

SJM (W.D. Pa., May 12, 2009) is unlawful (Count IV); and that it is prohibited by law of the case, collateral estoppel, and/or issue preclusion (Count V). Plaintiffs have now filed a motion for preliminary injunction alleging that the “directive” is based on an unlawful settlement agreement in FSEEE and that in fact, NEPA does not apply to any Forest Service activity related to development of private oil and gas interests in the Forest.

As an initial matter, these claims should be dismissed because Plaintiffs have not established standing and have alleged no final agency action subject to judicial review under the APA. However, even if Plaintiffs could get past these jurisdictional bars, their motion must fail because there is no likelihood of success on the merits. First, the Forest Service has issued no new “directive” or “policy”. The settlement agreement in FSEEE merely acknowledged that when the Forest Service issues a Notice to Proceed (NTP) that regulates surface disturbance in connection with development of private oil and gas interests, it has taken a federal action that is subject to analysis under NEPA; in other words, the Forest Service is complying with its responsibilities under the law.^{2/} Second, the Forest Service action that is subject to NEPA analysis is the reasonable regulation of surface disturbance related to private oil and gas development and that reasonable regulation is supported by law.

Plaintiffs would have this Court substitute its judgment for that of the Forest Service in determining the extent to which NEPA applies to the NTPs that authorize surface disturbance related to the development of private oil and gas interests in the Forest. That is something this Court may not do. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Therefore, this Court should deny Plaintiffs’ motion for preliminary injunction and dismiss these claims with prejudice.

^{2/} The settlement agreement does not pre-determine whether that analysis will be done as a categorical exclusion, and Environmental Assessment (EA) or an Environmental Impact Statement (EIS).

BACKGROUND

I. Statutory Background

A. The National Forest System

The Allegheny National Forest is part of the Eastern Region of the National Forest System. The National Forests are managed by the Forest Service, an agency within the Department of Agriculture, under several statutes. The Organic Administration Act of 1897 specified the purposes for the establishment of forest reserves (which later became known as National Forests), and provides that:

No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States[.]

More recently Congress addressed the mission of the Forest Service and the purpose of the National Forests in the Multiple-Use Sustained-Yield Act of 1960 (MUSYA), which states that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528. The Act authorizes and directs the Secretary to develop and administer “the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom,” giving “due consideration . . . to the relative values of the various resources in particular areas.” 16 U.S.C. § 529.

Multiple use is the focal point of National Forest System management. MUSYA defines multiple use as:

The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these

resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit of output.

16 U.S.C. § 531(a). Congress has delegated significant discretion to the agency to determine the appropriate use and management to protect the productivity of lands in the public interest. Indeed, “Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands.” Lands Council v. McNair, 537 F.3d 981, 990 (9th Cir. 2008).

To further facilitate forest management and protection, Congress passed the Forest and Rangeland Renewable Resources Planning Act of 1974, subsequently amended by the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600 *et seq.* NFMA directs the development of land and resource management plans for each unit of the National Forest System in order to provide for multiple use, sustained yield management of various forest resources, including water, timber, and wildlife. 16 U.S.C. 1604(a), (e); McNair, 537 F.3d at 990; Forest Guardians v. Dombeck, 131 F.3d 1309, 1312 (9th Cir. 1997). *See also* United States v. New Mexico, 438 U.S. 696, 716 n.23, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) (national forests established for multiple use, not non-use).

Forest planning occurs at multiple levels. Ohio Forestry Ass’n. v. Sierra Club, 523 U.S. 726, 729-730 (1998). At the land and resource management plan (“forest plan”) level, the Forest Service develops a multiple use plan that summarizes the management situation, management goals and objectives, desired future conditions. Forest plans like the 2007 Allegheny Forest Plan revised under the 1982 planning rules (36 C.F.R. 219 (1982)) include environmental protection measures known

as standards and guidelines. Consistent with MUSYA and NFMA, forest plan standards and guides function to ensure the productivity of the land is not impaired. The management goals of the programmatic plan combine to meet the overall multiple use objectives of the Forest. Sierra Club v. Espy, 38 F.3d 792, 800 (5th Cir. 1994). Public involvement is a key component of plan development. *See* 16 U.S.C. § 1604(d). Plan development must proceed in accordance with the principles of NEPA. 16 U.S.C. § 1604(g)(1). At the site specific level of planning, the Forest Service analyzes the local and cumulative effects of actions affecting the multiple use resources of the Forest. Site specific actions must be consistent with applicable Forest Plan provisions, 16 U.S.C. § 1604(I).

B. NEPA

The purpose of the NEPA is to focus the attention of the federal government and the public on a proposed action so that the consequences of the action can be studied before the action is implemented and potential negative environmental impacts can be avoided. 42 U.S.C. § 4321; 40 C.F.R. § 1501; Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). NEPA mandates the procedures for agencies to consider the environmental impacts of their actions, but does not dictate substantive results. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (“NEPA merely prohibits uninformed—rather than unwise—agency action.”). NEPA requires federal agencies to consider the environmental impact of any major federal actions they undertake, and to prepare an EIS for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3; Pub. Citizen v. Nat’l Highway Traffic Safety Admin., 848 F.2d 256, 265 (D.C. Cir. 1988). The purpose of the statute is to force an agency to consider “information concerning significant environmental impacts” when it makes decisions,

and to make that information available to the general public. Robertson, 490 U.S. at 349.

II. Factual Background

The Allegheny National Forest (Forest) was established in September 1923 under the authority of the Weeks Act of 1911. At that time, there was already a robust oil and gas industry in the area. Developers had been purchasing oil and gas rights from private landowners, many of which were large timber companies, since oil was first discovered in the region in 1859. Currently, the Forest Service owns and manages an estimated 513,000 acres that comprise the Forest. See Declaration of Leanne M. Marten at ¶ 3. (Attached as Exhibit 1.) Ninety-three percent, or about 478,283 acres of the Forest subsurface mineral estate are privately owned. See Declaration of Anthony V. Scardina at ¶ 5. (Attached as Exhibit 2.)

Between 1986 and 2008, approximately 7,531 oil and gas wells were drilled in the Forest. Exhibit 1 at ¶ 4. Approximately 1,883 miles of roads were constructed to access those wells. Id. The number of wells drilled has increased substantially since 2005, resulting in 3,726 wells being approved from 2005 to 2008, for an average of 931 new wells per year. Id. at ¶ 5. The Allegheny Land and Resource Management Plan (Forest Plan) identifies approximately 191,000 to 241,000 acres of the Forest subject to future applications for private oil and gas development. Id. at ¶ 7. Therefore, there is a potential of 36,200 to 48,200 new shallow wells in the Forest. Id. Since at least 1985, the Forest has reviewed new oil and gas development proposals for wildlife, water, soil, silvicultural, recreation, heritage and other surface impacts. After review, District Rangers would then issue a NTP containing surface mitigation requirements. The 1984 Forest Handbook called for application of NEPA procedures to private oil and gas development. Id. at ¶ 14. The Regional Office issued a policy letter to the Forest dated July 9, 1990 which stated “NEPA applies to all

federal decisions and there are federal decisions in circumstances where private mineral owners exercise their rights on [National Forest System] lands . . . [The federal action is] proposing various ways to mitigate surface [resource] damage.” See Declaration of Randall P. Rabideaux at ¶ 6. (Attached as Exhibit 3.) National Forests in the Eastern Region have applied NEPA to the private context. Id. at ¶ 12. In 1991, the USDA Office of General Counsel (OGC) issued a legal opinion concluding that NEPA analysis was not required for privately owned outstanding mineral rights.^{3/} Exhibit 1 at ¶ 15. In 2007, the Forest Service Eastern Regional Office requested OGC review of the applicability of NEPA to Forest Service regulation of private oil and gas development. The OGC reviewed recent legal developments and issued a new legal opinion advising the Forest Service that NEPA analysis is required in the context of authorization of development of reserved and outstanding mineral rights. (2007 OGC Legal Opinion attached as Exhibit 4.) The 2007 OGC legal opinion superseded the 1991 OGC opinion. Exhibit 3 at ¶ 10.

The Forest is responsible for protecting surface resources and managing and managing surface occupancy associated with the exercise if private mineral rights. The Pennsylvania State Department of Environmental Protection issues permits, but is only indirectly involved with certain aspects of development of private oil and gas on the Forest. Id. at ¶ 5.

On November 20, 2008, a coalition of environmental groups filed an action challenging the

^{3/} The 1991 legal opinion was limited to outstanding private oil and gas development. Exhibit 3 at ¶ 7. The Forest Service has never taken the position that NEPA did not apply to reserved mineral estates. “Outstanding” mineral estates are those that were severed and conveyed to a third party before federal acquisition of the surface. The development rights of outstanding mineral estate holders are subject to deed restrictions, and applicable state and federal laws and regulations. “Reserved” mineral estates were severed to the grantor at the time of federal acquisition of the surface and, in addition to being subject to the laws and regulations applicable to outstanding rights, are subject to the Secretary of Agriculture’s 1911, 1937, 1947, or 1963 Rules and Regulations governing mineral estate development. Later regulations generally provide the Forest Service increased authority over private mineral estate development through occupancy permitting and other requirements, although the 1911 regulation provides significant authority regarding, but not limited to, pollution measures and the placement of structures.

issuance of NTPs without NEPA analysis. FSEEE, Ca. No. 08-cv-323 (W.D. Pa.). Exhibit 1 at ¶ 17. The Forest Service and the Plaintiffs entered into a settlement agreement whereby the Forest agrees that there will be appropriate NEPA compliance prior to issuing future NTPs. The settlement agreement provides that the level of NEPA compliance may be the use of a categorical exclusion, the preparation of an EA or the development of an EIS. Id.

To initially implement the settlement agreement, the Forest has elected to comply with NEPA by processing the pending oil and gas development proposals in a Forest-wide EIS. Id. at ¶ 22. The Forest-wide site specific EIS is designed (1) to assess existing site-specific oil and gas development proposals within the Forest with provisions to mitigate the impacts to surface resources; and (2) to use design criteria and a site-specific review process to authorize reasonable access for future oil and gas development proposals in the Forest. Id. On June 22, 2009, the Forest published a notice of intent to prepare an environmental impact statement in the Federal Register. 74 Fed. Reg. 29463-64 (June 22, 2009); see also Exhibit 3 at ¶¶ 13,14. That notice provides that comments on the scope of the analysis must be received by August 21, 2009. The draft EIS is expected in January 2010 and the final EIS is expected in April 2010. Id.

STANDARD OF REVIEW

I. Motion to Dismiss

In reviewing a motion under Rule 12(b)(1) that asserts a factual basis that the court lacks jurisdiction, the court “is free to weigh the evidence and satisfy itself whether it has power to hear the case.” Carpet Group Int’l v. Oriental Rug Importers Ass’n, 227 F.3d 62, 69 (3d Cir. 2000) (citation omitted). In other words, “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself

the merits of jurisdictional claims.” Mortensen v. First Fed. Savs. & Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977). Furthermore, plaintiff bears the burden of proof to establish jurisdiction. Id. The court’s inquiry into jurisdiction, however brought, “may occur at any stage of the proceedings, from the time the answer has been served until after the trial has been completed.” Mortensen, 541 F.2d at 891-92; see also Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 571 (2004).

II. Preliminary Injunction

A preliminary injunction is an extraordinary remedy the entitlement to which the plaintiff bears the burden of proving by clear and convincing evidence. See Granny Goose Foods v. Teamsters, 415 U.S. 423, 442-43 (1974); Miller v. Skumanick, 605 F.Supp. 2d 634, 641 (M.D. Pa. 2009) (“An injunction is an ‘extraordinary remedy’ that is never awarded as of right. Winter v. NRDC, – U.S. – , 129 S.Ct. 365, 375, 172 L. Ed. 2d 249 (2008).”). Under the Third Circuit’s “traditional” criteria, a plaintiff must show “(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.” Kos Pharm. v. Andrx Corp., 369 F.3d 700, 708 (3rd Cir. 2004). Additionally, “[t]he injunction should issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief.” Merchant & Evans v. Roosevelt Bldg. Products Co., 963 F.2d 628, 632-33 (3rd Cir. 1992) (emphasis added). The above-cited factors “structure the inquiry” and the court’s task is to balance these four elements. Construction Ass’n. of Western Pennsylvania v. Kreps, 573 F.3d 811, 813, (3rd Cir. 1978). Plaintiff bears the burden of establishing these elements, Adams v. Freedom Forge Corp., 204 F.3d 475, 486 (3rd Cir. 2000), and the failure to establish any element in its favor renders a preliminary injunction inappropriate. Nutrasweet Co. v. Vit-Mar

Enters. Inc., 176 F.3d 151, 153 (3rd Cir. 1999).^{4/} Where a court concludes that plaintiffs have no likelihood of success on the merits, consideration of the public interest and the balancing of equities is not required. Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 232 n.13 (3rd Cir. 1990).

III. The APA

The APA regulates federal agency procedures, including promulgation of rules and regulations, 5 U.S.C. § 553, and the conduct of administrative adjudications. 5 U.S.C. § 554. The APA provides for judicial review of final agency actions in the event the agency conduct is not subject to some other legal remedy. 5 U.S.C. § 702. This review afforded by § 702 is a limited waiver of the government's sovereign immunity. The action must be "final" to be reviewable. 5 U.S.C. § 704.

The standard of review under the APA is highly deferential; an agency action is presumed to be valid and must be upheld if it is rationally based. Motor Vehicles Mfrs.' Ass'n of the United States, Inc. v. Sate Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983); C.K. v. New Jersey Dept. Of Health and Human Services, 92 F.3d 172, 182 (3rd Cir. 1996); Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.D. Cir. 1976)(en banc). The Court may not substitute its judgment for that of the agency. Overton Park 401 U.S. at 416. Instead, the Court's review is limited to a determination as to whether the Defendants decision is "arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

^{4/} There is no presumption that an injunction automatically follows the violation (if any) of federal law. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romerco-Barcelo, 456 U.S. 305, 315 (1982). As the Third Circuit noted, "[I]n the area of environmental statutes, the Supreme Court has explicitly rejected the notion that an injunction follows as a matter of course upon a finding of statutory violation." NRDC v. Texaco Refining & Marketing, Inc., 906 F.2d 934, 939 (1990) (citation omitted). The traditional rules of equitable relief, including balancing of all factors, are applicable here.

ARGUMENT

I. Plaintiffs' Claims Should Be Dismissed Because this Court Lacks Jurisdiction over Those Claims.

Pursuant to Fed. R. Civ. P 12(b)(1), this Court should dismiss all claims raised in Plaintiffs' complaint because the court lacks subject matter jurisdiction. Specifically, Plaintiffs have not established that they have standing to raise the claims. Even if Plaintiffs can establish standing, the claims must still be dismissed because Plaintiffs have failed to allege any final agency action subject to judicial review under the APA.

A. Plaintiffs Have Failed to Demonstrate Standing

Whether a party has standing under Article III of the Constitution is a "threshold jurisdictional question" that a court must decide before it may consider the merits. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). The Supreme Court articulated the test for standing in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992):

First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61 (citations omitted). This three-part test represents the "irreducible constitutional minimum" for standing. Id. at 560.

The party seeking federal court jurisdiction bears the burden of establishing the elements of standing. Lujan, 504 U.S. at 561.

Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter

on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Id. (citations and quotations omitted). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Id. at 562 (citation omitted).^{5/}

Here, none of the Plaintiffs address how they have suffered any "injury in fact" that is concrete and particularized, and that is actual or imminent, not conjectural or hypothetical. Mr. Mayer, submitting a declaration on behalf of POGAM, asserts that does not identify a single, specific application for oil and gas development that results in an "injury in fact" that is anything other than hypothetical. Similarly, the declarations of Mr. Fredley, Mr. Golubock, Mr. Carlson, Mr. Fustos, and Mr. Bortz provide nothing more than general assertions that private oil and gas developers will be adversely affected and that falls far short of meeting their burden of establishing an injury in fact. See, e.g., Summers v. Earth Island Inst., 555 U.S. ---, 129 S. Ct. 1142, 1148-51 (2009) (holding that environmental groups do not have standing without a live dispute over a concrete application of Forest Service regulations).

In Summers, the plaintiffs had challenged USDA procedural regulations that implemented the Appeals Reform Act. When claims concerning the site-specific project that had applied two of the challenged regulatory provisions were settled, any asserted injury in fact with respect to the challenged regulations "ha[d] been remedied" and was no longer at issue. Summers, 129 S. Ct. at

^{5/} An organization has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Associated Gen. Contractors of Calif., Inc. v. Coal. for Econ. Equal., 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting Hunt v. Washington State Apple Adv. Comm'n, 432 U.S. 333, 343 (1977)). Here, Plaintiffs have not identified any POGAM member that meets the specific injury standard of Sumner to allow standing for the association.

1149. The Court held that without a “concrete application” of the challenged regulatory provisions that “threaten[ed] imminent harm” to the plaintiffs’ interests, the plaintiffs’ claims in the abstract were not justiciable because injury-in-fact requirements were not satisfied. Id. at 1145. The Court found that to hold otherwise would “fly in the face of Article III’s injury-in-fact requirement.” Id. at 1149.

The factual scenario in Summers parallels, in relevant part, the factual scenario here. Plaintiffs have challenged the Forest Service’s acknowledgment that NTPs are federal actions for the purposes of NEPA and have brought their claims against that acknowledgment in the abstract, rather than in the context of a project-specific challenge after NEPA has been applied. They have not shown a concrete application of the commitment to comply with NEPA that threatens imminent harm to their interests and is not conjectural or hypothetical. Thus, the holding in Summers regarding lack of standing is persuasive, and should be followed by this Court.

Moreover, Plaintiffs must also demonstrate that any injury in fact is caused by the commitment to comply with NEPA, and that any injury in fact would be redressed by a favorable decision. See Lee v. Or., 107 F.3d 1382, 1389 (9th Cir. 1997) (holding that a tenuous and speculative chain of causation is not adequate to support standing); Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 (1978) (holding that a plaintiff must show a “substantial likelihood” that the alleged injury will be redressed by the relief it seeks). Plaintiffs do not assert that they meet these elements of standing and, while lodging declarations, Plaintiffs do not set forth any facts in their brief that they believe establish these elements.

Federal courts are courts of “limited jurisdiction,” and the presumption is that they lack jurisdiction unless the party asserting jurisdiction establishes it. Kokkonen v. Guardian Life Ins. Co.

of Am., 511 U.S. 375, 377 (1994). Because Plaintiffs have failed to meet their burden of establishing a single element of standing under the Constitution, Plaintiffs' motion for preliminary injunction must be denied, and the case should be dismissed for lack of jurisdiction.

B. Plaintiffs have Failed to Allege Any Final Agency Action that is Reviewable Under the APA

Plaintiffs here challenge the Forest Service's acknowledgment that an environmental analysis under NEPA should be prepared for future NTPs. However, a threshold requirement for judicial review under the APA is "final agency action." See e.g., Minn. Pesticide Info. & Educ., Inc. v. Madigan, 857 F. Supp. 653, 654 (D. Minn. 1993) ("Therefore, a court considering a claim that an agency decision implicates NEPA must first determine whether the agency has undertaken any 'action' within the meaning of the statute."), citing S. Dakota v. Andrus, 614 F. 2d 1190, 1193 (8th Cir.), cert. denied, 449 U.S. 822 (1980).

Plaintiffs here have not met that threshold requirement. Plaintiffs seek to enjoin the Forest Service from preparing a NEPA analysis prior to the issuance of future NTPs in the Forest. Plfs. Mem. at 1. However, the acknowledgment of the Forest that the issuance of NTPS are federal actions subject to the provisions of NEPA is not itself a final agency action subject to judicial review.

Plaintiffs' challenge is precluded by Supreme Court precedent which does not allow "programmatic" review of agency functions in the absence of a "final agency action." Furthermore, Plaintiffs have not challenged any individual final agency action that could form the basis for judicial review under the APA.

1. The APA Does Not Permit A Solely Programmatic Attack

The APA authorizes review only of "agency action" defined as "the whole or a part of an

agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). The action must be “final agency action.” 5 U.S.C. § 704. See Ecology Ctr. v. U.S. Forest Service, 192 F.3d at 922, 924 (9th Cir. 1999). An agency action must be upheld unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;” or “in excess of statutory jurisdiction authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A) & (C). See Overton Park. The APA also waives sovereign immunity to allow parties to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). Pursuant to this latter provision, courts have authority to require a federal agency to take certain actions that the agency has failed to take. The action that the agency allegedly failed to take, however, must be based on a mandatory, well-defined nondiscretionary duty. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004) (SUWA). Plaintiffs make absolutely no attempt to challenge an “agency action” within the meaning of the APA, and or a failure to act under § 706(1).

The Supreme Court’s opinion in Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871 (1990) (NWF), illustrates the nature of the APA’s final agency action requirement in the context of Section 706(2) and confirms the prohibition on programmatic challenges such as the one that Plaintiff attempts here. In NWF, the plaintiffs claimed that the Department of the Interior had violated NEPA in the course of implementing its “land withdrawal review program.” Id. at 875. In assessing whether the agency’s program was agency action at all, much less final agency action, the Court noted that the subject of the plaintiffs’ challenge was the agency’s operations in “reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the [Federal Land Policy and Management Act].” Id. at 890. The “program” extended to ““1250 or so individual classification terminations and withdrawal revocations.”” Id. The Supreme Court found

this to be no more an agency action, or final agency action, than a “‘weapons procurement program’ of the Department of Defense or a ‘drug interdiction program’ of the Drug Enforcement Administration.” Id. Judicial review must be upon a final action that is “an identifiable action or event.” Id. at 899. As for the claim that the agency was violating the law within the “land withdrawal review program,” the Supreme Court emphasized that the plaintiffs could not “seek *wholesale* improvement of this program by court decree . . . respondent must direct its attack against some particular ‘agency action’ that causes it harm.” Id. at 891 (emphasis in original).

Cases applying NWF confirm the scope of the APA’s “final agency action” requirement, holding that plaintiffs can obtain judicial review only when “a discrete agency action is called for.” Northcoast Env’tl. Ctr. v. Glickman, 136 F.3d 660, 670 (9th Cir. 1998); see also High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004) (APA “requires that there be a specific final agency action which has an actual or immediate threatened effect.”). In Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000) (en banc), the Fifth Circuit considered environmental challenge to the Forest Service’s even-aged timber management in the National Forests of Texas. Id. at 565. The plaintiffs there alleged that the Forest Service violated the National Forest Management Act, 16 U.S.C. § 1600, et seq., and cited as the basis for their claim twelve allegedly ripe agency decisions concerning timber sales. The plaintiffs sought injunctive relief blocking all future timber sales or even-aged management in the National Forests of Texas. Id. at 563. The court ruled that the plaintiffs failed to challenge “an identifiable agency action or event,” and “could not challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program.” Id. at 567.

More recently, in a Supreme Court decision construing a court’s authority under 5 U.S.C.

§ 706(1), Justice Scalia, writing for a unanimous Court, reiterated that Sections 702, 704, and 706(1) of the APA all require that the subject matter of a claim be an “agency action,” and that the definition of “agency action” in Section 551(13) is limited to “circumscribed, discrete agency actions.” SUWA, 542 U.S. at 62. The Court further explained that APA Section 706(1) was intended to continue the practice, previously achieved through writs of mandamus, of obtaining judicial review by seeking the ordering of a “precise, definite act . . . about which [an official] had no discretion whatever.” Id. at 63 (quoting United States ex rel. Dunlap v. Black, 128 U.S. 40 (1888)). By way of example, the Supreme Court explained that the limitation to discrete agency action precludes the type of broad, programmatic attack rejected in NWF as outside the scope of Section 706(2) of the APA. Id. at 64. Furthermore, with respect to Section 706(1), “[c]ourts have permitted jurisdiction under the limited exception to the finality doctrine only when there has been a genuine failure to act.” Ecology Ctr., 192 F.3d at 926.

As explained below, application of these principles to this case illustrates that Plaintiff has not challenged a discrete agency action--much less a final agency action--within the meaning of the APA. Rather, this case presents precisely the type of challenge held nonjusticiable in NWF and its progeny.

2. Plaintiffs Have Not Challenged Individual Agency Action Fit for Review.

In this case, rather than challenge any alleged action or failure to act on any specific NTP, Plaintiffs broadly challenge the Forest Service’s application of the provisions of NEPA to NTPs at all. The broad relief that Plaintiffs seek highlights the unfocused nature of their challenge, as it seeks to enjoin the application of NEPA to the NTPs and to also enjoin the EIS currently under development by the Forest. By making this type of challenge, Plaintiffs have brought what amounts

to a facial challenge to the Forest Service's interpretation of its obligations under NEPA. Such a challenge is not fit for review under the APA.

In particular, the Forest Service's application of NEPA cannot be addressed in the abstract. See Assinibone and Sioux Tribes of Fort Peck Indian Reservation v. Montana Bd. of Oil & Gas Conservation, 792 F.2d 782, 789 (9th Cir. 1986) (review is premature unless the agency action is final and the issues purely legal); Northcoast Env'tl. Ctr. v. Glickman, 136 F.3d at 668 (NEPA does not require consideration of effects from "speculative or hypothetical projects").

While it may be easier and cheaper to mount one vast programmatic legal challenge, the ease and cost of litigation are simply not considerations in the final agency action determination:

The case-by-case approach that [the APA] requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect.

Id. at 894 (emphasis omitted).

Further, each NTP provides limitations on disturbances of surface resources. Thus, to review the adequacy of the Forest Service's interpretation of the level of NEPA compliance for any NTP, it is necessary for Plaintiff to challenge--and the Court to review--the Forest Service's evaluation of specific NTPs. See NWE, 497 U.S. at 891-94.

Plaintiffs' claim fails to object to any discrete action, or seek relief with respect to any individual agency decisions, and in essence raises only a programmatic challenge to the Forest Service's acknowledgment of its obligations under NEPA. This is precisely the type of claim that has been held nonjusticiable by the Supreme Court. In sum, Plaintiffs' claims brought or reviewed

under the APA should be dismissed for failure to challenge final agency action fit for review.

II. Plaintiffs Are Not Entitled to Preliminary Injunctive Relief.

Even if this Court finds that it has subject matter jurisdiction over these claims, Plaintiffs have failed to meet their heavy burden to justify the extraordinary remedy of preliminary relief. Indeed, even though Plaintiffs must clearly show that all four factors favor preliminary relief, none of the four preliminary injunction factors tilts in favor of Plaintiffs here.

A. Plaintiffs Have No Likelihood of Success on the Merits.

Plaintiffs have presented no colorable argument that they are likely to succeed on the merits of their claims. In fact, Plaintiffs begin by misrepresenting the Forest Service position and then mischaracterizing legal precedent to support their argument that NEPA does not and cannot apply to the NTPs.

As an initial matter, Plaintiffs argue that the owners of private oil and gas interests in the Forest “have the legal right to access their property and to commence oil and gas operations after giving the Forest Service notice of planned operations and a 60-day period to negotiate accommodations.” Plfs. Mem. at 28-30. They allege that this position is supported by property law and case law including the unpublished decision of United States v. Minard Run, 1980 U.S. Dist. LEXIS 9570 (Minard Run) and a Pennsylvania State Supreme Court decision in Belden and Blake Corp. V. Commonwealth of Pennsylvania, 2009 WL 1143281 (Pa. S. Ct. Apr. 29, 2009) (Belden and Blake Corp). However, these cases do not, in fact, support Plaintiffs’ position.

The 60-day notice requirement framed in Minard Run is worded as a minimum for operators to act, i.e., to notify the Forest Service of intended actions. It is not worded as a maximum or

mandatory time allotted for Forest Service response.^{6/} Further, the argument that failure of the Forest Service to act within a 60-day time frame yielded authority to an outstanding mineral rights holder to go forward with development, was considered and rejected by Duncan Energy v. U.S. Forest Service, 109 F.3d 497 (8th Cir. 1997) (Duncan Energy II) (holding that the Forest Service's failure to process its review of the Duncan Energy's operating plan within a 60-day time frame did not give the mining company a right to unilaterally begin its operations without Forest Service approval). In addition, Belden and Blake Corp is of limited utility because it is based on an interpretation of state law; nonetheless, it does not support the position that the Forest Service has only 60 days to exercise its regulatory rights. In fact, Belden and Blake Corp does not address the timeliness issue at all.

Next Plaintiffs argue that the Forest Service lacks sufficient control to render private oil and gas development subject to NEPA. Plfs. Mem. at 30-33. Plaintiffs argue that NEPA only applies to "federal agency actions." However, in assessing whether an action by an agency requires analysis under NEPA, a court must make two determinations: first, whether the agency has undertaken any "action" at all within the meaning of the Act, and second, whether the agency's action is "major." NAACP v. The Medical Center, 584 F. 2d 619, 629 (3rd Cir. 1978). NEPA can apply to actions of non-federal parties. However, "[T]he federal agency must possess actual power to control the nonfederal activity." Sierra Club, 848 F. 2d at 1089.

Therefore, when a non-federal activity requires a permit, a regulatory decision, or funding from a Federal agency, the "action" by that agency must be considered for analysis under NEPA. The determination whether action is ministerial depends upon the authority under which the agency

^{6/} Neither does the forest Service Manual contain a mandatory 60 day processing period. Exhibit 3 at ¶ 9.

acts, not NEPA. In this case, the Forest Service issuance of NTPs for the development of reserved or outstanding mineral rights is subject to NEPA because the agency has authority to regulate surface occupancy.

Finally, Plaintiffs face their biggest hurdle by attempting to argue that the decisions in the two Duncan Energy cases are not relevant. Plfs. Mem. at 33-40. Duncan Energy v. U.S. Forest Service, 50 F.3d 584 (8th Cir. 1995) (Duncan Energy I); Duncan Energy II, 109 F.3d 497 (8th Cir. 1997). These cases are in fact, central to the issues before this Court. The Forest Service relies on its authority to reasonably regulate surface disturbance related to private oil and gas development in the Forest, requiring that NTPs be issued only after with appropriate NEPA analysis. That issue was squarely addressed in the Duncan Energy cases.

While, the Forest Service may act on behalf of the United States as surface owner and assert those rights recognized under deed, State and Federal law to protect surface interests, the Forest Service also has the Property Clause authority of Congress to reasonably regulate private mining interests so as to protect the Federal purposes of National Forest System land.

In Duncan Energy I, the court found that the Forest Service can impose reasonable terms and conditions on how private subsurface mineral rights are exercised. The issue in Duncan Energy I was the Forest Service's delay in reviewing and approving surface use plans of the outstanding mineral rights holder. In looking at North Dakota law, the court in Duncan Energy I concluded that while the mineral rights may be viewed as "dominant" those rights "however, are not unrestricted . . . they are limited to so much of the surface and such use thereof as are reasonably necessary to explore, develop, and transport the minerals." Id. at 588. The court also noted that while North Dakota law did not provide the Forest Service specific authority to review surface use plans,

“[n]evertheless, the Forest service contends that federal law gives it the authority to approve surface use plans.” Id. The court found that the “only issue before us is the Forest Service’s ability to regulate surface access to outstanding mineral rights.” Id. at 589

After citing to the Property Clause authority and distinguishing Duncan Energy’s appeal from Minard Run and 1991 Congressional hearing related to ANF operations, the court held: “[W]e 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.” Id. at 591.

Finally, the court also concluded that to the extent North Dakota law mandated access to the Federal surface after 20 days, irrespective of Forest Service approval, then North Dakota law “would impede Congress’ objective of protecting federal lands and abrogate a congressionally-declared program national in scope.” Id. As such it would be viewed as being “pre-empted” or falling under “choice-of-law principles.” Id.

Moreover, Duncan Energy II, 109 F.3d 497 (8th Cir. 1997), later held that the Forest Service’s failure to process its review of the Duncan Energy’s operating plan review within a 60-day time frame did not give the mining company a right to unilaterally begin its operations without Forest Service approval.

The Sixth Circuit has favorably cited to Duncan I in its analysis of the U.S. Fish & Wildlife Service’s ability to regulate private property (a dominant easement) on public land, Burlison v. United States Fish & Wildlife Service, 533 F.3d 419, 432-433 (6th Cir. 2008) (“The power to regulate federal lands includes, however, the power to regulate in a manner which affects non-federal property. . . . The court in Kleppe established that the Property Clause should be read expansively because ‘[t]he power over the public land thus entrusted to Congress is without

limitations.’ Kleppe, 426 U.S. at 539, 96 S. Ct. 2285 (quotation marks omitted). Accordingly, the Court found ‘that regulations under the Property Clause may have some effect on private lands not otherwise under federal control. . . . We reject the counterargument that because the easement is a private property interest in the public land, regulation of the easement constitutes a direct regulation of private property insupportable under Kleppe.’ Quoting Duncan I, the Sixth Circuit concluded that “[I]ikewise, Congress has the power to regulate access in this case by the holders of the dominant estate The logic of Duncan supports our conclusion that while Kleppe did not decide whether Congress could regulate directly private property interests respecting wholly private land, the holding of Kleppe is sufficiently broad to authorize Congressional regulation of private-property interests that are also located on public land.”). The Forest Service has the limited authority to determine reasonable use of the surface in the development of the dominant privately-owned oil and gas estate.

Plaintiffs attempt to distinguish the Duncan Energy cases by arguing that the split estates at issue in Duncan Energy were acquired under the Bankhead-Jones Farm Tenant Act rather than the Weeks Act. Plfs. Mem. at 34. However, pursuant to 16 U.S.C. § 521a, lands administered by the Forest Service for National Forest purposes, though acquired by or transferred to the Forest Service under authorities other than the Weeks Act “are made subject to the Weeks Act of March 1, 1911 (36 Stat. 961) as amended, and to all laws, rules, and regulations applicable to national forest lands acquired thereunder.” Consequently, the National Forest System land at issue in Duncan Energy were treated under the same laws and regulations as any other National Forest System lands. The decisions in both Duncan Energy cases do not reveal any different treatment of the lands due to the fact that they were initially acquired under the Bankhead Jones Act. Plaintiffs’ argument regarding

the acquisition authority is a distinction without difference. The logic of Duncan's Property Clause argument applies regardless of which acquisition authority was used.

Plaintiffs urge the Court to consider United States v. Srnsky, 271 F.3d 595 (4th Cir. 2001) for the view that the Forest Service cannot regulate outstanding rights. Plfs. Mem. at 35. However, that case did not involve an outstanding right but instead involved an "implied" reservation of a right of way easement in the deed to the United States. Furthermore, the deed to the United States did not contain terms and conditions, termed "Rules and Regulations of the Secretary" as required per 16 U.S.C. § 518. Also, the Government argued in Srnsky that the Federal laws at issue actually preempted any easement by necessity or implication that would otherwise be available under state law.

In the instant matter, the Forest Service is not arguing that the outstanding mineral rights are preempted. Nor is it stating that it can wholly deny the exercise of those rights. Rather, as in Duncan Energy, the Forest Service merely argues that it has the authority to determine "reasonable use" of the Federal surface.

Next, Plaintiffs argue that they are likely to succeed on the merits of their APA procedural claims. Plfs. Mem. at 41-48. However, as noted above, these claims are premised on the incorrect assertion that the Forest Service has issued a "new NEPA policy directive." What the Forest Service has done, is acknowledge that NEPA analysis is required because the Forest Service has discretion to impose surface protection measures on the development of private oil and gas interests. Taking steps to comply with NEPA does not itself separately trigger the procedural provisions of the APA.

Finally, Plaintiffs argue that the collection of information for the EIS that is being prepared by the Forest Service violates the Paperwork Reduction Act. Plfs. Mem. at 48-50. The Paperwork Reduction Act does not provide a general waiver of sovereign immunity but only provides that a

person cannot be subject to a penalty for failing to provides information under the Act. 44 U.S.C. § 3512. Therefore, these claims must fail because the Paperwork Reduction Act “does not create a private right of action but, rather, serves as a defense.” Springer v. United States, 447 F. Supp. 2d 1235, 1239 (N.D. Ok. (2006).

In summary, Plaintiffs have failed to establish that they have a likelihood of success on the merits of this claim and therefore, the motion for preliminary injunction should be denied.

B. Plaintiffs Will Not Suffer Irreparable Harm

Plaintiffs allege that they will suffer irreparable harm in the nature of economic harm from the Forest Service’ compliance with their NEPA obligations. Plfs. Mem. at 50-55. However, as Plaintiffs acknowledge “temporary loss of income, ultimately to be recovered, loss does not usually constitute irreparable injure.” Acierno v. New Castle County, 40 F.3d 645, 653 (3rd Cir. 1994). In this case, the EIS is estimated to be complete by April 2010. 74 Fed. Reg. 29463-64 (June 22, 2009). The current average time to process NTPs is 5.5 months. Exhibit 2 at ¶7. The short period of additional time to complete the EIS will amount to nothing more than “a temporary loss, ultimately to be recovered.” In addition, Plaintiffs’ allegations of harm ignore the fact that even with implementation of the settlement agreement, 588 wells - 102 more than last year - that will be processed this year. Exhibit 1 at ¶ 12.

The Supreme Court recently held that it is not sufficient for a plaintiff to show a mere possibility of irreparable harm in order to prevail on a request for preliminary injunctive relief. Winter v. NRDC, — U.S. —, 129 S. Ct. 365, 375-376, 172 L. Ed. 2d 249 (2008). Simply showing some possibility of irreparable injury will not allow for injunctive relief, as the Supreme Court as held that the possibility standard is “too lenient.” “[P]laintiffs seeking preliminary relief [must]

demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.* Plaintiffs assertions of economic harm are speculative and do not satisfy the threshold established by the Supreme Court for demonstrating irreparable harm. See Declaration of Richard H. Hokans, PhD (Attached as Exhibit 5.)

C. The Balance of the Equities Does Not Favor a Preliminary Injunction.

Plaintiffs argue that the balance of the equities argues in favor of a preliminary injunction. However, with the increased applications for NTPS outlined above, the District can no longer ensure that surface resources in the Forest are adequately protected. Exhibit 2 at ¶ 8; Declaration of Robert T. Fallon at ¶ 9 (Attached as Exhibit 6). The EIS process will provide for (1) public involvement, (2) alternative development and (3) assessment of direct, indirect and cumulative effects. Exhibit 2 at 15; Exhibit 6 at ¶¶ 9, 10. This NEPA analysis will aid the Forest to develop effective mitigation measures. Exhibit 1 at ¶ 25. In addition, once the EIS is complete, processing oil and gas development proposals is expected to be significantly shorter. *Id.* at ¶ 26. These benefits balanced against the relatively short time frame for completing the EIS weigh against a preliminary injunction. **D. A Preliminary Injunction is Not in the Public Interest.**

The public interest that Plaintiffs identify is not really a public interest but rather an industry interest. Plfs. Mem. at 58-62. The public interest is really best served by involving the public in Forest Service decision-making for improved environmental analysis and decisions. Exhibit 2 at ¶ 15. “[T]he less certain the district court is of the likelihood of success on the merits, the more the plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.” Lands Council v. McNair, 537 F.3d 981, 1003 (9th Cir. 2008).

CONCLUSION

For the foregoing reasons, this court should deny Plaintiffs' motion afor preliminary injunction and dismiss this matter with prejudice.

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Respectfully submitted,

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