

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

**FOREST SERVICE EMPLOYEES FOR)
ENVIRONMENTAL ETHICS;)
ALLEGHENY DEFENSE PROJECT;)
SIERRA CLUB,)**

Plaintiffs,)

vs.)

CIVIL ACTION NO. 1:08-cv-323-SJM

UNITED STATES FOREST SERVICE,)

Defendant,)

and)

**PENNSYLVANIA OIL AND GAS)
ASSOCIATION; and ALLEGHENY)
FOREST ALLIANCE,)**

Intervenor-Defendants.)

INTERVENOR-DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Intervenor-Defendants Pennsylvania Oil and Gas Association (“POGAM”) and Allegheny Forest Alliance (“AFA”) hereby move for summary judgment under Fed. R. Civ. P. 56 on their Counterclaim and Cross-Claim concerning the inapplicability of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, to U.S. Forest Service Notices to Proceed with oil and gas projects in the Allegheny National Forest (“ANF”) and request oral argument on this motion.

As we have explained in our opposition to the purported Stipulation of Dismissal and underlying Settlement Agreement, and as we supplement below, the Court should hear our claims through summary judgment in this action and not relegate POGAM and AFA to

attempting to raise the claims in subsequent litigation. Judicial review is needed now due to the severe and unprecedented adverse economic and social effects that the resolution of this case under the Settlement Agreement threatens to have upon private oil and gas exploration and production activities in the 500,000-acre ANF and a vast four-county region of northwestern Pennsylvania which already has average unemployment levels substantially higher than the U.S. average.¹ ANF Supervisor Leanne Marten admitted these adverse impacts in her April 10, 2009 Statement describing the immediate implementation of the Settlement Agreement, filed just the day before: “the simple truth is that these are our communities and homes, and *we acknowledge the impact this will have on families and businesses, especially at a time when our nation is facing such a difficult economic downturn.*” (Emphasis added.)²

In light of the immediacy of these serious harms and in the absence of a clear mechanism for seeking immediate relief outside the instant case,³ POGAM and AFA, through this motion for

¹ According to the U.S. Bureau of Labor Statistics, in February 2009 unemployment percentage rates were at 13.2 in Elk County, 11.6 in Forest County, 9.7 in McKean County, and 8.0 in Warren County, Pennsylvania. See <http://www.bls.gov/ro3/palaus.htm>. The U.S. national average unemployment rate for this period was 8.1 percent.

² Allegheny National Forest, Statement from Forest Supervisor Leanne Marten and District Rangers Tony Scardina and Rob Fallon (Apr, 10, 2009) (“Marten Statement”) (copy appended at Ex. A to Declaration of Craig L. Mayer of POGAM, filed with Intervenor-Defendants’ Opposition to Stipulation of Dismissal and Settlement Agreement (Apr. 16, 2009)).

³ See Intervenor-Defendants’ Opposition to Stipulation of Dismissal and Settlement Agreement at 17. As we explain there, if we were to file a separate suit to avert these harms now, we fully expect the Forest Service would contend that the suit would not be ripe for review and that we must await completion of the EIS 15 months or more from now, if not the subsequent application of the new practice to a specific Notice to Proceed. The Forest Service expressly declined to waive that defense at the April 17, 2009 hearing as well as in its April 22, 2009 Response to our opposition to dismissing this action. See USFS Resp. at 2 n.1. The substantial threat this defense poses to the availability of immediate judicial review, coupled with the severe economic injury and uncertainty over oil and gas property rights that will flow from implementation of the

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summary judgment, and for the reasons largely set forth previously in the Intervenor-Defendants' Opposition to Stipulation of Dismissal and Settlement Agreement, filed April 16, 2009, seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, that the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, does not apply to the processing of Notices to Proceed by the Forest Service, and is beyond the authority of the Forest Service to apply, regarding the exercise of private severed mineral rights in the Allegheny National Forest ("ANF"). Such Notices to Proceed are not "major federal actions" significantly affecting the environment under NEPA, and this view has been the past position and administrative practice of the U.S. Forest Service. *See generally* Declaration of Craig L. Mayer, filed April 16, 2009, and Second Declaration of Craig L. Mayer, attached hereto. Adjudication of this central issue of law will be

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Settlement Agreement, constitute sufficient legal prejudice to deny the plaintiffs' and Forest Service's request for an order dismissing this case. *See* 8 MOORE'S FEDERAL PRACTICE § 41.40[6] (3d ed. 2008) (legal prejudice is shown "when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable"); *see also, e.g., Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974) (prejudice resulting from uncertainty over title to land is valid consideration under Rule 41(a)(2)). *Bragg v. Robertson*, 54 F. Supp. 2d 653 (S.D. W.Va. 1999), cited in plaintiffs' April 22, 2009 Surreply (at 2), is distinguishable in that those disenfranchised intervenors, while able to show injury in fact from a settlement agreement, did not in that court's opinion demonstrate *legal* prejudice from the delays and added costs they would incur as a result of the settlement. In contrast, POGAM and AFA have show such prejudice here for the reasons just explained. In any event, the *Bragg* court proceeded to review the substantive legality of that settlement agreement (including under NEPA), just as we ask the Court to do in this case. *See id.* at 665-71.

dispositive of the Plaintiffs' Complaint, and the Counterclaim and Cross-Claim filed by the Intervenor-Defendants.⁴

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The summary judgment process is aimed at according parties expeditious justice and alleviating pressure on court dockets by defeating tactics resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses. 10A WRIGHT, MILLER & KANE FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d § 2712 (“WRIGHT & MILLER”). As the Third Circuit observed, summary judgment is appropriate “to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense.” *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). Summary judgment is particularly appropriate “in cases in which the court is asked to review or enforce a decision of a federal administrative agency.” 10B WRIGHT & MILLER § 2733.

Although in summary judgment proceedings the 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), summary judgment must be entered for the

⁴ This entire civil action arose out of the Plaintiffs' Complaint seeking APA review of the Forest Service's compliance with NEPA. The Intervenor-Defendants' Cross-Claim against the United States impliedly seeks APA review by this Court of the question of whether NEPA properly applies to these actions at issue.

moving party “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Id.* at 586-87 (citations omitted). That is the situation in this case. The material facts are not at issue, and POGAM and AFA are entitled to summary judgment as a matter of law on their claims that: (1) NEPA does not apply to the processing of Notices to Proceed by the Forest Service, and is beyond the authority of the Forest Service to apply, regarding the exercise of private oil, gas, and mineral estates in the ANF; and (2) the Settlement Agreement and Marten Statement are unlawful under the APA because NEPA does not apply to Notices to Proceed, and because the Settlement Agreement and the Marten Statement adopt radically new substantive rules in an unlawful manner without following notice and comment rulemaking procedures under the APA.

ARGUMENT

POGAM and AFA hereby incorporate by reference the points, authorities, and arguments in their Opposition to Stipulation of Dismissal and Settlement Agreement (Apr. 16, 2009) (“POGAM/AFA Opp.”) and supplement it as follows:

I. THIS COURT CAN AND SHOULD ADDRESS THE LEGALITY OF THE SETTLEMENT AGREEMENT AND THE INTEGRALLY RELATED MARTEN STATEMENT IN THIS ACTION.

Resolution of the issues of law regarding the unlawful nature of the Settlement Agreement and the Marten Statement is proper in this action because POGAM and AFA have alleged that the Settlement Agreement exceeds the legal authority of the federal government. *See United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008) (“Because the intervenors were not permitted to participate in the settlement review proceedings, the approval of the settlement must be vacated. The district court should not take any new action on the settlement before considering the contentions of the intervenors as well as the other parties. . . . Final

actions of the Attorney General fall within the definition of agency action reviewable under the APA.”), *cert. denied sub nom. Elko County, Nev. v. Wilderness Soc’y*, No. 08-571, 2009 WL 735796, 77 USLW 3281, 77 USLW 3526, 77 USLW 3530 (Mar. 23, 2009).

Resolution of the central issue of law regarding the inapplicability of NEPA to the processing of Notices to Proceed relating to private oil and gas activities also will enable this Court to set aside as unlawful the Settlement Agreement filed in this case by the United States on behalf of the Forest Service and plaintiffs on April 9, 2009, as well as the contemporaneous Statement from Forest Supervisor Leanne Marten which implemented the Settlement Agreement. The Marten Statement described its direct and immediate adverse impact upon all of POGAM’s future oil and gas activities in the ANF, where 93% of the Forest is underlain by hundreds of private mineral estates, but only 1.4% of the Forest’s land surface has been used for such activities over the past 75 years (as of 2007), according to the Forest Service. *See* Statement of Material Facts (attached hereto).

The Settlement Agreement and the Marten Statement are unlawful for the further reason that together they purport to establish immediately a new binding rule that Notices to Proceed cannot be processed without first preparing environmental analyses under NEPA concerning the private activities associated with such Notices. The Settlement Agreement and the Marten Statement constitute a gross abuse of discretion, and this Court should vacate them promptly. Notably, none of the other cases pending in this Court involving the Forest Service and the ANF involve NEPA and the legal issue of whether NEPA applies to the exercise of private severed oil, gas and mineral estates.

II. THE SETTLEMENT AGREEMENT AND THE MARTEN STATEMENT ARE UNLAWFUL AND AN ABUSE OF DISCRETION UNDER NEPA AND THE APA.

As we have already explained, the decisions in *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584 (8th Cir. 1995) and *Duncan Energy Co. v. U.S. Forest Service*, 109 F.3d 497 (8th Cir. 1997), on which plaintiffs continue to rely (Surreply at 8-10), are not controlling here because they did not involve the 1911 Weeks Act, 36 Stat. 961, primarily codified as amended at 16 U.S.C. §§ 511-521, which governs the ANF lands. See POGAM/AFA Opp. at 25-26. Instead, that case arose under an entirely different statute, the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010, *et seq.*, under which the Forest Service determined that oil and gas activities on those severed mineral estates in North Dakota were subject to the “special use permit” authority of the Forest Service under 36 C.F.R. § 251.50. Even the Settlement Agreement and the Marten Statement do not assert that private oil and gas activities in the ANF in Pennsylvania are subject to this “special use permit” authority. Rather, but equally as infirm, they instead assert that oil and gas activities are subject to regulatory constraints through Forest Service “Notices to Proceed,” which are not defined or required in any duly promulgated regulation of the Forest Service. See POGAM/AFA Opp. at 25-26. Furthermore, the other cases cited by the plaintiffs involving National Park System lands and lands managed by the U.S. Department of Energy are also inapplicable as they do not arise under the 1911 Weeks Act either.⁵

⁵ See *Dunn McCampbell Royalty Interest, Inc. v. Nat’l Park Service*, 964 F. Supp. 1125 (S.D. Tex. 1995) (construing wholly separate National Park Service statutory and regulatory authorities which are entirely inapplicable to National Forests); *Sierra Club v. U.S. Dep’t of Energy*, 255 F. Supp. 2d 1177 (D.Colo. 2002) (construing U.S. Department of Energy statutory

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There is no duly promulgated and codified Forest Service regulation which mentions or requires Forest Service issuance or approval of a “Notice to Proceed” as a precondition to oil and gas activity. *See generally* 36 C.F.R. Parts 200 to 299. The Opposition filed by the United States (at p. 3) asserts that “the Forest Service has the right to reasonably regulate that [mineral] access to minimize impacts to surface resources.” Three citations to inapplicable Forest Service regulations are provided to support this assertion, and none of them mention “Notices to Proceed.” Two of the cited regulatory provisions (36 C.F.R. § 251.50 and § 261 address “permits” for “special uses,” and even the Settlement Agreement does not require special use “permits” for oil and gas activities associated with private severed mineral rights. The other regulation cited, 36 C.F.R. § 251.15, was promulgated on May 3, 1963, 28 *Fed. Reg.* 4440, and it also requires a “permit” but only applies to “mineral rights hereafter [*i.e.*, post-1963] reserved.” 36 C.F.R. § 251.15(c). Virtually all of the private severed mineral estates in the ANF were created long before 1963, and the Forest Service knows this.⁶

A far more relevant precedent which did involve the 1911 Weeks Act is *United States v. Srnsky*, 271 F.3d 595 (4th Cir. 2001), where the appellate court rejected the position of the U.S. Forest Service that private individuals were required “to apply for a Forest Service special use permit in order to use a 2.6 mile road through the Monongahela National Forest [in West Virginia], which provides the sole access to their home.” *Id.* at 598. The court held that the

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and regulatory authorities at the Rocky Flats nuclear facility which are inapplicable to National Forests).

⁶ While some minor isolated land parcels in the ANF may be acquired post-1963 and subject to these rules, such a circumstance is not material to this action as it is presently postured.

Weeks Act, 16 U.S.C. § 518, precluded the Forest Service from requiring a “special use permit” for the exercise of common law easements that were existing under West Virginia law at the time of Forest Service acquisition of the lands in question. The court found that the “statutory scheme, on the government’s view, would wipe the National Forest clean of any and all easements, implied or express.” *Srnsky* at 604. The Fourth Circuit rejected the Forest Service’s view, following *North Dakota v. United States*, 460 U.S. 300, 317-19 (1983), for the rule that state law generally governs federal land acquisitions, unless state law is “aberrant or hostile.”

This Court properly followed Pennsylvania common law in construing the Forest Service’s rights as surface owner regarding a private oil and gas developer holding a severed oil, gas and mineral estate, *United States v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D.Pa. 1980), where it held:

The basic case is *Pennsylvania is Chartiers Block Coal . . . Company v. Mellon, et al.*, 152 Pa. 286, 25 A 597 (1893). It is not surprising that the Supreme Court at that time enunciated the rule which has been followed ever since in Pennsylvania, that the parties must each exercise due regard for the rights of the other, that . . . *while the owner of the mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nevertheless must exercise such rights with a recognition of surface rights and taking appropriate action to prevent unnecessary disturbance to the owner of the surface.*

...

The court notes that at the hearings on the preliminary injunction, *the United States specifically disclaimed any intention of proceeding . . . as a sovereign in regulating the use of the surface for the purpose of the Allegheny National Forest and it is obvious that the United States in this situation has no greater rights than*

any other landowner having acquired title to the surface subject to the mineral rights beneath. [Emphasis added.]⁷

In addition, the fact that the 1984 ANF *Handbook For Oil & Gas Administration* called for the preparation of certain limited environmental assessments as a management tool does not reflect any prior agency determination that the Forest Service's review of the exercise of private severed mineral estates was legally a "major federal action" subject to the full obligations of NEPA, and massive multi-year delays and costs. Indeed, the *ANF Handbook* (at 1) recognized the unique private nature of the exercise of the severed oil and gas property rights:

- "The mineral and surface owners are co-managers of the same tract of land. It is a two way street, involving both parties."
- "The Forest Officer needs to function in a leadership role, not one of conflict and enforcement. The Forest Service is a resource-management agency, not a regulatory authority."
- "Successful resource integration is achieved through negotiations and recommendations between the Forest Service and the oil and gas industry. . . . A major item we can give is time. Time is a valuable commodity to the oil and gas industry."⁸

It is certainly no surprise that the Forest Service, as landowner fulfilling its responsibilities consistent with Pennsylvania common law as delineated by this Court in *Minard Run* would conduct some review of the environmental resources on the land where oil and gas activities were proposed during the 60-day consultation period set forth in that case. As

⁷ *Accord Gillespie v. American Zinc and Chemical Co.*, 247 Pa. 222, 227 (1915); *Clearfield Bank & Trust Co. v. Shaffer*, 553 A.2d 455, 457-58 (Pa. Super. 1989); *T.W. Philips Gas & Oil Co. v. Manor Gas Coal Co.*, 68 Pa. Super. 372, 1917 WL 3502 at *7-8 (Pa. Super. Ct. 1917)

⁸ See attachment to Plaintiffs' Surreply (filed Apr. 22, 2009). Other relevant provisions and sample ANF deed provisions creating private oil, gas and mineral estates in the ANF, including from the 1984 *ANF Handbook*, are attached to provide further context with the Second Declaration of Craig L. Mayer, attached hereto.

previously explained, the Forest Service Manual has long recognized that 60-day review period, as has Congress in the enactment of specific provisions in the Energy Policy Act of 1992, 30 U.S.C. § 226(o), 106 Stat. 3108 (Oct. 24, 1992).

The currently effective Forest Service Manual, dated June 1, 1990, recognizes that the exercise of mineral rights must normally be processed by the Forest Service within 60 days:

2830.1 – Authority. The authority for the administration of mineral reservations is 36 CFR 251.15 or previously issued Secretary of Agriculture’s rules and regulations that govern the exercise of mineral rights reserved in conveyances to the United States.... The appropriate rules and regulations in effect at the time of the mineral reservation were incorporated as part of the deed by which the United States acquired the surface.

The Secretary’s rules and regulations do not apply to the administration of outstanding mineral rights. . . . The specific terms of the deeds by which the surface and subsurface owners acquired their interests also provide the basis for the Forest Service authority to administer mineral reservations and outstanding mineral rights. *If the terms of the deeds are unclear, the rights under deeds can generally be defined by reference to State law.*

As a general rule, the Forest Service does not have authority to deny the exercise of a mineral reservation or outstanding mineral right. . . .

2830.3 – Policy.

1. Promptly evaluate and respond to applications for reserved mineral permits and notices of surface occupancy for the exercise of outstanding rights. *Normally, the authorized officer must respond within 60 days after the applicant submits a complete operating plan. . . .*

See <http://www.fs.fed.us/im/directives/fsm/2800/2830.txt>⁹ (emphasis added). The 1990 Forest Service Manual makes no reference to the preparation of environmental assessments or environmental impact statements under NEPA in connection with the exercise of private oil and gas rights.

The Forest Service's review period was limited to 60 days by this Court's 1980 ruling in *Minard Run* to comport with the mineral developer's dominant and pre-existing private property rights and Pennsylvania common law:

the owner of the mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nevertheless must exercise such rights with a recognition of surface rights and taking appropriate action to prevent unnecessary disturbance to the owner of the surface.... The minor restrictions which we will impose in the preliminary injunction which will be issued should not seriously hamper the extraction of oil or gas....

IT IS ORDERED that defendant, Minard Run Oil Company...be preliminarily enjoined, in...[all] mineral operations on the lands of the Allegheny National Forest, from engaging, directly or indirectly in the clearing of well sites and/or road or pipeline accesses thereto, unless and until:

a. Defendant furnishes to plaintiff in writing reasonable advance notice of said [cl]earing, but not less than 60 days in advance of the same, this period being afforded to plaintiff, inter alia, as the minimum to enable it to market its own merchantable timber on such a clearing.

Minard Run, 1980 U.S. Dist. LEXIS 9570 at *13, 16, 21-22. The Forest Service does not possess discretion to indefinitely impede the exercise of these vested oil and gas property rights

⁹ The reference to 36 C.F.R. § 251.15 is entirely inapplicable to the ANF, because that regulation was promulgated in 1963, and by express terms it applies only to mineral reservations "hereafter" created, *i.e.*, post-1963. See 28 *Fed. Reg.* 4440 (1963). In contrast, the vast majority of the mineral estates in the ANF were created by the 1930s.

under NEPA or any other applicable law. Congress essentially codified the elements of the *Minard Run* ruling into statutory law for the ANF, after the Forest Service adopted it as standard agency policy and practice. Because any Forest Service delay beyond 60 days, to prepare and circulate NEPA documents, would be inconsistent with a mineral owner's statutory and property rights, NEPA simply does not apply.

The U.S. Supreme Court has held that NEPA does not apply where a statute required federal action within 30 days because: (1) NEPA applies only “to the fullest extent *possible*” (42 U.S.C. § 4332) (emphasis added); and (2) it is not possible to prepare and circulate draft and final Environmental Impact Statements (“EISs”) in a 30-day period. *Flint Ridge Devpt. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776 (1976). The Second Circuit has found that NEPA does not apply where other applicable law creates a 60-day period for action, such as the 60-day period here. *City of New York v. Minetta*, 262 F.3d 169, 182-83 (2d Cir. 2001).¹⁰ Such time limits are “designed to protect developers from costly delays” and, if NEPA were read to extend the time limit, this “would make such delays commonplace, and render the 30-day period...a nullity.” *Flint Ridge*, 426 U.S. at 791.

Furthermore, NEPA does not apply as a matter of law to private activities subject to notice and review obligations of this type. *See, e.g., Sierra Club v. Penfold*, 857 F.2d 1307, 1314

¹⁰ The 60-day period provided in the 1992 Energy Policy Act for Forest Service review and accommodations is actually generous in comparison to current positive Pennsylvania law. After all, the *Minard Run* decision was a reading of Pennsylvania common law. The Pennsylvania Oil and Gas Act (enacted in 1984 and last amended in 2001) supplements that judge-made law. The statute requires the Pennsylvania DEP to issue a “well permit” within “45 days of the submission of a permit application” and gives a surface owner only “15 days after receipt of the plat by the surface owner” to object to issuance of a well permit. 58 PA. CONS. STAT. Chapt. 11, §§ 601.201, 601.202.

(9th Cir. 1988) (“Notice” mining operation, for which private operator must submit notice to Bureau of Land Management (“BLM”) but which does not require BLM approval, is not major federal action triggering NEPA) and *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 55-56 (D.D.C. 2003) (private “Notice” mining exploration projects, for which BLM required notice but which do not require BLM approval, are not “major” or “federal” actions triggering NEPA).

The ANF, of course, lies within the Third Circuit, which has a well developed legal history on when federal involvement in a non-federal project “federalizes” the project and makes it subject to NEPA. *E.g.*, *State of New Jersey Dep’t of Env’tl. Prot. v. Long Island Power Auth.*, 30 F.3d 403, 417 (3d Cir. 1994) (“[f]ederal approval of a private party’s project, where that approval is not required for the project to go forward, does not constitute a major federal action” triggering NEPA); *National Ass’n for the Advancement of Colored People v. Medical Center*, 584 F. 2d 619 (3d Cir. 1979). Those decisions normally find that, in the absence of discretionary federal funding or permitting, NEPA does not apply. *Id.* For example, in *NAACP v. Medical Center*, the Third Circuit concluded that NEPA does not apply “when the agency had no discretion to prevent the [private proponent’s] action because of environmental impact” even if the agency “in any sense enables the other party’s action.” 584 F.2d at 633. NEPA should not be read to apply and thereby

hinder the Government’s ability to carry on its myriad programs and responsibilities in which it assists, informs, monitors and reacts to activities of individuals, organizations, and states, but in which the Government plays an insubstantial role.

584 F.2d at 634. Similarly here, it would hinder efficient use of limited federal NEPA resources and would unlawfully impede private development of energy resources if the Forest Service’s limited role created substantial NEPA delays. The Forest Service possesses no discretion to

indefinitely shut-down private oil and gas activities across the 500,000-acre ANF while it conducts complex NEPA studies which are not required by NEPA.

In the later *Long Island* decision, the Third Circuit found that the Coast Guard's "consistency review" and purported "approval" of a private action that did not otherwise require a federal permit or license was not subject to NEPA. 30 F.3d at 415-18. Similarly here, no Forest Service permit or other federal approval is required by any duly promulgated regulation having the force and effect of law for exercise of private severed mineral rights in the ANF. While some limited and informal federal accommodation may be required with respect to some reserved mineral rights, since oil and gas operations cannot be vetoed, there is insufficient federal authority to trigger NEPA duties.¹¹ Decisions to the same effect from other circuits include *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 506, 513-14 (4th Cir. 1992); *Macht v. Skinner*, 919 F.2d 13, 18-20 (D.C. Cir. 1990); and *Goos v. ICC*, 911 F.2d 1283, 1294-96 (8th Cir. 1990).

As noted, the limited 60-day review period and the limited nature of the Forest Service's role preclude the imposition of the time-consuming process for analysis under NEPA. See POGAM/AFA Opp. at 20-21, 24-25; *Flint Ridge*, 426 U.S. at 787-88 (NEPA must "give way" to conflicting mandatory statutory deadlines for agency action); *City of New York v. Minetta*, 262 F.3d 169, 182 (2d Cir. 2001) (federal aviation statute 60-day period after which airline's request is deemed granted absent express agency approval or denial precludes requiring NEPA analysis).

¹¹ To the extent the Forest Service does have some discretion to influence the location of, for example, a road, NEPA's purposes are better served by having the agency seek to reduce environmental impacts directly through negotiations and accommodations than futilely attempting to conduct a paper-writing NEPA exercise in 60 days.

In addition, the ANF Supervisor testified to the U.S. Congress in 1991 that the agency's view, on the advice of government counsel, was that NEPA did not apply to the exercise of private oil, gas and mineral rights in the ANF. *See 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. (1991) ("1991 Oversight Hearing") (excerpts attached hereto with Second Declaration of Craig L. Mayer). The agency practice and the traditional legal conclusion that NEPA does not apply is well reasoned and cannot be arbitrarily ignored.

At a 1991 U.S. Congressional Oversight Hearing, ANF Forest Supervisor Wright stated the Forest Service's position that NEPA "does not apply to oil and gas operations," but only in the forest resource management areas "outside of oil and gas" estates. *1991 Oversight Hearing* at 78. Moreover, in the 1991 testimony to the U.S. Congress, ANF Forest Supervisor Wright described the reasons NEPA does not apply in terms that are consistent with the case law discussed above.

Mr. Kostmayer. What is the basis for your view that NEPA does not apply?

Mr. Wright. We must have a Federal action that really triggers for NEPA documents to kick in. And in this particular case, when a private mineral right owner exercises his constitutional [property] right [with respect to the mineral estate], that is not really a Federal action. We respond to that action that he takes and try to negotiate the subsurface order. But it is being looked at right now, as I was advised by our attorneys. It appears at this time that it [NEPA] really does not apply.

1991 Oversight Hearing at 79.

The Associate Regional Attorney for Agriculture's Office of General Counsel prepared an October 1991 legal opinion, a summary of which was included in the 1991 Oversight Hearing record. It states in pertinent part:

we do not find the exercise of such [outstanding mineral] rights on National forest lands in Pennsylvania to be a federal action for NEPA purposes. This is so, in part, because Forest Service approval is not a legal condition precedent to the exercise of such rights under either state law, current federal law or regulation, or Forest Service policy. See for example FSM 2832. Our Washington office has reviewed the legal opinion and concurs with the substance of its analysis.

In summary, we find that in Pennsylvania, the third party mineral owner...is entitled to occupy and use so much of the surface as may be necessary to operate the mineral estate and remove the product. The question of whether the right can be exercised, and the ability to deny that right, is simply not left to the surface owner under Pennsylvania law!.... [While the Forest Service and mineral owners strive to reach a] reasonable accommodation... that practice does not elevate your involvement to a federal action for NEPA purposes.

1991 Oversight Hearing at 191-92. Notably, this statement of the U.S. Agriculture Department's Office of General Counsel (which advises the Forest Service) is consistent with Third Circuit decisions such as *NAACP v. Medical Center*, 584 F.2d at 633.

It is also significant that the "Washington office" and the regional Office of General Counsel office signed off on this conclusion.¹² Moreover, any purported change in the Forest Service's view is arbitrary unless it rationally explains the departure from prior precedent. *E.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, 48-50 (1983).

¹² 1991 Oversight Hearing at 191.

The action which Congress took in 1992 following this testimony from the Forest Service essentially codified the elements of the 1980 *Minard Run* ruling of this Court requiring only that the oil and gas operator provide detailed notice to the Forest Service 60 days prior to commencing on the ground activity. *See* 30 U.S.C. § 226(o). Indeed, Congress specifically rejected proposed legislation to grant the Forest Service an express approval authority over such oil and gas activities.¹³ The 1992 Act covers all severed mineral estates existing at the time of acquisition by the Forest Service through the Secretary of Agriculture. *See* 30 U.S.C. § 226(o)(5)(A). The 1992 Act provisions state that they apply “only in the Allegheny National Forest . . . ,” 30 U.S.C. § 226(o)(5)(B), which is a further reason why the *Duncan* precedent involving national forest lands in North Dakota is inapplicable. Further, the 1992 Act applies to all private severed oil and gas estates in the ANF, as confirmed by 30 U.S.C. § 226(o)(5)(A) (The lands referred to are those lands in the ANF “which are under the administration of the Secretary of Agriculture where the United States acquired an interest in such lands pursuant to the [Weeks] Act of March 1, 1911 (36 Stat. 961 and following), but does not have an interest in oil and gas deposits that may be present under such lands.”). Although the Forest Service was

¹³ After the 1991 House Oversight Hearing, the House in 1992 passed a provision that – had it been enacted – would have sought to provide the ANF with plausible authority to regulate “outstanding” mineral rights to “prevent or minimize damage to the environment and other resource values.” H.R. Rep. No. 102-474, pt. 8, at 42 (1992) (§ 2815(p)(2) of the House bill). “The Committee anticipates that the Secretary would utilize the authority granted under this section by acting to permit only those oil and gas development activities which, according to properly submitted applications, will satisfy the terms and conditions established in the regulations.” H.R. Rep. No. 102-474, pt. 8, at 137. However, the Conference Report on the Energy Policy Act of 1992 declined to adopt the House provision. Congress decided against granting the Forest Service the dubious authority to issue a new substantive basis for after-enacted regulations regarding severed mineral rights. Instead, Congress decided to simply reaffirm what *Minard Run* said was the Pennsylvania property law regarding private oil and gas estates in the ANF.

given authority to implement these provisions through regulations “promulgated by the Secretary . . . ,” 30 U.S.C. § 226(o)(1), *no such duly promulgated regulations have been implemented to the present day*, and so these activities are governed by the language of the Act itself.

Not only is it contrary to law for the reasons just described, the Forest Service’s new NEPA rule is procedurally defective as well. Significantly, the Forest Service adopted a new mandatory rule requiring NEPA compliance for private ANF oil and gas activities and virtually shutting down future ANF oil and gas activity through the Settlement Agreement and the Marten Statement without employing notice and comment rulemaking procedures required under the APA. *See, e.g., McLouth Steel Products Corporation v. Lee M. Thomas, et al.*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (“If a statement denies the decisionmaker discretion . . . , then the statement is binding, and creates rights of obligations . . .” and is a rule subject to APA notice and comment rulemaking procedures); *Appalachian Power Company, et al. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (“If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule . . . then the agency’s document is for all practical purposes ‘binding’.”); *General Electric Company v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (“the commands of the Guidance Document indicate it has the force of law. . . . On its face the Guidance Document imposes binding obligations upon applicants to submit applications that conform to the Document . . . ,” and thus the Document was unlawful for bypassing APA notice-and-comment rulemaking procedures.); *accord Community Nutrition Institute, et al. v. Frank Young*, 818 F.2d 943 (D.C. Cir. 1987); *Barrick Goldstrike Mines, Inc. v. Carol M. Browner, et al.*, 215 F.3d 45 (D.C. Cir. 2000).

The Forest Service's bypassing of APA rulemaking procedures is revealed by the fact that the Forest Service itself initiated a rulemaking on this very subject by publishing an advance notice of proposed rulemaking in the Federal Register on December 8, 2008, 73 Fed. Reg. 79,424 (re "Management of National Forest System Surface Resources With Privately Held Mineral Estates."). That rulemaking would apply to oil, gas and mineral estates in the ANF and other National Forests, and it is subject to the procedural safeguards of the APA notice and comment requirements, 5 U.S.C. § 553, and the Regulatory Flexibility Act, 5 U.S.C. § 601, which requires federal agencies to assess the adverse economic impacts of their actions on small businesses. By summarily adopting the Settlement Agreement and the Marten Statement, the Forest Service has evaded and bypassed those important legal protections under the APA.

III. THE UNLAWFUL SETTLEMENT AGREEMENT AND THE MARTEN STATEMENT ARE INTEGRALLY RELATED

The United States has asserted to this Court that the Settlement Agreement somehow does not affect POGAM and AFA because: "While the agreement affects the legal relationship between the two litigants, parties not joining the agreement are not bound by its terms."¹⁴ Yet, the Settlement Agreement and the Marten Statement were simultaneously prepared for execution and release by the U.S. Forest Service and the U.S. Justice Department (acting on behalf of the Forest Service) to create a new mandatory procedure to apply NEPA to all future Notices to Proceed across the 500,000-acre ANF, and they do so in a manner which effectively blocks all Notices to Proceed for at least the next 15 months and more likely for at least the next two to three years. *See* Mayer Decl. at ¶ 17-19 (filed Apr. 16, 2009).

¹⁴ *See* Response to Intervenor-Defendants' Opposition to Stipulation of Dismissal and Settlement Agreement at 3 (filed April 22, 2009).

Under the Settlement Agreement, “the Forest Service agrees that it *shall* undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests.” Settlement Agreement, p. 2 ¶ 1. The only exceptions are the 54 specific projects listed on Exhibit A to the Settlement Agreement.¹⁵ The Marten Statement explains further in mandatory terms: “*All* remaining pending, and *all* future oil and gas proposals on the Allegheny National Forest will be processed after the appropriate level of environmental analysis has been conducted under NEPA.” Marten Statement at p. 2 (emphasis added). The Marten Statement then describes the massive delay and shut-down of future oil and gas activities which lies ahead: “The Forest Service will be initiating a forest-wide site specific environmental analysis for proposals that were not included in the settlement and any other proposals for activity anticipated between now and 2013. . . . It is *estimated* that it will take until mid-April 2010 to issue a final decision for the project. The decision will then be subject to a 45-day appeal period. . . .” Marten Statement at p. 3 (emphasis added). That one-year *estimate* to complete this complex forest-wide NEPA study is totally unfounded, and the actual time will almost certainly be at least two to three years. *See* Mayer Decl. at ¶ 17-19 (filed Apr. 16, 2009).

Absent relief from this Court, the Forest Service’s Settlement Agreement and Marten Statement threaten to transform an economic recession into a deep and immediate depression for

¹⁵ As the Marten Statement explains, the “Notices to Proceed for these 54 packages will be issued as soon as possible.” While 54 projects may seem superficially like a lot of activity, spread across the nearly 500,000-acre ANF, that is roughly one oil and gas project per 10,000 acres.

the four-county region surrounding the ANF, the adverse effects of which are likely to last a “lifetime,” as the Marten Statement admitted. The communities, small businesses and municipalities deserve much better from their federal government. The unlawful Settlement Agreement and Marten Statement should be vacated.

CONCLUSION

In addition to the authorities cited above, as support for this motion for summary judgment, the Intervenor-Defendants rely upon and incorporate by reference the Intervenor-Defendants’ Opposition to Stipulation of Dismissal and Settlement filed April 16, 2009, together with the supporting Declaration of Mr. Craig L. Mayer, as well as the attached Second Declaration of Mr. Mayer, which provides further background and context. For these reasons, POGAM and AFA ask that the Court grant summary judgment in their favor on their Counterclaim and Cross-Claim in this action.

Respectfully submitted,

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