville Ranger District of the ANF, whose office is located at HC 2, Marienville, Forest County, Pennsylvania 16239, and against whom this action has been brought in his official capacity.

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

8. Defendant Robert A. Stovall is a Deputy District Ranger of the Bradford Ranger District of the ANF, whose office is located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his official capacity. Defendant Stovall was the Acting District Ranger of the Bradford Ranger District of the ANF at all times material to the cause of action asserted in this Complaint prior to the appointment of Defendant Scardina to the District Ranger position in that district of the ANF.

9. Defendant Robert Gydus is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford,

McKean County, Pennsylvania 16701, and against whom this action has been brought in his official capacity.

10. Defendant Jason J. Haberberger is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his official capacity.

11. Defendant William Mickle is a Uniformed Law Enforcement Officer of the USFS, stationed in the Bradford Ranger District of the ANF, located at 29 Forest Drive, Bradford, McKean County, Pennsylvania 16701, and against whom this action has been brought in his official capacity.

Subject Matter Jurisdiction

12. This Court has subject matter jurisdiction over the claims asserted against Defendants as follows:

a. This Court has subject matter jurisdiction over the claims asserted in Counts I, IV and V pursuant to the Federal Question Act, 28 U.S.C. § 1331, since the claims asserted therein arise under the laws of the United States and the United States Constitution. Section 702 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702, constitutes a waiver of sovereign immunity with respect to those claims, since they seek relief other than money damages and state claims that a federal agency and employees thereof acted and failed to act in an official capacity or under color of legal authority; and Section 703 of the APA, 5 U.S.C. § 703, permits such an action to be brought against the United States, the agency by its official title or the appropriate officer.

b. This Court has subject matter jurisdiction over the claims asserted against in Counts III, VI, and VII pursuant to the Supplemental Jurisdiction Act, 28 U.S.C. § 1367, since the claims asserted therein are so related to the claims made in Counts I, IV, and V, which are within the original jurisdiction of this Court, that they form a part of the same case or controversy under Article III of the United States Constitution. Section 702 of the APA, 5 U.S.C. § 702, constitutes a waiver of sovereign immunity with respect to those claims, since they seek relief other than money damages and state claims that a federal agency and employees thereof acted and failed to act in an official capacity or under color of legal authority; and Section 703 of the APA, 5 U.S.C. § 703 permits such an action to be brought against the United States, the agency by its official title or the appropriate officer.

c. This Court has subject matter jurisdiction over the claims asserted in Counts II and VIII pursuant to the Quiet Title Jurisdiction Act, 28 U.S.C. § 1346(f), the Quiet Title Act, 28 U.S.C. § 2409a, having waived sovereign immunity with respect to those claims, which seek the adjudication of title to real property in which the United States has claimed or asserted an interest.

Venue

13. Venue lies in this district pursuant to 28 U.S.C. § 1391(e) in that: Defendant USFS is an agency of the United States and Defendants Connaughton, Marten, Fallon, Scardina, Stovall, Gydus, Haberberger, and Mickle are officials or employees of the USFS who at all times relevant to the subject matter of this action acted as employees of the USFS under color of legal authority; a substantial part of the events or omissions giving rise to this action occurred in this district; and all the property that is the subject of this action is located in this district.

14. This action belongs on the Erie calendar of this Court pursuant to W.D. Pa. LR 3.1, since the causes of action arose in Warren and Forest Counties of the Commonwealth of Pennsylvania and Plaintiff Duhring Resource Company (“Duhring”) resides in Warren County, Pennsylvania.

Cause of Action

15. On March 1, 2007 the subsurface oil, gas and mineral (or “OGM”) rights in real property located in Warren County, Pennsylvania and described in a lease dated December 20, 2004 and recorded in the Warren County Recorder’s Office in Book 1439, Page 298 (“Lot 7”), were assigned to Plaintiff Duhring in an assignment of that date, recorded in the Warren County Recorder’s Office in Book 1693, Page 170.

16. On June 15, 2004 the OGM rights in certain real property located in Warren County, Pennsylvania were assigned to Duhring, which property is described in Annexure 1 to the June 15, 2004 assignment, which assignment was recorded in the Warren County Recorder’s Office in Book 1385, Page 233 (“Lot 8”).

17. On May 10, 2004 the OGM rights in certain real property located in Warren County, Pennsylvania and described in a lease dated January 30, 1990, a Memorandum of Lease Agreement relating thereto being recorded in the Warren County Recorder’s Office in Book 294, Page 132 (“Lot 9”), were assigned to Duhring by order of the United States Bankruptcy Court of the District of Arizona at Case No. 02-17432-CGC, which order was recorded in the Warren County, Pennsylvania Recorder’s Office in Book 1375, Page 263.

18. On December 15, 2006 the OGM rights in certain real property located in Forest County, Pennsylvania, being a square of land containing 150 acres in the northeast corner of Warrant 3672 and associated wells, as described in a December 15, 2006 assignment, which was

recorded in the Forest County Courthouse on December 22, 2006 (“Warrant 3672”), were assigned to Duhring.

19. Lots 7, 8 and 9, and Warrant 3672 (collectively, “Parcels”), are located in the ANF, which is part of the National Forest System; the surface estate of the Parcels is owned by the United States of America and managed by the USFS pursuant to the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600, *et seq.*

20. Duhring, as the owner of the rights to develop the OGM resources in the Parcels, has an easement for the use of the surface estate that is dominant to the surface estate, giving Duhring the right under the common law of Pennsylvania to the reasonable use of the surface estate to develop the OGM resources.

21. OGM estates in the ANF and other national forests, including estates held by Duhring and other members of Plaintiff-Intervenor POGAM, are of two general types under the Weeks Law of March 1, 1911 (“Weeks Act”), the General Exchange Act of March 20, 1922, the regulations of the Secretary of Agriculture and the common law of the Commonwealth of Pennsylvania: “reserved” and “outstanding.” Reserved OGM rights are rights retained by a grantor in a deed conveying land to the United States, while outstanding mineral rights are those rights owned by a party other than the surface owner at the time the surface was conveyed to the United States.

22. The exercise of reserved OGM rights by the owner of the reserved OGM estate is subject to the regulations of the Secretary of Agriculture as stated in the deed conveying the surface estate to the United States, while the exercise of outstanding OGM rights is not subject to those regulations of the Secretary of Agriculture.

23. The OGM rights of Duhring in Lots 7 and 9, and in Warrant 3672, are outstanding, while those in Lot 8 are reserved.

24. Section 2832 of the U.S. Forest Service Manual of Defendant USFS provides that the owner of outstanding OGM rights must furnish the Forest Supervisor of the particular national forest with 60 days' advance written notice of surface occupancy by submitting a proposed operating plan and other documents. Chapter 2, Section 2 of the Defendant USFS's ANF Handbook provides that all OGM developers must provide USFS with a "[m]inimum 60 days written notice on intent to develop," along with other documents.

25. The 60-day advance-notice procedure appearing in the Forest Service Manual and the ANF Handbook stems from a preliminary injunction issued by this Court in the *United States v. Minard Run Oil Co.*, No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980). That decision was based on Pennsylvania common law and was adopted by the USFS in its Forest Service Manual and in the ANF Handbook, in which owners of reserved and outstanding OGM rights in the ANF acquiesced as reasonable advance notice of their use of the surface estate to develop the OGM resources. This mutual recognition of the 60-day advance-notice procedure became a matter of custom and practice among the USFS and owners of OGM rights in the ANF after April 24, 1981.

26. On October 24, 1992 the 60-day advance-notice procedure first set forth in *Minard Run* became a matter of federal statutory law with the enactment of the Energy Policy Act of 1992, Pub. L. No. 102-482, § 2508(a), 106 Stat. 3108-09 (1992) (codified in 30 U.S.C. § 226(o)) ("EPAAct").

27. The *Minard Run* opinion did not require the OGM estate owner to first obtain Forest Service approval of a plan of operations or a notice to proceed, nor did it give the Forest

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

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

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

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

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

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

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

28. The 1992 EPAct provisions confirm the regulatory role of the Commonwealth of Pennsylvania regarding oil and gas development in the ANF by stating: "Nothing . . . shall be construed to affect the authority of any State in which the lands are located to impose any requirements with respect to such oil and gas operations." 108 Stat. 3108.

29. While the 1980 *Minard Run* opinion was an interpretation of the Pennsylvania common law, that judge-made law has now been supplemented by Pennsylvania statutory law. The Pennsylvania Oil and Gas Act, 58 P.S. § 601.101, *et seq.* ("POGA"), adopted in 1984 and

amended in 2001, provides for regulatory control over private OGM development in Pennsylvania by the Pennsylvania Department of Environmental Protection (“DEP”). POGA retains the dominance of the mineral estate, and the surface owner’s right to some advance notice of OGM development, both as understood in *Minard Run* and codified in the EPAct. Under POGA the surface owner has 15 days from receipt of notice to object to the DEP; the DEP must issue or deny the OGM owner’s permit application within 45 days of the submission, which time period can be extended to a total of 60 days for cause shown. 58 P.S. § 601.201(e).

30. The surface owner’s grounds for objection are limited under POGA and must be based either on the assertion that the well location violates POGA or that information in the application is untrue in some material respect. 58 P.S. §§ 601.201(b), 601.202(a).

31. The Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the *Minard Run* decision, the common law of Pennsylvania, the EPAct, and POGA do not require USFS approval of OGM operations before those operations can be commenced by OGM operators in the ANF. If any objections by the USFS not within the purview of POGA to those operations are not resolved by agreement within 60 days of notice to the USFS by the OGM operator, the sole recourse of the USFS is to initiate an action in a court of competent jurisdiction seeking appropriate legal relief.

32. Defendants Fallon, Scardina, Stovall, and Marten, their subordinates on their instructions, and Defendant Marten’s predecessor in office (Kathleen S. Morse) have expressly stated to Duhring and other owners of OGM rights in the ANF that they may not commence OGM development activities until the District Ranger of the USFS District in which the property to be developed is located issues a “notice to proceed”; and, on multiple occasions, those Defendants and/or their subordinates have threatened criminal prosecution should holders of

OGM rights commence their use of the surface estate in the absence of the issuance of a notice to proceed or use the surface estate in violation of its provisions after it has been issued.

33. On March 17, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 7, at the same time providing the USFS with all documents required by the EAct. It was not until September 12, 2007 that the USFS provided Duhring with a notice to proceed.

34. The USFS notice to proceed with respect to Lot 7 contained economically burdensome provisions that violate, and exceed the USFS's authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EAct, and POGA, and that were unilaterally imposed by the USFS in violation of those same laws, including a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

35. The USFS retained control of the removal of timber on Lot 7 and did not remove that timber in a timely manner, producing further delay in the OGM development operations of Duhring.

36. On March 19, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 8, at the same time providing the USFS with all documents set forth in the regulations of the Secretary of Agriculture, the Forest Service Manual and the ANF Handbook. The USFS determined to sell the timber to Duhring, but it was not until October 15, 2007 that the USFS provided Duhring with an invoice for the sale of timber on Lot 8.

37. After October 15, 2007, Duhring determined that the dollar amount of the invoice provided by the USFS with respect to the sale of the timber on Lot 8 was in excess of the fair market value of the timber, and Duhring declined to purchase the timber for that amount.

38. The USFS refused to reduce the amount of the invoice; refused to remove the timber itself; refused to offer the timber for sale to a third party by public auction or otherwise; would not permit the cutting of the timber by Duhring without the prior express permission of the USFS, threatening criminal prosecution unless Duhring received that permission on terms unilaterally determined by the USFS; and would not compensate Duhring for its removal of the timber to decking sites sought by the USFS.

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

40. On March 20, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Lot 9, at the same time providing the USFS with all documents required by the EPAct. It was not until November 13, 2007 that the USFS provided Duhring with a notice to proceed and, further, the USFS did not properly comply with the negotiation, consultation, and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

41. The delay associated with the issuance of the notice to proceed concerning Lot 7 produced additional delay with respect to Lot 9 since the well locations on Lot 7 had to be completed before the well locations on Lot 9 could be commenced.

42. The notice provided with respect to Lot 9 contained economically burdensome provisions that violate, and exceed the USFS's authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EPAct, and POGA, and that were unilaterally imposed by the USFS in violation of those same laws, including a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

43. On June 4, 2007 Duhring provided the USFS with notice of its intent to conduct OGM development operations on the surface of Warrant 3672, at the same time providing the USFS with all documents required by the EPAct. The USFS determined to sell the timber to Duhring, but it was not until November 6, 2007 that the USFS provided Duhring with an invoice for the sale of timber on Warrant 3672 and, further, the USFS did not properly comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

44. After November 6, 2007 Duhring determined that the dollar amount of the invoice provided by the USFS with respect to the sale of the timber on Warrant 3672 was in excess of the fair market value of the timber and Duhring declined to purchase the timber for that amount.

45. The USFS refused to reduce the amount of the invoice; refused to remove the timber itself; refused to offer the timber for sale to a third party by public auction or otherwise; would not permit the cutting of the timber by Duhring without the prior express permission of the USFS, threatening criminal prosecution unless Duhring received that permission on terms unilaterally determined by the USFS; and would not compensate Duhring for its removal of the

timber to decking sites sought by the USFS. In addition, the Forest Supervisor refused to meet with Duhring in violation of Section 2832.2 of the Forest Service Manual.

46. It was not until February 22, 2008 that the USFS gave its express permission to Duhring to cut the timber, provided that it “cut and stack” the marked trees, and the USFS has not properly complied with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual and the law of Pennsylvania.

47. On March 26, 2008, in contravention of its earlier stated “cut and stack” position, the USFS informed Duhring that if Duhring cut the timber upon Lot 8 and Warrant 3672, it must also “skid and deck” the timber at its own cost pursuant to terms and conditions of a written agreement; on April 3, 2008 the terms of that agreement, in a form prepared by the USFS, were presented to Duhring, which terms included a waiver of Duhring’s right to be compensated for the cost of cutting, skidding and decking.

48. On April 21, 2008 the USFS agreed to revise the agreement “in this instance only ... given the particular legal controversy that currently exists” to provide for the reimbursement of Duhring of the costs of cutting, skidding and decking if “directed to do so by a court of competent jurisdiction and last resort,” which revised agreement was executed by Duhring and the USFS with respect to Lot 8 and Warrant 3672 on May 1, 2008.

49. On May 5, 2008 the USFS provided Duhring with a notice to proceed with respect to Lot 8, and on May 8, 2008 the USFS provided Duhring with a notice to proceed with respect to Warrant 3672, which notices contained economically burdensome provisions that violate, and exceed the USFS’s authority under, the Weeks Act, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, EAct, and POGA, and that were unilaterally imposed by

the USFS in violation of those same laws, including (as to Warrant 3672) a failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual.

50. The USFS has notified Duhring that it will not permit the timely mining or use of stone located below the surface of Warrant 3672 in the course of Duhring's OGM development operations thereon, in violation of, and in excess of the USFS's authority under, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook, the common law of the Commonwealth of Pennsylvania, the Weeks Act, EPAct, and POGA. Duhring has the right to mine that stone as part of its OGM estate or to use it as part of its right to the reasonable use of the surface estate to develop the OGM resources.

51. The delay of the USFS as described above has imperiled the ability of Duhring to comply with its contractual obligations to third parties to drill new wells, produce OGM resources from existing wells and plug other existing wells, and it has dramatically increased Duhring's operating expenses. It has damaged Duhring's business reputation, interfered with the efficient conduct of its business operations and prevented it from taking advantage of otherwise available business opportunities by diverting the attention of its officers and employees from its business operations and substantially reducing its working capital.

52. From and including February 8, 2008 through February 11, 2008, Defendants Scardina, Gydus, Haberberger and Mickle, acting with the knowledge and permission, and on the instructions, of Defendants Connaughton and Marten, prevented Duhring and its subcontractors from conducting OGM operations on Lots 7, 8, and 9 by physically blocking access to wells on those parcels and by threat of arrest and criminal prosecution.

53. The stated basis for preventing OGM operations of Lots 7, 8, and 9 was that Duhring had not yet paid the road use fee demanded by the USFS and, therefore, a road use permit had not been issued by the USFS to Duhring, which payment and permit issuance were requirements of the notice to proceed issued to Duhring with respect to certain OGM operations conducted on those parcels.

54. Prior to February 8, 2008 Duhring notified the USFS of its objections to the amount charged by the USFS for said road maintenance and requested that the USFS discuss the appropriateness of that amount, which the USFS failed and refused to do. On February 11, 2008, Duhring paid the fees demanded under duress, and under protest of the amount and the manner of enforcement of payment.

55. Preventing OGM operations on February 8 through February 11, 2008 on Lots 7, 8, and 9 under these circumstances violated, and exceeded the USFS's authority under, the Weeks Act, the EPA Act, the POGA, the NFMA, the regulations of the Secretary of Agriculture, the Forest Service Manual, the ANF Handbook and the common law of the Commonwealth of Pennsylvania.

56. On May 8 and May 12, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM development operations on Lot 9; on May 10, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM operations on Lot 8; and on May 12, 2008 Duhring provided the USFS with notice of its intent to conduct additional OGM development operations on Warrant 3672. The documents set forth under the EPA Act, the Forest Service Manual, and the ANF Handbook accompanied those notices.

57. The economically-burdensome provisions imposed by the notices to proceed issued by the USFS, the recurrent unlawful conduct of Defendants and consequent delay, and the

determination on the part of the Defendants to unlawfully discourage the development of OGM resources in the ANF, demonstrate that there is a real threat of future multiple violations of Duhring's legal rights and the OGM rights of other POGAM members, to their substantial financial detriment.

Count I

POGAM v. USFS, Fallon, Scardina, Stovall, Connaughton, and Marten

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

Violation of National Forest Management Act, the Weeks Act, USDA Regulations, USFS Directives and Energy Policy Act of 1992

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

59. The failure of the USFS to acknowledge POGAM member Duhring's right to proceed with operations permitted under POGA within 60 days of its written notice of surface occupancy in the case of the Parcels, its delay in removing timber from Lot 7, its refusal to provide reasonably-priced invoices for the sale of timber on Lot 8 and Warrant 3672, to remove the timber and to compensate Duhring for its removal of the timber to decking locations desired by the USFS, its unilateral imposition of unlawful provisions on Duhring's OGM development operations on the Parcels, its failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual, its refusal to permit Duhring to timely mine or use stone below the surface of Warrant 3672, preventing OGM operations on Lots 7, 8 and 9 until the road use fees demanded were paid and a road use permit was issued, and its threats of arrest and criminal prosecution, have been the result of decisions made by Defendants, and they have diminished the value of Duhring's OGM rights, and diminished its profits by way of increasing its operational expenses and decreasing its gross revenue.

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

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

62. The positions of Defendants Fallon, Scardina, Stovall, Connaughton, and Marten within the USFS are such that their decisions in this regard can fairly be said to be those of the USFS.

WHEREFORE, in respect of the Statutes and directives hereinabove cited and incorporated, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendants as follows:

(a) compelling the Defendants to acknowledge Duhring’s right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring’s proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with Plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's

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

(i) declaring: that the failure to acknowledge an OGM operator's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are violations of the Federal Statutes and directives hereinabove incorporated;

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is a violation of the Federal Statutes and directives hereinabove incorporated.

Count II

POGAM v. USFS

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

63. The averments of paragraphs 1 through 62 of this Complaint are incorporated herein by reference.

64. The failure of the USFS to acknowledge POGAM member Duhring's right to proceed with operations permitted under POGA within 60 days of its written notice of surface occupancy in the case of the Parcels, its delay in removing timber from Lot 7, its refusal to provide reasonably-priced invoices for the sale of timber on Lot 8 and Warrant 3672 and to remove the timber and to compensate Duhring for its removal of the timber to decking locations desired by the USFS, its unilateral imposition of unlawful provisions on Duhring's OGM development operations on the Parcels, its failure to comply with the negotiation, consultation and notice requirements of Section 2832.2 of the Forest Service Manual, its refusal to permit Duhring to timely mine or use stone below the surface of Warrant 3672, preventing OGM operations on Lots 7, 8 and 9 until the road use fees demanded were paid and a road use permit was issued, and its threats of arrest and criminal prosecution, have been the result of decisions made by the Defendants, and they have diminished the value of Duhring's OGM rights, clouded its title thereto, and diminished its profits by way of increasing its operational expenses and decreasing its gross revenue.

65. The aforementioned decisions and the execution of those decisions have as their basis a determination on the part of the individual Defendants to unlawfully discourage the development of OGM resources in the ANF.

66. The positions of the individual Defendants within the USFS are such that their decisions in this regard can fairly be said to be those of the USFS.

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS as follows:

(a) compelling the Defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8

and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and

negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are violations of an OGM operator's private property rights recognized in accordance with the statutory, common law, and other authorities incorporated herein;

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is inconsistent with the operator's private property rights recognized in accordance with the statutory, common law, and other authorities incorporated herein.

Count III

Duhring v. USFS

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

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

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

68. The USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by the owner of the dominant estate, including holders of OGM rights.

69. The execution of the aforementioned decisions has unreasonably interfered with the enjoyment of the servitude by Duhring and will, in the future, unreasonably interfere with its enjoyment thereof by Duhring, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

70. The aforementioned decisions and the execution of those decisions have as their basis a determination on the part of Defendants to unlawfully discourage the development of OGM resources in the ANF.

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

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS as follows:

(a) compelling the Defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development

operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of “cutting, skidding and decking” the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator’s officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator’s right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator’s officers, employees and independent contractors for

failing to comply with unlawful requirements unilaterally imposed by Defendants, are unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by the OGM operator.

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by the operator.

Count IV

POGAM v. USFS

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

Procedural Due Process

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

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

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

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

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

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS as follows:

(a) compelling the Defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are violations of the right to procedural due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the

USFS issues a road use permit is a violation of the right to procedural due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Count V

POGAM v. USFS

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

Substantive Due Process

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

77. Defendant USFS's interference with the use and enjoyment of the Parcels by Duhring and other POGAM members in the past and future was and will be outrageous and arbitrary.

78. Defendant USFS's actions in preventing Duhring and other POGAM members from using the surface estate in the ANF in the absence of the issuance of a notice to proceed or a permit unlawfully discriminates against Duhring and other POGAM members and denies them substantive due process, since Defendant USFS does not require the issuance of notices to proceed or road use permits prior to use of the surface estate of the ANF by others with easements for the use of the surface estate in the ANF, such as owners and operators of rail lines, electrical transmission lines and natural gas transmission lines.

79. Defendant USFS's actions in preventing Duhring and other POGAM members from using the surface estate in the ANF in the absence of the issuance of a notice to proceed or a permit constitutes agency action "contrary to constitutional right, power, privilege, or immunity" within the meaning of the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing Defendant USFS as follows:

(a) compelling the Defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the

threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are violations of the right to substantive due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is a violation of the right to substantive due process under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Count VI

**POGAM v. Fallon, Scardina, Stovall, Connaughton, Marten,
Gydus, Haberberger and Mickle**

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

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

80. The averments of paragraphs 1 through 79 of this Complaint are incorporated herein by reference.

81. The USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by the owner of the dominant estate, including holders of OGM rights.

82. The execution of the aforementioned decisions by Defendants Fallon, Scardina, Stovall, Connaughton, Marten, Gydu, Haberberger, and Mickle has unreasonably interfered with the enjoyment of the servitude by OGM operators and will, in the future, unreasonably interfere with such operators' enjoyment thereof, diminishing the value of their OGM rights and diminishing the profits by way of increasing their operational expenses and decreasing their gross revenue.

83. The aforementioned conduct by Defendants is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "in excess of statutory jurisdiction, authority, or limitation," within the meaning of the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order directing the Defendants Fallon, Scardina, Stovall, Connaughton, Marten, Gydu, Haberberger, and Mickle as follows:

(a) compelling the Defendants to acknowledge Duhring's right to proceed with operations permitted under POGA on Lots 8 and 9 and Warrant 3672, within 60 days after notices of intent to conduct OGM development operations were provided by Duhring as described in paragraph 56 hereof;

(b) enjoining the Defendants from imposing unlawful conditions upon Duhring's proposed operations upon Lots 8 and 9 and Warrant 3672 and upon other OGM operations that Duhring or other similarly situated POGAM members may undertake in the future;

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

(d) compelling the Defendants to withdraw the unlawful conditions contained in the notices to proceed already issued by the Forest Service with respect to Lots 7, 8 and 9 and Warrant 3672 and compelling Defendants to discontinue use of the notice to proceed format, which seeks to impose unlawful conditions;

(e) compelling the Defendants to promptly meet, consult and negotiate in good faith with plaintiff or other similarly situated POGAM members when the Forest Service has concerns about OGM development operations proposed by Plaintiff-Intervenor's members;

(f) compelling the Defendants to remove timber from an OGM operator's areas of operation within 60 days after notice of intent to conduct OGM development operations is provided by the operator, or, when the OGM operator is willing to purchase the timber, compelling the Defendants to provide timely invoices for the sale of timber, or compelling the Forest Service to pay for the added value of "cutting, skidding and decking" the timber, when the parties agree that the timber will remain the property of the Forest Service but that the timber will be removed to decking locations desired by the Forest Service;

(g) enjoining the Defendants from preventing the mining or use of stone located below the surface of the ANF in the course of OGM development operations;

(h) enjoining the Defendants from threatening any OGM operator with arrest and criminal prosecution, and arresting and criminally prosecuting, the OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants;

(i) declaring: that the failure to acknowledge an OGM operator's right to proceed within 60 days of written notice of surface operations, that the unilateral imposition of unlawful conditions, that the failure of the Defendants to meet, consult and negotiate in good faith with an OGM operator regarding Forest Service concerns about OGM development, that the failure to timely remove timber or in the alternative provide timely invoices for the sale of timber, or in the alternative the refusal to compensate the OGM operator for the cost of removal of the timber to decking locations desired by the Forest Service, that preventing the timely mining or use of stone located below the surface of the ANF in the course of OGM development operations, and that the threatening with arrest and criminal prosecution, and arresting and criminally prosecuting, an OGM operator's officers, employees and independent contractors for failing to comply with unlawful requirements unilaterally imposed by Defendants, are unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by the OGM operator.

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

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

(l) declaring that the Defendants' prevention of OGM operations unless the OGM operator first pays a road use fee unilaterally determined by the USFS and the USFS issues a road use permit is unreasonable interference with the enjoyment of the servitude of the surface estate enjoyed by the operator.

Count VII

POGAM v. USFS

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

Pennsylvania Common Law – Trespass

Unreasonable Interference with Enjoyment of Servitude

84. The averments of 1 through 83 of this Complaint are incorporated herein by reference.

85. Defendant USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by the owner of the dominant estate, including holders of OGM rights.

86. Defendant USFS has on multiple occasions in the past used well locations, tank batteries and roads constructed, installed, owned or used by Duhring and other POGAM members who hold OGM rights in the ANF (“OGM Operator Facilities”).

87. The USFS has used the OGM Operator Facilities to conduct its own operations, including timber removal operations and materials storage, without prior notice to the OGM operator of its intent to conduct those operations, resulting in unreasonable interference with the

enjoyment of the servitude by the OGM operator, diminishing the value of the operator's OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

88. In view of this USFS past practice, it is likely that the USFS will use the OGM Operator Facilities in the future to conduct its operations, including timber removal operations and materials storage, and that its failure to provide prior notice of the same to the OGM operator will result in unreasonable interference with the enjoyment of the servitude by the OGM operator, diminishing the value of its OGM rights and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

89. The aforementioned conduct by Defendants is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and "in excess of statutory jurisdiction, authority, or limitation," within the meaning of the APA, 5 U.S.C. § 706(2).

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order (1) compelling Defendant USFS to provide OGM operators with 60 days advance written notice of its use of OGM Operator Facilities by submitting a proposed USFS operating plan that includes the following information: (a) the location of the OGM Operator Facilities to be used, (b) the nature of the use by the USFS, and (c) the time periods during which the use will occur, and requiring the USFS to negotiate modifications in the operating plan in good faith should the OGM operator object to the plan; (2) enjoining Defendant USFS from using OGM Operator Facilities without submitting an operating plan and negotiating modifications in the event of OGM operator objections; and (3) declaring that failing to submit an operating plan and negotiate modifications in the event of OGM operator objections constitutes unreasonable interference with the OGM Operator's enjoyment of the servitude.

Count VIII

POGAM v. USFS

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

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

91. Defendant USFS, as the holder of the servient estate in the ANF, is entitled to make use of that estate that does not unreasonably interfere with the enjoyment of the servitude by the owner of the dominant estate, including holders of OGM rights.

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

93. Defendant USFS has used the OGM Operator Facilities to conduct its own operations, including timber removal operations and materials storage, without prior notice to OGM operator of its intent to conduct those operations, resulting in unreasonable interference with the OGM operator’s enjoyment of the servitude, diminishing the value of its OGM rights, clouding its title thereto and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

94. In view of this USFS past practice, it is likely that the USFS will use OGM Operator Facilities in the future to conduct its operations, including timber removal operations and materials storage, and that its failure to provide prior notice of the same to the OGM operator will result in unreasonable interference with the OGM operator’s enjoyment of the servitude, diminishing the value of its OGM rights, and diminishing its profits by way of increasing its operational expenses and decreasing its gross revenue.

WHEREFORE, Plaintiff-Intervenor POGAM respectfully requests that the Court issue an order (1) compelling Defendant USFS to provide OGM operators with 60 days advance written notice of its use of OGM Operator Facilities by submitting a proposed USFS operating plan that includes the following information: (a) the location of the OGM Operator Facilities to be used, (b) the nature of the use by the USFS, and (c) the time periods during which the use will occur, and requiring the USFS to negotiate modifications in the operating plan in good faith should the OGM operator object to the plan; (2) enjoining Defendant USFS from using OGM Operator Facilities without submitting an operating plan and negotiating modifications in the event of OGM operator objections; and (3) declaring that failing to submit an operating plan and negotiate modifications in the event of OGM operator objections is inconsistent with the operator's private property rights recognized in accordance with the statutory, common law, and other authorities incorporated herein.

Respectfully submitted,

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