

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

FOREST SERVICE EMPLOYEES FOR)	
ENVIRONMENTAL ETHICS; ALLEGHENY)	
DEFENSE PROJECT; SIERRA CLUB,)	CIVIL ACTION NO. 08-CV-323
)	
Plaintiffs,)	
)	
v.)	<i>Electronically filed</i>
)	
UNITED STATES FOREST SERVICE,)	
)	
Defendant,)	
)	
and)	
)	
PENNSYLVANIA OIL AND GAS)	
ASSOCIATION and ALLEGHENY)	
FOREST ALLIANCE,)	
)	
Intervenor-Defendants.)	
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PLAINTIFFS' SURREPLY TO INTERVENORS' EMERGENCY MOTION FOR STAY

With the court's permission, plaintiffs submit this supplemental objection (surreply) to intervenors' emergency motion for stay.

INTRODUCTION

The law encourages settlements. United States v. State of North Carolina, 180 F.3d 574, 581 (4th Cir. 1999). This is particularly true where a government agency charged with protecting the public interest has "pulled the laboring oar in constructing the proposed

settlement." See, e.g., United States v. Vertac Chemical Corp., 756 F. Supp. 1215, 1218 (E.D. Ark. 1991), *aff'd*, 961 F.2d 796 (8th Cir. 1992). Thus the intervenors have a strong burden of showing that they have suffered "legal prejudice," and they have not done so.

As the court noted in Bragg v. Robertson, the intervenors' burden of challenging a settlement agreement is particularly high where the plaintiffs are citizens acting as "private attorneys general" to enforce the laws against the government. 54 F. Supp.2d 653 (S.D. W. Va. 1999) (rejecting mining industry's challenge to government settlement with environmental litigants in NEPA context). In Bragg, the industry intervenors argued that their operations would be slowed down by the settlement, as the government would now be conducting more exhaustive review prior to allowing "mountaintop removal" mining. While acknowledging that there was evidence the delay would "lead[] to a tremendous loss of jobs and revenue," the court held that such harm did not constitute "legal prejudice" warranting rejection of the settlement. The court noted that any decisions by the government proceeding from the settlement which directly affected the industry could be challenged as soon as they were final actions. Because the intervenors "have not been stripped of a cause of action or claim, which is the standard for formal legal prejudice," the court concluded that the industry lacked standing to challenge the settlement agreement.

The same is true in the instant case. No "legal prejudice" to intervenors' legal rights flows from the settlement agreement.

I. ANY HARM AS ALLEGED BY INTERVENORS IS CAUSED NOT BY THE SETTLEMENT BUT BY THE FOREST SERVICE'S SEPARATE DECISION TO PREPARE A FOREST-WIDE EIS

Intervenors are concerned that the Notices to Proceed will be delayed by the forest-wide

NEPA process. However, the lengthy programmatic EIS process which is being undertaken was not required by the settlement agreement; therefore, it is not the settlement agreement that is causing intervenors' distress. The settlement agreement states:

Except as provided in paragraph 2, the Forest agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument for authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests. Appropriate NEPA analysis shall consist of the use of a categorical exclusion or the preparation of an Environmental Assessment or an Environmental Impact Statement.

Settlement Agreement at 2. The Forest Service's decision to prepare a programmatic, forest-wide EIS was discretionary and was not mandated by the settlement agreement. As explicitly contemplated by the settlement, the Forest Service can comply with the agreement by preparing an individual Environmental Assessments for each Notice to Proceed.¹ In an EA an agency must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," as well as "brief discussions of the need for the proposal, of alternatives as required by sec. 102(2)(E), [and] of the environmental impacts of the proposed action and alternatives." 40 C.F.R. 1508.9. See id. 1502.9(c)(1)(ii). The relevant Forest Service rule requires a public comment period on EAs, but only 30 days. 36 C.F.R. 215.6(a).

If the Settlement Agreement is rejected, intervenors will likely suffer more harm, because the default position is the Regional Forester's previous directive from January 16, 2009, ordering all OGM proposals to go to the Regional Office for review -- which resulted in a *de facto*

¹ The Forest Service could also attempt to invoke one of the limited "categorical exclusions" for actions which normally do not significantly impact the environment -- but the logging and road-building and surface-destroying impacts of oil and gas exploration would most likely preclude such an approach for most NTPs.

moratorium on NTPs on the Allegheny.

And there is no indication that, if the court rejects the settlement, the Forest Service would abandon its decision to do a forest-wide EIS prior to issuing NTPs. As explained infra at 5-7, for 25 years the Allegheny National Forest's Oil and Gas Handbook has explicitly required NEPA analysis prior to issuance of NTPs. Exhibit A at 4-12. And, as discussed infra at 10-11, the fact that the Allegheny National Forest -- for whatever reason -- chose to ignore that requirement for 25 years cannot be used to now require the government to continue ignoring that requirement.²

What is clear is that a halt to the settlement would actually threaten progress on the issuance of the 54 NTPs "released" in the settlement, two of which have already been issued in the short time since the settlement was signed. Exhibit B. The Settlement Agreement permits the drilling of 588 oil and gas wells pursuant to the Forest Service's past (illegal) practices, without analysis of the environmental impacts of these wells. 588 oil and gas wells is above the Forest Service's average future projection of 512 new oil and gas wells per year set out in its Final Environmental Impact Statement ("FEIS") for the 2007 Revised Land and Resource Management Plan ("Forest Plan"). Exhibit C. It is also nearly double the average number of wells drilled per year from 1986 to 2004. Exhibit D (Appendix F to 2007 Revised Forest Plan FEIS).

The main factor setting the pace of drilling on the Allegheny is the price of oil and gas,

² The Allegheny NF's Oil and Gas Handbook also has for 25 years required the Forest Service to "[t]ry to determine the companies' five year plan for the area." Exhibit A at 4. Thus, the intervenors' protestations that providing such forecasting to the Forest Service is a new and unrealistic undertaking are not well-founded. Nor is there any indication that the intervenors would be bound to the list they compile at this time.

not whether or not the Forest Service completes a NEPA analysis. As the Forest Service stated in Appendix F to the 2007 revised Forest Plan: "The number of wells drilled per year is market driven." Exhibit D.

The settlement threatens no harm to the intervenors. And even the harm that intervenors do allege they will suffer (caused by the Forest Service's decision to do a programmatic EIS) does not constitute "legal prejudice" under the relevant case law.

II. FOR 25 YEARS THE OFFICIAL ALLEGHENY NATIONAL FOREST HANDBOOK HAS REQUIRED NEPA ANALYSIS FOR ALL NOTICES TO PROCEED

Intervenors protest that the Allegheny National Forest has never before required NEPA analysis for NTPs -- and indeed, implies that even NTPs themselves are a new phenomenon on the ANF. Nothing could be further from the truth. As is made clear in Exhibit A, the Allegheny National Forest Oil & Gas Handbook has for 25 years required NEPA analysis prior to issuance of Notices to Proceed for split estates.

The Handbook was issued in August 1984, and it makes clear that NEPA applies to both reserved and outstanding rights:

The significant difference between reserved and outstanding mineral rights is that (rights reserved) are addressed by the Secretary of Agriculture's Rules and Regulations, and outstanding rights are not. The review process is, however, the same for both. The Forest Service must review all proposals and prepare an Environmental Assessment of the surface disturbance activity regardless of mineral ownership. The discussion and the preliminary environmental review process described for the Administrative Procedure for mineral rights reserved are identical for outstanding mineral rights.

Exhibit A at 12 (emph. added). The Handbook requires, in relevant part, the following steps:

1) "Establish a time table to complete the permit process and/or issue the notice to proceed." Ex. A at 4.

2) "Scope issues, draft environmental assessment [EA] alternatives and decision criteria." Id. at 5.

3) "Ground disturbance and topsoil protection, erosion potential of fragile soils, steep slopes and proper drainage control should be discussed and control measures agreed upon and included as management constraints and requirements in the EA." Id. at 6 (emph. added).

4) "Determine where surfacing material is to be used and where 'stone' pits are located or to be developed (utilize Forest Geologist!). Arrange for 'pit plans' and surface protection plan if new 'stone' pits have to be developed. (Be sure to include as a management requirement in EA.)" Id. at 6 (emph. added).

5) "Abandonment and reclamation procedures need to be agreed on and included in the management requirement section of the EA." Id. at 7.

6) "If powerlines and pipelines and other ancillary facilities are required, determine where they are to be placed and the feasibility of buried power lines vs. overhead or tree mounted lines. Develop alternatives to be included in EA for line officer approval." Id. at 7 (emph. added).

7) "Establish timeframe to complete the Environmental Assessment and required permits." Id. at 7.

8) "Timber Cruising, Marking and Sale. When the results of the cultural resource survey are available, and any conflicts resolved, timber cruising and marking may commence. This activity could parallel the writing of the Environmental Assessment. However, timber harvesting activities can not begin until the Environmental Assessment Report has been approved (Reserved and Outstanding Rights) and the required permit or letter of consent issued."

Id. at 8 (emph. added).

9) "Permit Issuance by the Forest Service. The permit (Reserved Rights only), is prepared once the District Ranger and/or Forest Supervisor have approved the Environmental Assessment. The permit will include the appropriate management constraints developed in the Environmental Assessment. For the 1937, 1947 and 1963 Secretary's Rules and Regulations, it is necessary to obtain a performance or reclamation surety bond from the oil and gas operator."

Id. at 9.

10) "At this time, if permits are necessary, they should be prepared for the use or construction of roads and utility rights-of-way. The Environmental Assessment should have addressed this aspect of permit issuance, and will include site specific stipulations that are to be included with the permit." Id. at 9.

11) (for outstanding minerals) -- "The developer will provide the following minimum documents (the above mentioned times do not start until all six of the following items are received and this starting date should be mentioned in the introduction of the EA) . . ." Id. at 11-12.

Thus, neither this lawsuit, nor the government's decision to settle the lawsuit, nor the government's decision to conduct NEPA, should come as any surprise to the intervenors. What is surprising -- shocking -- is that the ANF has for so long ignored its own Oil and Gas Handbook.

III. THE PROPERTY CLAUSE OF THE CONSTITUTION, THE WEEKS ACT, AND FOREST SERVICE STATUTES AND REGULATIONS ALLOW -- AND REQUIRE -- THE FEDERAL GOVERNMENT TO PROTECT THE PUBLIC'S SURFACE RIGHTS ON THE NATIONAL FORESTS

Congress has the power under the property clause to regulate federal land. U.S. Const.

art. IV, § 3, cl. 2; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).

Congress may even regulate conduct occurring on or off federal land which affects federal land. Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S. Ct. 2285 (1976). Federal regulations pursuant to the Property Clause "necessarily override[] conflicting state laws under the Supremacy Clause." Id. at 543, 96 S. Ct. at 2293. See also Burlison v. United States, 533 F.3d 419, 432-33 (6th Cir. 2008) (reading Kleppe to hold that Congress can "regulate access . . . by holders of [a private] dominant estate . . . to [a public] servient estate").

The Forest Service is charged with managing "a nationally significant" network of lands, "dedicated to the long-term benefit for present and future generations," 16 U.S.C. 1609(a), must do so according to principles of multiple use and sustained yield, see, e.g., 16 U.S.C. 1604(e)(1), and must provide for full public engagement with its decisionmaking process, see, e.g., 16 U.S.C. 1612(a). The Service has considerable power to "regulate Forest System lands," and, even in the face of private mineral rights, has the limited but substantial authority to itself "determine the reasonable use of the federal surface." See Duncan Energy Co. v. United States Forest Serv., 109 F.3d 497,498 ("Duncan II") (8th Cir. 1997). Congress has given the Forest Service broad power to regulate Forest System land. See, e.g., 7 U.S.C. 1011; 16 U.S.C. 551. The Forest Service regulates surface access to outstanding mineral rights under the "special use" regulations. The special use regulations provide that "[a]ll uses of National Forest System land . . . are designated 'special uses' and must be approved by an authorized officer." 36 C.F.R. 251.50(a).

Even lands like the Allegheny NF lands, acquired under the Weeks Act, are subject to regulation. The Weeks Act statute itself makes clear that reserved private rights underlying

public lands "shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration" and that such private rights could not be acquired unless they would, "from their nature . . . in no manner interfere with the use of the lands so encumbered for the purposes of the [Weeks] Act." 16 U.S.C. 518. The Weeks Act also specifies that the Secretary is "authorized, under general regulations to be prescribed by him, to permit the prospecting development and utilization of the mineral resources of the lands acquired under the Act . . . , upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States." 16 U.S.C. 520. Because the Weeks Act was designed to protect public lands, the terms of contracts made under the acts should be construed "consistent with the purpose of the Act," thereby ensuring "productive use of the surface by the United States." Downstate Stone Co. v. United States, 712 F.2d 1215, 1217-19 (7th Cir. 1983).

In Duncan Energy v. US Forest Service, 50 F.3d 584 (8th Cir. 1995) ("Duncan I"), the court considered and applied these laws, and held that the government's duty and power to protect the public's interest in the surface of the National Forests supersedes any state law which purports to limit those rights. Although the state at issue in Duncan was North Dakota, the state laws governing the respective rights of surface and subsurface owners are virtually identical throughout the states -- the subsurface owner is dominant and cannot be vetoed by the surface user. Andrew C. Mergen, "Surface Tension: The Problem of Federal/Private Split Estate Lands," 33 Land & Water L. Rev. 419, 432-35 (1998). That said, in Duncan as well as in all other relevant cases, the courts have consistently rejected arguments from the oil and gas industry that they must be allowed to proceed when the government chooses to slow down the process long

enough to protect the public's lands.

In Duncan, the facts were quite similar to those at issue here. The Forest Service's practice had been to simply issue a letter of authorization establishing conditions for use of the surface. The plaintiff oil and gas interest ("Duncan") had a contract requiring it to drill seven wells within one year or incur liquidated damages. The Forest Service decided to prepare an area-wide EIS as well as a site-specific EIS, which it stated could take two to three years. Duncan sued for declaratory relief, arguing it had an absolute right to proceed. In turn, the Forest Service sought an injunction against disturbance of the surface. The Forest Service prevailed.

As here, the industry litigant in Duncan complained that the Forest Service should not be allowed to change its practices. The court rejected such a theory, stating:

[T]he Forest Service's position in other cases cannot be considered as binding authority that the special use regulations do not apply. "[W]hen an agency deviates from established precedent, it must provide a reasoned explanation for its failure to follow its own precedents," but "[t]his requirement does not mean that an agency may not change its policies." Baltimore Gas & Elec. Co. v. Heintz, 760 F.2d 1408, 1418 (4th Cir.), *cert. denied*, 474 U.S. 847 (1985). The Forest Service's position is entitled to deference. "[R]egulatory agencies do not establish rules of conduct to last forever,' and . . . an agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" Motor Vehicle Mfr's Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983) (citations omitted); see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863 (1984) ("The fact that the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded the agency's interpretation of the statute."). For these reasons, we are convinced that the Forest Service has the limited authority it seeks here; that is, the authority to determine the reasonable use of the federal surface.

See also Bragg ("It is rare that the United States is estopped from taking positions different from those mistakenly taken by its agents on prior occasions. See, e.g., United States v. Vanhorn, 20 F.3d 104, 112 n. 19 (4th Cir. 1994) ("The Government is simply not bound by the negligent,

unauthorized acts of its agents. Federal law is clear that estoppel is rarely, if ever, a valid defense against the Government absent proof of some affirmative misconduct by a Government agent").

The Duncan court concluded: "Allowing unrestricted access after twenty days' notice would impede Congress' objective of protecting federal lands and abrogate a congressionally-declared program of national scope. If North Dakota law is read to allow a developer unrestricted access after twenty days' notice, North Dakota law is pre-empted or falls under choice-of-law principles."

Every case plaintiffs' counsel has found has followed and reaffirmed the Duncan holding. See, e.g., Dunn Mccampbell Royalty Interest, Inc. v. National, 964 F. Supp. 1125 (S.D. Tex. 1995) (National Park Service had the right and duty to protect its surface lands from harm caused by subsurface owners' operations; citing Duncan, Property Clause and Supremacy Clause); Bragg v. Robertson, 54 F. Supp.2d 653 (S.D. W. Va. 1999) (citing Duncan in rejecting mining industry's challenge to government settlement with environmental litigants in NEPA context); Sierra Club v. United States Dep't of Energy, 255 F. Supp. 2d 1177,1185-86, 1189 (D. Colo. 2002) (citing Duncan II; Department of Energy required to complete NEPA analysis before allowing development of private mineral rights; DOE "maintains some discretion to determine how, where, and when mining can occur and ensure that surface use is reasonable").

Intervenors are simply incorrect in arguing that the government has no right to put the NTP process on hold while it complies with "our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a).

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IV. NEPA ANALYSIS OF NOTICES TO PROCEED IS NOT PRECLUDED BY TIMING CONSIDERATIONS

Intervenor argues that the 60-day (minimum) notice period is too short to allow for NEPA analysis. That is an incorrect reading of the relevant law.

First, the regulations do not allow the oil and gas holder to simply give the government notice of intent to proceed, and then to proceed after 60 days. 30 C.F.R. 226(o) states in relevant part:

(1) Prior to the commencement of surface-disturbing activities relating to the development of oil and gas deposits on lands described under paragraph (5), the Secretary of Agriculture shall require, pursuant to regulations promulgated by the Secretary, that such activities be subject to terms and conditions as provided under paragraph (2).

(2) The terms and conditions referred to in paragraph (1) shall require that reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities.

(Emph. added).

Second, and more importantly, a statute setting a short time period does not override NEPA unless there is an irreconcilable conflict between the two statutes. See supra at 9-11 (discussing Duncan). In Jones v. Gordon, 792 F.2d 821 (9th Cir. 1986), the court rejected the argument that a 90-day limit for agency review precluded application of NEPA. The court noted:

We begin our analysis with the important congressional mandate to have NEPA apply "to the fullest extent possible." 42 U.S.C. § 4332. These are strong words directing our statutory interpretation. The language was added by the Senate and House conferees who stated in explanation:

The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in . . . [Section 102(2)] unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible

Thus, it is the intent of the conferees that the provision "to the fullest extent possible" shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . No agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

115 Cong. Rec. 39703 (1969), quoted in Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). Thus, it appears to be the congressional desire that we make as liberal an interpretation as we can to accommodate the application of NEPA.

792 F.2d at 826.

In Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984), the court found that a federal energy agency could have produced an EIS even though it was obligated to negotiate power delivery contracts "as soon as practicable within nine months" of a law becoming effective. *Id.* at 684-85. The court noted that the agency could have utilized a "fast track" schedule, as permitted by Council on Environmental Quality regulations, to speed the process. *Id.* at 685 (citing 40 C.F.R. § 1506.10(d)). See also Baker v. USDA, 928 F. Supp. 1513 (D. Idaho 1996) (90-day period to process placer mining claims did not preclude NEPA analysis);

Here, intervenors' theory is even less compelling, because the oil and gas statute does not state that the Forest Service must allow the oil and gas owner to move forward within 60 days. As explained supra, to the contrary -- the Forest Service has a duty to protect the public's lands rather than simply give way to the subsurface owner's desires. The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535 (1974).

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V. ANY DEFENSES AVAILABLE TO THE GOVERNMENT IN A NEW LAWSUIT ACTION WOULD BE AVAILABLE AGAINST INTERVENORS' CROSS-CLAIMS

Intervenors argue that they would prefer to proceed with their so-called "counterclaim" against the plaintiffs (and cross-claim against the federal government) because they do not want to comply with the normal justiciability requirements that could arise in a new lawsuit, such as exhaustion. But clearly the plaintiff and defendant could raise these same defenses in response to the counterclaim/cross-claims, because they are indeed "claims," and therefore must be subject to the same justiciability and other requirements for claims brought in federal court. See, e.g., United States v. Dico, Inc., 136 F.3d 572 (8th Cir. 1998) (dismissing counterclaim for failure to exhaust administrative remedies).³

VI. INTERVENORS' "CLAIMS" CANNOT PROCEED, HERE OR IN A NEW CASE

If the court rejects the dismissal filed earlier, plaintiffs will move to dismiss intervenors' counterclaim and cross-claim.

Intervenors cannot properly present any sort of "claim" against plaintiffs under NEPA or the Declaratory Judgment Act, as the federal government is the only entity which has NEPA obligations and can be bound by NEPA. Wetlands Action Network v. United States Army Corps of Engineers, 222 F.3d 1105, 1114 (9th Cir. 2000) ("Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action").

Similarly, intervenors cannot properly bring a claim against the government, even under the Declaratory Judgment Act. In Collin County, Tex. v. Homeowners Ass'n, 915 F. 2d 167 (5th

³ In addition to the normal defenses available, the court has discretion to decline jurisdiction over a declaratory judgment action in its entirety. Henglein v. Colt Industries Operating Corp., 260 F.3d 201 (3d Cir. 2001).

Cir. 1990), the Fifth Circuit rejected a declaratory action brought by a county after a homeowners' association threatened to challenge the federal government's environmental impact statement for funding for a state highway. The County had no legal responsibility and, therefore no liability, for the preparation or approval of the EIS. The Fifth Circuit explained: "Although their interest in the completion of SH [State Highway]190 might have been adversely affected by potential litigation over the EIS, the local government plaintiffs have no actual liability for any deficiency in the EIS." 915 F.2d at 171.

VII. THE SETTLEMENT IS NOT A NEW "RULE"

Intervenors argue that the settlement is a new "rule" issued by the government. First, if that were so, intervenors could simply file a new lawsuit challenging that "rule" under the Administrative Procedures Act. But it is not a rule. It is a settlement in which the Forest Service promises to comply with NEPA with the exception of the over 500 wells which are proceeding.

In Bragg (the West Virginia case rejecting industry's challenge to a settlement), the court dealt with the identical argument, and rejected it. The court noted: "A rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." Am. Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

CONCLUSION

Intervenors' interests have been adequately considered by the Court. The settlement agreement violates no laws; imposes no duties or obligations upon the intervenors; and does not dispose of any valid asserted claims of the intervenors. Based upon this brief and the record

before the court, plaintiffs respectfully request that the Court deny the intervenors' motion, and enter the stipulated judgment forthwith.

Respectfully submitted April 22, 2009.

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