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

MINARD RUN OIL COMPANY

and

PENNSYLVANIA OIL AND GAS ASSOCIATION

and

ALLEGHENY FOREST ALLIANCE,

and

COUNTY OF WARREN, PENNSYLVANIA

Plaintiffs,

v.

UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture

and

ABIGAIL R. KIMBELL, in her official capacity as Chief of the U.S. Forest Service

and

KENT B. CONNAUGHTON, in his official capacity as Regional Forester for the U.S. Forest Service, Eastern Region

and

Case No.

Electronically filed

LEANNE M. MARTEN, in her official capacity as Forest Supervisor for the Allegheny National Forest

and

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States

and

FOREST SERVICE EMPLOYEES FOR ENVIRONMENTAL ETHICS

and

ALLEGHENY DEFENSE PROJECT

and

SIERRA CLUB,

Defendants.

COMPLAINT

This lawsuit, brought by holders of dominant private oil, gas, and mineral ("OGM") rights in the Allegheny National Forest ("ANF"), challenges the recently established directive of the United States Forest Service ("Forest Service") to impose lengthy delays under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, as a precondition to the use of the servient Federal surface estate in conjunction with exercising private OGM rights in the ANF. The directive was adopted as part of an unlawful settlement agreement ("Settlement Agreement") that resulted in dismissal of *Forest Service Employees for Environmental Ethics, et al. v. U.S. Forest Service*, U.S. District Court Docket No. 1:08-cv-323-SJM (W.D. Pa.) and a

contemporaneous April 2009 statement by ANF Forest Supervisor Leanne Marten ("Marten Statement"). The directive improperly produces extensive delays associated with NEPA before legally dominant OGM rights can be exercised. Under a proper understanding of the relative property rights, NEPA does not apply to a private oil and gas developer's planned operations. Moreover, the directive is arbitrary, capricious, unreasonable, and an unlawful departure from longstanding agency policy and practice within the meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*

Parties

1. Plaintiff Minard Run Oil Company ("Minard Run") is a Pennsylvania corporation with its principal place of business located at 609 South Avenue, Bradford, Pennsylvania. Minard Run is in the business of crude oil and natural gas drilling, production, and related development activities, primarily in western Pennsylvania.

2. Plaintiff Pennsylvania Oil and Gas Association ("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. POGAM promotes the general welfare of Pennsylvania's crude oil and natural gas exploration and production industry. 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.

3. Plaintiff Allegheny Forest Alliance ("AFA") is a Pennsylvania non-profit corporation with its principal place of business at 22 Greeves Street, Kane, Pennsylvania. AFA is a coalition of public school districts, municipalities, and businesses with interests tied to the Allegheny National Forest ("ANF"). AFA promotes and supports sustainable development

within the ANF, including sustainable forestry, environmental stewardship, and multiple-use management of the ANF.

4. Plaintiff County of Warren, Pennsylvania ("Warren County") is a government entity located in northwestern Pennsylvania with its principal place of business at 204 Fourth Avenue, Warren, Pennsylvania. Warren County is one of four Pennsylvania counties in which the ANF is situated.

5. Defendant United States Forest Service is an agency of the U.S. Department of Agriculture ("USDA"), organized by the USDA under the laws of the United States of America, with a national office located at 1400 Independence Avenue, SW, Washington, District of Columbia. Defendant Forest Service is a citizen of Washington, District of Columbia. The Forest Service is a party to the unlawful Settlement Agreement.

6. Defendant Abigail R. Kimbell is the Chief of the Forest Service, with a principal place of business located at 1400 Independence Avenue, SW, Washington, District of Columbia. She is sued in her official capacity as Chief of the Forest Service, and in that capacity resides in Washington, District of Columbia.

7. Defendant Kent P. Connaughton is the Regional Forester of the Eastern Region of the Forest Service, which includes supervision of the ANF, with a principal place of business located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin. He is sued in his official capacity as Regional Forester, and in that capacity resides in Milwaukee, Wisconsin.

8. Defendant Leanne M. Marten is the Forest Supervisor of the ANF, with a principal place of business located at 4 Farm Colony Drive, Warren, Pennsylvania. She is sued in her official capacity as ANF Forest Supervisor, and in that capacity resides in Warren, Pennsylvania.

9. Defendant Eric H. Holder, Jr., is the Attorney General of the United States and the head of the U.S. Department of Justice, with a principal place of business located at 950 Pennsylvania Avenue, NW, Washington, District of Columbia. Attorney General Holder has control over the conduct of litigation involving, and settlement of claims regarding, the United States. He is sued in his official capacity as the Attorney General, and in that capacity resides in Washington, District of Columbia.

10. Defendant Forest Service Employees for Environmental Ethics, Inc. (“FSEEE”) is an Oregon non-profit corporation with its principal place of business located at 1175 Charnelton Avenue, Eugene, Oregon. FSEEE is a party to the unlawful Settlement Agreement.

11. Defendant Allegheny Defense Project, Inc. (“ADP”) is a Pennsylvania non-profit corporation with its principal place of business located at 117 West Wood Lane, Kane, Pennsylvania, and a registered office address of 9 Grant Street, Suite C, Clarion, Pennsylvania. ADP is a party to the unlawful Settlement Agreement.

12. Defendant Sierra Club is a national non-profit organization with its principal place of business located at 85 Second Street, 2nd Floor, San Francisco, California. Sierra Club is a party to the unlawful Settlement Agreement.

Subject Matter Jurisdiction

13. This Court has subject matter jurisdiction over the claims asserted against Defendants under 28 U.S.C. §§ 1331, 1361, 2201, and 2202. The APA, in 5 U.S.C. §§ 701-706, provides for judicial review and relief of the claims asserted herein.

Venue

14. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). All the property involved in this action is located in this district. A substantial part of the events or omissions

giving rise to this action occurred in this district through the actions of ANF Forest Supervisor Marten and other ANF employees subject to her control.

15. This action belongs on the Erie calendar of this Court pursuant to W.D. Pa. LR 3.1. The causes of action arise out of management of the ANF, which is located in Elk, Forest, McKean, and Warren Counties in the Commonwealth of Pennsylvania.

Background

U.S. acquisition of ANF surface lands under the Weeks Act

16. The lands that now comprise the ANF and other eastern national forests were once privately owned. Federal land acquisitions for the ANF took place largely in the 1920s under the 1911 Weeks Act and amendments thereto (primarily codified at 16 U.S.C §§ 511-31), and were supervised by the National Forest Reservation Commission. The Commission followed a policy of not acquiring valuable mineral rights in order to acquire more lands for surface management of timber from fixed appropriations, and because oil and gas development was viewed as being consistent with protecting timber from wildfires (through the construction of access roads). As a result, most of the mineral rights in the ANF are privately owned.

17. Oil, gas, and mineral ("OGM") rights in the ANF fall into two categories: "outstanding" and "reserved":[1]

a. "Outstanding" mineral rights refer to mineral rights that were severed while the lands were in private ownership, and before the United States acquired the surface estate. The Weeks Act was amended in 1913 to allow federal acquisition of surface estates subject to outstanding mineral rights. 37 Stat. 828, 855 (1913); *see United States v. Southern Power Co.*, 31 F.2d 852, 856 (4th Cir. 1929); *Nebo Oil Co.*, 90 F. Supp. at 85 and 90. Since the

[1] Outstanding and reserved OGM rights are collectively referred to in this Complaint as "OGM rights."

United States acquired and paid for only the rights the private surface owner could convey, there is no contractual basis for any regulatory overlay of applicable State property law.

b. "Reserved" mineral rights refer to mineral rights that were reserved by the former owner of the full fee interest at the time the surface estate was acquired by the United States. Under the terms of the Weeks Act, use of reserved private mineral rights are subject to Forest Service regulation only to the extent "such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands of the United States." 16 U.S.C. § 518. In other words, to create a fair process for negotiating a sales price for acquisition of the surface estate between a willing buyer and seller, any constraints on the use of the mineral estate had to be identified in rules known at the time of the negotiations. The legislative policy of the 1911 Weeks Act required "that any rules or regulations that the Secretary wishes to apply to easements reserved by the grantor must be 'expressed in and made part of' the instrument of conveyance." *United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001). As a result, the language of individual deeds and incorporated rules must be consulted to determine the precise legal relationship between the Federal surface owner and the reserved mineral rights owner.

<u>Nature of "split estates" in the ANF</u>

18. Both before and at the time the United States acquired the surface estate for the ANF, private owners of real property retained the ability to recover oil, gas, and minerals in what is now the ANF. As a result, the majority of the ANF is comprised of "split estates" in that private owners own the OGM estate, and the United States of America owns the surface estate.

19. Under Pennsylvania law, the owner of an OGM estate, "without any express words of grant for that purpose, [has the right] to go upon the surface to open a way by...well, to his underlying estate, and to occupy so much of the surface...as may be necessary to remove the

product thereof." *Chartiers Block Coal Co. v. Mellon*, 25 A. 597, 598 (Pa. S. Ct. 1893); *Dewey v. Great Lakes Coal Co.*, 84 A. 913, 915 (Pa. S. Ct. 1912). In the absence of deed language to the contrary, "no permission or consent is required from the surface owners prior to going on the land to mine" or develop oil and gas resources, and implying such a consent power would unlawfully "give the surface owners a veto power over the [mineral] rights reserved" in the deed. *Clearfield Bank & Trust Co. v. Shaffer*, 553 A.2d 455, 457-58 (Pa. Super. 1989). In this regard, OGM estates are "dominant" to "servient" surface estates under Pennsylvania law. *Taylor v. Heffner*, 58 A.2d 450, 453-54 (Pa. 1948). Pennsylvania law has remained unchanged since *Chartiers*, as recently reaffirmed by the Pennsylvania Supreme Court in *Belden & Blake Corporation v. Commonwealth of Pennsylvania, DCNR*, Pennsylvania Supreme Court Docket No. 35 MAP 2007 (decided April 29, 2009).

20. Pennsylvania law also provides for an accommodation doctrine, under which OGM rights must be exercised with "due regard" to the interests of surface owners. The parties have 60 days to attempt to reach an "amicable agreement" and, if that fails, the surface owner can seek relief in a court of equity. *T.W. Philips Gas & Oil Co. v. Manor Gas Coal Co.*, 68 Pa. Super. 372, 1917 WL 3502 at *7-8 (Pa. Super. Ct. 1917). S*ee also, Gillespie v. American Zinc & Chemical Co.*, 93 A. 272, 273-74 (Pa. S. Ct. 1915) ("due regard" requires that if "two locations for drilling a well [are] equally available to him, the oil and gas developer was bound to choose the one that would do the least injury" to the surface owner). The accommodation doctrine was also reaffirmed in *Belden & Blake, supra*, along with the related holding that as between the surface owner and the OGM holder, the surface owner must seek redress in court if agreement cannot be reached concerning the reasonableness of conditions concerning use of the surface. *Belden & Blake*, at 9.

21. Although the United States of America became the owner of the surface estates that comprise the ANF, the fact that the surface is managed by a government agency instead of a private party does not alter the servient nature of the surface estate under Pennsylvania law. *Belden & Blake, supra*. Accordingly, the Forest Service has only limited rights with respect to development of dominant private OGM rights within the ANF. This is consistent with the Forest Service Manual, which provides:

> Secretary's rules and regulations do not apply to the administration of outstanding mineral rights.... If the terms of the deeds are unclear, the rights under deeds can generally be defined by reference to State law. As a general rule, 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 *Minard Run* decision

22. In 1980, this Court had occasion to apply the above-referenced State law principles in a dispute between Plaintiff Minard Run, the owner of a certain OGM estates in the ANF, and the Forest Service. *See, United States v. Minard Run Oil Co*., Civil Action No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. 1980). There, the respective rights of Plaintiff Minard Run as the OGM owner and the Forest Service as surface owner were specifically addressed under Pennsylvania law in the context of a preliminary injunction.

> [W]hile the owner of the mineral rights has unquestioned right to enter upon the property for the purpose of access and extracting his minerals, he nonetheless must exercise such rights… [with "due regard"] to prevent unnecessary disturbance to the owner of the surface…. Under the language of the operative conveyances, the [private mineral owner] defendant possesses, inter alia, the right of access for roads and pipelines to wells drilled to it, the right to clear areas for roads and pipeline access to the extent reasonably necessary to the exercise of its oil and gas rights."

Minard Run, 1980 U.S. Dist. LEXIS 9570 at *13. To fulfill the property law objectives that the mineral rights are dominant, but must be exercised to reduce unnecessary disturbance of the surface estate, this Court adopted some "minor restrictions which . . . should not seriously

hamper the extraction of oil or gas." *Id*. at *16. The Court determined that the Forest Service "is entitled to receive from defendant reasonable advance notice in writing" on five specific matters (*e.g.*, a Plan of Operations), after which oil and gas development can commence. *Id*. at *18-22. This reasonable advance notice to provide time for accommodations between the surface and mineral owners was defined to be "no less than 60 days in advance" of forest clearing for roads and drill sites. *Id*. at *22.

23. In accordance with *Minard Run*, the Forest Service established a 60-day notice and cooperative consultation procedure as part of its Forest-wide Standards and Guidelines in the 1986 Land and Resource Management Plan for the ANF ("1986 ANF Forest Plan") that applies to both outstanding and reserved OGM rights. *See*, 1986 ANF Forest Plan, at 4-42 – 4-47.

24. Also, in recognition by Congress that *Minard Run* provided an appropriate notice and cooperative consultation procedure with respect to private oil and gas development in the ANF, the Energy Policy Act of 1992 provides that where the United States "does not have an interest in oil and gas deposits" in the "Allegheny National Forest," "reasonable advance notice be furnished to the Secretary of Agriculture at least 60 days prior to the commencement of surface disturbing activities" including "well sites and road and pipeline accesses." Energy Policy Act of 1992, Pub. L. No. 102-482, §2508(a), 106 Stat. 3108-09 (1992) (codified at 30 U.S.C. § 226(o), hereinafter "Energy Policy Act"). Congress tracked the language of *Minard Run* in the Energy Policy Act, and conspicuously did not provide the Forest Service with regulatory approval authority over oil and gas development in the ANF.

25. The 60-day notice and cooperative consultation procedure adopted as a result of the *Minard Run* decision is a longstanding practice and policy of the Forest Service. The specific administrative procedures followed by the Forest Service during the 60-day period are

set forth in the Chapter 2 of the ANF *Handbook for Oil & Gas Administration* ("ANF O&G Handbook"), which was published in 1984.

26. To implement the 60-day notice and cooperative consultation procedure, an oil and gas developer sends the Forest Service a written notice of its planned development activities (commonly referred to as a Plan of Operations) 60 days before commencing development. In response, the Forest Service consults with the oil and gas developer during the 60-day period, and, if the Forest Service has no further accommodation requests at the end of the 60-day period, sends the developer a letter indicating the Forest Service's view that it has no problem with the developer proceeding in accordance with the Plan of Operations. This letter, which has become known as a "Notice to Proceed," is simply a written communication in the form of a letter that was developed by the Forest Service to indicate that it has no further accommodation requests in response to a proposed oil and gas development. A Notice to Proceed does not constitute an "approval decision" of the Forest Service to "permit" oil and gas development because the Forest Service lacks permitting or regulatory authority over oil and gas development of privately owned OGM estates in the ANF. "Notices to Proceed" are not drafted or issued pursuant to any statute, regulation, or rule. To the contrary, they are an informal communication marking the end of the 60-day consultation process between the owners of the respective interests in the subject property.

27. From 1980 until at least 2006, the Forest Service understood that it had only a 60-day time window to reach accommodations with owners of dominant mineral estates before private oil and gas operations could commence. In this regard, the 1986 ANF Forest Plan states that:

> Land management decisions must not preclude the ability of private mineral owners to make reasonable use of the surface, as defined by deed and public law. The Forest Service will protect the rights of the federal government, respect private mineral rights, and insure that private mineral owners and operators take reasonable and prudent measures to prevent unnecessary disturbance to the surface. . . . At least 60 days in advance of proposed development, the developer will provide the Forest Service with written notification of planned activities.
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> 1986 ANF Forest Plan, pp. 4-42 - 4-45; *see also*, ANF O&G Handbook, Chapt. 1 at p. 19.

Similarly, the Forest Service Manual provides:

> The Secretary's rules and regulations do not apply to the administration of outstanding mineral rights.... Promptly evaluate and respond to applications for reserved mineral permits and notices of surface occupancy for the exercise of outstanding rights. Normally, the authorized office shall respond within 60 days after the applicant submits a complete application plan.
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> Forest Service Manual §§ 2830.1. 2830.3. *See also*, FSM § 2832 (tracking *Minard Run*).

28. Longstanding Forest Service respect for dominant private mineral rights changed during the period from 2007 to 2009 without adequate explanation, culminating in the NEPA directive embodied in the April 2009 Settlement Agreement and Marten Statement (*see* ¶ 45, below). The changed policy apparently was developed within the Forest Service's Eastern Region. However, it is questionable whether the changed policy was approved by the Forest Service's national office, and the new policy is inconsistent with other national-level Forest Service guidance (*e.g.*, in the Forest Service Manual).

Forest Service Management of the ANF

29. As required by the National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq.* ("NFMA"), management of the ANF by the Forest Service is governed by a Land and Resource Management Plan ("Forest Plan"). 16 U.S.C. § 1604. The first Forest Plan for the ANF under the NFMA was approved in 1986 (*i.e.*, 1986 ANF Forest Plan).

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30. The NFMA and its implementing regulations require that Forest Plans be periodically updated. When this occurs, the public is to be given a three month period to comment on a proposed Forest Plan revision, and the Forest Service is to consider those comments before adopting a revised Forest Plan. 16 U.S.C. §§ 1604(d) and (f)(4), § 1612; 36 C.F.R. Part 216, and §§ 219.6, 219.10, and 219.12 (1999). In addition, Section 102 of NEPA, 42 U.S.C. § 4332, requires that "...all agencies of the Federal Government shall...include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement…." 42 U.S.C. § 4332(A). This "detailed statement" is commonly referred to as an "Environmental Impact Statement," or "EIS." NEPA and its implementing regulations require that anticipated environmental impacts be disclosed in a draft EIS, and the public is entitled to comment on those disclosed impacts before the Forest Service prepares a final EIS and chooses a particular alternative in a record of decision. 42 U.S.C. § 4332(2)(C); and 40 C.F.R. § 1502.9, § 1502.19, Part 1503, and § 1505.2.

31. In May 2006, the Forest Service issued a Proposed Land and Resource Management Plan ("Draft Revised Forest Plan") for the ANF, along with an accompanying Draft Environmental Impact Statement ("DEIS"), to revise the 1986 ANF Forest Plan. According to the DEIS, an ANF interdisciplinary team identified three major areas of the 1986 ANF Forest Plan that needed to be revised: 1) vegetation management; 2) habitat diversity; and 3) recreation and special area designations. Management or restriction of OGM rights and related development activities was not included in the three major areas that needed to be revised.

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32. The Forest Service provided an opportunity for public comment on the Draft Revised Forest Plan and DEIS, and the Plaintiffs and some of POGAM's and AFA's members submitted comments.

33. In March 2007, the Forest Service issued a final updated Forest Plan for the ANF ("2007 ANF Forest Plan"), along with an accompanying Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD"). The ROD, dated February 2, 2007, was issued by Randy Moore, then Regional Forester of the Eastern Region of the Forest Service (and Defendant Connaughton's predecessor).

34. As noted repeatedly in the 2007 Revised Forest Plan and FEIS (as well as in the Draft Revised Forest Plan and DEIS), approximately 93% of the subsurface OGM rights in the ANF are privately owned. With this in mind, the FEIS attempted to predict environmental consequences related to oil and gas activities within the ANF over the next decade. *See generally, e.g.*, FEIS, at Appendix F. To address predicted environmental consequences (primarily road construction and surface occupation, not environmental hazards), the 2007 ANF Forest Plan included a number of measures to restrict OGM development, including but not limited to: a) guidelines in Part 4 (Management Area Direction) of the Plan, which require mitigation measures as a precondition to the exercise of legal rights by private owners of OGM interests; b) requirements to reduce impacts on the environmental resource objectives of specific designated Management Areas; and c) establishment of design criteria to regulate oil and gas activities. *See*, ROD, at pp. ROD-29 and ROD-34. According to the Regional Forester, these new provisions of the 2007 ANF Forest Plan were designed to make "energy minerals... available in an environmentally sensitive manner…" while establishing a framework for "restoring, enhancing, or maintaining ecological conditions that will improve ecosystem

resiliency, sustain biological diversity, and aid in conserving and recovering federally-listed threatened and endangered species and other species with viability concern." ROD, at p. ROD-16.

35. Many of the above-referenced measures in the 2007 ANF Forest Plan to restrict OGM development were not included in the Draft Revised Forest Plan, and therefore were not subjected to public comment. Moreover, many of the measures are inconsistent with, or in conflict with, the comprehensive regulatory requirements governing oil and gas activities administered and enforced by the Pennsylvania Department of Environmental Protection.

36. As a result of the adverse consequences to POGAM's and AFA's members posed by the 2007 ANF Forest Plan, these Plaintiffs and certain of their members administratively appealed the Plan on a number of grounds. During the pendency of the administrative appeals, meetings were held by and between the Forest Service and the appellants. At one such meeting held in December 2007, an Associate Deputy Chief of the Forest Service stated his belief that NEPA requirements should be imposed on all private oil and gas development in the ANF.

37. On February 15, 2008, the Chief of the Forest Service issued an unusual appeals decision on the 2007 ANF Forest Plan and FEIS ("Appeals Decision"). Specifically, the Appeals Decision found (at pp. 3-5) that the FEIS upon which the 2007 ANF Forest Plan was based did not comply with NEPA in at least three material respects. In one of these respects, the Chief stated that "the regulations at 40 CFR 1502.22 require the use of complete information," and "the Allegheny NF's outline of the process of management of private oil and gas development under the 'Description of Surface Oil, Gas, and Mineral Activity' (FEIS Appendix F, p. F-5) does not clearly describe private, state and federal responsibilities and authorities." Appeals Decision, at p. 4. "In fact, there are inconsistencies throughout the record in regard to managing the private

oil and gas development process"... and "Clearly, the description of this process is essential to the decision particularly as the FEIS and Revised Plan rely upon Appendix F throughout the documents." *Id.*, at pp. 4-5. To address this violation of NEPA, the Chief instructed the Forest Service to "incorporate language in the ROD, Revised Plan, and FEIS to clarify Allegheny NF's authority to manage oil and gas activities." *Id.*, at p. 4.

38. Although the Appeals Decision plainly acknowledged several NEPA violations and the need for a more comprehensive EIS, the Chief of the Forest Service nonetheless affirmed the noncompliant 2007 ANF Forest Plan and FEIS. As a result, POGAM and AFA filed a lawsuit in this Court to address the NEPA violations, *Pennsylvania Oil and Gas Association, et al. v. United States Forest Service, et al.*, U.S. District Court Docket No. 1:08-cv-162-SJM, which is pending. Among the issues raised in that lawsuit, POGAM and AFA complained that requiring affirmative measures as a condition of the lawful exercise of OGM rights goes beyond managing the surface estate and this Court's decision in *Minard Run*, and instead involves an attempted exercise of regulatory authority as sovereign, contrary to Congressional limitations expressed in 30 U.S.C. § 226(o).

39. At the end of 2008, the Forest Service published an advance notice of proposed rulemaking at 73 Fed. Reg. 79424 (Dec. 29, 2008). The notice announced an intent to "engage in rulemaking to provide clarity and direction on the management of the National Forest System when the mineral estate is privately held" in the "Allegheny National Forest." 73 Fed. Reg. 79425. Upon information and belief, the intent of the proposed rulemaking is to provide additional regulatory authority over oil and gas development in the ANF that the Forest Service currently lacks.

40. By letter dated January 16, 2009, the Forest Service informed "Interested Parties" about two developments: a) a Notice of Intent to prepare an EIS to address some of the NEPA violations identified in the Appeals Decision would be published on or before February 27, 2009; and b) as a result of "litigation" related review being undertaken by the Forest Service Regional Office, Forest Supervisor Marten directed ANF Forest Service personnel to cease sending Notice to Proceed letters related to private oil and gas development projects for submissions made after January 1, 2009. This effectively resulted in a moratorium of Notices to Proceed as of January 1, 2009.

41. By letter dated February 24, 2009, the Forest Service informed "Interested Parties" that "the Allegheny National Forest proposes to apply design criteria included in the [2007 ANF Forest Plan] to reserved and outstanding oil and gas development on the Forest," and that "a Notice of Intent to prepare a Supplement to the Forest Plan [EIS] will be published in the Federal Register on February 27, 2009." A Notice of Intent was thereafter published in the *Federal Register* on February 27, 2009. Consistent with the Appeals Decision and the February 24 "Interested Party" letter, the first two proposed actions listed in the Notice of Intent are to: a) "apply the design criteria…of the 2007 Forest Plan to reserved and outstanding oil and gas development"; and b) "clarify the roles and responsibilities held by the Forest Service, the Commonwealth of Pennsylvania, and private mineral owners in regard to the protection of surface resources during the development of reserved and outstanding oil and gas…." These are precisely the type of issues that the Pennsylvania Supreme Court in *Belden & Blake, supra,* held to be not a government agency function but instead within the exclusive province of the courts.

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42. At the same time the Forest Service was attempting to circumvent the Weeks Act, administratively overturn *Minard Run*, and redefine the agency's role as both a surface owner and a regulatory agency, it was also negotiating a settlement with the Forest Service Employees for Environmental Ethics ("FSEEE") and two other activist groups in *FSEEE, et al. v. United States Forest Service, supra*. There, Defendants FSEEE, ADP, and Sierra Club (as plaintiffs therein) challenged the longstanding Forest Service policy that NEPA does not apply to the exercise of dominant private OGM rights in the ANF. According to FSEEE, ADP, and Sierra Club, a Notice to Proceed issued by the Forest Service is a "major federal action" subject to NEPA. *FSEEE* Amended Complaint, at ¶ 35.

43. POGAM and AFA moved to intervene as defendants in *FSEEE*. Shortly after the Court granted intervenor-defendant status on April 7, 2009, the Forest Service filed a "Stipulation of Dismissal" (on April 9, 2009). The basis for dismissal was the Settlement Agreement, which was hastily signed by counsel for the plaintiffs and the Forest Service on April 8, 2009. A true and accurate copy of the Settlement Agreement is attached hereto as Exhibit A and is incorporated by reference herein. The Settlement Agreement was not signed by POGAM or AFA, and POGAM and AFA were not allowed to participate in any settlement discussions.

44. Under the Settlement Agreement, except for some grandfathered submissions, the Forest Service agreed:

"…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, ¶ 1. The Forest Service's agreement that NEPA applies to Notices to Proceed is contrary to controlling Pennsylvania law, the Energy Policy Act, the *Minard Run* decision, prior Forest Service policy, and longstanding Forest Service practice.

45. Contemporaneously with the filing of the Stipulation of Dismissal and Settlement Agreement, ANF officials released a document entitled "Statement from Forest Supervisor Leanne Marten and District Rangers Tony Scardina and Rob Fallon" ("Marten Statement"). A true and accurate copy of the Marten Statement is attached hereto as Exhibit B and is incorporated by reference herein. The Marten Statement provides an overview of how the ANF will implement the Settlement Agreement and how the Forest Service will apply NEPA to private oil and gas development in the ANF. Except for the grandfathered submissions, the ANF will not issue any new Notices to Proceed until the Forest Service completes a "forest-wide site specific environmental analysis for proposals that were not included in the settlement and any other proposals for activity anticipated between now and 2013." Marten Statement at p. 3. According to the Forest Service website, the site-specific NEPA document is going to be an EIS.[2] According to the Marten Statement, the ANF optimistically intends to "publish a Notice of Intent (NOI) to prepare a forest-wide . . . [EIS] in June 2009," and it will take at least "until mid-April, 2010, to issue a final decision," not counting the "45-day appeal period" for administrative appeals. *Id*. If the *FSEEE* plaintiffs or other environmental groups exercise administrative appeal rights, this will add 45 days from public notice of the decision after an EIS to file an administrative appeal, and an additional 45 days for the Forest Service to decide the appeal. 36 C.F.R. §§ 215.15, 215.18.

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[2] *See*, http://fs.fed.us/r9/forests/allegheny/projects/OGM_eis/index.php.

46. As outlined above, the new policy of the Forest Service under the Settlement Agreement and Marten Statement ("New NEPA Directive") is that there is an ANF-wide ban on the issuance of non-grandfathered Notices to Proceed until the completion of an EIS and administrative appeals that will last at least through mid-July 2010. The New NEPA Directive is contrary to controlling Pennsylvania law, the Energy Policy Act, the *Minard Run* decision, prior Forest Service policy, and longstanding Forest Service practice.

47. As noted in the Marten Statement, the Forest Service scheduled public meetings on April 13-15 to discuss the Settlement Agreement. At these meetings, representatives of the Forest Service explained that proposed oil and gas development projects subject to the ANF forest-wide EIS to implement the New NEPA Directive will be analyzed using the design criteria of the 2007 ANF Forest Plan. This approach, which was subsequently reiterated by Forest Service representatives at an oil and gas operators meeting held on April 28, 2009, is contrary to the express direction of the Chief of the Forest Service in the Appeals Decision. *See*, Appeals Decision, at p. 3 (suspending application of the new design criteria to oil and gas development pending completion of additional public comment).

48. By Order and Opinion entered on May 12, 2009, this Court in *FSEEE* approved the Plaintiffs' request to voluntarily dismiss the action. In doing so, the Court expressly noted that "there is no impediment to [POGAM and AFA] or, for that matter, any other party with standing, to challenge the settlement agreement as an allegedly unlawful exercise of the Forest Service's discretion in a subsequent lawsuit." *FSEEE*, Memorandum Opinion dated May 12, 2009, at p. 7 of 8. This is that lawsuit.

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Effect of the New NEPA Directive

49. The *de facto* ban on all non-grandfathered pending submissions and all new exercises of dominant private oil and gas rights as a result of the New NEPA Directive will likely last much longer than the Forest Service's mid-2010 estimate. In this regard:

a. The process for an EIS requires: (1) a public scoping process to identify issues to be addressed in an EIS; (2) preparation of a draft EIS; (2) circulation of the draft EIS for at least a 45-day public comment period; (3) preparation of a final EIS that responds to comments, and a record of decision explaining the alternative action chosen by the agency; and (4) an additional 30-day delay before the chosen action can be implemented. *See* 40 C.F.R. §§ 1501.7, 1502.9, 1503.4, 1505.2, 1508.10; 73 Fed. Reg. 43084 (July 24, 2008) (Forest Service NEPA guidance to be published as 36 C.F.R. Part 220). The overly optimistic Forest Service estimate that these steps can be completed in one year will almost certainly prove to be unrealistic. For example, although the Forest Service commenced NEPA scoping in 2003 on the proposed revisions to the 1986 ANF Forest Plan, the final EIS and ROD were not issued until March 2007.[3]

b. Additionally, after the Forest Service produces an EIS, the *FSEEE* plaintiffs (or other parties) could prevent implementation of the decision by filing an administrative appeal. This builds in an additional delay of at least 45 days from public notice of the decision after an EIS to file an administrative appeal, and another 45 days for the Forest Service to decide the appeal. 36 C.F.R. §§ 215.15, 215.18. The administrative appeal delay may last much longer, especially if the Forest Service finds a NEPA or other error. For example, the Forest Service Chief's office found NEPA errors in the EIS for the 2007 ANF Forest Plan, and a

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[3] *See* documents available at http://www.fs.fed.us/r9/forests/allegheny/projects/forest_plan_revision/index.php.

proposed supplemental draft EIS still has not been issued as of May 2009. *See* documents available at http://www.fs.fed.us/r9/forests/allegheny/projects/supp_eis/index.php. Thus, between the EIS preparation time and administrative appeal time, it is more likely that the Forest Service's ban on issuance of new Notices to Proceed will last two years or longer.

c. After completion of agency processes, the *FSEEE* plaintiffs or other parties could file suit concerning the adequacy of NEPA compliance (as the *FSEEE* plaintiffs expressly reserved the right to do in the Settlement Agreement), thereby further delaying the lawful exercise of oil and gas rights.

d. Given the agency and judicial processes associated with the New NEPA Directive, the *de facto* ban on the private exercise of dominant oil and gas rights in the ANF could well be in the range of two to five years.

50. In the Marten Statement, Defendant Marten "acknowledge[d] the impact this [multi-year ban on new private oil and gas development] will have on families and businesses, especially at a time when our nation is facing such a difficult economic downturn." Marten Statement, at p. 1. "For some, this impact . . . may be a lifetime." *Id.* That is, the ban will spawn unemployment in local oil- and gas-related industries. Some companies may go bankrupt or be forced to sell oil and gas properties that cannot be developed in the near term. Other companies have purchased oil and gas leases from a private mineral owner, where the leases contain a short primary term to produce oil and gas in paying quantities. Those companies are likely to suffer the loss of their investment because the Forest Service is now banning new Notices to Proceed.

51. POGAM's members have already had the New NEPA Directive applied against them, and the Directive will continue to be applied against them. For example, POGAM's

members, including but not limited to Pennsylvania General Energy Company L.L.C. and East Resources, Inc., submitted proposed plans to the Forest Service pursuant to the 60-day notice requirement prior to the Settlement Agreement, but the Forest Service deferred the plans for handling under the New NEPA Directive. Under the Directive, these plans will not be processed until the EIS is completed, causing at least a one year delay. This is well beyond the 60-day period for Federal review authorized by *Minard Run* and 30 U.S.C. § 226(o).

52. Prospectively, application of the New NEPA Directive means that all future applications from oil and gas developers in 2009 will not result in Notices to Proceed being issued until at least 2010. During this delay, there will be no opportunity for effective judicial relief, and there seemingly will be no challengeable agency action. Accordingly, the Plaintiffs challenge the New NEPA Directive both: (1) as applied, in denying timely action on specific applications from POGAM's members; and (2) on its face.

Nature of the Injuries

53. Plaintiff Minard Run, which was the defendant in the *Minard Run* case, is an oil and gas development company with approximately 4,700 acres of oil and gas lands in the ANF. Minard Run owns both outstanding and reserved OGM estates in the ANF. As the owner of OGM rights in the ANF, Minard Run has dominant easement rights for the use of the servient surface estate, giving it the right under the laws of Pennsylvania and the United States to the reasonable use of the Federally-owned surface estate to develop its OGM resources. Minard Run has direct, vested real property interests in its OGM rights in the ANF, and also has vested economic interests in its OGM rights in the ANF. Minard Run and its 65 employees are injured with respect to Minard Run's real property and economic interests by actions undertaken by the Forest Service and its officers and employees that restrict, limit, interfere with, or otherwise

adversely affect Minard Run's OGM rights in the ANF, including but not limited to the New NEPA Directive.

54. Plaintiff POGAM's members include corporations, individuals, and other business entities that own OGM rights (both outstanding and reserved) in the ANF. As such, POGAM's members have direct, vested real property interests in such OGM rights. POGAM's members also have direct, vested economic interests in their OGM rights in the ANF. As the owners of OGM rights in the ANF, POGAM's members have dominant easement rights for the use of the servient surface estate, giving them the right under the laws of Pennsylvania and the United States to the reasonable use of the Federally-owned surface estate to develop their OGM resources. POGAM's members have direct, vested real property interests in their OGM rights in the ANF, and also have direct, vested economic interests in their OGM rights in the ANF. POGAM and its members are injured with respect to their real property and economic interests by actions undertaken by the Forest Service and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect their OGM rights in the ANF, including but not limited to the New NEPA Directive.

55. Plaintiff AFA's members include a coalition of public school districts, municipalities, and businesses. AFA's government-based membership includes seven public school districts, 33 townships, and two boroughs from Elk, Forest, McKean, and Warren Counties, all within the ANF region of the Commonwealth of Pennsylvania. More specifically, AFA's member public school districts include Bradford Area School District, Forest County School District, Johnsonburg Area School District, Kane Area School District, Ridgway Area School District, Smethport Area School District, and Warren County School District. The AFA's member municipalities include:

Elk County

Highland Township
Jones Township
Millstone Township
Ridgway Township
Spring Creek Township

Warren County

Brokenstraw Township
Cherry Grove Township
Deerfield Township
Elk Township
Glade Township
Kane Borough
Limestone Township
Mead Township
Pleasant Township
Sheffield Township
Tidioute Township
Triumph Township
Watson Township

Forest County

Barnett Township
Green Township
Harmony Township
Hickory Township
Howe Township
Jenks Township
Kingsley Township
Tionesta Township

McKean County

Bradford Township
Corydon Township
Foster Township
Hamilton Township
Hamlin Township
Lafayette Township
Lewis Run Borough
Wetmore Township

56. Collectively, the above-referenced entities represent a wide range of public interests in education, governance, and protection of human health, safety and the environment within the ANF region. AFA's members also include privately owned businesses (such as forest products and lumber companies) that depend upon, and historically have generated, revenues from timber contracts with the Forest Service to harvest timber in the ANF. Through their activities, AFA and its members help maintain the ANF as a significant revenue source for public schools and as a source of socio-economic stability for the represented forest county communities.

57. Central to AFA's mission is promotion of sustainable development within the ANF, including advancement of public interests in maintaining an adequate, stable, and sustaining supply of forest goods and services. AFA promotes and supports sustainable forestry, environmental stewardship, and multiple-use management of the ANF. AFA's members have direct, vested interests in appropriate and lawful management of the ANF in that they are directly affected by Forest Service management decisions and actions concerning the ANF. For example, by statute, AFA's public school district and municipal members are eligible to receive a 25% share of all receipts generated through timber sales within the ANF. 16 U.S.C. § 500. The rationale for this compensation is the recognition by Congress of the heavy financial burden placed upon public school districts and municipalities when large areas of tax-exempt property are established within their geographic regions. As a result of the 25% compensation arrangement, when the Forest Service manages the ANF in manner that results in more or less timber harvesting, this increases or decreases (respectively) operating revenues for affected public school districts and municipalities. Accordingly, AFA members are directly injured by

actions undertaken by the Forest Service and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect timbering within the ANF, including but not limited to curtailments in timber contracts resulting from reduced oil and gas development caused by the New NEPA Directive. When timber harvesting is curtailed or suspended by the Forest Service, member public school districts and municipal entities are severely impaired in their ability to fund schools, maintain roads, and carry out other legally-mandated duties; and member businesses can lose substantial amounts of revenue, jeopardizing their long-term existence and forcing them to lay off or terminate employees whose jobs and livelihoods depend upon timber harvesting in the ANF.

58. Plaintiff Warren County has a population of approximately 44,000 people (2000 U.S. Census), and a median household income of approximately $36,000. As one of four Pennsylvania counties in which the ANF is situated, Warren County has interests in the protection of the ANF, sustainable forestry practices, and other activities that occur in the ANF that are consistent with the multiple-use mandate of the Forest Service and the National Forest System, including environmentally responsible development of oil and gas interests (including its own). In this regard, the Board of Warren County Commissioners is the trustee of the Hoffman Trust, which owns the OGM rights for more than 1,000 acres in the ANF. The purpose of the trust is to provide for the underprivileged of Warren County. For example, in the past, trust assets have been used by the County Commissioners (as trustee) to fund the Tidioute Charter School and the Beacon Light Group Home in Youngsville, Pennsylvania. Due to budgetary concerns, the Hoffman Trust recently has been considering development of oil and gas in the ANF to increase funding of the Warren County Children and Youth Services, a social services program that serves the needs of underprivileged youth in the county. In light of its

OGM interests, Warren County has direct, vested real property interests in its OGM rights in the ANF, and also has direct, vested economic interests in its OGM rights in the ANF. Warren County is injured with respect to its real property and economic interests by actions undertaken by the Forest Service and its officers and employees that restrict, limit, interfere with, or otherwise adversely affect its OGM rights in the ANF, including but not limited to the New NEPA Directive.

59. Indirectly, development of oil and gas in the ANF sustains and creates jobs which, in turn, stimulates and supports the local economy. Statistics maintained by the Warren County Chamber of Business and Industry reflect that Warren County has over 80 registered independent oil and gas companies which collectively employ hundreds of persons and add millions of dollars in economic support to the local economy. Interference with sustaining and potentially creating jobs that support the local economy will add to the hardship already being faced due to current economic conditions.

Count I – The New NEPA Directive and resultant ban on Notices To Proceed are contrary to NEPA.

Plaintiffs vs. Federal Defendants

60. Paragraphs 1-59 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

61. NEPA requires an EIS only prior to adopting "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA does not apply to non-federal actions or to actions where a federal agency has only a limited role. *See, e.g., Foundation for Horses v. Babbitt*, 154 F.3d 1103 (9th Cir. 1997); *State of New Jersey Dep't of Envtl. Prot. v. Long Island Power Auth.*, 30 F.3d 403, 415-18 (3d Cir. 1994). Also, NEPA analysis is required only if there are environmental impacts that a discretionary federal agency

action proximately causes. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 765-70 (2004). For example, NEPA does not apply to Bureau of Land Management review of notices regarding private mineral operations under the Mining Law of 1872. *Sierra Club v. Penfold*, 857 F.2d 1307, 1311-14 (9th Cir. 1988).

62. The Forest Service lacks authority to prevent development of dominant OGM estates in the ANF, as reflected by the agency's historic position concerning oil and gas development in the ANF that "there is no Federal action that triggers a NEPA documentation for oil and gas operations…." *See, Oil and Gas Operations in the Allegheny National Forest, Northwestern Pennsylvania, Oversight Hearing Before the Subcomm. on Energy and Env't of the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. (1991), at 75-79, 113 ("1991 Oversight Hearing"). In other words, because the Forest Service is obligated as a matter of law to accommodate oil and gas development on lands with privately owned OGM rights, this precludes discretionary agency action central to NEPA. A Notice to Proceed is not a permit, approval, or authorization subject to NEPA – it is merely a communication from the Forest Service to an oil and gas developer signaling completion of the cooperative consultation period arising from the Pennsylvania common law concept of "due regard" as applied by this Court in *Minard Run.*

63. Under the New NEPA Directive, except for certain grandfathered submissions, there is an ANF-wide ban on the Forest Service's issuance of Notices to Proceed with private oil and gas development until the completion of a forest-wide EIS and related appeals in mid-2010 or later. This ban and lengthy delay contravenes established law and Forest Service policy and longstanding practice as described in detail above.

64. None of the applicable deeds, Pennsylvania law, the *Minard Run* decision, the Energy Policy Act, or Federal regulations requires a Forest Service Notice to Proceed before dominant private OGM rights can be exercised. Plaintiff Minard Run, Plaintiff Warren County, and Plaintiff POGAM's members hold outstanding OGM rights and reserved OGM rights that contain no language requiring Forest Service "approval" before oil and gas operations can commence. For some of these OGM rights, POGAM's members have provided the Forest Service with more than 60 days advance notice. Under the New NEPA Directive, however, the Forest Service maintains that oil and gas development cannot commence until after the lengthy forest-wide EIS and related appeals are completed, and have threatened Plaintiffs with prosecution if they attempt to exercise their property rights earlier. This is unlawful.

65. In addition, the 60-day time limit for Federal review recognized in *Minard Run* and codified in the Energy Policy Act creates a separate fatal obstacle to the application of NEPA. This is because NEPA applies only to the "fullest extent possible" consistent with other law (42 U.S.C. § 4332), and no NEPA document is required where a statute creates a short deadline for Federal action. *Flint Ridge Devpt. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976) (30-day deadline renders NEPA inapplicable); *City of New York v. Minetta*, 262 F.3d 169, 182-83 (2d Cir. 2001) (no EIS is required where a statute requires federal action within 60 days).

66. The 60-day deadline for Forest Service review and negotiation is too short to complete draft and final EISs, or to subject them to public comment. *City of New York v. Minetta*, 262 F.3d 169, 182-83 (2d Cir. 2001). In such situations, the Supreme Court has found that NEPA does not apply – and that a statutory time limit cannot be simply ignored or extended to provide time for NEPA analysis. *Flint Ridge*, 426 U.S. at 791. Accordingly, the answer to the time limit problem that a few lower courts have provided – that the statutory time limit can be

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extended under NEPA or only runs after a NEPA document has been prepared (*Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986)) – is an unlawful answer that "the Court rejected in *Flint Ridge*." MANDELKER, NEPA LAW AND LITIGATION § 5.12 (2d ed. 2008).

67. The 60-day deadline is also too short to complete an environmental assessment ("EA"). *See* 40 C.F.R. § 1508.9. The 60-day deadline for any EA and for Forest Service review and negotiation concerning where to site roads, drilling sites, etc., after notice from the OGM owner, cannot be achieved under FSEEE's view that "the relevant Forest Service rule requires a public comment period on EAs" of "30 days" ("36 C.F.R. § 215.6(a)"), plus 45 days for an administrative appeal and 45 days for an appeal decision (36 C.F.R. § 215.15). Plaintiffs' Sur-reply to Intervenors' Emergency Motion for a Stay (April 22, 2009) at p. 3, in *FSEEE, supra*.

68. Contrary to the New NEPA Directive, no NEPA document is required before private OGM operations can lawfully commence in the ANF for a number of reasons, including but not limited to: (a) the issuance by the Forest Service of a Notice to Proceed is not a "major federal action" under NEPA; (b) NEPA does not apply to private actions, and the Forest Service has too limited a role to trigger NEPA; and (c) the 60-day deadline for Forest Service action precludes the preparation of a NEPA document.

69. The APA provides for courts to set aside federal agency action that is: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence; or (f) unwarranted by the facts. 5 U.S.C. § 706(2).

70. The New NEPA Directive is contrary to NEPA in the various particulars as set forth above. Moreover, because the Directive is neither required nor authorized under NEPA, the Forest Service lacks the requisite legal authority to subject the Plaintiffs to its requirements. Accordingly, the New NEPA Directive is unlawful and *ultra vires* and should be set aside.

Count II – The New NEPA Directive and resultant ban on Notices To Proceed are otherwise contrary to the APA.

Plaintiffs vs. Federal Defendants

71. Paragraphs 1-70 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

72. In addition to being contrary to NEPA, the New NEPA Directive was imposed on the owners of private mineral rights as a *fait accompli*, without any opportunity for advance public comment. This is contrary to applicable statutes and regulations, including 16 U.S.C. §§ 1604(d) and (f) and 36 C.F.R. Part 216. This is also contrary to Forest Service guidance, such as the commitments to resolving ANF split estate issues in a public forum in the advance notice of proposed rulemaking (73 Fed. Reg. 79424 (Dec. 29, 2008)). The conduct of the Forest Service is especially egregious in this case because the Chief of the Forest Service directed in the Appeals Decision (concerning the 2007 ANF Forest Plan) that the 1986 ANF Forest Plan be applied to private oil and gas development in the ANF until the NEPA violations identified by the Chief have been addressed (which has not occurred). Because the new NEPA Directive is contrary to the Chief's instruction, it is a *de facto* revision to the ANF Forest Plan that is unlawful because the comment period required by 16 U.S.C. §§ 1604(d) and (f) were not provided. It also constitutes an unlawful attempt to override the Forest Service Manual without notice and comment procedures, in violation of 16 U.S.C. §§ 1612(a) and 36 C.F.R. Part 216.

73. Moreover, the Forest Service's recent conclusions that a NEPA analysis must be undertaken before private mineral operations can lawfully commence and that the Forest Service can impose a lengthy ban on such operations are departures from applicable law and prior Forest Service practice. However, an agency's departure from prior practice is invalid unless it is accompanied by a contemporaneous reasoned analysis explaining the reasons for the change, and showing a consideration of the relevant factors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 41-43, 48-51 (1983). The Settlement Agreement, the Marten Statement, and other Forest Service communications provide no rational explanation as to why the change in Forest Service position is lawful, or why the change is desirable or justified as a matter of policy.

74. In addition, the New NEPA Directive deprives the Plaintiffs reasonable and timely access to their oil, gas and minerals, in violation of their constitutionally-protected property rights.

75. In addition, the New NEPA Directive is not authorized by the NFMA, the Multiple-Use Sustained Yield Act of 1960 (16 U.S.C. § 528, *et seq.*), or any other statute creating powers and duties of the Forest Service. The New NEPA Directive therefore exceeds the jurisdiction and authority of the Forest Service and is *ultra vires*.

76. In addition, the New NEPA Directive is unsupported by substantial evidence and is unwarranted by facts.

77. As noted previously, the APA provides for courts to set aside federal agency action that is: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance

of procedure required by law; (e) unsupported by substantial evidence; or (f) unwarranted by the facts. 5 U.S.C. § 706(2). The New NEPA Directive must be set aside on a number of these grounds for the reasons set forth above.

Count III – The New NEPA Directive violates the
Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq*.

Plaintiffs vs. Federal Defendants

78. Paragraphs 1-77 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

79. By letters dated April 10 and April 29, 2009, the Forest Service informed all oil and gas developers operating in the ANF that in order for the Forest Service to conduct an EIS under the New NEPA Directive, oil and gas developers must submit information on any proposed development activities anticipated between April 2009 and December 31, 2013. True and accurate copies of the two April letters are attached hereto as Exhibit C and incorporated by reference herein. According to these letters, the requested information must include a map showing locations for proposed wells, proposed access roads, proposed tank batteries, proposed pipelines, and proposed utility lines. The submission deadline for the information was originally May 8, 2009, but was extended one week. Failure to submit the requested information will result in a proposed development being disqualified from receiving a Notice to Proceed in 2010 or thereafter because, under the New NEPA Directive, Notices to Proceed cannot be issued until a NEPA analysis has been completed.

80. The Plaintiffs are comprised of small businesses, educational and nonprofit institutions, local government, and other persons, and therefore fall squarely within the protections of the Paperwork Reduction Act. 44 U.S.C. § 3501(1). In addition, the Forest Service is an "agency" as defined in the Act, and is therefore covered by the Act's requirements.

44 U.S.C. § 3502(1). In addition, the requirement of the New NEPA Directive that all oil and gas developers with OGM rights in the ANF must submit information as a condition to exercising their OGM rights constitutes "collection of information" under the Act. 44 U.S.C. § 3502(3).

81. Because implementation of the New NEPA Directive requires the Forest Service to conduct a collection of information, and because the Forest Service has already commenced a collection of information, this aspect of the Directive is subject to the provisions of the Paperwork Reduction Act. However, the Forest Service violated the Act by failing to: (a) conduct a review under Section 3506(c)(1) of the Act; (b) evaluate public comments received under Section 3506(c)(2) of the Act; (c) submit a certification to the Director of the Office and Management and Budget ("OMB") under Section 3506(c)(3) of the Act; and/or (d) publish legally sufficient notice in the *Federal Register*. 44 U.S.C. § 3507(a)(1). Moreover, the OMB Director has not approved the collection of information, and the Forest Service has not obtained a control number for the same. 44 U.S.C. § 3507(a)(2). Furthermore, the collection of information letters dated April 10 and April 29, 2009, did not display a valid control number assigned by the OMB Director, and failed to inform the recipients that they were not required to respond without such display. *See*, 44 U.S.C. § 3512.

82. Although implementation of the New NEPA Directive required the submission of information by oil and gas developers, the information request (or more accurately, demand) was done contrary to the Paperwork Reduction Act. This was not in accordance with law, constituted an abuse of discretion, exceeded the authority and limitations of the Forest Service, and was not in observance of procedure required by law. Accordingly, failure to comport with the Act

provides a separate ground for setting aside the New NEPA Directive under the APA. 5 U.S.C. § 706(2).

Count IV – The Settlement Agreement Is Unlawful

Plaintiffs vs. All Defendants

83. Paragraphs 1-82 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

84. The Settlement Agreement contractually obligates the Forest Service to apply NEPA to Notices to Proceed and implement NEPA measures that are contrary to law. Stated another way, the Settlement Agreement violates the Plaintiffs' rights to proceed promptly with oil and gas development in accordance with Pennsylvania law, *Minard Run*, 30 U.S.C. § 226(o), and other relevant law and authorities. As such, the Settlement Agreement is unlawful and must be set aside.

85. The settlement authority of the Attorney General does not include the ability to settle a case on grounds that violate a statute or other law. *See, e.g.*, *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008). Moreover, lower level Department of Justice officials have authority to settle cases only within the limits established by 28 C.F.R. § 0.160. Because the Settlement Agreement is unlawful, the settlement of the *FSEEE* lawsuit was contrary to 28 C.F.R. § 0.160.

86. In addition, the Settlement Agreement creates substantive requirements for the Forest Service and oil and gas developers that are plainly intended to be applied as legally binding norms. As such, the Settlement Agreement constitutes a *de facto* regulation and should have been promulgated pursuant to the APA. *See, e.g.*, *State of Louisiana, ex rel. Guste v. United States*, 656 F. Supp. 1310, *affirmed* 832 F.2d 935, *rehearing denied,* 836 F.2d 1346, *cert.*

denied, 485 U.S. 1033 (conditions in memorandum respecting well drilling permits and well spacing requirements in a buffer zone were designed to implement, interpret or prescribe law or policy and to impose specific obligations on private interests in mandatory terms, and adoption of terms therefore constituted rulemaking under the APA). In other words, by entering into the Settlement Agreement, the Forest Service engaged in rulemaking without compliance with the APA's procedural requirements. Accordingly, the Settlement Agreement must be set aside. *See*, 5 U.S.C. §706(2)(D) (reviewing court must set aside agency action taken "without observance of procedure required by law").

Count V – The New NEPA Directive cannot be applied to Plaintiff Minard Run by virtue of law of the case, collateral estoppel, and/or issue preclusion

Plaintiff Minard Run vs. Federal Defendants

87. Paragraphs 1-86 of this Complaint are incorporated by reference, as if the same were set forth at length herein.

88. Plaintiff Minard Run is the same party that was the defendant in *Minard Run, supra*. The decision in *Minard Run* was not appealed by either the Forest Service or Minard Run, and therefore became final. As a final judgment, the *Minard Run* decision constitutes law of the case as between the Forest Service and Minard Run, and both parties are bound by the decision.

89. Federal courts adhere to the doctrines of res judicata and collateral estoppel. *See, e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Id.* (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of

action involving a party to the first case. *Id.* (citing *Montana v. United States*, 440 U.S. 147, 153). Application of these doctrines is central to the purpose of civil courts, the conclusive resolution of disputes within their jurisdictions. *Montana v. United States*, at 153.

90. Issue preclusion will be held to apply where the following elements exist: a) a final judgment on the merits in a prior suit; b) the prior suit involved the same parties or their privies; and c) a subsequent suit is based on the same cause of action. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960 (3rd Cir. 1991).

91. The holding of *Minard Run,* that the Forest Service is entitled to a 60-day notice and cooperative consultation period, was final and unappealed. Because NEPA was enacted prior to *Minard Run*, the Forest Service could have argued in that lawsuit that the 60-day notice and cooperative consultation procedure is unacceptable because it is contrary to NEPA. This was not argued, however. To the contrary, the Forest Service conceded that it should be treated as any other non-government landowner and did not contend that NEPA applied to private oil and gas development in the ANF. As a result, the Forest Service is precluded from arguing that NEPA applies in the context of oil and gas development proposed in the ANF by Plaintiff Minard Run.

92. The requirement of the Settlement Agreement that the Forest Service must apply time-consuming NEPA procedures to oil and gas development submissions does not create an exception for submissions made by Plaintiff Minard Run, but instead applies to all submissions for oil and gas development made after the effective date of the Agreement. As such, the New NEPA Directive and the Settlement Agreement are in derogation of *Minard Run* with respect to Plaintiff Minard Run. Whether characterized as law of the case, res judicata, collateral estoppel,

or issue preclusion, the New NEPA Directive is contrary to *Minard Run*, and cannot be applied to Plaintiff Minard Run as a matter of law.

PRAYER FOR RELIEF

WHEREFORE, for all of the foregoing reasons, the Plaintiffs respectfully request this Honorable Court to issue a declaratory judgment that: (a) NEPA does not apply to private oil and gas development of outstanding and reserved OGM estates in the ANF; (b) the Forest Service shall continue to be entitled to 60-day notice of proposed oil and gas development as provided in this Court's decision in *Minard Run* and the Energy Policy Act; (c) once the 60-day notice and cooperative consultation period has lapsed, oil and gas development may proceed without any action from the Forest Service; (d) the Federal Defendants' sole recourse in the event that agreement is not reached concerning a proposed oil and gas development within the 60-day notice and cooperative consultation period is to seek redress in court; (e) the Forest Service is prohibited from undertaking criminal enforcement and/or threatening to do so in lieu of or in addition to seeking redress in court; (f) the Settlement Agreement in *Forest Service Employees for Environmental Ethics, et al. v. U.S. Forest Service*, U.S. District Court Docket No. 1:08-cv-323-SJM (W.D. Pa.), is set aside in its entirety; (g) the Forest Service is enjoined from implementing the New NEPA Directive, and the impending EIS being undertaken by the Forest Service to analyze plans for private oil and gas development in the ANF through 2013 shall immediately cease; (h) the requirements of the Settlement Agreement and New NEPA Directive

cannot be applied to submissions for oil and gas development made by Plaintiff Minard Run; and (i) the Forest Service is enjoined from acting in a manner contrary to such declaratory judgment.

Respectfully submitted,

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June 1, 2009