

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

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

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant,

and

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

Intervenor-Defendants.

Case No. 1:08-CV-00323-SJM

Electronically filed

**INTERVENOR-DEFENDANTS' OPPOSITION TO STIPULATION OF DISMISSAL
AND SETTLEMENT AGREEMENT**

Pursuant to the Court's direction at the hearing in this action held on April 13, 2009, Intervenor-Defendants Pennsylvania Oil & Gas Association ("POGAM") and the Allegheny Forest Alliance ("AFA") hereby oppose the putative "Stipulation of Dismissal" under Rule 41(a)(1)(A) of the Federal Rules of Civil Procedure ("Stipulation") and accompanying "Settlement Agreement" presented by Plaintiffs Forest Service Employees for Environmental Ethics,¹ *et al.* ("Employees") and Defendant U.S. Forest Service to the Court on April 9, 2009.

¹ Plaintiffs bring to the case a heavy agenda against resource development activities in the ANF. Plaintiff Forest Service Employees for Environmental Ethics (unless the name is an

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We also respond here to “Plaintiffs’ Response to Intervenors’ Emergency Motion for Stay” (Dkt. 31) (“Pls. Resp.”) and to the Forest Service’s “Opposition to Intervenor-Defendants’ Emergency Motion to Stay Settlement” (Dkt. 32) (“FS Opp.”), which were filed late yesterday afternoon.

SUMMARY OF ARGUMENT

As we explain in part I below, the Stipulation cannot of its own accord achieve dismissal of this action because it does not satisfy the clear requirements for voluntary dismissal under Rule 41(a)(1)(A). That provision requires either a stipulation “signed by all parties” or an unconditional notice of dismissal by Plaintiffs. Since it is undisputed that two parties – POGAM and AFA – did not sign the Stipulation, and since the Employees did not file an unconditional

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exaggeration or misnomer) is built around a core of employees of Defendant U.S. Forest Service. See Amended Compl. ¶ 9. They are a disgruntled group, whose mission is not necessarily to further their employer’s business but “working to *change* the Forest Service’s basic land management philosophy.” See “Our Mission,” <http://www.fseee.org> (viewed April 15, 2009) (emphasis added). As for Plaintiff Allegheny Defense Project, the Third Circuit has observed of this litigious group and one of its founders:

[Plaintiff] Kleissler is not a neophyte to the administrative appeal process. To the contrary, [Plaintiff] Allegheny Defense Project, of which Kleissler is a founding member, professed that it employs the “Paper Monkeywrench” tactic to protect the ecological integrity of the region. The group’s website described its “Paper Monkeywrench” methods as responding to scoping letters “with comments and . . . public input such that the Forest Service has “more work to do.” The site also instructed that another common tactic is to appeal the final decision to the Forest Service “within 45 days trying to demonstrate either how [the Forest Service] ha[s] not followed the Forest Plan or how they have violated some aspect of NEPA.” Finally, the Defense Project encouraged its web site readers to “ask [the Allegheny National Forest Supervisor] to put you on the mailing list for ALL districts of the [Allegheny National Forest] Now you can start your own Paper Monkeywrenching!”

Kleissler v. U.S. Forest Serv., 183 F.3d 196, 202 n.6 (3d Cir. 1999).

notice of dismissal, Rule 41(a)(1)(A), as invoked by the Forest Service Employees and the Forest Service, does not and cannot apply. Thus, the Stipulation should be stricken.

If the Forest Service and Employees want to dismiss this action without complying with Rule 41(a)(1)(A), they must obtain a Court order under Rule 41(a)(2), which enables a court to dismiss an action at the plaintiff's request, but only "on terms that the court considers proper." Under Rule 41(a)(2), this Court "has an express judicial function to perform," *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 298 (5th Cir. 1963), to ensure that "substantial justice" is accorded to all parties to this action. *Mobil Oil Corp. v. Advanced Environmental Recycling Technologies, Inc.*, 203 F.R.D. 156, 157-58 (D. Del. 2001). Even if the Forest Service and Employees had requested an order of dismissal pursuant to Rule 41(a)(2) – which they did not do – the request should be denied because the Settlement Agreement, which dramatically alters the Forest Service's settled administrative practice for processing so-called Notices to Proceed to private parties in connection with exercising their undisputed oil and gas rights in the ANF, is highly prejudicial to POGAM and AFA and abounds with arbitrary, capricious, and unlawful provisions, as we explain in part II below.

As the Forest Service candidly admits, the provisions of the private Settlement Agreement between it and its Employees will have a significant adverse impact on precisely those interests POGAM and AFA sought to protect by intervening – the families, businesses, and communities that depend on oil and gas activities in the Allegheny National Forest ("ANF"), "especially at a time when our nation is facing such a difficult economic downturn." 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, attached hereto). As Mr. Mayer has declared: "the

Settlement Agreement is punitive, even retaliatory, in nature and will have an irrevocable, profound, massive and devastating adverse impact on oil and gas production activity in the ANF and upon the economy, communities, and people of the surrounding region dependant on this development activity.” Mayer Decl. at ¶ 22. Further, the possibility that holders of oil and gas rights might much later have some recourse to judicial review in the future does not alleviate these immediate harms, and indeed would only increase costs and delay by spawning multiple future lawsuits on an issue (whether Notices to Proceed with the exercise of private property rights are subject to analysis under the National Environmental Policy Act (“NEPA”)) that is before the Court now and should be resolved in this litigation.

Indeed, in the Marten Statement which was released contemporaneously with the Settlement Agreement, the Forest Service has announced that *no new* oil and gas drilling activities may proceed for over one year as the Forest Service embarks on an unprecedented and complex “forest-wide site specific environmental analysis . . . for proposals anticipated between now and 2013.” Marten Statement at 3, Ex. A to Mayer Decl. We can fully expect that the U.S. Justice Department will claim that POGAM or any plaintiff oil and gas operator would have no right to challenge that Forest Service action in court until the NEPA process is completed and administrative appeals are concluded. During that lengthy delay (which is more likely to last at least 2-3 years), POGAM and AFA members will suffer grievous harm as oil and gas exploration activity in the nearly 500,000-acre ANF would come to a grinding halt. *See generally* Mayer Decl., attached hereto.

ARGUMENT

I. THE STIPULATION OF DISMISSAL FAILS TO SATISFY RULE 41(a)(1)(A) AND SHOULD BE STRICKEN

The Forest Service Employees' and Forest Service's Stipulation of Dismissal, which purports to do away with this lawsuit without this Court's order, should be stricken because it does not satisfy the provisions of Fed. R. Civ. P. 41(a)(1)(A). Rule 41(a)(1)(A) provides two methods of dismissal without court order: unconditional notice of dismissal under Rule 41(a)(1)(A)(i), and stipulation under Rule 41(a)(1)(A)(ii). The requirements are clear from the plain language of the Rule. It states that:

. . . the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either and answer or a motion for summary judgment; or
- (ii) a stipulation of dismissal signed by all parties who have appeared.

Fed. R. Civ. P. 41(a)(1)(A). "These two methods are the exclusive means of terminating an action as of right." 8 MOORE'S FEDERAL PRACTICE § 41.30 (3d ed. 2008). Since the Stipulation at issue satisfies neither of these rules, it must be stricken.

A. The Stipulation Was Not Signed By All Parties Who Have Appeared

The current state of the record in this case is that, on April 9, 2009, counsel for the Forest Service filed a "Stipulation of Dismissal" on behalf of the Forest Service and Employees. Since that Stipulation (and not a Rule 41(a)(1)(A)(i) notice of dismissal, as those parties now suggest) is what was filed – indeed, a "stipulation to dismiss" is what their Settlement Agreement (¶ 11) calls for – we begin by explaining why the Stipulation is defective. Since the purported Stipulation, if allowed to stand, would terminate the action immediately upon filing without need

for court approval or implementation, 8 MOORE'S § 41.34[6][a], it is critical that the defective Stipulation, which unlawfully excludes two parties to this case, be stricken.

The Stipulation was not “signed by all parties,” as Fed. R. Civ. P. 41(a)(1)(A)(ii) requires. Neither the Forest Service nor Employees dispute their failure to obtain the signature of all parties. The language of this provision is clear – “all parties” means “*all* parties,” including intervenors, as the Fifth Circuit explained in reversing the dismissal of a stipulation because intervenors had not signed it:

The District Court dismissed this action, including the claims of the [plaintiff] intervenors, on the basis of a stipulation between the original parties. This could not properly be done. *Raylite Electric Corp. v. Noma Electric Corp.*, 170 F.2d 914, 915 (2d Cir. 1948). “. . . [O]nce intervention has been allowed, the original parties may not stipulate away the rights of the intervener.” 3B Moore's Federal Practice (2d ed.) 24-671, 672.

Wheeler v. American Home Prods Corp. (Boyle-Midway Div.), 582 F.2d 891, 896 (5th Cir. 1977). POGAM and AFA became parties to this action on April 7, 2009 – two days before the Stipulation was filed – when the Court granted our motion to intervene. *See* Dkt. No. 26. Counsel for all parties – including the Plaintiffs and Forest Service – received electronic notice of that Order from the Court at 3:09 p.m. EDT on April 7. Thus, two days later, those parties knew full well that the Stipulation they were filing on April 9 did not satisfy Rule 41(a)(1)(A)(ii)'s requirement for signature “by all parties.”

This is an alarming omission for many reasons, not just a technicality. First, it deprived POGAM and AFA and the interests they represent (which include oil and gas producers, public school districts, municipalities, and businesses with interests affected by the welfare of the ANF, *see* Apr. 7 Order at 2) of precisely the voice in the proceedings that their intervention was meant to secure. Indeed, our intervention on remedial aspects of the case, such as terms of a settlement, was unopposed even by the Plaintiffs. *See* Dkt. No. 12. The Stipulation effectively end-runs

Court's order granting intervention and thus poses the danger recognized in another case brought by activist groups against the Forest Service – that POGAM's and AFA's interests “may become lost in the thicket of sometimes inconsistent governmental policies” and “unanticipated policy shifts.” *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998). (We address some of those inconsistent policies and unanticipated shifts in part II of this brief.) It also belies the ANF Forest Supervisor's statement the day after the Stipulation was filed that the Forest Service had “no intention of bailing out” on its commitment to “our communities, our homes, and our friends” who depend on oil and gas operations on the ANF. Marten Statement (Ex. A to Mayer Decl.). The Forest Service bailed out when it filed the Stipulation. Rule 41(a)(1) is clear: once POGAM and the AFA had been granted intervention, the Forest Service had no authority to “stipulate away the rights” of the intervenors. *Wheeler*, 582 F.2d at 896.

Second, the Forest Service and its Employees were on specific notice of POGAM's and AFA's concern about the closed-door settlement discussions nearly a month before they attempted to stipulate to dismissal. On March 5, 2009, the Forest Service had filed a motion to extend (to April 3) the deadline to respond to the amended complaint on grounds that the then-parties were engaged in settlement negotiations and had made “some progress.” POGAM and AFA promptly moved to expedite consideration of the motion to intervene, noting that we had not been permitted to participate in the settlement discussions, that adequacy of representation of our interests was an imminent concern, and that any settlement by the principal parties was “highly likely to harm” POGAM's and AFA's interests. Despite our specific expression of interest in the potential settlement, and contrary to the Forest Service's *post-hoc* professed concern for its “communities, . . . homes, and . . . friends” who are affected by the Settlement

Agreement, the Employees and Forest Service jointly opted to ignore us in the April 9 stipulation even though, as they knew, we were full-fledged parties to the lawsuit at that point.

Third, the rush of the Forest Service and Employees to dismiss this action without complying with Rule 41(a)(1)(A)'s signature requirement defeated another goal of intervention – giving voice to third-party interests “if there is even a hint of collusion between the purported representative and those to whom the representative is formally opposed in the litigation, or if for any other reason it appears that the representative is not making or may not make a diligent effort to protect the absentee’s interest.” 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1909 at 428-29 (3d ed. 2007) (“WRIGHT & MILLER”). The federal rules governing intervention and stipulated dismissals dovetail on this point and underscore the importance of securing the agreement of “all parties.” See *United States v. Mercedes-Benz of No. America, Inc.*, 547 F. Supp. 399, 400 (N.D. Cal. 1982) (while stipulation of dismissal is effective automatically upon filing, “the court, exercising its inherent judicial powers, may look behind it to determine whether there is collusion or other improper conduct giving rise to the dismissal”).

The very identity of the lead plaintiff, Forest Service Employees, etc., which is made up of “present, former, and retired Forest Service employees” (see “Our Mission” at www.fsee.org), raises the very real potential for collusion where the defendant is the Forest Service, and the key decision-makers in any settlement are by definition Forest Service employees. Similarly, the concurrent, premature actions of the Forest Service and Employees to publicize and implement the settlement (as reflected in the Employees’ April 10 press release, the Forest Service’s April 10 postcard announcing implementation public meetings on April 13, 14, and 15, its April 10 implementation letters to private oil and gas developers (appended as Exs. A-C to POGAM’s Emergency Motion (Dkt. 30)), and in the Forest Service’s seemingly

apologetic Statement to affected citizens in the ANF area (Ex. A to Mayer Decl.) all show that, in the minds of the Forest Service and its Employees, the Settlement Agreement is a done deal regardless of what the other adversely affected parties to the litigation may think.

The failure of the Forest Service and its Employees to comply with Rule 41(a)(1)(A), and the Forest Service's premature implementation of the Settlement Agreement, severely prejudice POGAM and AFA in two overarching ways. From a procedural standpoint, putting aside the manifest injustice of excluding the parties with legally protected interests in the outcome of this suit, the settling parties should have filed a motion seeking a Court order dismissing this action based on their Settlement Agreement, not a self-executing Stipulation of Dismissal. *See* Fed. R. Civ. P. 41(a)(2). Had they done so, POGAM and AFA could have briefed the Court on their objections to the Settlement Agreement under a conventional briefing schedule rather than under the compressed schedule that itself is necessitated by the Forest Service's premature implementation of the significant policy changes to which it had agreed with the Plaintiffs. And from a substantive standpoint, as explained in part II below, POGAM and AFA are terribly prejudiced by being made subject now to the purportedly binding legal policy changes recited in the Settlement Agreement, rather than awaiting Court approval or rejection of the changes in response to a properly filed motion to dismiss. *See generally* Mayer Decl. attached hereto (detailing severe harm being caused now to POGAM and AFA members).

For these reasons, the Stipulation of Dismissal should be stricken.²

B. The “Stipulation Of Dismissal” Is Not A Rule 41 “Notice Of Dismissal”

The Forest Service and its Employees contend that their failure to obtain the signatures of all parties as required by Rule 41(a)(1)(A)(ii) is inconsequential, in that Plaintiffs could have achieved dismissal unilaterally by filing a “notice of dismissal” under Rule 41(a)(1)(A)(i), without need of signature by any other party. FS Opp. at 4-5; Pls. Resp. at 4-5. Indeed, the Forest Service goes so far as to suggest that the Stipulation was just a “misabeled” Rule 41(a)(1)(A)(i) notice. FS Opp. at 4 n.2. The Court should reject these arguments for several reasons:

First, and obviously, the record in this case shows that Employees did *not* file a notice of dismissal. Nothing prevented them from doing so, and a properly filed notice would have immediately and automatically terminated this action, with no need for a further court order or judicial approval. *See* 8 MOORE’S FEDERAL PRACTICE § 41.33[6][a] (collecting cases). Yet, the Settlement Agreement itself does not call for a unilateral notice of dismissal. Rather, it calls for the “Parties” (defined in the Agreement as the Plaintiffs and Defendant, but not Defendant-Intervenors) to file a “stipulation to dismiss.” *See* Settlement Agreement ¶ 11. The Forest

² The lead case cited by the Forest Service and Employees, *Local 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), is irrelevant to the attempted Stipulation of Dismissal in this case. *Firefighters* holds that an intervenor does not have the power to block court approval of a consent decree by withholding its signature from the decree. The case does mean that an attempted Stipulation of Dismissal under Rule 41(a)(1)(A)(ii) which lacks the required signature of “all parties” somehow becomes valid if the non-signing party is an intervenor. The Fifth Circuit’s admonition bears repeating: “once intervention has been allowed, the original parties may not stipulate away the rights of the intervener.” *Wheeler*, 582 F.2d at 896.

Service's and Employees' desire now to rewrite the record in this case contradicts the very document their Stipulation cites as the basis for dismissal.

Second, the Stipulation was filed by *government counsel*, not the Plaintiffs' counsel, reflecting the joint nature of the document. Again, the Forest Service and Employees cannot rewrite history and turn this into a filing by the Plaintiffs, as is required for dismissal by notice.

Third, and critically, a plaintiff may not attach conditions to dismissal by notice – that is one price a plaintiff pays for the right to voluntary dismissal that Rule 41(a)(1)(A)(i) confers. *See* 9 WRIGHT & MILLER § 2363 n.42, and accompanying text. The notice provision is “intended to provide a quick, automatic method of terminating an action,” not a vehicle for securing a defendant's commitment to a course of action embodied in a settlement agreement. *See* 8 MOORE'S FEDERAL PRACTICE § 41.33[4][c]. Here, in contrast, the dismissal is conditioned on the Forest Service's agreement to settle, and largely acquiesce to, the Employees' claims pursuant to the Settlement Agreement. Any doubt about the Employees' intention to obtain judicial ratification of the Settlement Agreement is erased by the Employees' response, which concludes with a request that the Court “enter the stipulated judgment” forthwith. Pls. Resp. at 9. Clearly, this is not an unconditional request for dismissal. Thus, dismissal by notice is foreclosed.

Fourth, dismissal by plaintiff notice cannot be conditioned on the payment of attorney's fees. *See* 8 MOORE'S FEDERAL PRACTICE § 41.33[3] (collecting cases, including *Maleski v. DP Realty Trust*, 162 F.R.D. 496, 499 (E.D. Pa. 1995)). Yet, that is exactly the bargain struck in the Settlement Agreement (¶¶ 6-9), which would award \$19,221.60 to the Employees under the Equal Access to Justice Act (even though there has been no showing that the Forest Service's

prior position was not substantially justified (as required by that Act, and no admission to that effect by the agency)).

Fifth, the Forest Service's argument that the Stipulation was a "misabeled" Rule 41(a)(1)(A)(i) is specious. FS Opp. at 4 n.2. The cited case is inapt, as it involved a unilateral request for voluntary dismissal that a plaintiff had mistakenly called a "motion" instead of a "notice," not a joint filing on behalf of plaintiff and defendant, filed by *defendant*, to stipulate to dismissal that the parties claimed was really just a plaintiff's notice. *See Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008). The error was harmless in that case, but not so here because, as explained above, there is a world of difference between a plaintiff unilaterally exercising its right to unconditional dismissal and a stipulation that embodies opposing litigants' agreement on settlement terms. Moreover, unlike here, the mislabeled document in that case was not filed by the U.S. Department of Justice, which should understand the salient differences between the two forms of voluntary dismissal.

For all these reasons, the Court should decline the Forest Service's and Employees' request to treat their purported Stipulation to Dismiss as though it were a Rule 41(a)(1)(A)(i) notice of voluntary dismissal.

II. THE SETTLEMENT AGREEMENT IS UNLAWFUL, UNREASONABLE, AND UNDULY BURDENSOME AND SHOULD NOT BE ENDORSED OR APPROVED BY THIS COURT

If the Forest Service and Employees had sought an order of dismissal under Rule 42(a)(2) based on the Settlement Agreement, as they now seem to suggest in yesterday's briefs, we would urge the Court to deny the request. Dismissal under Rule 42(a)(2) must be "*on terms that the court considers proper*" (emphasis added.). Proper terms should not include terms that would have severe prejudicial effects on a party opposing settlement. "It is the possibility of prejudice to the defendant, rather than the convenience of the court, that is to be considered in deciding

motion for dismissal under Rule 41(a)(2).” 9 WRIGHT & MILLER § 2364 n.31 and accompanying text. Moreover, courts cannot approve settlements whose terms are unlawful, unreasonable, or contrary to public policy. *Firefighters*, 478 U.S. at 526; *Firefighters Local U. No. 1784 v. Stotts*, 476 U.S. 561, 576 n.9 (1984); *System Federation No. 91, Railway Employees’ Dep’t, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961). Nor can “[j]udicial approval . . . be obtained for an agreement which is illegal, a product of collusion, or contrary to the public interest.” *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983).

Contrary to the Forest Service’s suggestion (FS Opp. at 5), the fact that Employees will agree to dismissal with prejudice does not foreclose review of the terms of the dismissal by the Court. “The essential question in deciding such a motion is whether the defendant will be unfairly prejudiced by dismissal. This test also applies to voluntary dismissals with, as well as without, prejudice.” *Sheridan v. Fox*, 531 F. Supp. 151, 154 (E.D. Pa. 1982).³

There are myriad reasons for denying a request to dismiss based on the Settlement Agreement proffered by the Forest Service and Employees in this case:

A. POGAM And AFA Are Prejudiced Severely By The Settlement Agreement

As POGAM Director Craig L. Mayer (who is also chief legal counsel for POGAM member Pennsylvania General Energy Company LLC (“PGE”)) has explained, “the Settlement

³ The Forest Service is correct (FS Opp. at 5) that *some* courts have held there is no judicial discretion when dismissal is requested with prejudice. *Other* courts, however, such as the Eastern District of Pennsylvania in the *Sheridan* case cited above, disagree. *See generally* 9 WRIGHT & MILLER § 2364 nn. 13-14 and accompanying text. In fact, in the case the Forest Service cites, the court qualified its view by stating that where a plaintiff has consented to dismissal with prejudice, the Court should grant the motion “so long as it is not unfair to the defendant to do so.” *Gilbreth Int’l Corp. v. Lionel Leisure, Inc.*, 587 F. Supp. 605, 614 (E.D. Pa. 1983). Here, for reasons we explain, dismissal based on the Settlement Agreement would be grossly unfair to POGAM and AFA.

Agreement adopted without our knowledge and without any public input, particularly from elected officials of the ANF region and communities, radically changes the legal regime applicable to oil and gas exploration and development activities in the ANF, by subjecting such Notices to Proceed to compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (“NEPA”), which was enacted nearly 40 years ago on January 1, 1970.”⁴ Mayer Decl. ¶ 5. Under the Settlement Agreement, the Forest Service has sought to bind itself to apply NEPA to each individual Notice to Proceed. This is confirmed prominently by the statement in paragraph 1 of the Settlement Agreement, in which “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. . . .” Further, the Forest Service agrees that it shall not issue Notices to Proceed “prior to conducting the appropriate NEPA analysis.” *Id.* ¶ 3. The Plaintiffs in turn reserve the right in paragraph 4 of the Settlement Agreement to challenge the legal adequacy of NEPA compliance for those individual activities.

Mr. Mayer aptly describes the devastating harm the unlawful Settlement Agreement would cause as a result of this change in Forest Service practice:

- the Settlement Agreement would result in a *de facto* ban on future oil and gas exploration and development across the entire 513,000-acre ANF for at least the next year, and likely for years into the future. POGAM members, already harmed by the Forest Service’s inaction on notifications submitted since January 1, 2009, would literally go out of business during that lengthy delay. It must be kept in mind that normal past practices have already been delayed for months leading up to the Settlement Agreement. In recent weeks and months, employees of oil and gas developers have been threatened by the Forest Service with criminal prosecution if they proceed with their ordinary business activities in ANF while waiting for an approved Notice to Proceed. To my knowledge, the Forest Service has directly threatened at least four individuals, and charged at least one individual with a

⁴ Section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) before carrying out “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

misdemeanor in early 2009, a contested change that remains pending. Mayer Decl. ¶ 13.

- I strongly disagree that the Settlement Agreement adopted by the Allegheny National Forest properly follows the laws, regulations and policies that define the responsibilities of the Forest Service, but I agree that this action by the Forest Service will have profound, irrevocable, and severe adverse economic impacts on families, businesses, local governments and school districts in the ANF region. For many POGAM members and their employees, these adverse economic impacts will directly affect their livelihoods. Indeed, if this Settlement Agreement is implemented, many small businesses and individuals will suffer harms that will undoubtedly last a “lifetime” as the Marten Statement admits. To put this as clearly as possible, companies will go out of business and many individuals and families will lose their sources of income if this Settlement Agreement is implemented as proposed by the Forest Service. For example, the American Refining Group refinery at Bradford relies heavily on oil production from ANF lands. Based on my discussions with the general manager of the refinery, as many as 40 employees could be laid off just because of the 4-month delay that has already been experienced and more employees could be laid off if the Settlement Agreement is implemented. Mayer Decl. ¶ 15.
- I find it especially disingenuous that the Marten Statement asserts that “[w]e will not impede access to private property rights . . .” but that “we will fulfill our land management responsibilities, and we will do this via NEPA.” Under the Settlement Agreement, as explained in the Marten Statement and as further explained at the public meeting of April 13, 2009, the Forest Service plans to allow no further oil and gas exploration or development activities to occur in the ANF until a “forest-wide environmental analysis on these proposals is prepared.” The Marten Statement (at p. 3) asserts that the “Forest Service will be initiating a forest-wide site specific environmental analysis for proposals that were not included in the settlement and for any other proposals for activity anticipated between now and 2013.” The Marten Statement further declares that they will issue a Notice of Intent to prepare this Forest-wide environmental analysis in June of 2009, and the Forest Service is currently asking all oil and gas operators to identify proposed activity between now and 2013 for this Forest-wide environmental analysis. This approach is unprecedented in the ANF, is contrary to the approach used for the 1986 ANF Forest Plan and associated Environmental Impact Statement for that Plan, and is contrary to the approach used by the Forest Service in the recent 2007 ANF Plan and the associated EIS for that Plan. It is infeasible to require individual oil and gas operators to project their proposed activities between now and 2013. Mayer Decl. ¶ 16.
- Notably, the Settlement Agreement would effectively supersede and substitute for a pending rulemaking process which the Forest Service recently initiated by publishing an Advanced Notice of Proposed Rulemaking on December 29, 2008, in the *Federal Register*. See 73 *Fed. Reg.* 79,424 (re “Management of National Forest System Surface Resources With Privately Held Mineral Estates”). That potential rulemaking action would specifically address the ANF, and potentially other National Forests. Any such rulemaking would have to comply with the Administrative Procedure Act,

5 U.S.C. § 551 *et seq.*, and many other procedural and substantive requirements, such as the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, which requires federal agencies to assess the adverse economic impacts of their actions on small businesses. By adopting a new command and control regulatory approval process and NEPA review requirements through this Settlement Agreement, the Forest Service here effectively seeks to evade and avoid those rulemaking requirements. Mayer Decl. ¶ 20.

- In many cases in the ANF, POGAM members hold oil and gas leases (and similar agreements) to the severed private oil, gas and mineral estates. These leases typically have a relatively short primary term, such as one year or three years, and in order for the lease term to be extended, a well must be drilled and produce “paying quantities” of oil or gas before the expiration of the primary term. The massive and unforeseen delays that would result from the Settlement Agreement’s requirement to conduct NEPA analyses before processing all future Notices to Proceed would invariably cause many leases held by POGAM members to expire, causing substantial investment and job losses. Mayer Decl. ¶ 18.
- In sum, I firmly believe the Settlement Agreement is punitive, even retaliatory, in nature and will have an irrevocable, profound, massive, and devastating adverse impact on oil and gas production activity in the ANF and upon the economy, communities, and people of the surrounding region dependant on this development activity. Mayer Decl. ¶ 22.

That some of the issues Mr. Mayer describes might be raised later by the affected companies, communities, and others in future requests for judicial review of the Forest Service’s decisions (whether on the programmatic or Notice-specific level) does not eliminate the immediate harm in the form of substantial delays to projects which are the immediate result of the Settlement Agreement (and to which the Marten Statement alludes). The threshold underlying legal issue in those cases would be precisely the one before the Court in this case – whether NEPA applies at all to the issuance of Notices to Proceed with the exercise of privately held oil and gas rights. Resolving that issue now can avert the expenses of having to address it later in multiple lawsuits. None of the other pending lawsuits which POGAM (or any member) is a party to involving the ANF involve the issue of whether NEPA applies to individual Notices to Proceed.

Moreover, depending on when in the sequence of NEPA analysis such future suits would be filed, the Forest Service almost certainly will contend that any suit is not ripe for review until the agency takes “final agency action.” *See* 5 U.S.C. § 704. Since NEPA analyses of smaller scale projects in the federal sector have taken years to complete and at great expense, *see* Mayer Decl. ¶¶ 17, 19, the holders of oil and gas rights and their employees would be significantly harmed by the multi-year delays and expenses NEPA review would entail before judicial review may become available, with spillover detrimental effects on other businesses and communities dependent on the development of privately held rights to resources on the ANF.

B. The Settlement Agreement’s Conflicting Positions On The Applicability Of NEPA To Forest Service “Notices To Proceed” Are Arbitrary And Capricious, And One Of Them Is Unlawful

The primary issue presented in this lawsuit is a purely legal one: whether the Forest Service must prepare an analysis under NEPA when it processes so-called “Notices to Proceed”⁵ to private holders of severed oil, gas, and mineral interests in the ANF. *See* Amended Complaint. On that issue, the Settlement Agreement arbitrarily and capriciously endorses two contradictory positions, one of which must be wrong. It takes the view that 54 currently pending submissions for Notices to Proceed can be processed without analysis under NEPA, but that all

⁵ 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.”

(continued...)

other Notices to Proceed shall be subject to NEPA review because NEPA analysis is *required* for Notices to Proceed.

At the April 13 hearing on POGAM's and AFA's emergency motion to stay the settlement, counsel for the Forest Service informed the Court that the NEPA review in question was discretionary and not mandatory. Still, the view that it is mandatory is the predicate of the Employees' lawsuit and clearly a driving force behind the Settlement Agreement. *See* Pls. Resp. at 2 (Settlement Agreement implements "required government processes"). In addition, counsel's statement is at odds with the Forest Service's own public conduct contemporaneous with the filing of the Stipulation of Dismissal. ANF Supervisor Marten and other Forest Service officials told citizens, businesses, and communities who would be affected by the delays and other burdens the Settlement Agreement would cause that the Forest Service had no choice but to follow what the law required:

There is no easy answer of why this is occurring. The honest answer from use is that *we must follow our oath as public servants to uphold the laws, regulations, and policies* that define our responsibilities as federal land managers. Following these principles can result in us having to make decisions that may impact the people we work, live, interact, and care for [sic].

Marten Statement (Apr. 10, 2009) (emphasis added). In other words, "we didn't want to settle on these terms, but the law left us no choice." Since the agency has spoken, "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

(...continued)

36 C.F.R. § 251.15(c). All of the private severed mineral estates in the ANF were created long before 1963, and the Forest Service knows this.

In sum, the Court should not endorse this Settlement Agreement inasmuch as it arbitrarily and capriciously rests on contradictory views of the applicability on NEPA to Notices to Proceed. Either NEPA does not apply as a mandatory step in processing Notices to Proceed (as we believe and explain below), or it *is* mandatory, in which case allowing the 54 Notices to Proceed to issue without NEPA analysis violates the law. The Forest Service and Employees cannot have it both ways. The Settlement Agreement is indisputably unlawful.

C. NEPA Does Not Apply To The Processing Of Forest Service Notices To Proceed

The Court should decline to order dismissal based on the Settlement Agreement because it adopts, and subjects POGAM's and AFA's members to the consequences of, the mistaken new view that Notices to Proceed require NEPA analysis – a view which is contrary to the Forest Service's settled past practices in the ANF.⁶

NEPA requires an Environmental Impact Statement (“EIS”) on “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Where the federal action does not rise to the level of environmental significance that justifies the time delay and expense of an EIS, an environmental assessment (“EA”) must be prepared unless the action is within an agency's categorical exclusions from NEPA or unless NEPA otherwise does not apply. *See* 40 C.F.R. §§ 1507.3, 1508.4, 1508.8, 1508.18. But, as we explain below, NEPA does not apply to a private party's exercise of severed mineral rights in the ANF.

⁶ The issues addressed here are essentially the ultimate issues of law which are dispositive of this entire litigation. While we address them here in an abbreviated fashion to show why the Settlement Agreement is unlawful, as explained below in the conclusion, we seek leave of the Court to more fully address this in a summary judgment motion to be filed in accordance with a schedule established by the Court (for non-emergency motions).

1. Because The Forest Service Has Only A 60-Day Window To Reach Accommodations, NEPA Does Not Apply

Even skipping over NEPA's limitation to actions subject to discretionary federal control (*see* subsection 2, below), NEPA does not apply for timing reasons. By statute (30 U.S.C. § 226(o)), case law (e.g., *United States v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980)), and Forest Service guidance such as the Forest Service Manual, the mineral estate owner in the ANF need only provide 60 days advance notice before exercising his dominant mineral rights. The Forest Service has a 60-day period in which to review a private operating plan and to seek accommodations through negotiation. This has been the agency's consistent past practice for many years and recent decades. *See* Mayer Decl. ¶¶ 6-11.

A provision in the 1992 Energy Policy Act, which applies expressly and solely to the ANF, and was apparently patterned upon this Court's 1980 *Minard Run* precedent and prevailing Forest Service practice, allows private "commencement of surface disturbing activities" once 60 days "advance notice [has been] furnished to the Secretary of Agriculture." 30 U.S.C. § 226(o)(5). Courts have found that NEPA does not apply in situations where the agency has such a short deadline for action. The 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 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).⁷

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. Similarly here, the Forest Service’s review period was limited to 60 days by a 1980 ruling of this Court to comport with the mineral developer’s dominant and pre-existing property rights:

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.

⁷ 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.

Minard Run, 1980 U.S. Dist. LEXIS 9570 at *13, 16, 21-22. 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.

2. The Forest Service Does Not Have Sufficient Control To Render Private Oil And Gas Development A Federal Action Subject To NEPA

Under federal and Pennsylvania law: (1) the private mineral estate is dominant estate; (2) the Forest Service lacks the power to prohibit private oil and gas development; (3) no Forest Service permit or approved Notice to Proceed is required for the exercise of severed mineral rights in the ANF; and (4) the Forest Service has a 60-day period to review a private oil and gas operating plan and to seek accommodations to reduce impacts to the federal estate through negotiations. *See* Mayer Decl. ¶¶ 6-11. Consequently, the Forest Service lacks sufficient control to transform the private action into a federal action subject to NEPA. This common-sense result is supported by several principles and authorities.

1. NEPA analysis is required only for impacts that a discretionary federal agency action proximately causes. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 765-70 (2004). There, because a federal agency had no authority to alter the President's NAFTA decision to allow Mexican trucks into the United States, NEPA's "rule of reason" was read to not require analysis of the air pollution effects of the President's decision in the agency's NEPA document:

[A] "but for" causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.... [We look to the] "familiar doctrine of proximate cause from tort law".... Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.... Since FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border

operations would have no effect on FMCSA's decisionmaking – FMCSA simply lacks the power to act on whatever information might be contained in the EIS.... We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant “cause” of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA in determining whether its action is a “major Federal action.” Because the President, not FMCSA, could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because FMCSA has no discretion to prevent the entry of Mexican trucks, its EA did not need to consider the environmental impacts arising from the entry.

541 U.S. at 767-68, 770.

Similarly here, discretionary Forest Service action does not cause the environmental impacts associated with private oil and gas uses. Rather, the proximate causes of those environmental impacts are: (1) a private person's exercise of mineral property rights created years ago; and (2) the legislative and administrative decisions at the time of surface estate acquisition to not acquire the mineral estate, and to not subject the dominant mineral estate to later-enacted federal regulations. *See Sierra Club v. Babbitt*, 65 F.3d 1502-1512-13 (9th Cir. 1995) (NEPA does not apply where the significant exercise of discretion occurred before NEPA was enacted).

2. The same result occurs if, instead of focusing on legal causes, the inquiry focuses on whether there is sufficient federal control and discretion to warrant a NEPA document. The Ninth Circuit considered another mineral development situation, where the federal Bureau of Land Management (“BLM”) landowner's rules only required advance “notice” of certain proposed mining operations on federal lands under the General Mining Law, where BLM might be said to review certain elements of the mining plan, and where BLM had the statutory power to avoid undue degradation of federal resources. Still, “[n]either BLM's approval process nor regulatory involvement is sufficient to trigger NEPA.” *Sierra Club v. Penfold*, 857 F.2d 1307,

1314 (9th Cir. 1988) (emphasis added), *see id.* at 1312-14. The District Court for the District of Columbia later agreed that such “private [mineral exploration] projects, undertaken in coordination with the Federal Government” by a “notice” are not sufficiently federal to be subject to NEPA. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 55-56 (D.D.C. 2003). Because the Forest Service receives a “notice” and has no greater rights than BLM had in the mining claims cases, the exercise of severed oil and gas rights in the ANF are also not subject to NEPA.

The ANF lies within the Third Circuit. The Third Circuit 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 (3d Cir. 1994); *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 hinder private development of energy resources if the Forest Service’s limited role created substantial NEPA delays.

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 require a federal permit or license was not subject to NEPA. 30 F.3d at 415-18. Similarly here, no Forest Service permit or license is required for exercise of private severed mineral rights in the ANF. While some limited and informal federal "approval" or 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.⁸ 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).

Both the Plaintiffs and the Forest Service now rely on a case that notably did not involve federal rights acquired under the 1911 Weeks Act (that governs the ANF lands) in which the Eighth Circuit ruled that outstanding mineral rights underlying a surface estate acquired by the United States under the Bankhead-Jones Farm Tenant Act were not immune from the "special use permit" authority of the Forest Service, 36 C.F.R. § 251.50. See *Duncan Energy Co. v. U.S. Forest Service*, 50 F.3d 584 (8th Cir. 1995); *Duncan Energy Co. v. USFS*, 109 F.3d 497 (8th Cir. 1997). In the decade since the *Duncan* case was decided, the Forest Service has not followed that precedent by employing the special use permit authority in the ANF under 36 C.F.R. § 251.50. See Mayer Decl. ¶¶ 8-12. To the extent it might appear to have superficial relevance, *Duncan Energy* should be ignored for a number of reasons. In particular, the court completely

⁸ 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 attempting to conduct a paper-writing NEPA exercise in 60 days.

ignored the Forest Service Manual in its interpretation of the USFS's special use regulations (36 C.F.R. §§ 251.50, 251.110). But even more, *Duncan Energy* did not concern the ANF or a Weeks Act acquisition more generally, and is clearly at odds with the *Minard Run* rule and the 1992 Energy Policy Act, 30 U.S.C. § 226(o), provision which expressly applies solely to the ANF. See Casenote, *The Post-Duncan Era: Are Federal Surface Estates Really Subservient?*, 2 Great Plains Nat. Res. J. 266, 278-79 (1997) (opining that the *Duncan Energy* court got it completely wrong).

3. The Forest Service's limited legal authority in the ANF is further recognized in several agency opinions that conclude NEPA does not apply to the exercise of severed mineral rights in the Allegheny National Forest. 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." 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), at 78 ("1991 Oversight Hearing").

Moreover, 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 OGC office signed off on this conclusion.⁹ Moreover, any purported change in OGC'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).

D. The Settlement Agreement Constitutes An Unlawfully Adopted Regulation

The Settlement Agreement purports to impose new regulatory restrictions on the issuance of Notices to Proceed and on the exercise of privately held oil and gas rights in the ANF. It would effectively supersede a pending Forest Service rulemaking process, 73 Fed. Reg. 79,242 (Dec. 29, 2008), without compliance with the Administrative Procedure Act’s requirements for notice and comment rulemaking. *See* Mayer Decl. ¶¶ 20, 5 U.S.C. §§ 553 (notice and comment requirements), 706(2)(D) (reviewing court must set aside agency action taken “without observance of procedure required by law”). For this further reason, the Court should not grant dismissal based on the Settlement Agreement.

E. The Settlement Agreement Conflicts With The Equal Access To Justice Act

The Settlement Agreement also unlawfully grants attorney’s fees to Employees in conflict with the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 2412. The Settlement Agreement (¶¶ 6-9) purports to award Employees \$19,221.60 under EAJA, without any condition except the processing of the necessary paperwork.

EAJA, however, requires much more. To begin with, EAJA authorizes awards only to a “prevailing party.” Employees are not a prevailing party here. To the contrary, they consent to dismissal of their claims *with prejudice*, and the Settlement Agreement (¶ 14) disavows any “admission by any Party to any fact, claim, or defense on any issue in the lawsuit.”

More importantly, EAJA awards are unavailable where “the position of the United States was substantially justified.” 5 U.S.C. § 2412(d)(3). It is clear that the prior position of the

(...continued)

⁹ 1991 Oversight Hearing at 191.

Forest Service on NEPA attacked in this lawsuit was substantially justified. The Forest Service has followed that position for years in the ANF based on a thoroughly reasoned rationale. *See* Mayer Decl. ¶¶ 6-11. And just last week, ANF Supervisor Marten described her agency’s active deliberations on the issue, refuting any argument that the agency’s prior position was unjustified:

The ANF has met this direction through the use of environmental reviews for all proposals and working with operators to help mitigate resource impacts. *Whether or not this has been the right approach has been debated for quite some time.* Recent litigation pushed this debate to the forefront, and agency direction on how to go about meeting those two key objectives has been clarified – we will not impede access to private property rights, we will fulfill our land management responsibilities, and we will do this via NEPA.

Marten Statement (Apr. 10, 2009) (emphasis added).

F. The Settlement Agreement Is Voidable

Finally, the Settlement Agreement is voidable because of its unlawful provisions. It is axiomatic that “[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect.” *United States v. Amdahl Corp.*, 786 F.2d 387, 392-93 (Fed. Cir. 1986) (citing *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917)). *See id.* at 409 (“the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit”). A contractor with the government assumes the risk that the agency has the actual authority to enter into a bargain. *Amdahl*, 786 F.2d 393.

Here, the Forest Service lacked authority to enter into their unlawful Settlement Agreement for the reasons we have described. Thus, the Settlement Agreement is voidable, and the Court should not endorse it by granting dismissal on the terms sought by the Forest Service and Employees.

CONCLUSION

Whether NEPA applies to Forest Service notices to proceed is an issue of law to be decided by this Court, and not by a settlement agreement from which the parties most profoundly affected – the holders of oil, gas, and mineral rights in the ANF – have been emphatically excluded by the Forest Service. Therefore, POGAM and AFA respectfully ask the Court to strike the Forest Service and Employees’ Stipulation of Dismissal for failure to comply with Rule 41(a)(1), and to allow POGAM and AFA to brief the issue of NEPA applicability fully through a motion for summary judgment to be filed in accordance with a schedule established by the Court following an Order of this Court ruling upon the emergency motion for a stay of the Settlement Agreement.

Respectfully submitted,

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