

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

_____ )		
MINARD RUN OIL COMPANY, <i>et al.</i> , )	)	
	)	
<b>Plaintiffs,</b> )	)	
	)	
<b>v.</b> )	)	<b>Case No. 1:09-cv-00125-SJM</b>
	)	
UNITED STATES FOREST SERVICE, )	)	
<i>et al.</i> , )	)	
	)	
<b>Defendants.</b> )	)	<i>Electronically filed</i>
	)	
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	)	
_____ )	)	

MOTION FOR PRELIMINARY INJUNCTION,  
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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## INTRODUCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Minard Run Oil Company, Pennsylvania Oil and Gas Association (“POGAM”), Allegheny Forest Alliance (“AFA”), and Warren County hereby move the Court for a preliminary injunction prohibiting Defendant U.S. Forest Service from implementing its recent policy-changing directive that imposes lengthy crippling delays under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332, as a precondition to the lawful exercise of privately held oil, gas, and mineral (“OGM”) rights in the Allegheny National Forest (“ANF”).

The Forest Service issued and has begun to implement this NEPA directive based on an unlawful April 2009 Settlement Agreement between the Forest Service and three activist groups in the related case *Forest Service Employees for Environmental Ethics, et al. v. U.S. Forest Service*, No. 1:08-cv-323-SJM (W.D. Pa. May 12, 2009) (“*FSEEE*”).<sup>1</sup> The Settlement Agreement is tied to, and implemented in, a contemporaneous statement by ANF Forest Supervisor Leanne Marten. Copies of the Settlement Agreement and Supervisor Marten’s Statement are appended as Exhibits 1 and 2 to the attached Declaration of POGAM Director Craig L. Mayer (who is also chief legal counsel for POGAM member Pennsylvania General Energy Company LLC (“PGE”)). Mr. Mayer’s Declaration is appended as Exhibit A to this motion.

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<sup>1</sup> This Court dismissed *FSEEE* at the Forest Service’s and activists’ request based on their settlement of the case, but expressly refrained from approving the Settlement Agreement and stating any opinion on the underlying merits of that case. *See FSEEE*, Mem. Op. at 5, 7 (May 12, 2009).

## SUMMARY OF ARGUMENT

A preliminary injunction is warranted under each of the four factors courts are to consider: likely success on the merits, irreparable harm, balance of equities, and the public interest. *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2009).

1. Plaintiffs are likely to succeed on the merits of their claim that the NEPA directive is both substantively and procedurally unlawful. As to substance, the relevant statutes, legislative history, and case law demonstrate, and the Forest Service's own past practices confirm, that NEPA does not apply to the processing of so-called "Notices to Proceed" with the exercise of privately held OGM property rights in the ANF. In addition, the Forest Service has failed to provide a rational explanation for the complete reversal of its prior practice, under which there was no NEPA review. Procedurally, the new NEPA directive is unlawful because the Forest Service failed to provide public notice and opportunity to comment on it as required by the Administrative Procedure Act ("APA"), and to the contrary adopted it through a settlement agreement in which the Plaintiffs and other holders of OGM rights in the ANF had no say; and because the Forest Service failed to comply with the Paperwork Reduction Act in implementing the new directive.

2. Plaintiffs will suffer irreparable harm without a preliminary injunction. Imposing NEPA review on Notices to Proceed will result in a *de facto* ban on future oil and gas exploration and development across the entire 513,000-acre ANF *for at least the next year, and likely for years into the future*, just as the optimum summer-fall drilling season is approaching. Meanwhile, holders of OGM property rights are unable to exercise those rights, unable to engage in their livelihoods, and risk going out of business, during the lengthy multi-year delay – to the detriment of the oil and gas operators and other businesses dependent on them, their employees

who would face layoffs, and the surrounding communities in northwestern Pennsylvania which already are facing increasing unemployment, such as Plaintiff Warren County and the municipal township members of Plaintiff AFA.<sup>2</sup>

3. The balance of equities strongly favors a preliminary injunction. In contrast to the severe harm to oil and gas operators and dependent businesses, their employees, and the surrounding communities that the NEPA directive would cause, the Forest Service will suffer no harm if the directive is preliminarily enjoined pending this Court's review of its legality. Private oil and gas operations in the ANF have been conducted for decades unimpeded by review under NEPA. In the ANF, a preliminary injunction will simply preserve the status quo, which the NEPA directive has radically and unlawfully disrupted.

4. A preliminary injunction is in the public interest. The President has repeatedly called current economic conditions "the most profound economic emergency [and] the worst economic crisis since the Great Depression."<sup>3</sup> The unfounded NEPA directive cavalierly would worsen economic conditions in the ANF region even further by delaying development of

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<sup>2</sup> The unemployment rates in the four County regions which encompass the ANF are as follows: Elk (13.8%); Forest (11.0%); McKean (10.2%), and Warren (8.2%). The national unemployment rate was 8.5% as of April 2009. *See* [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=latest\\_numbers&series\\_id=LNS1400000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS1400000).

<sup>3</sup> Transcript: Press Conference by the President (Feb. 9, 2009) (available at [http://www.whitehouse.gov/the\\_press\\_office/PressConferencebythePresident/](http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/)). *See also, e.g.*, Transcript: News Conference by the President (Apr. 29, 2009) ("the worst economic crisis since the Great Depression") (available at [http://www.whitehouse.gov/the\\_press\\_office/News-Conference-by-the-President-4/29/2009/](http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009/)); Remarks of President Barack Obama Weekly Address (Feb. 7, 2009) ("our greatest economic crisis since the Great Depression") (available at [http://www.whitehouse.gov/blog\\_post/compromise1/](http://www.whitehouse.gov/blog_post/compromise1/)); Remarks by the President at Town Hall - Elkhart, Indiana (Feb. 9, 2009) ("[T]he situation we face could not be more serious. We have inherited an economic crisis as deep and as dire as any since the Great Depression") (available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-Town-Hall-Elkhart-Indiana/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Town-Hall-Elkhart-Indiana/)).

important domestic sources of energy, jeopardizing the livelihoods of small businesses and their employees, and causing ripple effects throughout the communities in the ANF region. In addition, as the President recently stressed,<sup>4</sup> there is a strong public interest in favor of safeguarding rights under state law, such as the property rights that are impinged by the NEPA directive. The Pennsylvania Legislature, the Chairman of the Pennsylvania Senate Environmental Resources and Energy Committee, and the Pennsylvania Attorney General have all recently voiced concern over the Forest Service's encroachment on rights protected by state law and on the harm to the citizens of the ANF region that comes from the NEPA directive. Finally, the public interest in participatory government will be served by enjoining the NEPA policy, which was conceived in closed-door proceedings between the Forest Service and activist group litigants rather than in an open process required by the APA.

### PROCEDURAL BACKGROUND

**The *FSEEE* Case.** In the related *FSEEE* case, three activist group plaintiffs filed suit in late 2008 challenging the longstanding Forest Service policy and practice that NEPA does not apply to exercise of dominant private mineral rights in the ANF.<sup>5</sup> Shortly after Judge Sean J.

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<sup>4</sup> Presidential "Memorandum for the Heads of Executive Departments and Agencies" on "Preemption" (May 20, 2009), 74 Fed. Reg. 24693 (May 22, 2009).

<sup>5</sup> The Plaintiffs in *FSEEE* brought to that case a heavy agenda against resource development activities in the ANF. The Forest Service Employees for Environmental Ethics (unless the name is an exaggeration or misnomer) is built around a core of employees of the U.S. Forest Service itself. See *FSEEE* Amended Compl. ¶ 9. They are a disgruntled group whose mission is "working to *change* the Forest Service's basic land management philosophy." See "Our Mission," <http://www.fseee.org> (viewed April 15, 2009) (emphasis added). As for the Allegheny Defense Project, the Third Circuit has observed of this litigious group and one of its founders:

[Plaintiff] Kleissler is not a neophyte to the administrative appeal process. To the contrary, [Plaintiff] Allegheny Defense Project, of which Kleissler is a founding member, professed that it employs the "Paper Monkeywrench" tactic to protect

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McLaughlin had granted intervenor-defendant status to two of the plaintiffs in the instant suit, POGAM and AFA, the Federal Defendants filed a purported “Stipulation of Dismissal” in *FSEEE* on April 9, 2009.

The Stipulation’s basis for dismissal was a filed “Settlement Agreement” signed by counsel for Plaintiffs and Federal Defendants on April 8, 2009, just one day after POGAM and AFA were granted intervention. POGAM and AFA were not allowed to participate in those settlement discussions; and, contrary Fed. R. Civ. P. 41(a)(1)(A)(ii)’s requirement that a stipulation of dismissal be signed by “all parties,” the putative Stipulation of Dismissal filed by the activists and Forest Service did not bear Intervenor-Defendants’ signature. The defective stipulation rested on a sweetheart settlement in which the Forest Service proclaimed a new policy devised by the *FSEEE* Plaintiffs and Defendants. Those most affected by the policy – the holders of OGM rights and local municipalities targeted by the policy – were deliberately excluded from a voice in developing it despite the Obama Administration’s commitment to transparent, participatory, and collaborative government.<sup>6</sup> The new NEPA directive requires that

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the ecological integrity of the region. The group’s website described its “Paper Monkeywrench” methods as responding to scoping letters “with comments and . . . public input such that the Forest Service has “more work to do.” The site also instructed that another common tactic is to appeal the final decision to the Forest Service “within 45 days trying to demonstrate either how [the Forest Service] ha[s] not followed the Forest Plan or how they have violated some aspect of NEPA.” Finally, the Defense Project encouraged its web site readers to “ask [the Allegheny National Forest Supervisor] to put you on the mailing list for ALL districts of the [Allegheny National Forest] . . . . Now you can start your own Paper Monkeywrenching!”

*Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 n.6 (3d Cir. 1999).

<sup>6</sup> See 74 Fed. Reg. 4,685-86 (Jan. 26, 2009) (“Obama Transparency Memo”) (Presidential “Memorandum for the Heads of Executive Departments and Agencies” on “Transparency and Open Government”) (“Government should be transparent. . . . Executive departments and agencies should offer Americans increased opportunities to participate in policy-making . . .”).

time-consuming and costly processes under NEPA will be applied in the future to the exercise of private OGM rights in the ANF, such that new oil and gas operations will be barred for years into the future as the NEPA analysis drags on.

The excluded and adversely affected Intervenor-Defendants moved to stay the Settlement Agreement and filed a brief opposing it. Judge McLaughlin dismissed the *FSEEE* case on May 12, 2009, finding that POGAM's and AFA's remedy is to bring its own suit challenging the Settlement Agreement and applicability of NEPA. *FSEEE*, Mem. Op. at 7 (May 12, 2009). POGAM, AFA, and the other Plaintiffs bring that suit here.

**The Settlement Agreement and the Implementing Marten Statement.** Under the Settlement Agreement, except for some grandfathered projects, the Forest Service “agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument for authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests.” Settlement Agreement ¶ 1.

The day after the Forest Service filed the Settlement Agreement with the Court, ANF officials publicly released a three-page “Statement from Forest Supervisor Leanne Marten and District Rangers Tony Scardina and Rob Fallon” (“Marten Statement,” Mayer Ex. 2). The Statement discusses the “site specific” NEPA process “tied to the recently filed settlement.” Marten Statement at 3. The Statement describes how the Forest Service had handled drilling on the ANF in the past (without NEPA procedures), how that practice has changed with implementation of the Settlement Agreement, and how the Forest Service will now apply NEPA, unlike before. Except for the grandfathered projects, “All remaining pending, and all future, oil and gas proposals on the Allegheny National Forest will be processed after the appropriate level

of environmental analysis has been conducted under NEPA.” Marten Statement at 2. More specifically, the ANF will not approve 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.” *Id.* at 3. The NEPA document would be an “EIS,” *id.* – an Environmental Impact Statement – which the Forest Service, in an acknowledgment of the change taking place, has dubbed the “Oil and Gas Development Transition 09 EIS.” *See* [http://www.fs.fed.us/r9/forests/allegheny/projects/OGM\\_eis/index.php](http://www.fs.fed.us/r9/forests/allegheny/projects/OGM_eis/index.php). This “transition” to a regime of NEPA review imposes a long-term *de facto* ban on new oil and gas operations across the 500,000-acre ANF, which will almost certainly last two to three years and likely much longer. *See* attached Declaration of former U.S. Forest Service Minerals Official, David C. Fredley (attached hereto as Exhibit B).<sup>7</sup>

Moreover, the Marten Statement reveals that the revised process is well under way and likely had been in the works before the Forest Service and the *FSEEE* Plaintiffs formally presented their Settlement Agreement to the Court. Just one day after those parties lodged the Settlement Agreement with the Court, Supervisor Marten stated that the Forest Service already had “mailed letters to oil and gas operators with ownership or leases on the ANF asking for their assistance in providing proposals for oil and gas development over the three-year period from 2010 through 2013”; and, just three days after that, the Forest Service held the first of its public

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<sup>7</sup> Mr. Fredley had 23 years experience with the U.S. Forest Service and the U.S. Department of the Interior, including substantial experience with private mineral estates in National Forests acquired under the Weeks Act of 1911; he retired from the Forest Service in 1997 as Assistant Director, Minerals and Geology Management, where he oversaw oil, gas and mineral production activities with an estimated annual value exceeding \$4 billion. *Id.*

meetings. (Copies of the April 10, 2009 letter and a follow-up letter dated April 29, 2009 are appended as Exhibit 7 to the Mayer Declaration.)

The letters show that the Forest Service directed operators to produce voluminous information on extremely short notice: to “submit . . . information on any proposed activities you anticipate between now and December 31, 2013.” The letters gave operators just over a month (originally until May 8, 2009, later extended by a week) to provide detailed information concerning any proposed development activities between the date of the letter and December 31, 2013, including: (1) maps showing future development locations; (2) proposed wells; (3) proposed access roads; (4) proposed tank batteries; (5) proposed pipelines; and (6) proposed utility lines. *See* Mayer Decl. ¶ 21 & Ex. 7. Operators declined to provide this information, raising concerns about the legality of the request (*e.g.*, lack of authority under NEPA, taking without just compensation, and failure to comply with the Paperwork Reduction Act, 44 U.S.C. §§ 3501, *et seq.*), the infeasibility of providing a four-year projection (particularly on such short notice, and the confidentiality of information disclosed. *See, e.g.*, Letter from Plaintiff Minard Run Oil Company to Leanne M. Marten (May 12, 2009) (Mayer Ex. 9); Letter from Catalyst Energy, Inc. to Leanne M. Marten (May 15, 2009) (Mayer Ex. 12). Similar responses were submitted by many operators. *See, e.g.*, Mayer Decl. ¶ 21 & Exs. 8, 10, 11.

The Forest Service optimistically (but unrealistically) claims that the ban will last just over a year (on top of the 5 months that already have elapsed since the Forest Service imposed a drilling moratorium in the ANF on January 1, 2009).<sup>8</sup> It is highly likely, based on past agency

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<sup>8</sup> The *de facto* moratorium is in place as a result of a directive from the Regional Forester that, in light of the then-pending *FSEEE* litigation, “all applications for access to reserved and outstanding oil and gas . . . pending as of January 1, 2009,” would be reviewed by the Regional Office. Based on that, Supervisor Marten directed District Rangers “to not sign/approve any  
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experience in preparing EISs, that the ban will last *at least* two to three years,<sup>9</sup> and likely much longer. *See* Fredley Decl. ¶¶ 9-14; Mayer Decl. ¶ 26 (Environmental Assessment for one minor drilling project under federal oil and gas project in ANF took over two years to complete at direct cost to lessee PGE of over \$150,000).

ANF Supervisor Marten announced this change in policy and practice just several months after receiving the following legal advice on November 7, 2008 (shortly before the *FSEEE* case was commenced) from her regional counsel:

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Notice to Proceed until the requested review by the Regional Office is complete.” *See* Mayer Decl. ¶ 18 & Ex. 6 (letter from Forest Supervisor Marten to “Interested Party” (Jan. 16, 2009) and attachments). Going forward, the Forest Service 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 period for administrative appeals. Marten Statement at 3. If any environmental advocacy group exercises administrative appeal rights, this adds 45 days from public notice of the decision after an EIS for someone to file an administrative appeal, and 45 more days for the Forest Service to decide the appeal. 36 C.F.R. §§ 215.15, 215.18. This means the Forest Service is following a policy of an ANF-wide ban on 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.

<sup>9</sup> The process for an EIS requires: (1) a public scoping to identify issues to be addressed; (2) preparation of a draft EIS; (3) circulation of the draft EIS for at least a 45-day public comment period; (4) preparation of a final EIS that responds to comments, and a record of decision explaining the alternative action chosen by the agency; and (5) a 30-day time lag 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 ANF’s hope that it can complete these steps in the EIS process in a one-year period is unrealistic, as the Forest Service’s own experience shows. For example, though the Forest Service commenced NEPA scoping in 2003 on the proposed revisions to the Allegheny Forest Plan, a final EIS and record of decision were not issued until March 2007. *See* documents available at [http://www.fs.fed.us/r9/forests/allegheny/projects/forest\\_plan\\_revision/index.php](http://www.fs.fed.us/r9/forests/allegheny/projects/forest_plan_revision/index.php). And the process did not end there. In the subsequent administrative appeal, the Forest Service Chief’s office found NEPA errors in the 2007 EIS on the revised ANF Forest Plan, and a proposed supplemental draft EIS still has not been issued as of May 2009. *See* Mayer Ex. 13, and related documents available at [http://www.fs.fed.us/r9/forests/allegheny/projects/supp\\_eis/index.php](http://www.fs.fed.us/r9/forests/allegheny/projects/supp_eis/index.php). Thus, the EIS process on the ANF Forest Plan has dragged on for *six years*, with no end in sight.

**As a matter of law**, mineral and [oil and gas] O&G ownership constitutes a real property interest that can't be taken by FS [Forest Service] denial of a right to exercise the same without the payment of just compensation. Stated a bit differently, that the FS or Congress may draw a line around an area of NF [National Forest] and label it "Experimental" or "Wilderness" or . . . "Scenic River" or "National Trail" etc. does nothing to displace or abrogate the existing rights of a private OGM owner. At least not without the payment of just compensation for the displacement of those rights. [Emphasis in original]<sup>10</sup>

Despite counsel's admonitions about compensable harm to the owners of oil and gas rights, Supervisor Marten proceeded to implement the NEPA directive even while admitting "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 1 (emphasis added). The harm she foresaw was irreparable: "For some, this impact . . . may be a *lifetime.*" *Id.* (emphasis added).

The forecast irreparable harm takes many forms. The ban will spawn unemployment in the western Pennsylvania oil and gas industry and businesses relying upon oil and gas operations. Some companies will be threatened with bankruptcy or be forced to sell oil and gas properties that cannot be developed in the near term. *See* Mayer Decl. ¶¶ 18-20, 22-25. Many would lose access to credit facility funds as uncertainties spawned by the ban preclude findings of proven and probable oil and gas reserves. *See* Mayer Decl. ¶ 23. In addition, under the "rule of capture" that applies to oil and gas estates in Pennsylvania, operators holding oil and gas rights in the ANF are put at risk to lose their resources that can be drained from their properties from operations on adjacent non-ANF parcels, and stand to lose the "go and do likewise" remedy available in Pennsylvania. *See* Mayer Decl. ¶ 24; *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 365, 65 A. 801 (1907). Other companies have purchased oil and gas leases from a

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<sup>10</sup> *See* Mayer Decl. ¶ 41 & Ex. 20.

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, which the Forest Service contends are needed for new oil and gas activities. *See* Mayer Decl. ¶ 25, and discussion *infra* regarding irreparable harm.

The operations of the nation's oldest oil refinery, the American Refining Group in Bradford, Pennsylvania, would be threatened because it relies on the ANF for up to 25% of its oil and "it would be difficult at best, and impossible at worst to find sufficient production outside the ANF to make up for losses in that proven productive area." Decl. of Harvey Golubock, President ARG, attached hereto as Ex. C. Businesses such as D & I Silica, which imports and distributes hydrofracture sand for use in ANF oil and gas operations, would lose half its business during curtailment of ANF operations, as well as well as forgo the fruits of recent capital investments of over \$1.5 million in rail cars, storage silos, and other equipment to service the needs of oil and gas operators. *See* Decl. of Glenn Carlson, attached hereto as Ex. D. As another example, East Resources, Inc., will be indefinitely precluded from drilling new wells that are critical to its drilling and production operations and will also lose the minimum volume of gas necessary to operate its natural gas liquids plants, causing economic losses and threatening substantial job losses. *See* Decl. of William A. Fustos, appended hereto as Ex. E. Plaintiff Warren County would be barred from proceeding with development of approximately 1,000 acres of oil and gas property rights that it holds in the ANF in trust for underprivileged children. *See* Decl. of County Commissioner John Bortz, attached hereto as Ex. F. These grievous and irreparable harms are detailed further below and in the attached declarations of just some of the many adversely affected parties.

## PROPERTY RIGHTS AND REGULATORY CONTEXT

**Acquisition of Surface Estates for the Allegheny National Forest, Subject to Private Mineral Rights.** The 1911 Weeks Act established funding and procedures for acquiring the land interests that became the eastern national forests. 36 Stat. 961 (1911), primarily codified at 16 U.S.C. §§ 511-21. Those land interests were privately owned and subject to State property laws. Land acquisitions normally took place between a willing buyer and seller under rules known in advance. The vast majority of land interests that became the ANF in Pennsylvania were acquired before 1935. The ANF was established by Presidential Proclamation in 1923. 43 Stat. 1925 (1923).<sup>11</sup>

Land acquisitions were supervised by the National Forest Reservation Commission. *See* 36 Stat. 962, §§ 4-7. The United States consciously followed a policy of not acquiring valuable private mineral rights. That way, limited federal appropriated funds could be used to acquire a greater acreage of surface estates valuable for timber and watershed uses. *See United States v.*

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<sup>11</sup> Even before passage of the Weeks Act, economic development in, on, and under national forests was an inherent component of the national forest system. Congress first authorized the federal acquisition of lands suitable for timber production in 1891. *See* 16 U.S.C. § 471, 26 Stat. 1103 (repealed). Six years later, in 1897, Congress passed the Organic Administration Act, which declared that the purpose of reserving land for national forests was to conserve water flows and furnish a continuous supply of timber for the United States. *See* 16 U.S.C. § 475, 30 Stat. 34. In 1960, Congress broadened the intended purposes of the national forests, directing them to be administered henceforth for multiple-use purposes, including recreation, range, timber, watershed, and wildlife and fish. *See* 16 U.S.C. § 528, 74 Stat. 215. In expanding the purposes for which national forests could be put to use, Congress intended those additional uses “to be supplemental to, ... not in derogation of” the original and overarching purpose of harvesting timber. *See United States v. New Mexico*, 438 U.S. 696, 714 (1978); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998) (recognizing national forest system policy of protecting timber interests). In other words, “national forests, unlike national parks, are not wholly dedicated to recreational and environmental values.” *Cronin v. U.S. Department of Agriculture*, 919 F.2d 439, 448 (7th Cir. 1990); *see also United States v. New Mexico*, 438 U.S. at 709 (distinguishing national forests from far more preservationist-related purposes of the national parks).

*Nebo Oil Co.*, 90 F. Supp. 73, 86-87 (W.D. La. 1950) (quoting Commission). The contemporaneous view was that private oil and gas development was consistent with forest uses and fire protection.

Oil and gas development in the Allegheny Purchase Area seldom involves the withdrawal from timber production of more than one per cent of the surface. . . . The fire preventive measures of the oil men contribute more to timber production than would the use of the small surface areas they occupy.

*Id.* As a result of this policy, 93 percent of the mineral rights in the ANF are privately owned. Although oil and gas production has been ongoing in the ANF since before the creation of the National Forest, in 2007 the Forest Service found that only about 1.4 percent of the vast lands had been cleared by oil and gas development activities.<sup>12</sup>

The Weeks Act is very respectful of State prerogatives and private property rights. Lands could be acquired for a national forest only with the consent of the State. 36 Stat. 961, §§ 1, 2. The State retained civil jurisdiction on the acquired lands. 36 Stat. 963, § 12. Within this framework of State law primacy, reserved private mineral rights are subject to federal control *only* to the extent set forth in “rules and regulations” that were “expressed in the written instrument of conveyance.” 16 U.S.C. § 518. This category of private mineral rights created when the fee owner conveyed the surface estate to the U.S. and retained the mineral estate is termed *reserved rights*.

There is also a category of *outstanding rights*. This refers to lands where the surface estate and mineral estate had been severed from one another when all land interests were in private hands. About half of the private severed oil, gas and mineral estates in the ANF consist of outstanding rights. The Weeks Act had to be amended in 1913 to allow federal acquisition of

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<sup>12</sup> Forest Service, *ANF Final Environmental Impact Statement* at 3-163 (Mar. 2007); excerpt attached to Mayer Decl. at Ex. 17.

a surface estate, and the acquisition was subject to outstanding mineral rights or easements created earlier. 37 Stat. 828, 855 (1913). The United States acquired and paid for only the rights the private surface owner could convey. On such lands, the relationship between the surface owner and mineral owner is determined by State property law. There is no Weeks Act basis or regulations-expressed-in-the-deed basis for any federal regulatory authority.

**The Mineral Estate Is the Dominant Estate.** As the General Accounting Office has summarized, because the mineral estate is the dominant estate, the Forest Service has no ability to prevent private mineral development and only limited rights to seek accommodations.

Under the laws of many states, a mineral estate that has been separated from the surface is legally considered to be the “dominant estate” and the surface is “servient.” The owner of a mineral estate has either an explicit or implied right of entry or access to minerals over and through the surface....

With outstanding mineral rights, the Forest Service must accept those restrictions to protect surface values which may have been included in the original deed separating the mineral estate from the surface. The Forest Service has the same rights and duties as any other surface owner in a state.... *Terms of a deed which give mineral owners extensive rights can result in the federal government having little or no ability to control mineral development.*

*Private Mineral Rights Complicate The Management Of Eastern Wilderness Areas* at 28-29 (GAO/RCED-84-101, 1984) (emphasis added) (available at <http://www.fs.fed.us/geology/romineral.html>).

Under Pennsylvania and any federal common law of split estate property rights, the mineral owner may proceed after providing notice of planned operations, and a 60-day period for any negotiations with a government surface owner on reasonable locations for operations and access. The respective property rights of the ANF surface owner and the private owner of outstanding mineral rights were addressed in a preliminary injunction context in *United States v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. LEXIS 9570 (W.D. Pa. Dec. 16, 1980).

[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.

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, the *Minard Run* Court adopted some “minor restrictions which . . . should not seriously hamper the extraction of oil or gas.” *Id.* at \*16. Notably, the Court agreed with the acknowledgment by the United States that the Forest Service was not acting in a sovereign capacity but as a typical surface owner under Pennsylvania common law. *Id.* at 12 (“it is obvious that the United States in this situation has no greater rights than any other landowner having acquired title to the surface subject to the mineral rights beneath.”).

The Forest Service “is entitled to receive from defendant reasonable advance notice in writing” on five matters (e.g., a map showing the proposed well sites and access routes, 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.” *Id.* at \*22.

*Minard Run* accurately captures the longstanding Pennsylvania common law of split estates.<sup>13</sup> Most recently, the Supreme Court of Pennsylvania reinforced that even a

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<sup>13</sup> The owner of the dominant mineral 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); see, e.g., *Dewey v. Great Lakes Coal Co.*, 84 A. 913, 915 (Pa. S. Ct. 1912). In the absence of deed language to the  
(continued...)

governmental surface owner cannot prevent a mineral owner's ability to proceed. Property rights cannot be altered if the surface is part of a public park (or, here, a public forest) without compensation.

Appellee Belden & Blake owns or leases oil and natural gas estates . . . in Oil Creek State Park; the Commonwealth owns the surface. . . . [T]he Department of Conservation and Natural Resources . . . sought to impose a "coordination agreement" on Belden & Blake before allowing it to access the parcels. . . . We find partial summary judgment in Belden & Blake's favor was warranted. Belden & Blake has the right to enter the surface to access what it owns. . . . Chartiers holds that the exercise of a subsurface owner's rights must be reasonable, and Belden & Blake facially fulfilled its obligation to do so. The matter before us turns on whether DCNR's special responsibilities allow it to unilaterally impose additional conditions on Belden & Blake's exercise of its right to enter. . . . DCNR contends [that it has Pa. constitutional authority] to impose conditions restraining those exercising their rights to the subsurface. Such a holding would be a departure from our jurisprudence, for it would place the burden on the subsurface owner to seek judicial redress. Chartiers clearly places the burden on the surface owner to seek legal redress to prevent or restrain the subsurface owner's exercise of its rights. . . . A subsurface owner's rights cannot be diminished because the surface comes to be owned by the government, or any party with statutory obligations, regardless of their salutary nature. . . . DCNR may seek additional conditions because of its mandate, but it has no authority to impose them unilaterally without compensation. . . . If there is no agreement on the reasonableness of the conditions sought, DCNR must seek redress in the appropriate judicial forum. . . . If DCNR wishes further conditions pursuant to its statutory duties, the Commonwealth must compensate the subsurface owner for the diminution of its rights. . . . However, a property owner's interests and rights cannot be lessened, nor their reasonable exercise impaired without just

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(continued)

contrary, "no permission or consent is required from the surface owners prior to going on the land to mine or" drill, 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). Under an accommodation doctrine, oil and gas rights must be exercised with "due regard" to the interests of surface owners – the parties have "sixty days" to attempt to reach an "amicable agreement" and, if that fails, a party 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); see *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 plaintiff was bound to choose the one that would do the least injury" to the surface owner).

compensation, simply because a governmental agency with a statutory mandate comes to own the surface.

*Belden & Blake Corp. v. Commonwealth of Pennsylvania*, \_\_\_ A.2d \_\_\_, 2009 WL 1143281 at \*1-4 (Pa. S. Ct. Apr. 29, 2009). *Belden & Blake* expresses neutral principles of property law, applicable in all split estate situations, and to both state and federal owners of surface estates.

ANF Forest Supervisor Wright expressed the same understanding of the relative property rights at a 1991 House oversight hearing regarding split estate relationships in the ANF:

Mr. Wright. . . . in 1923, we decided to begin acquiring the land. . . . but we did not pick up the mineral rights at that point. The situation that this creates is those who own the subsurface rights have a constitutional right to access that oil and gas subsurface right, and they have a constitutional right to travel across our surface to get there and try to access it. . . .

We do not give people permission to drill. That is their right. It is not a Federal action.

Mr. Kostmayer. You do not have to approve a plan?

Mr. Wright. No, sir. We review the plan and negotiate a plan with them. We do not approve a plan. . . .

Mr. Wright. The [National Environmental Policy Act] NEPA applies to all activities that we have in that area outside of oil and gas runs. It does not apply to oil and gas operations.

Mr. Kostmayer. And what do you cite as your legal basis for that statement?

Mr. Wright. Mr. Chairman, this issue. . . [is being] explored right now by the attorneys of the USDA General Counsel. It is our position at this time that there is no Federal action that triggers a NEPA documentation for oil and gas operations with an outstanding right situation. . . . And in this particular case, when a private mineral owner exercises his constitutional right, that is not really a Federal action. . . .

Mr. Wright. If [negotiation] does not work, then we must go to court to resolve differences.

*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., 75-79, 113 (1991) (1991 Oversight Hearing); excerpts attached as Exhibit 3 to Mayer Declaration.

The 1991 Congressional hearing record provides the official digest of an opinion by the U.S. Department of Agriculture Office of General Counsel. The opinion explains that, in light of the property law relationship, *NEPA does not apply* to exercise of outstanding private mineral rights.

[W]e do not find that exercise of such rights on National Forest land in Pennsylvania to be a federal action for NEPA purposes. This is so, in part, because Forest Service approval is not a legal condition precedent to the exercise of such rights under either state law, current federal law or regulation, or Forest Service Policy. See for example FSM 2832.... In summary, we find that in Pennsylvania, the third party mineral owner, without any express words of grant is entitled to use so much of the surface as may be necessary to operate the mineral estate and remove the product. The question of whether the right can be exercised, and the ability to deny that right, is simply not left to the surface owner under Pennsylvania law! A “reasonable use” standard does govern the exercise of such rights, but it also recognizes the limited role of the surface owner in the process. In other words, if the exercise of such rights extends beyond what is reasonable, as was the situation some years ago in the instance of Minard Run, then your recourse is to move to protect your rights as surface owner, to reach a reasonable accommodation so that each may enjoy their respective rights.... That practice does not elevate your involvement to a federal action for NEPA purposes.

1991 Oversight Hearing at 192-93.

The *Minard Run* statement, and ANF Supervisor Wright’s statement, of property and regulatory rights were codified by Congress in § 2508 of the Energy Policy Act of 1992. It requires that, for “the Allegheny National Forest” (30 U.S.C. § 226(o)(5)), the Forest Service shall issue rules<sup>14</sup> for private oil and gas estates that are limited to the following terms and conditions specified by Congress.

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<sup>14</sup> The Forest Service has not issued the rules prescribed by the Energy Policy Act. Nonetheless, 30 U.S.C. § 226(o) remains effective as a statement of federal legislative policy governing the ANF.

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

(3) Advance notice under paragraph (2) shall include each of the following items of information:

(A) A designated field representative.

(B) A map showing the location and dimensions of all improvements, including, but not limited to, well sites and road and pipelines accesses.

(C) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.

(D) A plan of erosion and sedimentation control.

(E) Proof of ownership of mineral title.

Nothing in this subsection shall be construed to affect any authority of the State in which the lands concerned are located to impose any requirements with respect to such oil and gas operations.

30 U.S.C. § 226(o), 106 Stat. 3108 (1992).

Thus, § 226(o) respects State law by tracking *Minard Run*. It does not create new federal regulatory authority over private oil and gas rights in the ANF. The legislative history shows that Congress considered and rejected such a broader provision.<sup>15</sup>

**The Forest Service Rules, Manual, and Handbooks.** The Forest Service has adopted no rules in the Code of Federal Regulations that assert private oil and gas operations are

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<sup>15</sup> After the 1991 Oversight Hearing, the House in 1992 passed a provision that would have sought to provide the ANF with plausible authority to regulate “outstanding” mineral rights to “prevent or minimize damage to the environment and other resource values.” H.R. Rep. No. 102-474, pt. 8, at 42 (1992) (§ 2815(p)(2) of the House bill). “The Committee anticipates that the Secretary would utilize the authority granted under this section by acting to permit only those oil and gas development activities which, according to properly submitted applications, will satisfy the terms and conditions established in the regulations.” H.R. Rep. No. 102-474, pt. 8, at 137.

The Conference Report on the Energy Policy Act of 1992 declined to adopt the House provision. Congress decided against granting the Forest Service the dubious authority to issue after-enacted regulations regarding severed private mineral rights. That approach would have been contrary to the Weeks Act. It would have raised constitutional issues, including the taking of vested property rights. The Weeks Act limits regulations to those disclosed at the time the purchase price was negotiated, as the only applicable regulations “must be ‘expressed in and made part of’ the instrument of conveyance.” *United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001). Instead, Congress chose to simply reaffirm what *Minard Run* said was the Pennsylvania property law regarding private oil and gas estates in the ANF.

unlawful without Forest Service “approval” or an agency “permit” of some kind. Nor has the agency adopted a rule that NEPA applies in those situations.

A 1963-adopted rule asserts permitting authority with respect to Weeks Act reserved private mineral estates created *after 1963*. But, consistent with 16 U.S.C. § 518, the prior “regulations heretofore issued by the Secretary of Agriculture to govern the exercise of mineral rights reserved in conveyances to the United States . . . continue to be effective in the cases to which they apply.” 36 C.F.R. § 251.15.

The currently effective Forest Service Manual describes the Forest Service’s limited role with respect to private mineral estates:

*The Secretary’s rules and regulations do not apply to the administration of outstanding mineral rights. . . . 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 (attached as Mayer Ex. 5; also available at <http://www.fs.fed.us/im/directives/fsm/2800/2830.txt>) (emphasis added).

The Manual goes on to provide detail that is consistent with *Minard Run Oil Co.* and 30 U.S.C. § 226(o). Forest Service Manual §§ 2830.3, 2832; <http://www.fs.fed.us/im/directives/fsm/2800/2830.txt>. This includes restating a 60-day deadline for reaching accommodations before private mineral operations can commence. *Id.* If the private operating plan is not acceptable to the Forest Service, the agency may attempt to negotiate an acceptable agreement, but cannot veto or disallow mineral development.

2832.2 – Negotiation of an Acceptable Operating Plan. If an operating plan does not meet the three criteria in Sec. 2832.1, the Forest Supervisor shall meet with the owner or lessee to negotiate modifications needed to make the plan acceptable. If negotiations are unsuccessful, the Forest Supervisor shall consult with the Regional Forester and the Office of General Counsel before advising the owner or lessee, by registered letter, of the unacceptable portions of the plan and stating that implementation of the plan may require appropriate legal action.

Forest Service Manual §§ 2832.2; *see also id.* § 28321 (Mayer Ex, 5, also available at <http://www.fs.fed.us/im/directives/fsm/2800/2830.txt>).

In 1984, the ANF produced a “Handbook for Oil & Gas Administration” (ANF O&G Handbook). *Minard Run* was described as setting the following “standard operating procedures on the ANF” for outstanding mineral rights. ANF O&G Handbook, Chapt. 1 at 19.<sup>16</sup> “*Outstanding rights....are not subject to any of the Secretary of Agriculture’s Rules and Regulations.*” *Id.* Chapt. 2 at 11 (emphasis added).

Most *reserved* mineral deeds in the ANF incorporate some version of rules adopted in 1911. Chapter 1 of the ANF O&G Handbook provides copies of the three main variants of the rules that were negotiated with a particular landowner, and then added to the deed. *Id.* Chapt. 1 at 15. The 1911 rules generally require “[n]o permit” for “surface use, occupancy or disturbance.” ANF O&G Handbook, Chapt. 1 at 3, Chapt. 2 at 14. At bottom:

[M]ineral and surface owners are co-managers of the same tract of land. It is a two-way street, involving both parties. . . . The Forest Service is a resource-management agency, not a regulatory authority. . . . Successful resource integration is achieved through negotiations and recommendations between the Forest Service and the oil and gas industry.

ANF O&G Handbook, Chapt. 2 at 1.

**The ANF Forest Plans.** The National Forest Management Act requires that a land resource and management plan (forest plan) be prepared for each national forest, and that it be revised every 15 years. 16 U.S.C. § 1604. The 1986 ANF Forest Plan – like the Forest Service Manual, the 1984 ANF O&G Handbook, and *Minard Run* – reflects the Forest Service’s limited ability to influence the exercise of dominant private mineral rights. Its Part 2800 standards for private minerals state:

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<sup>16</sup> Excerpts from the 1984 Handbook are attached as Exhibit 15 to the Mayer Declaration.

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.

Forest Service administration of outstanding and reserved mineral rights will be in accordance with deeds, mineral reservations, and state and federal laws.

Actions required of mineral operator by law, mineral reservation, or contracts

At least 60 days in advance of proposed development, the developer will provide the Forest Service with written notification of planned activities. . . . The Forest Service works cooperatively with oil and gas developers to mitigate adverse impacts on surface resources.

*Land and Resource Management Plan, Allegheny National Forest* 4-42 to 45 (1986).<sup>17</sup>

In 2007, the Forest Service's Eastern Regional Office produced a revised ANF Forest Plan. The revised ANF Forest Plan asserted broader Forest Service control over private oil and gas development than is supported by the property rights and practices described above. POGAM and other mineral interests administratively appealed the 2007 revised ANF Plan. The appeal decision for the Forest Service Chief set aside, at least temporarily, the oil and gas portions of the 2007 ANF Plan for procedural and substantive defects.<sup>18</sup> The Chief's office directed the ANF to more accurately describe the legal rights and duties of various classes of split estate owners.

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<sup>17</sup> Available at [http://www.fs.fed.us/r9/forests/allegheny/projects/forest\\_plan/documents/ANF-LRMP-1986.pdf](http://www.fs.fed.us/r9/forests/allegheny/projects/forest_plan/documents/ANF-LRMP-1986.pdf).

<sup>18</sup> "Allegheny National Forest 2007 Revised Land and Resource Management Plan (Plan) Appeal Decision" at 3-5 (Feb. 15, 2008) ("2008 ANF Plan Appeal Decision") (copy appended at Mayer Ex. 13; also available at [http://www.fs.fed.us/emc/applit/2008wo\\_decisions.htm](http://www.fs.fed.us/emc/applit/2008wo_decisions.htm)). The Chief's office "suspended . . . the use of the Revised Plan design criteria specific to private OGD." *Id.* at 3.

I instruct you to incorporate language in the ROD, Revised Plan and FEIS to clarify the Allegheny NF's authority to manage oil and gas activities. This includes:

- Identifying the roles and responsibilities of the Forest Service, State of Pennsylvania and the private oil and gas operator for the purpose of protection of surface resources from oil and gas development.
- Distinguishing between reserved and outstanding rights and how the management of these two distinct private mineral estates may vary depending upon language in the individual deeds and/or the USDA Secretary's rules and regulations.

2008 ANF Plan Appeal Decision at 4.<sup>19</sup>

**“Notices to Proceed.”** No deed, statute, regulation, or principle of Pennsylvania property law requires that a mineral owner receive a “Notice to Proceed” from a surface owner before mineral operations can lawfully commence. The 1984 ANF Handbook employs the term with respect to reserved mineral rights. A Notice to Proceed is merely a Forest Service acknowledgment that the 60-day accommodation period has been concluded satisfactorily and that the Forest Service has no further requests of the private mineral estate holder. No codified regulation of the U.S. Forest Service (or any other agency) mentions or requires issuance of a Notice to Proceed. *Belden & Blake* and other legal authorities presented above make it clear that, on the contrary, the surface owner's affirmative assent (e.g., through a notice to proceed, agreement, or permit) is *not* required for the owner of the dominant mineral estate to commence oil and gas operations that are within the scope of its property rights.

**The Pennsylvania Oil and Gas Act.** The Pennsylvania Oil and Gas Act (enacted in 1984 and last amended in 2001) is the principal statute governing the environmental impacts of oil and gas development in Pennsylvania. The statute requires the Pennsylvania Department of

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<sup>19</sup> The 2008 ANF Plan Appeal Decision and the 2007 ANF Forest Plan are the subject of a related pending legal action in this Court. See *POGAM and AFA v. U.S. Forest Service*, No. 1:08-cv-00162-SJM.

Environmental Protection (“DEP”) to issue a “well permit” within “45 days of the submission of a permit application.” It gives a surface owner “15 days after receipt of the plat by the surface owner” to object to issuance of a well permit. 58 PA. CONS. STAT. Chapt. 11, §§ 601.201, 601.202.

**NEPA.** NEPA is a procedural statute which requires consideration of environmental impacts prior to major federal agency actions significantly affecting the environment. 42 U.S.C. § 4332. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-53 (1989). The implementing NEPA rules: (1) require draft and final environmental impact statements (EISs) prior to taking any major federal action significantly affecting the quality of the human environment; (2) require a shorter environmental assessment (EA) on another class of federal actions; and (3) provide that some agency actions can be categorically excluded from any NEPA documentation duty. *See* 40 C.F.R. Group 1500. It is well documented that preparation of an EIS typically takes multiple years. *See* Fredley Decl. ¶¶ 9-14, Ex. B hereto.

Because NEPA applies only “to the fullest extent possible” (42 U.S.C. § 4332(2)(C)), where another law creates a short deadline for a federal action, NEPA does not apply. *Flint Ridge Devpt. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776 (1976). Additionally, NEPA does not apply where a federal agency has insufficient control over a private action. *E.g.*, *Sierra Club v. Penfold*, 857 F.2d 1307, 1312-14 (9th Cir. 1988). As we have shown below, NEPA does not apply to the exercise of private oil and gas rights in the ANF for both of these reasons.

### **ARGUMENT**

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*

*Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2009). See also, e.g., *Swartzwelder v. McNeilly*, 297 F.3d 228, 234 (3d Cir. 2002) (opinion by Alito, J.). In each case, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 129 S. Ct. at 376 (quoting *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987)).

Plaintiffs satisfy the requirements for a preliminary injunction. As we explain in the argument that follows, Plaintiffs are likely to succeed on their claim that the Forest Service’s new NEPA directive for the ANF is unlawful. Furthermore, without a preliminary injunction, Plaintiffs are likely to suffer irreparable harm to their property rights and economic and governmental interests, whereas no harm will befall the Forest Service if the new policy is enjoined pending this Court’s review.

Additionally, courts “should pay particular regard for the public consequences” of an injunction. *Winter*, 129 S. Ct. at 376-77 (citations omitted). A preliminary injunction in this case will serve the public interest by: (1) averting the ill-timed and severe detrimental social and economic consequences to the ANF region that the Forest Service admits will occur under the new policy; (2) implementing the Pennsylvania state legislative intent that the state’s assent to the federal government’s acquisition of ANF lands under the Weeks Act “is conditioned on the preservation of State and privately owned property interests”; (3) preventing implementation of a new burdensome federal agency policy that was developed behind closed doors, without the participation of affected businesses and communities, contrary to the public processes that are required under the APA and endorsed in the President Obama’s call for greater transparency in the federal government. Public officials have addressed all these interests recently. See Marten Statement at 1 (“we acknowledge the impact this will have on families and businesses, especially

at a time when our nation is facing a difficult economic downturn”); Pennsylvania S. Res. No. 294, 2008 Sess. (Apr. 29, 2008); Pennsylvania H. Res. No. 693, 2008 Sess. (Pa. Apr. 7, 2008)<sup>20</sup> (copies appended as Mayer Exs. 23 and 24); Letters from Pa. Attorney General and Chair of Pa. Senate Environmental Resources and Energy Committee addressing economic impacts and raising concerns about rights under state law (Mayer Exs. 21, 22); Obama Transparency Memo.

The adverse public consequences of the Forest Service’s new NEPA directives were aptly described by Pennsylvania Senator Mary Jo White in a May 20, 2009 letter to Gail Kimbell, Chief, United States Forest Service (Mayer Ex. 21), stating, in part:

As chairman of the Pennsylvania Senate Environmental Resources and Energy Committee, and a senator representing a northwestern Pennsylvania district that

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<sup>20</sup> In relevant part, the 2008 Pennsylvania legislative resolutions provide:

WHEREAS, Recent revisions to the Land and Resource Management Plan for the Allegheny National Forest purport to impose new and additional rules and regulations on oil, gas and mineral estates and the easements and surface rights appurtenant thereto that had been or were excepted and reserved by their owners when the United States acquired the lands pursuant to the Weeks Law; therefore be it

RESOLVED, That the Senate of the Commonwealth of Pennsylvania . . . REAFFIRM that the consent of the Commonwealth to the acquisition of the Allegheny National Forest Lands pursuant to the Weeks Law by the act of May 11, 1911 (P.L. 271, No. 173) did not and does not confer power on the United States to manage or regulate or to extinguish, diminish or disparage any State or privately owned easements, rights-of-way, mineral estates and surface rights appurtenant thereto or any other property interests that were in existence but not purchased or condemned by the United States at the time of acquisition; and be it further

RESOLVED, That the adoption or imposition by the United States of any rules, regulations or policies that would manage, regulate, extinguish, diminish or disparage those property interests exceed the consent of the Commonwealth of Pennsylvania insofar as the rules, regulations or policies are not expressed in and made part of the written instrument conveying title to the lands to the United States; . . . .

Pennsylvania S. Res. No. 294, 2008 Sess. (Apr. 29, 2008); *see also* Pennsylvania H. Res. No. 693, 2008 Sess. (Pa. Apr. 7, 2008).

includes much of the Allegheny National Forest, I am writing to share with you my strong opposition to recent actions taken by the Forest Service which are infringing upon property rights and impeding the responsible development of oil and gas.

...

I have heard from numerous oil and gas operators and their employees that are opposing the Forest Service's actions. Many of these operators are extremely disappointed that, after a productive working relationship with your agency for so many years, they are confronting an adversarial Forest Service that seems intent on impeding their right to access their own property. *Additionally, the Forest Service's new hurdles are having a significant economic impact on the region, at a time when our region needs every job it can get.* [Emphasis added.]

The irreparable harm extends throughout the four-county ANF region and even to natural resource production areas outside the ANF. It extends to small towns like Sheffield, Pennsylvania, in Warren County where D & I Silica imports and annually distributes up to 30 million pounds of sand used in oil and gas well drilling, which is hauled from Wisconsin and Illinois by rail. *See* Decl. of Glenn Carlson of POGAM member D & I Silica. D & I has made capital expenditures of \$1.5 million over the past three years (*id.* ¶ 4), and the company planned to invest another \$1 million in 2009, but now, as a result of the new ANF drilling ban, it expects a severe "reduction in D & I's business" which will "necessitate radical survival measures which will be enormously disruptive to our company." *Id.* ¶ 6.

Further adverse effects will be felt in Bradford, Pennsylvania, where the American Refining Group ("ARG") operates the nation's oldest oil refinery, employing over 325 people in good-paying jobs, which operations are dependent, in substantial part, upon continued production of oil from new wells in the ANF. *See* Decl. of Harvey Golubock, ARG President, at ¶ \_\_\_. *See also* Declaration of William F. Fustos, Chief Operating Officer of East Resources, Inc. (which owns 60,000 acres of OGM properties in the ANF but has no "grandfathered" proposals under the Settlement Agreement) (attached hereto as Ex. E). Furthermore, this irreparable harm

extends to the municipalities and communities which are benefiting from this economic activity that is providing jobs and incomes to thousands of families. *See* Decl. of John Bortz, Warren County Commissioner (Ex. F).

**I. Plaintiffs Are Very Likely to Prevail on the Merits of Their Challenge to the New NEPA Directive**

The Forest Service's revised NEPA directive rests on the Settlement Agreement. Yet, the Attorney General does not have settlement authority "to agree to settlement terms that would violate the civil laws governing the agency." *United States v. Carpenter*, 526 F.3d 1237 (9th Cir. 2008) (quoting *Executive Business Media v. U.S. Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993)). Under the changed Forest Service policy driven by the Settlement Agreement here, "the Forest shall not issue Notices to Proceed for any proposals to develop reserved and outstanding oil and gas resources on the Forest prior to conducting the appropriate NEPA analysis." Settlement Agreement at 2. This assertion that NEPA applies to private development of the dominant oil and gas estate violates property rights and other laws governing the Forest Service. Hence, the Settlement Agreement is unlawful.

The contemporaneous Marten Statement tied to the Settlement Agreement creates a long-term *de facto* ban on new oil and gas operations that will last at least one year, and likely several years, until a forest-wide EIS has been approved by the agency and subject to further judicial review. *See* Fredley Decl. ¶¶ 9-14 (Ex. B hereto) This lengthy NEPA-caused ban is contrary to law for reasons explained below.

**A. Because The Forest Service Has Only A 60-Day Window To Reach Accommodations, NEPA Does Not Apply**

The owner of dominant mineral estates in the ANF 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. This 60-day limit is

imposed: (1) by property law and case law, including the *Minard Run* precedent of this Court and *Belden & Blake*; (2) by statute, in 30 U.S.C. § 226(o); and (3) by longstanding and still-effective agency guidance in the Forest Service Manual, the ANF O&G Handbook, ANF statements at the 1991 House oversight hearing, a 1991 legal opinion, and the 1986 ANF Forest Plan. For example, Forest Service Manual § 2830.1 recognizes the agency must:

[P]romptly 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.

A government surface owner of a public park or forest cannot “impose [delays or other] conditions restraining those exercising their rights to the subsurface.” *Belden & Blake Corp. v. Commonwealth of Pennsylvania*, 2009 WL 1143281 (Pa. S. Ct. Apr. 29, 2009). This Court called for only “60 days” of advance notice and discussion precisely because they were “minor restrictions” which “should not hamper the extraction of oil and gas.” *Minard Run*, 1980 U.S. Dist. LEXIS 9570 at \*21-22.

The 60-day “minor restrictions” have been grievously exceeded in the Forest Service’s new NEPA directive. The Forest Service is imposing at least a year-plus delay in reviewing planned private mineral operations. Thus, the Marten Statement and the ban of over one year are unlawful under *Minard Run* and other applicable law allowing the owner of the dominant mineral estate to proceed after 60 days of providing notice to the Forest Service.

NEPA does not apply where an agency has such a short deadline to act. The Supreme Court has held that NEPA does not apply where a statute required federal action within 30 days because: (1) NEPA applies only “to the fullest extent *possible*” (42 U.S.C. § 4332) (emphasis added); and (2) it is not possible to prepare and circulate draft and final EISs in a 30-day period. *Flint Ridge Devpt. Co. v. Scenic Rivers Ass’n*, 426 U.S. 776 (1976). An appellate court has

found NEPA does not apply where other applicable law creates a 60-day period for action. *City of New York v. Minetta*, 262 F.3d 169, 182-83 (2d Cir. 2001). Here, this means either that: (1) NEPA does not apply; or (2) the Forest Service must complete any NEPA analysis and negotiations within a 60-day time window, which it admits is impossible.<sup>21</sup> NEPA clearly does not authorize the over one year ban on ANF consideration of private oil and gas development that the Forest Service has imposed through the Marten Statement.

The Pennsylvania Supreme Court recently found in *Belden & Blake* that protection goals under the Pennsylvania Constitution could not alter a mineral owner's property right to commence operations in a timely manner. Similarly here, the protection goals of NEPA and general authorities of the Forest Service cannot alter, without paying compensation, a mineral owner's property right to commence operations in a timely manner.

Thus, because there is a 60-day time limit on a Forest Service response to an operating plan, NEPA (which applies only to the "extent possible") must give way and dominant private property rights must be respected.

**B. The Forest Service Lacks Sufficient Control to Render Private Oil and Gas Development a Federal Action Subject to NEPA**

NEPA also does not apply, and cannot be used as a basis for the multi-year delays in processing proposed oil and gas operating plans, for two other related reasons.

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<sup>21</sup> In the *FSEEE* case, even the Plaintiffs acknowledged 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). *FSEEE*, Plaintiffs' Surreply to Intervenor's Emergency Motion for a Stay (April 22, 2009). Under that review, not even a concise EA could be prepared within the 60-day period the Forest Service has to seek accommodations of its interests in managing the surface estate. The EIS process would take years longer. See Fredley Decl. ¶¶ 9-14.

NEPA, which applies only to *federal* agency actions, 42 U.S.C. § 4332(2)(C), as a matter of law is inapplicable to *private* mineral activities that happen to be subject to federal notice and review obligations similar to that in the ANF. *E.g., Sierra Club v. Penfold*, 857 F.2d 1307, 1312-14 (9th Cir. 1988). In that case, the rules of the federal landowner (the Bureau of Land Management (“BLM”)) only required advance “notice” of certain proposed mining operations on federal lands under the Mining Law of 1872, 30 U.S.C. § 22 *et seq.* BLM also had the statutory and regulatory power to avoid undue degradation of federal resources under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq.* The court held, “Neither BLM’s approval process nor regulatory involvement” was “sufficient to trigger NEPA.” 857 F.2d at 1314. The District Court for the District of Columbia later agreed in the context of mineral exploration projects on federal lands that such “private projects, undertaken in coordination with the Federal Government” by a “notice,” are not sufficiently federal to be subject to NEPA. *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 55-56 (D.D.C. 2003).

The “notice” situations in *Penfold* and *Mineral Policy Center* are functionally identical to the “notice” of planned mineral development operators provide in the ANF and to the allowance of Forest Service review to seek accommodations here under *Minard Run* and 30 U.S.C. § 226(o). Consequently, under the *Penfold* and *Mineral Policy Center* precedents, NEPA does not apply.

Moreover, under Third Circuit precedent, “[f]ederal approval of a private party’s project, where that approval is not required for the project to go forward, does not constitute a major federal action” triggering NEPA. *State of New Jersey Dep’t of Env’tl. Prot. v. Long Island Power*

*Auth.*, 30 F.3d 403, 417 (3d Cir. 1994).<sup>22</sup> There, the Third Circuit found the Coast Guard's "consistency review" and purported "approval" of a private action that did not otherwise require a federal permit or license was not subject to NEPA. *Id.* at 415-18. Similarly here, no Forest Service permit or other federal approval is required by any duly promulgated regulation prior to the exercise of dominant private mineral rights in the ANF. Accordingly, NEPA does not apply.

In another decision, the Third Circuit concluded that NEPA does not apply "when the agency had no discretion to prevent the [private proponent's] action because of environmental impact" even if the agency "in any sense enables the other party's action." *National Ass'n for the Advancement of Colored People v. Medical Center*, 584 F. 2d 619 (3d Cir. 1979). NEPA should not be read to apply and thereby

hinder the Government's ability to carry on its myriad programs and responsibilities in which it assists, informs, monitors and reacts to activities of individuals, organizations, and states, but in which the Government plays an insubstantial role.

*Id.* at 634. Similarly here, while some limited accommodation may be required, private oil and gas operations cannot be vetoed. Accordingly, there is insufficient federal authority to trigger NEPA duties.

This is precisely the reasoning the Forest Service's attorneys employed in informing Congress in 1991 that NEPA does not apply to the Forest Service's limited role in private oil and gas development in the ANF.

[W]e do not find the exercise of such [outstanding mineral] rights on National forest lands in Pennsylvania to be a federal action for NEPA purposes. This is so,

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<sup>22</sup> This accords with the law in other circuits that NEPA does not apply to non-federal actions and to actions where a federal agency has only a limited role. *E.g.*, *Foundation for Horses v. Babbitt*, 154 F.3d 1103 (9th Cir. 1997); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 506, 513-14 (4th Cir. 1992); *Macht v. Skinner*, 919 F.2d 13, 18-20 (D.C. Cir. 1990); *Goos v. ICC*, 911 F.2d 1283, 1294-96 (8th Cir. 1990).

in part, because Forest Service approval is not a legal condition precedent to the exercise of such rights under either state law, current federal law or regulation, or Forest Service policy. See for example FSM 2832. Our Washington office has reviewed the legal opinion and concurs with the substance of its analysis.

In summary, we find that in Pennsylvania, the third party mineral owner...is entitled to occupy and use so much of the surface as may be necessary to operate the mineral estate and remove the product. The question of whether the right can be exercised, and the ability to deny that right, is simply not left to the surface owner under Pennsylvania law!.... [While the Forest Service and mineral owners strive to reach a] reasonable accommodation... that practice does not elevate your involvement to a federal action for NEPA purposes.

1991 Oversight Hearing at 191-92.<sup>23</sup>

Congress, after being informed that NEPA did not apply, chose to not alter that practice in the 1992 ANF provision. This provides further compelling support for concluding that NEPA does not apply here.

**C. *Duncan Energy* Does Not Involve NEPA Nor Override the Foregoing Law**

We expect Federal Defendants to argue that the Court should ignore the law just described and instead adopt the Eighth Circuit's view in two *Duncan Energy* decisions that the Forest Service has authority to regulate and approve private oil and gas activities. See *Duncan Energy Co. v. U.S. Forest Serv.*, 109 F.3d 497 (8th Cir. 1997), and 50 F.3d 584 (8th Cir. 1995).

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<sup>23</sup> The legal opinion was provided for the record after the following exchange between ANF Supervisor Wright and Rep. Kostmayer:

Mr. Kostmayer. What is the basis for your view that NEPA does not apply?

Mr. Wright. We must have a Federal action that really triggers for NEPA documents to kick in. And in this particular case, when a private mineral right owner exercises his constitutional [property] right [with respect to the dominant mineral estate], that is not really a Federal action. We respond to that action that he takes and try to negotiate the subsurface order. But it is being looked at right now, as I was advised by our attorneys. It appears at this time that it [NEPA] really does not apply.

1991 Oversight Hearing at 79; Ex. 3 to Mayer Decl.

Those out-of-circuit decisions are distinguishable, however, and are not persuasive in light of this Court's *Minard Run* precedent, the *Belden & Blake* decision, 30 U.S.C. § 226(o), and other law applicable to the ANF.

Notably, *Duncan Energy* did not concern property and regulatory rights in a Weeks Act split-estate situation. Rather, it concerned split-estate rights in North Dakota when the U.S. acquired surface rights for a national grassland under the "Bankhead-Jones Farm Tenant Act." *Duncan*, 50 F.3d at 585 n.1. Moreover, *Duncan Energy* did not hold that NEPA was applicable to the private oil and gas activities at issue. For these reasons alone, *Duncan Energy* is distinguishable.

Unlike the Bankhead-Jones Farm Tenant Act, the 1911 Weeks Act "does require 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) (quoting 16 U.S.C. § 518 and finding the Weeks Act protects certain easements from Forest Service regulation). In our case, the legislative policy of the Weeks Act does prohibit later-adopted statutes or rules from interfering with a mineral owner's property rights in the ANF.

There is no duly promulgated and codified Forest Service regulation which mentions or requires Forest Service issuance or approval of a "Notice to Proceed" as a precondition to oil and gas activity. *See generally* 36 C.F.R. Parts 200 to 299. Two regulatory provisions (36 C.F.R. § 251.50 and § 261 address "permits" for "special uses," but even the Settlement Agreement does not require special use "permits" for oil and gas activities associated with private severed mineral rights. One other regulation, 36 C.F.R. § 251.15, was promulgated on May 3, 1963, 28 *Fed. Reg.* 4440, and it also requires a "permit" but only applies to "mineral rights hereafter [*i.e.*,

post-1963] reserved.” 36 C.F.R. § 251.15(c). Virtually all the private severed mineral estates in the ANF were created long before 1963, and the Forest Service knows this.

The far more relevant precedent which did involve the 1911 Weeks Act is *United States v. Srnsky*, 271 F.3d 595 (4th Cir. 2001), where the appellate court rejected the position of the U.S. Forest Service that private individuals were required “to apply for a Forest Service special use permit in order to use a 2.6 mile road through the Monongahela National Forest [in West Virginia], which provides the sole access to their home.” *Id.* at 598. The court held that the Weeks Act, 16 U.S.C. § 518, precluded the Forest Service from requiring a “special use permit” for the exercise of common law easements that were existing under West Virginia law at the time of Forest Service acquisition of the lands in question. The court found that the “*statutory scheme, on the government’s view, would wipe the National Forest clean of any and all easements, implied or express.*” *Srnsky* at 604 (emphasis added). The Fourth Circuit rejected the Forest Service’s view, following *North Dakota v. United States*, 460 U.S. 300, 317-19 (1983), for the rule that state law generally governs federal land acquisitions, unless state law is “aberrant or hostile.”

In another split-estates case, the terms of the Migratory Bird Conservation Act – like the Weeks Act – limited federal rules applicable to private mineral development in a National Wildlife Refuge to rules “expressed in the deed.” 16 U.S.C. § 715e; see *Caire v. Fulton*, No. 84-3184, 1986 U.S. Dist. LEXIS 31049 at \*20-21 (W.D. La. 1986). The *Caire* court correctly found that the issue is not what might be allowable under the full extent of Congress’s authority under the Property Clause of the U.S. Constitution, but what more limited powers Congress delegated to the agency in the statute. *Id.* at \*23-27.

Further, the *Caire* court noted that “questions involving federal agencies and state property rights, state law will apply.” *Id.* at \*34. Under that State law, the court granted summary judgment to the mineral owners “with respect to their right to go upon the land [the surface of which is a national wildlife refuge] to search for and capture minerals and their duty to abide by state regulation and the reasonably prudent operator standard.” *Id.* at \*34, 36. The court held, as the Court should here in this analogous situation, that “NEPA does not apply.” *Id.* at \*28 and 30. This Court should find the Weeks Act, 30 U.S.C. § 226(o), *Minard Run, Srnsky*, and *Caire* to be persuasive as to the legal rights in a land acquisition under the Weeks Act, regardless of what the *Duncan Energy* court said about the distinct Bankhead-Jones Farm Tenant Act. Moreover, and most notably, neither of the *Duncan Energy* decisions of the Eighth Circuit held that NEPA applied to limited Forest Service approvals of the exercise of private oil and gas. Indeed, in each decision, the *Duncan Energy* courts held that such Forest Service approvals should ordinarily be given within 60 days of an application, thereby effectively precluding the application of NEPA. *See* 109 F.3d at 499-500.

The Weeks Act adopts a strong legislative policy of fairness to holders of mineral property rights. A reserved mineral rights owner is subject only to the regulations made part of the deed when the parties were negotiating a sales price. 16 U.S.C. § 518. This policy remains in place at least unless and until there is some clear statement from Congress that it is consciously altering the policy in the Weeks Act and pushing federal authority as far as the Constitution might arguably allow. As the Supreme Court has found, absent a “clear indication that Congress intended that result,” an “administrative interpretation” fails if it “alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173

(2001). Property rights regimes and regulation of private oil and gas development are traditionally not areas of federal regulation. Indeed, the President has just issued a Memorandum instructing agency heads to refrain from asserting federal preemption of state law “without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” Presidential “Memorandum for the Heads of Executive Departments and Agencies” on “Preemption” (May 20, 2009), 74 Fed. Reg. 24693.

Accordingly, NEPA and other general authorities are not sufficient to displace the legislative policy of the Weeks Act, because they provide no clear intent to override the Weeks Act or the deference to state law it embodies. Instead, the language and legislative history of 30 U.S.C. § 226(o) show that: (1) Congress respected the Pennsylvania property law as described in *Minard Run*; and (2) Congress rejected provisions that would have granted the Forest Service greater regulatory authority. “Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987). Consequently, NEPA and general Forest Service authorities do not authorize a multi-year ban on new ANF oil and gas development.

The *Duncan Energy* Court sustained the Forest Service’s reading that, for severed mineral estates under the Bankhead-Jones Farm Tenant Act, oil and gas activities required a “special use permit” under 36 C.F.R. § 251.50. 50 F.3d at 589. In contrast here, even the Settlement Agreement and the Marten Statement do not assert that private oil and gas activities in the ANF in Pennsylvania are subject to this after-enacted “special use permit” regulation. Instead, the law here is that no Forest Service permit is required, and the Forest Service’s consent is not required for activities on the property with the dominant mineral rights. Under the Weeks

Act and 36 C.F.R. § 251.15, for activities on split-estate lands, the mineral rights owner is subject only to the rules incorporated as part of the deed, not the later-adopted § 251.50.

Further, as a law review note states, the Eighth Circuit erred in concluding that a Forest Service permit is necessary under 36 C.F.R. § 251.50. The Eighth Circuit overlooked, *inter alia*, the authorities discussed earlier in this motion:

It is apparent that the court disregarded the provisions of the FSM and opinions of the General Counsel, which expressly state that the Forest Service does not have the authority to require outstanding mineral owners to apply for a surface use permit. Further, the FSM's directive that the Forest Service negotiate with the dominant mineral estate developers and enter into a memorandum of understanding when negotiations fail, would be unnecessary if the Forest Service could, as the court held, require outstanding mineral owners to obtain special use permits before they exercise their mineral rights.... [O]utstanding mineral rights had already vested before the United States acquired the surface estate.

Casenote, *The Post-Duncan Era: Are Federal Surface Estates Really Subservient?*, 2 GREAT PLAINS NAT. RES. J. 266, 278-79 (1997).<sup>24</sup>

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<sup>24</sup> *Duncan Energy* clearly misreads the Forest Service Manual. Manual § 2830.1, as well as the Forest Service O&G Handbook for the ANF, state that “the Secretary’s rules and regulations do not apply to the administration of outstanding mineral rights.” Other provisions in the Forest Service Manual confirm that no special use authorization is required for a mineral or road use that is within the scope of the outstanding or reserved rights in a deed. *See* Forest Service Manual § 2718.5 (describing outstanding and reserved rights and stating the “United States has limited control over outstanding rights except to prevent undue degradation or nuisance to adjacent surrounding National Forest System Land”), § 2719 (a “special use authorization is not required for a proposed use in any of the following categories: 1. Uses on lands the United States acquired subject to occupancy without special use authorization because of reservations or outstanding rights”), § 2734 (“road . . . authorization may already exist through a deed reservation, as outstanding rights. . . . In these cases, no additional authorization by the Forest Service is necessary, unless there is a need for additional rights”); § 2734.2 (“The holder of outstanding rights perfected on acquired land prior to Forest Service acquisition, reservation in deeds, easements, or agreements made at the time of acquisition of the land or easement by the United States may exercise those rights without obtaining a special use authorization, unless the document creating the rights provides for an additional authorization”).

In *Minard Run*, this Court found that, in the ANF, “[u]nder the language of the operative conveyances, defendant possesses, *inter alia*, the right of access for roads and pipelines to wells drilled to it, the right to clear areas for road and pipeline access to the extent reasonably

(continued...)

Pennsylvania's property law on split estates is not superseded by federal law. Under *Minard Run*, a surface owner obtains an operating plan and has a 60-day period to seek accommodations, and then can seek an injunction in court to prevent unnecessary damage to the surface estate. Such "[n]eutral, across-the-board [State] property rules likely would not be overridden by federal common law." COGGINS AND GLICKSMAN, I PUBLIC NATURAL RESOURCES LAW § 5.33 (2d ed. 2008). *Accord Srnsky*, 271 F.3d at 604 (State law applies in federal/private split estate situations unless state law is "aberrant or hostile"); *Caire v. Fulton*, 1986 U.S. Dist. LEXIS 31049 at \*34 (in "questions involving federal agencies and state property rights, state law will apply").

Moreover, the relief in *Duncan Energy* was tied to a period of approximately 60 days. Though a strict "sixty-day limitation is too rigid a schedule for the Forest Service to meet," the court would revisit that if "future developments reveal a pattern of unwarranted delay by the Forest Service in processing proposed surface plans." 109 F.3d at 499-500. Thus, not even *Duncan Energy* would support the over one year ban on oil and gas development that is unquestionably part of the challenged ANF policy.

The Forest Service's view that private property rights can be diminished to further a governmental policy desire is inconsistent with controlling law here. It is inconsistent with the Pennsylvania Supreme Court's decision in *Belden & Blake* that the desire to protect a public park or forest to not allow a diminution in property rights without paying just compensation. The Eighth Circuit's view is inconsistent with this Court's specific *Minard Run* precedent on

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(continued)

necessary to the exercise of its oil and gas rights." *Minard Run Oil Co.*, 1980 U.S. Dist. LEXIS 9570 at \*17-18 (W.D. Pa. 1980); *see* ANF O&G Handbook, Chapt. 1 at 15-16 and 20, Chapt. 5 at 6. Thus, no Forest Service special use authorization is required for activities that are within the scope of the mineral estate owner's rights under the deed.

reconciling the rights of the ANF surface owner and the mineral owner – the owner of the dominant mineral estate can proceed after providing a 60-day period for negotiations with the ANF surface owner.

Finally, *Duncan Energy* is unpersuasive due to its illogical rationales. The opinion agrees that the Forest Service has no:

“veto authority” over mineral development. The Forest Service concedes that it cannot prohibit mineral development and recognizes the mineral holder’s absolute right to develop its mineral estate.

*Duncan Energy*, 50 F.3d at 591 n.8; *see id.* at 589-92. While paying lip service to the dominance of the mineral estate, the Eighth Circuit’s rulings unlawfully “enable[] the Forest Service to have ‘veto authority’ over the [mineral owner, whose] . . . rights are now subservient to the whim of the Forest Service.” 2 GREAT PLAINS NAT. RES. J. at 279. The *Duncan Energy* rulings improperly “switched the power of who can determine ‘reasonable’ surface use from the mineral owner [or a court] to the federal surface owner.” *Id.* at 275.

Under *Belden & Blake*, if the oil and gas rights established by deed and Pennsylvania property law cannot be exercised until Forest Service “approval” is received and there is no deadline for agency action, property rights have been altered and taken. The supposedly-dominant mineral estate becomes subservient to a surface owner’s approval within any timeframe chosen by the surface owner.

For all these reasons, the out-of-circuit decisions in *Duncan Energy* are distinguishable and are not persuasive. The result here is dictated by this Court’s *Minard Run* precedent, *Belden & Blake*, the Weeks Act, and 30 U.S.C. § 226(o).

**D. Plaintiffs Are Likely to Succeed on the Merits of Their APA-Related Claims on Public Notice and Comment, and on Other Procedural Violations**

The Administrative Procedure Act (“APA”) is relevant to many aspects of this case. The APA provides Plaintiffs with the basic right to review of Forest Service and other federal agency actions. *See* 5 U.S.C. § § 701-06. The APA also provides the relief for the property rights, NEPA, and other violations described above and below.<sup>25</sup>

Moreover, the APA is one of several sources of important *procedural* rights that the Forest Service has violated with its new NEPA policy directive and restraint on new oil and gas operations. As summarized below, Plaintiffs are very likely to prevail on their claims of violations of procedural rights. Courts do not hesitate to set aside actions for failure to follow the due process fairness inherent in an opportunity for advance public comment. *E.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

1. The Settlement Agreement and Marten Statement adopt changed policies in final as a *fait accompli*, and without first seeking public comment. If Federal Defendants had bothered to include POGAM in settlement discussions that concern its members’ property rights, or if the Forest Service had provided notice of a proposed change in policy, POGAM members could have informed Federal Defendants that the above-described property rights, statutes, and

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<sup>25</sup> The APA authorizes a court to “compel agency action unlawfully withheld” and to “hold unlawful and set aside agency action...found to be...arbitrary...or otherwise not in accordance with law;...in excess of statutory...authority...or short of statutory right; ...[or adopted] without observance of the procedure required by law.” 5 U.S.C. § 706. The Court should set aside the Settlement Agreement and Marten Statement because their assertions that NEPA applies and that the exercise of dominant mineral rights can be banned for a multi-year period is contrary to controlling statutory law, agency statements, and the common law. Further, the Court should declare that holders of dominant mineral rights in the ANF have the ability to commence mineral operations that are within the scope of the deed after providing the Forest Service with 60 days notice of the items required under *Minard Run*, and that the Forest Service issuance of a Notice to Proceed or other “approval” is not a condition precedent to lawful oil and gas operations.

Forest Service guidance preclude the change. This might have eliminated the need for POGAM to bring this action.

By failing to provide advance public notice prior to the dramatic change in ANF minerals policy and practice, Federal Defendants have violated the following laws.

a. The APA requires public notice-and-comment procedures before a legislative rule can be adopted or changed. 5 U.S.C. §§ 551(5), 553; *see Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).<sup>26</sup> A binding legislative policy that private oil and gas operations could commence after providing the Forest Service with a 60-day period to review planned operations and to seek accommodations was established in 30 U.S.C. 226(o), the Forest Service Manual and ANF O&G Handbook, *Minard Run*, and the Forest Service's statements and legal opinion in the 1991 Oversight Hearing.

The Forest Service's bypassing of APA rulemaking procedures is revealed by the fact that the Forest Service itself initiated a rulemaking on this very subject by publishing an advance notice of proposed rulemaking in the Federal Register on December 8, 2008, 73 Fed. Reg. 79,424 (re "Management of National Forest System Surface Resources With Privately Held

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<sup>26</sup> *See, e.g., McLouth Steel Products Corporation v. Lee M. Thomas, et al.*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) ("If a statement denies the decisionmaker discretion . . . , then the statement is binding, and creates rights of obligations . . ." and is a rule subject to APA notice and comment rulemaking procedures); *Appalachian Power Company, et al. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) ("If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule . . . then the agency's document is for all practical purposes 'binding'."); *General Electric Company v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) ("the commands of the Guidance Document indicate it has the force of law. . . . On its face the Guidance Document imposes binding obligations upon applicants to submit applications that conform to the Document . . . ,” and thus the Document was unlawful for bypassing APA notice-and-comment rulemaking procedures.); *accord Community Nutrition Institute, et al. v. Frank Young*, 818 F.2d 943 (D.C. Cir. 1987); *Barrick Goldstrike Mines, Inc. v. Carol M. Browner, et al.*, 215 F.3d 45 (D.C. Cir. 2000).

Mineral Estates.”). That rulemaking would apply to oil, gas and mineral estates in the ANF and other National Forests, and it is subject to the procedural safeguards of the APA notice and comment requirements, 5 U.S.C. § 553, and the Regulatory Flexibility Act, 5 U.S.C. § 601, which requires federal agencies to assess the adverse economic impacts of their actions on small businesses. By summarily adopting the Settlement Agreement and the Marten Statement, the Forest Service has evaded and bypassed those important legal protections under the APA.

Accordingly, the Forest Service would have a colorable claim that it could change that legislative rule only if had proceeded by notice-and-comment rulemaking. Since it did not do so, the April Surprise of the Settlement Agreement and Marten Statement are unlawful. *See Appalachian Power*, 208 F.3d 1015 (D.C. Cir 2000); *Revak v. National Mines Corp.*, 808 F.2d 996, 1002 n.10 (3d Cir. 1987) (“an agency must abide by its own regulations until it rescinds them”).

If an agency guidance document imposes binding obligations, it is a legislative rule that is invalid if not adopted by advance public notice-and-comment procedures. *E.g., General Electric Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002); *Appalachian Power*, 208 F.3d at 1021-23. The Settlement Agreement and Marten Statement tied to it do establish binding obligations that NEPA applies, that private oil and gas operations cannot commence without a Forest Service Notice to Proceed, and that it is unlawful to commence new oil and gas operations until the Forest Service completes an EIS and administrative appeals. These binding rules are unlawful for failure to engage in the notice-and-comment rulemaking procedures required by 5 U.S.C. § 553.

b. In addition to violating APA procedures, the Forest Service has procedurally violated 30 U.S.C. § 226(o). With respect to constraints on “surface-disturbing

activities relating to the development of oil and gas deposits” in the ANF, Congress directed the Forest Service to proceed through “regulations promulgated by the Secretary.” 30 U.S.C. § 226(o)(1) and (5). The challenged actions violate § 226(o) because they were not adopted as regulations through a public rulemaking process.

The Forest Service recently did provide the public with an advance opportunity to comment before it even proposes § 226(o) rules. 73 Fed. Reg. 79424 (Dec. 8, 2008). The April 2009 Marten Statement and Settlement Agreement are arbitrary departures from this supposedly public process. Those documents make a mockery of any commitment to obtaining public input. Those documents adopt *de facto* new rules in final that radically change relationships between mineral owners and the surface owner in the ANF.

c. Another authority requiring draft set of proposed changes for public comment is the Forest Service Chief’s 2008 appeal decision on the 2007 ANF Forest Plan.

The Chief’s office found that the Regional office had unlawfully adopted a new regulatory regime for ANF minerals in the final Plan, final EIS on the Plan, and ROD, without first exposing those changes to public review. The Chief’s office directed the Regional office and the ANF to: (1) first clarify what the respective legal rights are for holders of outstanding and reserved mineral rights and the ANF surface owner and incorporate those into the ROD, Revised Plan, and FEIS; and (2) provide opportunity for public comment to changes that had occurred between the DEIS and the FEIS. 2008 ANF Plan Appeal Decision at 3-4 (available at [http://www.fs.fed.us/r9/forests/allegHENY/projects/supp\\_eis/appeal\\_decision\\_letter.pdf](http://www.fs.fed.us/r9/forests/allegHENY/projects/supp_eis/appeal_decision_letter.pdf)).

I find the public was not provided the opportunity to comment on substantial changes made to the design criteria as it applies to private oil and gas development (OGD). The application of all forest-wide standards to private OGD was a change from the Preliminary Land and Resource Management Plan (LRMP). Further, the design criteria specific to private OGD in Section 2800 was changed. These changes occurred between the Draft Environmental Impact

Statement (DEIS) and the FEIS.... I instruct you to provide the public the opportunity to comment on these changes in accordance with FSH 1909.15, Chapter 18.2. Until that time, .... in order to carry out our surface management responsibilities, I expect you to follow the site-specific authority as provided in the 1986 ANF Plan to administer private OGD....

This is a substantial change between DEIS and FEIS where there was no opportunity provided for public comment.... The Regional Forester acknowledges his responsibility to protect the publicly-owned surface resources while recognizing that mineral estate owners have the right to access and develop their privately owned minerals (ROD, p.29). Private mineral owners have the right to make reasonable use of the surface in order to develop their mineral estate. Forest Service land management decisions and administration of outstanding and reserved mineral rights will be in accordance with deed provisions as well as Commonwealth and Federal law (RLRMP, p. 90).

*Id.*

Despite the Chief's direction that the 1986 ANF Forest Plan applies to split estate matters until the public was given an opportunity to comment on any changes, the ANF and Regional office adopted the Marten Statement in final in April 2009 without any opportunity for advance public comment. This is a *de facto* revision to the ANF Forest Plan that is unlawful because the public comment period required by the National Forest Management Act, 16 U.S.C. § 1604(d) and (f), were not provided. *See Allegheny Defense Project v. U.S. Forest Service*, 423 F.3d 215, 222 (3d Cir. 2005); *Wyoming Sawmills v. U.S. Forest Service*, 383 F.3d 1241, 1250 (10th Cir. 2004).

Moreover, the Region has again proceeded directly to a final action (this time in the Marten statement) without engaging in the public comment process required by the Chief's Appeal Decision. This is seen in the fact that Supervisor Marten has directed that the design criteria that were suspended in the February 15, 2008 appeal decision for lack of public notice and opportunity to comment will now be applied by virtue of the Settlement Agreement, *regardless* of the lack of public notice and opportunity to comment on them. *See Appeal*

Decision at 3; Mayer Decl. ¶ 26. The Forest Service's Eastern Region is unlawfully ignoring direction from the Chief of the Forest Service.

d. The Forest Service Manual codifies such principles as: (1) the agency cannot preclude private oil and gas operations; and (2) the agency must respond promptly to proposed operating plans within 60 days. The Marten Statement (*e.g.*, in imposing a year-plus ban on new oil and gas operations) is inconsistent with the Forest Service Manual, and is an attempt to override the Manual. Just as a rule can be superseded only by another rule adopted after public notice-and-comment (*SBC Inc. v. FCC*, 414 F.3d 486, 497-98 (3d Cir. 2005)), a Forest Service Manual provision can be superseded only by another Manual provision.

By law, material in the Forest Service Manual can be amended only through public notice-and-comment procedures. *See* 16 U.S.C. § 1612(a); 36 C.F.R. Part 216. Accordingly, the Marten Statement is invalid for failure to comply with these required public procedures. *See Back Country Horsemen of America v. Johanns*, 424 F. Supp. 2d 89, 94-98 (D.D.C. 2006).

2. An agency's departure from an established practice is "arbitrary" under the APA 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) (setting aside a rule on those grounds). "Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without 'announcing a principled reason' for the departure." *Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002).

Here, prior to the April 2009 actions, there was an established legal policy that a mineral estate owner could proceed with oil and gas development after providing the Forest Service with a 60-day period to review proposed operations and to seek accommodations. This legal policy is

embodied in sources such as *Minard Run*, 30 U.S.C. 226(o), and the Forest Service Manual, and the Forest Service's statements and legal opinion in the 1991 Oversight Hearing. The Forest Service has departed from those precedents by threatening criminal sanctions if mineral owners proceed with development without a Notice to Proceed and by prohibiting the issuance of Notices to Proceed for at least one year, under the Settlement Agreement and Marten Statement. *See* Mayer Decl. ¶ 18.

Yet, the Forest Service has provided no rational explanation as to how its new policy is consistent with law, and why the new policy is in the public interest. The Settlement Agreement and Marten Statement just state conclusions, and act as if there is no relevant law and no prior agency practice. Accordingly, the new policy is arbitrary and unlawful, and should be set aside.

Moreover, the Settlement Agreement and Marten Statement adopt a new policy that NEPA applies and allows year-plus delays before private oil and gas operations can commence on the dominant mineral estate. This is directly contrary to the legal position that NEPA does not apply – a position the Forest Service explained and defended in the 1991 Oversight Hearing. The Forest Service's current view that NEPA applies and allows year-plus delays also conflicts with the statutory and property rights discussed in the preceding paragraph. Yet, the Forest Service has provided no rational explanation of its new 2009 position on NEPA. Accordingly, the Settlement Agreement and Marten Statement are arbitrary and unlawful, and should be set aside.

3. An intervenor in a court case is a party having rights to participate in settlement discussions. Where “intervenors were not permitted to participate in the settlement review proceedings, the approval of the settlement agreement must be vacated.” *United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008). Similarly here, POGAM was an intervenor in

the *FSEEE* case. POGAM was excluded from settlement discussions, even though the Settlement Agreement and contemporaneous Marten Statement diminished the property rights of POGAM members. Due to this failure to provide an opportunity to participate, the Settlement Agreement and Marten Statement should be vacated under *Carpenter*.

**E. Plaintiffs Are Likely to Succeed on Their Paperwork Reduction Act Claim**

A further reason for the Court to set aside the NEPA doctrine under 5 U.S.C. § 706 as “not in accordance with law” and adopted “without observance of procedure required by law” is the Forest Service’s failure to comply with the Paperwork Reduction Act (“PRA”) before it issued the directive. One of the main purposes of the PRA is to “minimize the paperwork burden for individuals [and] small businesses.” 44 U.S.C. § 3501. To this and other ends, this Act establishes myriad requirements an agency must satisfy before it can “conduct or sponsor the collection of information.” *Id.* §§ 3506, 3507.

More specifically, the PRA prohibits an agency from conducting or sponsoring a collection of information unless, in advance: (1) the agency reviews the proposed collection of information to evaluate, *inter alia*, the need for the information, a plan for collecting it, the burden associated with collecting it, and a plan for efficient and effective management and use of the information, *id.* §§ 3506(c)(1), 3507(a)(1)(A); (2) the agency solicits and evaluates public comment on the proposed collection, *id.* §§ 3506(c)(2), 3507(a)(1)(B); (3) the agency certifies to the Director of the Office of Management and Budget (“OMB”) that, *inter alia*, the collection “reduces to the extent practicable the burden on persons who shall provide” the information, and is implemented in a way that is “consistent and compatible” with the “existing reporting and recordkeeping practices” of those who are to supply the information, *id.* §§ 3606(c)(3), 3507(a)(1)(C); (4) the agency publishes a notice of the submission to OMB in the Federal

Register, *id.* § 3507(a)(1)(D); and (5) the OMB Director approves the proposed collection of information, *id.* § 2507(a)(2). Failure to comply with the PRA is not harmless error and can preclude enforcement of the unlawfully implemented agency action. *See Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31-32 (D.C. Cir. 1998); *United States v. Smith*, 866 F.2d 1092, 1098-99 (9th Cir. 1989) (Forest Service noncompliance with PRA was complete defense to criminal charge).

The Forest Service failed to comply with any of these provisions before initiating its collection of information<sup>27</sup> from ANF oil and gas operators to implement the NEPA directive. Rather, it just sent them letters the day after lodging the Settlement Agreement with the Court demanding information it said was needed by virtue of the Settlement Agreement. *See Mayer Ex. 7*. The letters directed operators on extremely short notice to “submit . . . information on any proposed activities you anticipate between now and December 31, 2013.” The Forest Service gave operators just over a month (originally until May 8, 2009, later extended by a week) to provide detailed information concerning any proposed development activities between the date of the letter and December 31, 2013, including: (1) maps showing future development locations; (2) proposed wells; (3) proposed access roads; (4) proposed tank batteries; (5) proposed pipelines; and (6) proposed utility lines.

The Forest Service’s letters were issued without compliance with the PRA’s procedural requirements as just described, and also offend the PRA’s substantive standards by virtue of the

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<sup>27</sup> Under the PRA, “collection of information” means “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format. . . .” 44 U.S.C. § 3502(3). The Forest Service’s letters clearly fall within this broad definition. *See United States v. Smith*, 866 F.2d at 1098-99 (Forest Service request for Plan of Operations for mining claim in national forest was “collection of information” subject to PRA).

burden involved in responding to the request, the lack of compatibility with current recordkeeping practices, the impossibility of providing some of the requested information for a 4-year projection, and the lack of agency assurance that the information collected will be managed in a manner that is effective in protecting it from unwarranted public disclosure. Operators identified these and other problems with the request when they declined to provide the information – they raised concerns about the legality of the request (*e.g.*, lack of authority under NEPA, taking property without due process or just compensation, and failure to comply with the PRA), the infeasibility of providing a four-year projection (particularly on such short notice), and the need to protect confidentiality against disclosure under statutes such as the Freedom of Information Act. *See, e.g.*, Response Letters from Operators, attached hereto as Mayer Exs. 8-12; *see also* Mayer Decl. ¶ 21.

In sum, because the Forest Service initiated this collection of information in conjunction with the NEPA directive without complying with the PRA, the NEPA directive is “not in accordance with law” and adopted “without observance of procedure required by law” and must be set aside. 5 U.S.C. § 706(a)(A), (D).

## **II. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction**

The NEPA directive causes irreparable harm because, as explained above, it compromises the *real property* interests of holders of OGM estates. “As a general rule, interference with the enjoyment or possession of land is considered ‘irreparable’ since land is viewed as a unique commodity for which monetary compensation is an inadequate substitute.” *Pelfresne v. Village of Williams Bay*, 865 F.2d 877, 883 (7th Cir. 1989) (citation omitted). Here, the Forest Service has placed a new, time-consuming, costly obstacle in the path of the exercise of private property rights. A preliminary injunction is needed to avert this irreparable harm.

The economic harm to OGM operators that flows from impairing their property rights under the NEPA directive provides a further compelling reason why a preliminary injunction should issue. *See Southland Corp. v. Froelich*, 41 F. Supp. 2d 227, 242 (E.D.N.Y. 1999) (“[a] real property owner’s inability to make use of its own property may constitute irreparable harm”). Irreparable harm is “harm which cannot be redressed by a legal or equitable remedy.” *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994). While “temporary loss of income, ultimately to be recovered, loss does not usually constitute irreparable injury,” *id.*, severe economic hardship, irrecoverable losses, losses of business opportunities and employment, and unquantifiable harm, such as Plaintiffs will suffer here because of the NEPA directive, does. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 163-64 (3d Cir. 1999) (loss of business opportunity); *Johnson v. Shalala*, 2 F.3d 918, 922 (9th Cir. 1993), *cited with approval in Pallotta v. Barnhart*, No. 04-3749, 2005 WL 1989601 at \*\*2 (3d Cir. Aug. 18, 2005) (“economic hardship does constitute irreparable harm”); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“threat of unrecoverable economic loss... qualif[ies] as irreparable harm”). *See also Pittsburgh Newspaper Printing Pressmen’s Union No. 9 v. Pittsburgh Press Co.*, 4579 F. 2d 607, 610 n.3 (3d Cir. 1973) (collecting cases involving injunctions to prevent job losses).

POGAM Director Craig L. Mayer (who is also chief legal counsel for POGAM member Pennsylvania General Energy Company LLC (“PGE”)) has explained, “the Settlement Agreement adopted without our knowledge and without any public input, particularly from elected officials of the ANF region and communities, radically changes the legal regime applicable to oil and gas exploration and development activities in the ANF, by subjecting such Notices to Proceed to compliance with the National Environmental Policy Act of 1969, 42

U.S.C. § 4332 (“NEPA”), which was enacted nearly 40 years ago on January 1, 1970.”<sup>28</sup> Mayer Decl. ¶ 6. Under the Settlement Agreement, the Forest Service has sought to bind itself to apply NEPA to each individual Notice to Proceed. This is confirmed prominently by the statement in paragraph 1 of the Settlement Agreement, in which “the Forest Service agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument authorizing access to and surface occupancy of the. . . .” Further, the Forest Service agrees that it shall not issue Notices to Proceed “prior to conducting the appropriate NEPA analysis.” *Id.* The Plaintiffs in turn reserve the right in paragraph 4 of the Settlement Agreement to challenge the legal adequacy of NEPA compliance for those individual activities.

Mr. Mayer aptly describes the devastating harm the unlawful Settlement Agreement would cause as a result of this change in Forest Service practice:

- the Settlement Agreement would result in a *de facto* ban on future oil and gas exploration and development across the entire 513,000-acre ANF for at least the next year, and likely for years into the future. Some POGAM members, already harmed by the Forest Service’s failure to act on notifications submitted since January 1, 2009, would literally go out of business during that lengthy delay. It must be kept in mind that the Forest Service’s unlawful policy to not process Notices to Proceed (except for the select companies that have one of the 54 projects) has already been in effect for five (5) months, by virtue of being put on hold by Supervisor Marten in January 2009 due to the then-pending *FSEEE* lawsuit. . . . In recent weeks and in the past, commencing in 2007, employees of oil and gas businesses have been referred to as criminals and threatened by the Forest Service with prosecution if they proceed with their ordinary business activities in ANF while waiting for an approved Notice to Proceed. To my knowledge, the Forest Service has threatened at least four individuals, and charged at least one individual officer of a POGAM member with a misdemeanor in early 2009, a contested change that remains pending. Mayer Decl. ¶ 18.
- I strongly disagree that the *FSEEE* Settlement Agreement adopted by the Forest Service properly follows the laws, regulations and policies that define the

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<sup>28</sup> Section 102(2)(C) of NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) before carrying out “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

responsibilities of the Forest Service, but I agree with Supervisor Marten that this action by the Forest Service will have profound, irrevocable, and severe adverse economic impacts on families, businesses, local governments and school districts in the ANF region. For POGAM members and their employees who rely on development of their ANF estates these adverse economic impacts will directly affect their livelihoods. . . . Indeed, if this Settlement Agreement is implemented, many small businesses and individuals will suffer harms that will undoubtedly last a “lifetime” as the Marten Statement admits. It will impact drillers, service rig operators, rig-hands, welders, cementers, loggers, excavators, seismic testing companies, water pumpers and truckers, geologists, surveyors, restaurants, gas stations, motels, accountants and companies supplying all manner of oil field supplies and equipment. To put this as clearly as possible, OGM companies and dependant businesses will go out of business and many individuals and families will lose their sources of income. Mayer Decl. ¶ 20.

- I find it especially disingenuous that the Marten Statement asserts that “[w]e will not impede access to private property rights . . .” but that “we will fulfill our land management responsibilities, and we will do this via NEPA.” Under the Settlement Agreement, as explained in the Marten Statement and as further explained at the public meeting of April 13, 2009, the Forest Service plans to allow no further oil and gas exploration or development activities to occur in the ANF until a “forest-wide environmental analysis on these proposals is prepared.” The Marten Statement (at p. 3) asserts that the “Forest Service will be initiating a forest-wide site specific environmental analysis for proposals that were not included in the settlement and for any other proposals for activity anticipated between now and 2013.” The Marten Statement further declares that they will issue a Notice of Intent to prepare this Forest-wide environmental analysis in June of 2009, and the Forest Service is currently asking all oil and gas operators to identify within less than one month proposed activity between now and 2013 for this Forest-wide environmental analysis. This approach is unprecedented in the ANF, is contrary to the approach used for the 1986 ANF Forest Plan and associated Environmental Impact Statement for that Plan, and is contrary to the approach used by the Forest Service in the recent 2007 ANF Plan and the associated EIS for that Plan. It is infeasible to require individual oil and gas operators to project their proposed activities between now and 2014, as the Forest Service demanded when it began implementing the Settlement Agreement. . . . For the Forest Service to require that this be done in approximately one month is unrealistic and reveals that the true intent of the Forest Service is to impede and halt future oil and gas development. On May 12, 2009, PGE informed the Forest Service that it could not feasibly project its future oil and gas drilling activities for years into the future. . . . Other operators sent similar communications to the Forest Service in May 2009. . . . A public statement on the Settlement Agreement on the ANF Forest Service website confirms that the environmental analysis will be an EIS, which the Forest Service calls the “Oil and Gas Development Transition 09 EIS.” See [http://www.fs.fed.us/r9/forests/allegheny/projects/OGM\\_eis/index.php](http://www.fs.fed.us/r9/forests/allegheny/projects/OGM_eis/index.php). Mayer Decl. ¶ 21.

- In many cases in the ANF, POGAM members hold oil and gas leases (and similar agreements) to the severed private oil, gas and mineral estates. These leases typically have a relatively short primary term, such as one year or three years, and in order for the lease term to be extended, a well must be drilled and produce “paying quantities” of oil or gas before the expiration of the primary term. The massive and unforeseen delays that would result from the *FSEEE* Settlement Agreement’s requirement to conduct NEPA analyses before processing all future Notices to Proceed would invariably cause many leases held by POGAM members to expire, causing substantial investment and job losses. Given the complete forest-wide seizure of new production and the shutting-down of drilling it is simply not possible to calculate the possible losses or identify the many situations where this will occur. Mayer Decl. ¶ 25.
- Under the “rule of capture” applying to Pennsylvania oil and gas estates, one landowner may lawfully drain oil and gas from an adjacent parcel of land where he does not own the oil and gas rights. This has long been settled law and it recognizes the fugacious nature of gas and oil. The ANF is comprised of a patchwork of land tracts – contiguous and non-contiguous - lying within four Counties and both among and adjacent to hundreds of thousands of acres of private or state owned lands. Under the Settlement Agreement, all owners of oil and gas estates on the ANF bordering any non-ANF lands, effective now and for the foreseeable future are simply precluded from drilling new wells to protect their resources even if oil or gas is being drained from their properties from an adjacent non-ANF parcel. Put simply, the Agreement denies the OGM owner the only legal remedy available in Pennsylvania to protect against such drainage, which is to “go and do likewise.” *Bernard v. Monongahela Natural Gas Co.*, 216 Pa. 362 at 365 (1907). The harm in not being able to protect properties from drainage that results to POGAM members is irreparable and incalculable. Mayer Decl. ¶ 24.
- In sum, I firmly believe the *FSEEE* Settlement Agreement is punitive, even retaliatory, in nature and will have an irrevocable, profound, massive, and devastating adverse impact on oil and gas production activity in the ANF and upon the economy, communities, and people of the surrounding region dependant on this development activity. Mayer Decl. ¶ 30.

The critically important ARG refinery operations in Bradford are also threatened because up to 25% of ARG’s 10,000 barrels of oil per day throughput is derived from ANF lands.

Golubock Decl. ¶ 3. The refinery generates \$150 million per year in revenues, providing direct and indirect jobs and benefits to several hundred families in the Bradford area. *Id.* ¶ 2. As new wells are restricted in the ANF, oil production will drop quickly because “50% of the total oil to ever be produced from a well will typically be produced in the first year of the life of [the].” *Id.* ¶ 5. It “would be difficult at best, and impossible at worst, to replace production from the ANF.”

*Id.* ¶ 4. Just last year, ARG contributed \$250,000 to the University of Pittsburgh at Bradford to help finance a new Energy Institute to assist with the mission of educating undergraduate students in energy fields, including alternative energies. *Id.* ¶ 7. All of these social benefits are jeopardized by the Forest Service’s ill-considered NEPA directives. Moreover, ARG has an oil producing affiliate, ARG Resources, which has drilled 50-60 wells per year in order to provide some of the refinery’s daily oil supply. *Id.* ¶ 6. All of the production of ARG Resources comes from the ANF. *Id.* ARG has no wells grandfathered under the Settlement Agreement, and so ARG Resources is facing a complete ban of new wells in the coming year under the NEPA Directive, and likely for years into the future. *Id.* These harms to ARG, its employees and the community are devastating and irreparable. *See also* Declaration of Mr. William Fustos of POGAM member East Resources (describing severe operational and feasibility problems associated with expected gas production declines at “liquids plants”); and Declaration of Mr. Glen Carlson of D & I Silica.

### **III. The Balance of Equities Favors a Preliminary Injunction**

In weighing the equities, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 129 S. Ct. at 376 (citations omitted). That balance overwhelmingly favors granting a preliminary injunction in this case. As already explained, the Forest Service’s NEPA directive will significantly harm Plaintiffs by delaying their oil and gas projects and in some cases prohibiting them altogether; and in the process will severely harm businesses, limit the availability of financing, cause layoffs, and have ripple effects throughout the ANF region – all at a time when the businesses, employees, and region are already suffering due to “an economic crisis as deep and as dire as any since the great depression.” As the Third Circuit found in a case that would have impeded operations of the Port Authority of New York and New Jersey, here the economic

importance (to companies, employees, and the region) of a viable and thriving oil and gas industry in the ANF weighs heavily in favor of enjoining the NEPA directive pending further the Court's further review, particularly since the entire region is already suffering from serious economic conditions." *Clean Ocean Action v. York*, 57 F.3d 328, 334 (3d Cir. 1995).

In contrast, there will be no harm to the Forest Service if, instead of implementing the NEPA directive now, the agency must wait until this Court addresses the policy's legality in this case. The preliminary injunction will do no more than restore the status quo that existed before the Forest Service began implementing the NEPA directive. *See American Can Co. v. Local Union 7420, United Steelworkers of America*, 350 F. Supp. 810, 812 (W.D. Pa. 1972) ("the proper standard to determine the status quo is the last uncontested status which preceded the pending controversy"). There can be no harm to the Forest Service from restoring the status quo, because private oil and gas operations in the ANF have been conducted for decades unimpeded by review under NEPA.

The unlawful Settlement Agreement and Marten Statement also are opposed by the Plaintiff AFA, whose 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. *See* Complaint, ¶ 55.

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. *Id.* See also [www.renewableforests.com](http://www.renewableforests.com) (describing AFA mission and purpose).

In like circumstances, a court granted a preliminary injunction against new Forest Service restrictions on the exercise of private property rights and business activity in the Ottawa National Forest. See *Stupak-Thrall v. Glickman*, No. 2:96-CV-054, 1996 WL 466524 (W.D. Mich. May 15, 1996). In that case, fishing resort operators who owned shore property on a lake in a wilderness area of the national forest and, as riparian owners, had a property interest in the entire surface of the lake challenged new Forest Service motorboat restrictions on the lake. The court found irreparable harm because the resort was the plaintiffs' sole means of livelihood (much like the oil and gas business in this case), and that the resort's survival depended on their ability to offer motor boating on the lake. While noting a competing interest in preserving wilderness areas, the court balanced the equities in the plaintiffs' favor:

[I]n light of the fact that motorboats have been operating on Crooked Lake for 50 years, it appears that the harm to Plaintiffs from the failure to enter a preliminary injunction exceeds the harm to Defendants and the public if a preliminary injunction is entered.

1996 WL 466524 at \*3.

The same balance should be struck here. Oil and gas operations are the sole means of livelihood for many businesses and individuals in the ANF region, and their survival depends on their ability to exercise their private property rights without undue Forest Service impediments such as the NEPA directive. Oil and gas operations have occurred for decades prior to the NEPA

directive with no harm to the Forest Service – in fact, with the Forest Service’s endorsement. Thus, the harm to Plaintiffs from denial of a preliminary injunction greatly outweighs any harm to the Forest Service if the injunction is entered.

#### **IV. A Preliminary Injunction Is in the Public Interest**

In exercising their sound discretion to grant preliminary injunctive relief, courts “should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 129 S. Ct. at 376-77.

A preliminary injunction against implementation of the NEPA directive is in the public interest for four reasons, each of them highlighted by statements of the President. First, the country faces an economic crisis that requires action by the federal government as well as the private sector to solve:

And if there’s anyone out there who still doesn’t believe this constitutes a full-blown crisis, I suggest speaking to one of the millions of Americans whose lives have been turned upside-down because they don’t know where their next paycheck is coming from. . . . It is absolutely true that we can’t depend on government alone to create jobs or economic growth. That is and must be the role of the private sector. But at this particular moment, with the private sector so weakened by this recession, the federal government is the only entity left with the resources to jolt our economy back into life. . . .

. . . we also inherited the most profound economic emergency since the Great Depression, doing little or nothing at all will result in even greater deficits, even greater job loss, even greater loss of income, and even greater loss of confidence. . . . I think that what I’ve said is what other economists have said across the political spectrum, which is that, if you delay acting on an economy of this severity, then you potentially create a negative spiral that becomes much more difficult for us to get out of.

Transcript: Press Conference by the President (Feb. 9, 2009)

([http://www.whitehouse.gov/the\\_press\\_office/PressConferencebythePresident/](http://www.whitehouse.gov/the_press_office/PressConferencebythePresident/)). The NEPA directive undermines the goals of economic recovery by thwarting economic development at a

time when the federal government should be encouraging business development. Enjoining the directive will promote the public policy favoring economic development and recovery.

Second, a particular focus of economic recovery is developing domestic energy sources and reducing this country's dependence on foreign oil. Again, the President addressed this squarely in recent remarks:

We send billions of dollars overseas to oil-exporting nations, and I think all of you know many of them are not our friends. It's the same costs attributable to our vulnerability to the volatility of oil markets. . . .

It's going to take a variety of energy sources, pursued through a variety of policies, to drastically reduce our dependence on oil and fossil fuels. As I've often said, in the short term, as we transition to renewable energy, *we can and should increase our domestic production of oil and natural gas*. We're not going to transform our economy overnight. We still need more oil, we still need more gas. If we've got some here in the United States that we can use, we should find it and do so in an environmentally sustainable way.

Remarks by the President on Clean Energy (Apr. 22, 2009) ( available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-in-Newton-IA/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-in-Newton-IA/)).

Obviously, the NEPA directive does not advance this public policy, but frustrates it by making domestic energy sources harder to develop. Thus, it is in the public interest to enjoin the NEPA directive and remove the unlawful impediments to developing this country's oil and gas resources.

Third, a preliminary injunction will foster the goal just announced by the President to avoid undue preemption of state law by federal agency actions:

The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption. Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values. As Justice Brandeis explained more than 70 years ago, "[i]t is one of the happy incidents of the federal

system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Presidential “Memorandum for the Heads of Executive Departments and Agencies” on “Preemption” (May 20, 2009), 74 Fed. Reg.. As we have explained, the private property rights on which the NEPA directive tramples are established under Pennsylvania state law, and both Houses of the Pennsylvania Legislature have enacted resolutions reasserting that the federal government’s acquisition of ANF lands under the Weeks Act “is conditioned on the preservation of State and privately owned property interests.” *See* Mayer Exs. 23, 24. A preliminary injunction against the preemptive NEPA directive will further the public interest in assuring proper respect for state law. The Pennsylvania Attorney General Tom Corbett recently expressed strong concerns to the U.S. Secretary of Agriculture Tom Vilsak about the severe harm being caused by the Forest Service’s recent policy changes, stating in part:

My office is in receipt of numerous pieces of correspondence from businesses, their employees, and legislators both at the state and federal levels describing a situation in which the businesses are unable to proceed with oil or gas development within the Allegheny National Forest due to a lack of action by the U.S. Forest Service on submitted development proposals. Prevention of the development of private gas and mineral rights has reportedly resulted in severe economic hardships.

I hope to work collaboratively in pursuit of a resolution to these concerns raised by Pennsylvanians whose privately held gas and mineral rights are being impacted by the U.S. Forest Service’s policy.

The preservation of the enjoyment of Pennsylvanians’ private gas and mineral rights is of the utmost concern.<sup>29</sup>

In addition, Warren County has grave concerns about the adverse effects of the Settlement Agreement and the associated NEPA directive from the standpoint of 1,000 acres of oil and gas properties in the ANF which the County holds in trust for underprivileged youth, as

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<sup>29</sup> Exhibit 22, Mayer Decl.

well as the adverse social and economic effects on citizens of the County as a whole, as County Commissioner John Bortz has declared:

The Board of Warren County Commissioners is trustee of the Hoffman Trust, which owns the oil, gas and mineral rights for more than 1,000 acres in the ANF. The purpose of the trust is to provide for the underprivileged residents of Warren County. . . . Specifically, the county desires to use revenues from such mineral development to increase its funding of the Warren County Children and Youth Services, a social services program that serves the needs of the underprivileged youth in the county. There is currently no oil and gas production from this land, but it is located in an area with high oil and gas potential.

. . .

Warren County has benefited from oil and gas production for over a century. Much of this activity has occurred and still occurs in the ANF. Development of the oil and gas interests also creates jobs for mineral developers which, in turn, stimulates the local economy. Moreover, beyond the county's own mineral interests, statistics maintained by the Warren County Chamber of Business and Industry indicate that the county has over 80 registered independent oil and gas companies which collectively employ hundreds of persons and add millions of dollars in economic value to the local economy. These 80 companies in turn provide indirect jobs for thousands of residents of Warren County, adding greatly to the economic and social well-being of the county's residents.

Warren County's development of its oil and gas interests in the near future would be prohibited for at least two to three years under the terms of the Settlement Agreement between the plaintiffs and the Forest Service filed April 9, 2009 in *Forest Service Employees for Environmental Ethics, et al. v. U.S. Forest Service*, No. 1:08-CV-00323-SJM. The Settlement Agreement would also mean that the jobs created by new development activities across the ANF would not be created, which in turn means greater hardship for the local economy, tax base and our county residents. We have a compelling interest in reducing unemployment in Warren County. It is obvious that rising unemployment leads to lower tax revenues, increased crime, and other serious social problems. Because of this, Warren County emphatically objects to the terms of the Settlement Agreement and the directly related implementing actions of the Forest Service as described in the April 10, 2009 Statement of Forest Supervisor Marten.<sup>30</sup>

Finally, an injunction against the NEPA directive, which was developed behind closed doors without the participation of the general public or even of the oil and gas operators who are

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<sup>30</sup> Bortz Declaration, pp. 2-3, attached as Exhibit E hereto.

the true stakeholders in processing Notices to Proceed, will advance the public interest in participatory government, as reflected in the APA and in the President's call for greater transparency in the federal government. *See* Obama Transparency Memo.

**CONCLUSION**

Fore the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted. Relief from this Court is urgently needed to protect the citizens, municipalities, and the small businesses of this northwestern Pennsylvania region.

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