

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

<b>FOREST SERVICE EMPLOYEES FOR</b>	)	
<b>ENVIRONMENTAL ETHICS;</b>	)	
<b>ALLEGHENY DEFENSE PROJECT;</b>	)	
<b>SIERRA CLUB,</b>	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	<b>CIVIL ACTION NO. 1:08-cv-323-SJM</b>
<b>UNITED STATES FOREST SERVICE,</b>	)	
	)	
Defendant,	)	
	)	<i>Electronically filed</i>
and	)	
	)	
<b>PENNSYLVANIA OIL AND GAS</b>	)	
<b>ASSOCIATION; and ALLEGHENY</b>	)	
<b>FOREST ALLIANCE,</b>	)	
	)	
Applicants for Intervention.	)	

**MOTION FOR LEAVE TO INTERVENE  
AND MEMORANDUM IN SUPPORT**

Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Rule 7.1 of this Court, the Pennsylvania Oil and Gas Association (“POGAM”) and the Allegheny Forest Alliance (“AFA”) hereby move to intervene in this case as defendants. POGAM and AFA seek intervention of right under Rule 24(a)(2) or, alternatively, permissive intervention under Rule 24(b)(1)(b).

Applicants’ counsel has conferred with counsel for the other parties to ascertain whether there is any opposition to this motion. Counsel for the three plaintiffs (Ms. Dugan) has advised that the plaintiffs oppose POGAM’s and AFA’s intervention. Counsel for defendant United States Forest Service (Ms. Storey) has advised that the Federal defendant does not oppose POGAM’s and AFA’s intervention.

## INTRODUCTION

In this lawsuit, plaintiffs seek declaratory and injunctive relief against the Forest Service under the Administrative Procedure Act (“APA”), 5 U.S.C. § 701, *et seq.*, for alleged violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.* According to the Complaint, the Forest Service violated NEPA by issuing certain “Notices to Proceed” to oil and gas companies operating within the boundaries of the Allegheny National Forest (“ANF”), which is located within the Commonwealth of Pennsylvania. *See* Complaint ¶ 3. According to the plaintiffs’ allegations, the Forest Service was required to, but did not, prepare a “NEPA analysis” before issuing the Notices to Proceed in order to determine the impact, if any, its actions (of issuing the Notices to Proceed) would have the environment. *See id.* ¶¶ 14-39.

Left out of the Complaint is the fact that the United States acquired the ANF surface estate in the early 1900s pursuant to the Weeks Act,<sup>1</sup> which enabled the United States to acquire land for the protection of watersheds and navigable waters, and that approximately 93% of the land acquired by the United States for the ANF were acquired at reduced purchase prices because the acquisitions did not include any compensation for the oil, gas, and mineral (“OGM”) rights. Moreover, these acquisitions were made subject to express covenants in title documents allowing for oil and gas development by private owners of OGM rights.

With respect to the ANF land acquisitions, certain parcels of the surface estate were acquired subject to “outstanding” mineral rights, which are rights owned by a party other than the surface owner at the time the surface was conveyed to the United States. There is usually no contractual or other legal relationship between the United States and the owner of outstanding mineral rights, and the exercise of outstanding rights is not subject to regulation of any kind. *See* Forest Service Manual § 2830.0 (“[t]he Secretary’s rules and regulations do not apply to the

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<sup>1</sup> Act of Mar. 1, 1911, ch. 186, 36 Stat. 961 (codified as amended in scattered sections of Title 16 of the U.S. Code).

administration of outstanding mineral rights”). Certain other parcels of the ANF surface estate consist of “reserved” mineral rights, which are rights that were retained by the surface owner in the deed executed to convey the surface estate to the United States. Under the Weeks Act, the exercise of reserved rights is subject only to such limited regulations of the Forest Service as were expressly included in the deeds at the time of conveyance to the United States. *See* 16 U.S.C. § 518.

The Forest Service, as owner of the servient surface estate, has only limited rights with respect to a mineral owner’s access to and development of its mineral rights underlying the ANF. As the agency states in its own Manual, the “Forest Service does not have the authority to deny the exercise of a mineral reservation or outstanding mineral right.” Forest Service Manual § 2830.1.

The lack of Forest Service discretion to deny the exercise of mineral rights is critical to the NEPA issue posed by plaintiffs in this case. NEPA is triggered *only* by discretionary agency action, meaning an action that the agency has the power to prevent. *See Dep’t of Transportation v. Public Citizen*, 541 U.S. 752, 765-770 (2004) (NEPA only applies to the extent the agency’s action is the “but for” cause of the environmental impact; a non-discretionary action, *i.e.*, an action the agency has no power to prevent, cannot be a “but for” cause). Where an agency does not have discretion to prevent the private conduct, NEPA review is not required because it serves no effective purpose. *See, e.g., State of New Jersey Dep’t of Env’tl. Prot. v. Long Island Power Auth.*, 30 F.3d 403, 416-418 (3d Cir. 1994); *NAACP v. Medical Center*, 584 F.2d 619, 634 (3d Cir. 1979); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1512-1513 (9th Cir. 1995); *Sierra Club v. Penfold*, 857 F.2d 1307 (9th Cir. 1988).

### **PROPOSED INTERVENORS**

POGAM is a Pennsylvania non-profit corporation, with its principal place of business at 240 North Third Street, Harrisburg, Pennsylvania. POGAM is a trade association of the Commonwealth's independent oil and gas producers, and promotes the general welfare of Pennsylvania's crude oil and natural gas exploration and production industry. POGAM's membership includes corporations, individuals, and other business entities that own oil and gas rights, both outstanding and reserved, within the ANF. As the owners of such rights within the ANF, POGAM's members have easements for the use of the surface that are dominant to the surface estate, giving POGAM's members the right under Federal and State law to the reasonable use of the surface to develop their oil and gas resources. POGAM's members have direct, vested real property and economic interests in their oil and gas rights within the ANF, and POGAM has an interest in defending against the efforts of the plaintiffs in this case to require the Forest Service to impose constraints on POGAM's members that the Forest Service has no lawful right to impose and that would, if imposed, adversely affect the rights that POGAM's members have in their ANF oil and gas estates.

POGAM and its members are committed to the economical and environmentally responsible development, production, and use of the Commonwealth's crude oil and natural gas resources. POGAM is also dedicated to promoting a strong and healthy natural gas and crude oil industry in Pennsylvania to help meet the needs of energy consumers in Pennsylvania and the Northeast United States. Domestic production of oil and gas in Pennsylvania assists in the critically important national effort to reduce the reliance of the United States on foreign sources of energy supplies.

POGAM's government relations efforts focus on State legislative and regulatory issues that matter most to independent producers. POGAM maintains an ongoing dialogue with Federal and State agencies and commissions, including the Forest Service, the Pennsylvania Department of Environmental Protection, the Pennsylvania Department of Conservation and Natural Resources, the Pennsylvania Public Utility Commission, and any other State agency whose actions could affect oil and gas interests in Pennsylvania.

In addition, POGAM represents its members' interests in court to ensure that oil and gas development operations are not subjected to undue regulatory constraints. For example, in addition to moving to intervene in this case, POGAM and AFA recently filed a lawsuit against the Forest Service challenging portions of the Forest Service's revised Land and Resource Management Plan for the ANF, which they believe was issued in violation of NEPA. *See* No. 1:08-cv-00162-SJM. POGAM is also an intervenor in a lawsuit filed by POGAM member company Duhring Resource Company ("Duhring") challenging the Forest Service's attempt to impose unlawful roadblocks to Duhring's development of its oil and gas interests in the ANF – exactly the type of regulatory overreaching that POGAM seeks to prevent. *See* No. 1:07-cv-00314 (recently transferred from Judge McLaughlin to Judge Lancaster).

AFA is a Pennsylvania non-profit corporation with its principal place of business at 22 Greves Street, Kane, Pennsylvania. 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.

## ARGUMENT

### I. POGAM AND AFA ARE ENTITLED TO INTERVENTION OF RIGHT.

Federal Rule of Civil Procedure 24 provides in pertinent part:

**(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who . . . (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

The Third Circuit interprets Rule 24(a)(2) to require intervention if four conditions are met: (1) the application is timely; (2) the applicant has a "sufficient interest in the litigation"; (3) there is "a threat that the interest will be impaired or affected, as a practical matter, by the disposition of the action"; and (4) there may be "inadequate representation of the prospective intervenor's interest by existing parties to the litigation." *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998) (granting intervention to companies and trade association in suit that implicated their business interests in timber harvesting in the ANF). As with the trade association intervenor in *Kleissler*, POGAM and AFA in this case satisfy these four conditions.

#### A. The Motion To Intervene Is Timely.

The timeliness of a motion to intervene is determined by the totality of the circumstances, based on factors such as the stage of the proceedings and the prejudice to the parties from a delay in filing the motion. *See In re Community Bank of No. Va. & Guar Nat'l Bank of Tallahassee Second Mortgage Loan Litig.*, 418 F.3d 277, 314 (3d Cir. 2005); *United States ex rel. Frank M. Sheesley Co. v. St. Paul Fire and Marine Ins. Co.*, 239 F.R.D. 404, 408 (W.D. Pa. 2006).

This motion is timely because this case is still at a preliminary stage. The Complaint was filed on November 20, 2008, and was supplanted by the First Amended Complaint filed on December 4, 2008. An Answer has not yet been filed by the Forest Service. The fact that “little progress has been made in the underlying action” strongly militates in favor of timeliness here. *LaRouche v. FBI*, 677 F.2d 256, 257-258 (2d Cir. 1982); 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1916, at 557 (3d ed. 2007) (a motion to intervene “made before the existing parties have joined issue in the pleadings has been regarded as clearly timely”).

There is no possibility of prejudice to those already party to the case by reason of the timing of this intervention, inasmuch as POGAM and AFA seek to “participate in an upcoming... phase of the litigation,” *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 908 (D.C. Cir. 1977) (“*NRDC v. Costle*”), and not to reopen issues that would otherwise remain closed. POGAM’s and AFA’s purposes for intervening are to protect their members’ interests by defending against the allegations raised by plaintiffs.

Considering both the short amount of time since the filing of the Complaint and the First Amended Complaint and the significance of POGAM’s and AFA’s interests in intervention, this motion “cannot be regarded as untimely.” *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998) (reversing district court and granting intervention of right to an economically-interested party).

**B. POGAM and AFA Have Legally Protectable Interests Relating to This Suit.**

Rule 24(a)(2) is satisfied when the applicant has an interest “relating to the property or transaction which is the subject of the action” that is “significantly protectable.” *Kleissler*, 157 F.3d at 969 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). In *Kleissler*, the Third Circuit interpreted the interest test flexibly, in keeping with the pragmatic concerns that prompted the amendment of Rule 24 in 1966 to facilitate intervention. *See* 157 F.3d at 970-972 (citing, *inter alia*, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-134 (1967), and 7C Wright, *et al.*, § 1908 at 301 (2d ed. 1986)). The Third Circuit held that parties similarly situated to the members of POGAM and AFA (*i.e.*, Pennsylvania forest product companies and an industry trade association whose members had interests in engaging in business activities in the ANF) had sufficient interests to warrant intervention of right in a suit whose disposition could have impaired those interests. *See Kleissler*, at 972-974.

The factors relied upon by the Court in *Kleissler* weigh strongly in favor of the right of POGAM and AFA to intervene in this case. Specifically, POGAM’s members hold oil and gas rights underlying the ANF which they develop or plan to develop. It is critical that they enjoy access to, and use of, their real property in a way that, while avoiding unnecessary disturbance to the Forest Service as surface owner, will permit extraction activities free of unlawful and burdensome constraints and conditions such as those which, in the case at bar, plaintiffs allege the Forest Service is required to impose. AFA, too, with its members’ interests in sustainable forestry practices and multiple-use activities in the ANF, has a strong vested interest in the outcome of this litigation.

Under Rule 24(a), an industry has “direct and substantial interests” in a suit that challenges practices aimed at “halting ... or, at a minimum, reducing the efficiency of,” their business activities. *Kleissler*, 157 F.3d at 972.<sup>2</sup> As the Eleventh Circuit has noted:

[I]n cases challenging various statutory schemes as unconstitutional or as improperly interpreted and applied, the courts have recognized that the interests of those who are governed by those schemes are sufficient to support intervention.

*Chiles v. Thornburgh*, 865 F.2d 1197, 1214 (11th Cir. 1989) (quoting 7C Wright, *et al.*, § 1904 (2d ed. 1986)).

Besides the interests already described, POGAM and AFA have another judicially recognized interest that satisfies Rule 24: an interest in avoiding adverse precedent that would construe relevant law in a manner that would impede the exercise of private oil and gas rights in the ANF. If POGAM and AFA are not allowed to intervene and contest the legality of what plaintiffs seek in their Complaint, an adverse decision with precedential significance could result, thereby impairing the ability of POGAM’s and AFA’s respective members to have their voices meaningfully heard in future instances where the Forest Service imposes burdens on oil and gas operations in the ANF of the type sought by the plaintiffs in this action. This interest in avoiding adverse *stare decisis* effects is sufficient for intervention of right. *See Sierra Club v. Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994); *United States v. Oregon*, 839 F.2d 635, 638 (9th Cir. 1988).

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<sup>2</sup> *See also id.* at 973, citing with approval *Sierra Club v. Glickman*, 82 F.3d 106, 108 (5th Cir. 1996) (farming interests granted intervention in a case that could adversely affect them); *Sierra Club v. Espy*, 18 F.3d 1202, 1203 (5th Cir. 1994) (timber industry granted intervention of right in a national forest case seeking to reduce the timber supply); and *Conservation Law Foundation of New England v. Mosbacher*, 966 F.2d 39, 40 (1st Cir. 1992) (fishing industry granted intervention of right in a case seeking greater regulation of fishing). *See also Nat’l Wildlife Fed’n v. Hodel*, 661 F. Supp. 473, 474-75 (E.D. Ky. 1987) (coal industry granted intervention in suit concerning mining regulations). All of these cases, like *Kleissler*, involved industry intervention as *defendants* in suits that, if successful, would impose greater constraints on their business activities – the very posture POGAM and AFA find themselves in here.

**C. POGAM's And AFA's Interests May Be Impaired Or Affected, As A Practical Matter, By The Disposition Of This Suit.**

The impairment factor requires “that the Court surmise the practical effects” of the grant or denial of intervention. *St. Paul Fire and Marine*, 239 F.R.D. at 409. The practical effect that the equitable relief sought by plaintiffs would have on oil and gas operators in the ANF if plaintiffs’ suit is successful would include encumbering real property interests with burdensome, costly, and time-consuming requirements, creating “common law” regulatory authority that the Forest Service lacks as a matter of statutory law, interfering with AFA’s sources of revenue, and emboldening the Forest Service to treat all oil and gas developers in the ANF – many of whom may be POGAM members – in a heavy-handed, unlawful manner. In addition, plaintiffs’ success in this case would embolden them or others with similar interests to file future lawsuits to compel the Forest Service to act in such a manner whenever they (plaintiffs or others like them) did not feel as if the Forest Service had adequately regulated the property rights of those holding oil and gas rights in the ANF. If this were to occur, the interests of POGAM and AFA in oil and gas development would be impaired. Because they have a “substantial interest, directly related to and threatened by” the types of equitable relief sought by plaintiffs in the case at bar which “meets the requirements of Rule 24(a),” *Kleissler*, 157 F.3d at 973, POGAM and AFA are entitled to intervene of right.

**D. POGAM's And AFA's Interests Will Not Be Adequately Represented By Existing Parties.**

The final criterion for intervention of right is whether the representation of POGAM’s and AFA’s interests by an existing party is inadequate. The “burden of that showing should be treated as minimal.” *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538-539 n.10 (1972); accord *Sierra Club v. Espy*, 18 F.3d at 1207; *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990). POGAM and AFA are certainly not

adequately represented by the plaintiffs, whose interests appear to be directly at odds with those of POGAM and AFA. *See United States v. Stringfellow*, 783 F.2d 821, 828 (9th Cir. 1986) (adverse party cannot adequately represent applicant's interests). Nor can the interests of POGAM and AFA be adequately represented by the Forest Service. Although the Forest Service is the named defendant in this case, its reasons to oppose the allegations in the Complaint, if any, are unknown to POGAM and AFA, and will likely be quite different from the reasons for opposition that will be presented by POGAM and AFA. Indeed, as the actions of the Forest Service complained of in related case No. 1:07-cv-00314 demonstrate, the Forest Service has increasingly attempted to manage the ANF and the rights of oil and gas owners in a manner that is diametrically opposed to the rights and interests of those oil and gas owners, many of whom are POGAM members. POGAM and AFA have an interest in defending the rights and interests of those oil and gas owners that the Forest Service simply does not share.

In short, the requested intervention would provide this Court with an industry perspective on the dispute. Industry intervention in similar circumstances has long been seen by courts as serving a useful purpose. *See Nat'l Resources Def. Council, Inc. v. U.S. Nuclear Regulatory Commission*, 578 F.2d 1341, 1345-1346 (10th Cir. 1978) (reversing the district court and granting intervention to a mining industry trade association (American Mining Congress) to represent industry perspective in a NEPA case). Because this case seeks to compel the Forest Service to conduct a NEPA analysis before issuing a Notice to Proceed to *any* holder of mineral rights in the ANF, the lawsuit implicates industry-wide oil and gas development in the ANF – an issue that directly impacts the missions of POGAM and AFA in a manner that is of no concern to, and therefore cannot be protected by, the Forest Service.

Moreover, were there a settlement of this case, POGAM and AFA would want to ensure that whatever accord might be entered into between plaintiffs and the Forest Service would be acceptable to holders of oil and gas rights in the ANF. As the Third Circuit aptly put it, “[r]igid rules [barring intervention] contravene a major premise of intervention – the protection of third parties affected by the pending litigation. Evenhandedness is of paramount importance.”

*Kleissler*, 157 F.3d at 971.

## **II. PERMISSIVE INTERVENTION SHOULD BE GRANTED IN THE ALTERNATIVE.**

If the Court denies POGAM’s and AFA’s request for intervention of right, it should grant permissive intervention under Rule 24(b)(1)(B). POGAM and AFA clearly qualify for permissive intervention for the reasons presented in Section I.

An applicant seeking to intervene under Rule 24(b)(1)(B) must show that: (1) its application is timely; and (2) its claim or defense and the main action have a question of law or fact in common. As shown above, this application is timely. At this early stage of the litigation, intervention will not unduly delay the proceedings, and the named parties cannot show that POGAM’s and AFA’s participation will unfairly prejudice the named parties’ interests in a fair adjudication of the case. Indeed, the prospect of a fair and full adjudication is enhanced by POGAM’s and AFA’s participation, inasmuch as their intervention would add an industry perspective and an interested third party’s perspective for this Court’s consideration.

At this time, POGAM and AFA do not foresee one or both of them filing any counterclaims or cross-claims, or taking any other procedural steps to complicate this matter. They seek intervention solely to help ensure that this Court renders a fully informed decision.

**CONCLUSION**

For the foregoing reasons, POGAM and AFA respectfully request that they be granted Defendant-Intervenor status.

Respectfully submitted,

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