

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.

UNITED STATES FOREST SERVICE,

Defendant,

and

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

Intervenor-Defendants.

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

Electronically filed

INTERVENOR-DEFENDANTS' EMERGENCY MOTION TO STAY SETTLEMENT

Pursuant to Rule 7 of the Federal Rules of Civil Procedure and Local Rule 7.1 of this Court, Pennsylvania Oil and Gas Association ("POGAM") and Allegheny Forest Alliance ("AFA") (collectively "Intervenor-Defendants") hereby move to stay the proposed settlement of this action, stating as follows:

1. This lawsuit arises as a result of the desire of the Plaintiffs and Defendant United States Forest Service ("Forest Service") to subject private oil and gas development within the Allegheny National Forest ("ANF") to the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(d). For their part, the Plaintiffs would like to completely stop oil and gas development in the ANF, and view the imposition of NEPA requirements as an effective means to hinder such development. Similarly, Defendant Forest Service views private oil and gas development in the ANF as

a significant threat. *See generally*, Land and Resource Management Plan and Final Environmental Impact Statement for the ANF issued in March 2007. Moreover, John Phipps, Associate Deputy Chief of the Forest Service, stated to POGAM members at an administrative appeal meeting in December 2007 that he believed NEPA requirements should be imposed on private oil and gas development within the ANF.

2. Notwithstanding the mutual desire of the Plaintiffs and Defendant Forest Service to impose NEPA requirements on private oil and gas development within the ANF, such private development does not involve “major Federal action” under NEPA, and is therefore not subject to NEPA. To the contrary, approximately 93% of the oil, gas, and mineral (“OGM”) rights in the ANF are owned and controlled by private parties (including POGAM members), whose OGM estate interests are dominant to the United States’ servient surface estate ownership and are not subject to NEPA.
3. The purported basis for imposing NEPA requirements on private oil and gas development in the ANF is the issuance of “Notices to Proceed” by Defendant Forest Service. *See, e.g.* Amended Complaint, at Par. 3, 12, 24. Apparently conceding that private oil and gas development *per se* does not involve “major Federal action” under NEPA (*see generally*, Amended Complaint), the Plaintiffs instead cleverly advanced the theory that necessary timber removal, road construction, and “other activities” incidental to oil and gas development are separate activities being approved by the issuance of Notices to Proceed. *See*, Amended Complaint, at Par. 3, 25, and 35.
4. Contrary to the Plaintiffs’ legal theory, Defendant Forest Service is obligated as a matter of law to accommodate oil and gas development on lands with privately owned OGM rights, thereby precluding discretionary agency action central to NEPA. *See*, Intervenor-Defendants’ Answer, at Par. 3. Moreover, a Notice to Proceed is not a permit, approval,

or authorization subject to NEPA – it is merely a communication from Defendant Forest Service to an oil and gas developer signaling completion of the cooperative consulting period established by this Court in *United States v. Minard Run Oil Company*, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. (Erie Division), 1980). *See*, Intervenor-Defendants’ Answer, at Par. 26, 27.

5. Since the 60-day cooperative consulting procedure was first established in *Minard Run*, Defendant Forest Service has increasingly accorded “quasi-permit” status to Notices to Proceed. Despite this decades’ long sleight of hand, there is no legitimate legal basis for according “permit,” “approval,” or “authorization” status to Notices to Proceed. Accordingly, there is no legitimate legal basis for imposing NEPA requirements on private oil and gas development based on the issuance of a Notice to Proceed.
6. The Plaintiffs filed the instant lawsuit on November 20, 2008. Although the requested remedy plainly and directly interferes with the interests of private oil and gas developers, no developers were named as defendants.
7. Intervenor-Defendants learned of the instant lawsuit through media reports. Because the primary requested relief was to enjoin Defendant Forest Service from issuing Notices to Proceed unless and until NEPA requirements are met (*see* Amended Complaint, Relief Requested), and because Intervenor-Defendants were aware that this outcome was already desired by Defendant Forest Service (*see* Paragraph 1, above), Intervenor-Defendants sought leave to intervene.
8. On December 26, 2008, Intervenor-Defendants filed a Motion to Intervene, along with a Proposed Answer of Intervenor-Defendants to First Amended Complaint (“Proposed Answer”). In support of their Motion, Intervenor-Defendants explained, *inter alia*, that POGAM’s membership includes corporations, individuals, and other business entities

that own oil and gas rights (both outstanding and reserved) within the ANF, and therefore have direct, vested real property and economic interests in their oil and gas rights within the ANF and in the outcome of this litigation. Motion to Intervene, at pp. 4-5, and pp. 8-10. In addition, AFA is a coalition of public school districts, municipalities, and businesses with interests tied to the welfare of the ANF. AFA promotes and supports sustainable development within the ANF – including sustainable forestry, environmental stewardship, and multiple-use management of the ANF – and also has a strong vested interest in the outcome of this litigation. *Id.*, at p. 5, and pp. 8-10. *See also, generally*, Proposed Answer.

9. Among the elements supporting the Intervenor-Defendants right to intervene was that neither the Plaintiffs nor Defendant Forest Service can adequately represent the Intervenor-Defendants' interests. Motion to Intervene, at pp. 10-12.
10. On February 6, 2009, the Plaintiffs filed a Response in Opposition to the Motion to Intervene. Plaintiffs opposed full intervention, **but acknowledged that POGAM and AFA should be granted intervention concerning the issue of remedy**. Thereafter, on March 6, 2009, Intervenor-Defendants filed a Reply to the Plaintiffs' Response in Opposition.
11. On March 5, 2009, Defendant Forest Service filed an Unopposed Motion to Extend Time to Answer the First Amended Complaint. Therein, Defendant Forest Service averred that the parties had been actively engaged in settlement discussions and were making significant progress. Intervenor-Defendants were not permitted to participate in said settlement discussions.
12. On March 10, 2009, Intervenor-Defendants filed a Motion to Expedite Consideration of their Motion to Intervene in light of the reported progress being made in settlement

discussions. As reiterated in the Motion to Expedite, neither the Plaintiffs nor Defendant Forest Service adequately represent the interests of the Intervenor-Defendants, and any settlement by these parties was considered highly likely to harm Intervenor-Defendants' interests. Accordingly, the Intervenor-Defendants requested Intervenor status without delay.

13. On April 7, 2009, the Court granted the Motion to Intervene (which included the Proposed Answer) in full, thereby according party status to the Intervenor-Defendants. In doing so, the Court correctly concluded that the "POGAM's members hold oil and mineral rights underlying the ANF that could be impaired or restricted depending upon the outcome of this litigation." Memorandum Opinion, at p. 4.
14. On April 9, 2009, Defendant Forest Service filed a Stipulation of Dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(A). Notwithstanding the unambiguous requirement of Fed.R.Civ.P. 41(a)(1)(A)(ii), the Stipulation of Dismissal was not signed by "all parties" to the litigation. Notably, Intervenor-Defendants had not signed the Stipulation and, indeed, had never seen the Stipulation or been consulted about it before it was filed with the Court. This was brought to the Court's attention on April 9, and the Court scheduled a telephonic hearing to review the matter. The hearing is currently scheduled for April 16, 2009.
15. Also on April 9, 2009, Intervenor-Defendants re-filed the Proposed Answer as an Answer.
16. On April 10, 2009, Plaintiff Allegheny Defense Project ("ADP") issued a press release concerning the Plaintiffs putative "settlement" (not proposed settlement) with Defendant Forest Service. A true and accurate copy of the press release is attached hereto as Exhibit A.

17. Also on April 10, 2009 – in what was perhaps the quickest action taken by the Forest Service in its entire history – Defendant Forest Service printed and mailed postcard notices of meetings that had been scheduled to explain implementation of the putative settlement. A true and accurate copy of a representative postcard notice is attached hereto as Exhibit B. As can be seen from the notice, the meetings are scheduled to occur on April 13, April 14, and April 15, 2009.
18. Also on April 10, 2009, Defendant Forest Service mailed letters to private oil and gas developers affected by the settlement to inform them of the settlement and to demand submission of information on any proposed oil and gas activities anticipated through 2013. The letter demanded that such information be submitted in less than one month. A true and accurate copy of a representative letter is attached hereto as Exhibit C.
19. Pursuant to Fed.R.Civ.P. 41(a)(2), the instant lawsuit can only be dismissed at the Plaintiffs’ request as approved “by court order, on terms that the court considers proper.”
20. It is inappropriate, premature, and potentially harmful to Intervenor-Defendants for Defendant Forest Service to conduct meetings and/or proceed with other measures to implement a putative settlement that has not been approved by the Court in accordance with Fed.R.Civ.P. 41(a)(2).
21. The Plaintiffs (and possibly Defendant Forest Service) chose to invoke the jurisdiction of this Court to redress their alleged grievances. Once the Court’s jurisdiction was invoked, the parties became obligated to comply with applicable rules and procedures designed to secure a just and fair outcome for all parties. However, the filing of the Stipulation to Dismiss and settlement without input or approval of Intervenor-Defendants and without Court approval failed comport with Fed.R.Civ.P. 41, subverted judicial process, and was contrary to the interests of justice. Moreover, permitting Defendant Forest Service to

