

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

MINARD RUN OIL COMPANY;)	
PENNSYLVANIA OIL AND GAS)	Case No. 1:09-cv-00125-SJM
ASSOCIATION; ALLEGHENY FOREST)	
ALLIANCE; and COUNTY OF WARREN,)	
PENNSYLVANIA,)	
)	<i>Electronically filed</i>
Plaintiffs,)	
)	
v.)	
)	
UNITED STATES FOREST SERVICE; ABIGAIL)	
R. KIMBELL; KENT B. CONNAUGHTON;)	
LEANNE M. MARTEN; ERIC H. HOLDER, JR.;)	
FOREST SERVICE EMPLOYEES FOR)	
ENVIRONMENTAL ETHICS; ALLEGHENY)	
DEFENSE PROJECT; and SIERRA CLUB,)	
)	
Defendants.)	
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**CITIZEN DEFENDANTS' RESPONSE TO
MOTION FOR PRELIMINARY INJUNCTION**

Forest Service Employees for Environmental Ethics; Allegheny Defense Project; and Sierra Club (hereinafter "citizen defendants") submit this response in objection to plaintiffs' motion for preliminary injunction. Due to timing constraints and in the interest of judicial efficiency, the citizen defendants also incorporate by reference the combined brief submitted today by the federal defendants in support of their motion to dismiss and response to motion for preliminary injunction.

INTRODUCTION

The one claim plaintiffs bring against the citizen defendants – a challenge to the settlement agreement between the citizen defendants and the Forest Service – is not ripe because there is no final agency action. Nor do the plaintiffs have standing to challenge the settlement. They can show no prejudice from the settlement. Likewise, they can show no irreparable harm from the settlement and therefore an injunction would be inappropriate.

If the court does analyze the likelihood of success on the merits, plaintiffs cannot demonstrate such a likelihood. The settlement is not illegal, nor do the other actions alleged in the complaint violate any laws.

I. STANDARD FOR PRELIMINARY INJUNCTION

A "preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Resources Defense Council, ___ U.S. ___, 129 S. Ct. 365, 379 (2008). "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." Id. at 374 (citations omitted; emph. added). The "possibility" of irreparable harm does not satisfy a party's burden seeking a preliminary injunction. Id. at 375. Instead, a party must prove that "irreparable injury is likely in the absence of an injunction." Id. (citations omitted; emph. in original). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that a plaintiff is entitled to such relief." Id. at 375-76 (citations omitted).

II. PLAINTIFFS DO NOT HAVE STANDING, BECAUSE THEY HAVE NOT AND CANNOT DEMONSTRATE HARM OR PREJUDICE FROM THE

SETTLEMENT

Plaintiffs insist that they will be harmed by the settlement. But they have presented no cogent explanation of why they will be harmed by involvement of the public in the analysis of what environmental impacts oil and gas exploration and drilling will have on our public lands.

As the federal defendants fully explain in their brief, plaintiffs cannot meet the requirements for standing set by the Supreme Court's recent decision in Summers v. Earth Island Inst., 555 U.S. ---, 129 S. Ct. 1142, 1148-51 (2009) (plaintiffs do not have standing without a live dispute over a concrete application of Forest Service regulations). The lengthy standing analysis by the federal defendants makes clear that plaintiffs' view is clearly unsupported under current case precedent and under any rational extension of that precedent.

Furthermore, plaintiffs' asserted interests do not satisfy the statutory "zone of interest" for a NEPA claim. See Nevada Land Action v. U.S. Forest Service, 8 F.3d 713 (9th Cir. 1993) (ranchers could not base standing for NEPA claim on economic harm).

A party challenging a settlement has a strong burden of showing that it has suffered "legal prejudice," because the law encourages settlements. United States v. State of North Carolina, 180 F.3d 574, 581 (4th Cir. 1999). This is particularly true where a government agency charged with protecting the public interest has "pulled the laboring oar in constructing the proposed settlement." See, e.g., United States v. Vertac Chemical Corp., 756 F. Supp. 1215, 1218 (E.D. Ark. 1991), *aff'd*, 961 F.2d 796 (8th Cir. 1992). Plaintiffs have not met their burden of demonstrating "legal prejudice" to them caused by the settlement.

As the court noted in Bragg v. Robertson, the plaintiffs' burden of challenging a settlement agreement is particularly high where – as here – the settling parties are citizens acting

as "private attorneys general" to enforce the laws against the government. 54 F. Supp.2d 653 (S.D. W. Va. 1999) (rejecting mining industry's challenge to government settlement with environmental litigants in NEPA context). In Bragg, the industry intervenors argued that their operations would be slowed down by the settlement, as the government would now be conducting more exhaustive review prior to allowing "mountaintop removal" mining. While acknowledging that there was evidence the delay would "lead[] to a tremendous loss of jobs and revenue," the court held that such harm did not constitute "legal prejudice" warranting rejection of the settlement. The court noted that any decisions by the government proceeding from the settlement which directly affected the industry could be challenged as soon as they were final actions. Because the plaintiffs "have not been stripped of a cause of action or claim, which is the standard for formal legal prejudice," the court concluded that the industry lacked standing to challenge the settlement agreement. The same is true in the instant case. No "legal prejudice" to plaintiffs' legal rights flows from the settlement agreement.

Furthermore, the settlement will not itself cause any of the harms alleged by plaintiffs. The settlement itself does not require the government to prepare a programmatic EIS. Rather, it states that "appropriate" NEPA analysis will be conducted – which theoretically could be anything from a categorical exclusion to a full-blown programmatic EIS, depending upon the level of impacts and the scope of analysis the Forest Service, in its discretion, chooses. Those decisions were not made in the settlement. Any harm alleged by plaintiffs is caused not by the settlement but by the forest service's separate decision to prepare a forest-wide EIS. The settlement agreement states:

Except as provided in paragraph 2, the Forest agrees that it shall undertake appropriate NEPA analysis prior to issuing Notices to Proceed, or any other instrument

for authorizing access to and surface occupancy of the Forest for oil and gas projects on split estates including both reserved and outstanding mineral interests. Appropriate NEPA analysis shall consist of the use of a categorical exclusion or the preparation of an Environmental Assessment or an Environmental Impact Statement.

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

If the Settlement Agreement is overturned by the court, plaintiffs will actually likely suffer more harm in the short term, because the default position is the Regional Forester's previous directive from January 16, 2009, ordering all OGM proposals to go to the Regional Office for review -- which resulted in a *de facto* moratorium on NTPs on the Allegheny.

And there is no indication that, if the court rejects the settlement, the Forest Service would abandon its decision to do a forest-wide EIS prior to issuing NTPs. As explained *infra*, for 25 years the Allegheny National Forest's Oil and Gas Handbook has explicitly required

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

NEPA analysis prior to issuance of NTPs. Exhibit A at 4-12.² And, as discussed *infra* the fact that the Allegheny National Forest -- for whatever reason -- chose to ignore that requirement for 25 years cannot be used to now require the government to continue ignoring that requirement.³

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

The main factor setting the pace of drilling on the Allegheny is the price of oil and gas, not whether or not the Forest Service completes a NEPA analysis. As the Forest Service stated in Appendix F to the 2007 revised Forest Plan: "The number of wells drilled per year is market driven." Exhibit D.

The settlement threatens no harm to the plaintiffs. And even the harm that plaintiffs do allege they will suffer (caused by the Forest Service's decision to do a programmatic EIS) does

² All exhibits are attached to the Declaration of Dugan.

³ The Allegheny NF's Oil and Gas Handbook also has for 25 years required the Forest Service to "[t]ry to determine the companies' five year plan for the area." Exhibit A at 4. Thus, the plaintiffs' protestations that providing such forecasting to the Forest Service is a new and unrealistic undertaking are not well-founded. Nor is there any indication that the plaintiffs would be bound to the list they compile at this time.

not constitute "legal prejudice" under the relevant case law.

III. PLAINTIFFS HAVE NOT AND CANNOT DEMONSTRATE THAT THE SETTLEMENT CONSTITUTES "FINAL AGENCY ACTION" ALLOWING A LAWSUIT UNDER THE APA

As the federal defendants point out, a threshold requirement for judicial review under the Administrative Procedures Act (APA) is "final agency action." Finality exists where agency action (1) definitively states the agency's position, (2) has a direct and immediate effect on the complaining party, (3) has the status of law, and (4) anticipates immediate compliance. Hecla Mining Co. v. U.S. E.P.A., 12 F.3d 164, 165 (9th Cir. 1993). Plaintiff cannot meet any of these factors. Because the settlement simply discusses "appropriate" NEPA analysis, it does not "definitively" state the agency's position. It does not directly and immediately affect the complaining party – because the *status quo ante* was the moratorium that was in effect until the settlement broke the logjam of hundreds of pending well proposals. It does not have the status of law, as it does not issue new rules or interpret existing ones – it simply states that the Forest Service will comply with NEPA by preparing "adequate" NEPA analysis. Finally, the settlement does not anticipate immediate compliance because it does not state a timetable for preparation of the "appropriate" NEPA. In fact the only immediate effect of the settlement is to allow hundreds of wells to proceed.

Plaintiffs argue that the settlement is a new "rule" issued by the government. To the contrary, it is a settlement in which the Forest Service promises to comply with NEPA with the exception of the over 500 wells which are proceeding. In Bragg (the West Virginia case rejecting industry's challenge to a settlement), the court dealt with the identical argument, and rejected it. The court noted: "A rule does not . . . become an amendment merely because it

supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." Am. Mining Congress v. MSHA, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

IV. PLAINTIFFS HAVE NOT AND CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Purpose of NEPA is to Provide Information to the Decision-Maker and the Public

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. 1500.1(a). In NEPA, Congress declared as a national policy "creat[ing] and maintain[ing] conditions under which man and nature can exist in productive harmony." 40 U.S.C. 4331(a). NEPA "simply guarantees a particular procedure," rather than a substantive result. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 737, 118 S. Ct. 1665, 140 L.Ed.2d 921 (1998)); see also Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51, 109 S. Ct. 1835 (1989) (discussing NEPA's procedural focus). Nonetheless, the statute remains "the broadest and perhaps most important" of the environmental statutes. Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that. Robertson v. Methow Valley, 490 U.S. at 350. See also Churchill County v. Norton, 276 F.3d 1060, 1072-73 (9th Cir.2001) (describing NEPA's theory of democratic decisionmaking). By requiring the consideration of environmental factors in the course of agency decisionmaking on major federal actions, NEPA serves two purposes: First, "it ensures that the agency, in reaching its decision, will have available, and will carefully

consider, detailed information concerning significant environmental impacts." Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Dep't of Transp. v. Public Citizen, 541 U.S. 752, 768, 124 S. Ct. 2204, 159 L.Ed.2d 60 (2004) (internal citations and alteration omitted). "Public scrutiny [is] essential to implementing NEPA." 40 C.F.R. 1500.1(b). By requiring agencies to take a "hard look" at how the choices before them affect the environment, and then to place their data and conclusions before the public, NEPA relies upon democratic processes to ensure -- as the first appellate court to construe the statute in detail put it -- that "the most intelligent, optimally beneficial decision will ultimately be made." Calvert Cliffs', 449 F.2d at 1114.

Federal courts clearly have the authority to approve and enforce consent decrees in which the parties undertake obligations that the court could not impose. Local No. 93 v. City of Cleveland, 478 U.S. 501, 522-23, 106 S. Ct. 3063, 3075 (1986). By settling this matter (and by settling the citizen defendants' attorney fees and costs, as would be available to them under 28 U.S.C. 2412 had the government chosen to litigate the case), the government has violated no laws and has not abused its discretion in any way.

B. The Property Clause of the Constitution Allows -- and Requires -- the Federal Government to Protect the Public's Surface Rights on the National Forests

Congress has the power under the property clause to regulate federal land. U.S. Const. art. IV, § 3, cl. 2; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). Congress may even regulate conduct occurring on or off federal land which affects federal land. Kleppe v. New Mexico, 426 U.S. 529, 539, 96 S. Ct. 2285 (1976). Federal regulations pursuant

to the Property Clause "necessarily override[] conflicting state laws under the Supremacy Clause." *Id.* at 543, 96 S. Ct. at 2293. See also *Burlison v. United States*, 533 F.3d 419, 432-33 (6th Cir. 2008) (reading *Kleppe* to hold that Congress can "regulate access . . . by holders of [a private] dominant estate . . . to [a public] servient estate").

C. The Forest Service Organic Act, NFMA, and MUSYA Allow -- and Require - the Federal Government to Protect the Public's Surface Rights on the National Forests

The Organic Administration Act of 1897 specified the purposes for the establishment of forest reserves (which later became known as National Forests). It provides that: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States"

Under the Organic Act, the National Forest Management Act (NFMA), and the Multiple Use Sustained Yield Act (MUSYA), the Forest Service is charged with managing "a nationally significant" network of lands, "dedicated to the long-term benefit for present and future generations," 16 U.S.C. 1609(a). The agency must do so according to principles of multiple use and sustained yield, see, e.g., 16 U.S.C. 1604(e)(1), and must provide for full public engagement with its decisionmaking process, see, e.g., 16 U.S.C. 1612(a). The Service has considerable power to "regulate Forest System lands," and, even in the face of private mineral rights, has the limited but substantial authority to itself "determine the reasonable use of the federal surface." See *Duncan Energy Co. v. United States Forest Serv.*, 109 F.3d 497,498 ("*Duncan II*") (8th Cir. 1997). Congress has given the Forest Service broad power to regulate Forest System land. See, e.g., 7 U.S.C. 1011; 16 U.S.C. 551. The Forest Service regulates surface access to outstanding

mineral rights under the "special use" regulations. The special use regulations established under these laws provide that "[a]ll uses of National Forest System land . . . are designated 'special uses' and must be approved by an authorized officer." 36 C.F.R. 251.50(a).

D. The Forest Service Has These Powers and Duties Notwithstanding the Existence of Private Subsurface Rights

Even lands like the Allegheny NF lands, acquired under the Weeks Act, are subject to regulation. The Weeks Act statute itself makes clear that reserved private rights underlying public lands "shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration," and that obtaining these public split estates is appropriate only where the public's interest in using the surface can be maintained. 16 U.S.C. 518. Because the Weeks Act was designed to protect public lands, the terms of contracts made under the acts should be construed "consistent with the purpose of the Act," thereby ensuring "productive use of the surface by the United States." Downstate Stone Co. v. United States, 712 F.2d 1215, 1217-19 (7th Cir. 1983).

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

they must be allowed to proceed when the government chooses to slow down the process long enough to protect the public's lands.

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

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

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

See also Bragg ("It is rare that the United States is estopped from taking positions different from those mistakenly taken by its agents on prior occasions. *See, e.g., United States v. Vanhorn*, 20

F.3d 104, 112 n. 19 (4th Cir. 1994) ("The Government is simply not bound by the negligent, unauthorized acts of its agents. Federal law is clear that estoppel is rarely, if ever, a valid defense against the Government absent proof of some affirmative misconduct by a Government agent").

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

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

As the federal defendants explain in detail, plaintiffs are incorrect in arguing that the Duncan Energy and other cases are inapplicable. Plaintiffs are simply incorrect in arguing that the government has no right to put the NTP process on hold while it complies with "our basic

national charter for protection of the environment." 40 C.F.R. 1500.1(a).

E. NEPA Analysis of Notices to Proceed Is Not Precluded by Timing Considerations

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

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

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

This provision does not state that the government must address the action within 60 days; it says the O&G owner must provide notice at least 60 days prior to action. Thus there are not one but two logical fallacies in arguing that this creates a 60-day deadline on government action -- first, (o) says nothing about how long the government has to act; and second, (o) does not set a 60-day deadline but rather sets a 60-day minimum on the private actor. That argument is well-supported by both general reserved/outstanding rights caselaw (Duncan Energy and other cases cited *supra*) and specific caselaw about that timing issue.

In Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984), the court found that a federal energy agency could have produced an EIS even though it was obligated to negotiate power delivery contracts "as soon as practicable within nine months" of a law becoming effective. *Id.* at 684-85. The court noted that the agency could have utilized a "fast track" schedule, as permitted by Council on Environmental Quality regulations, to speed the process.

Id. at 685 (citing 40 C.F.R. § 1506.10(d)). See also Baker v. USDA, 928 F. Supp. 1513 (D. Idaho 1996) (90-day period to process placer mining claims did not preclude NEPA analysis);

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

As subsection (o) simply sets a minimum notice period (and because the government has the authority to require NEPA analysis prior to issuing NTPs, as argued *supra*), that subsection does not limit the time period available to the government to conduct the NEPA analysis. Indeed, the very next subsection of that statute – subsection (p) – explicitly allows the government to require further procedures, including NEPA analysis, and allows the private party up to two years to comply with those procedures. Although that subsection uses the word "permit" rather than "Notice to Proceed," as explained *supra*, any use of the surface of the public lands requires a special use permit.

Thus, subsections (o) and (p) can easily be read together to create the following chronology:

1) private party submits notice to Forest Service at least 60 days prior to the date it wishes to begin work.

2) Such a notice triggers the Forest Service's duty to process a special use permit

application.

3) Within 10 days after receiving the notice/permit application, the government must either (A) notify the applicant that the application is complete; or (B) notify the applicant that information is missing and specify any information that is required to be submitted for the application to be complete.

4) Within 30 days after the applicant has submitted a complete application, the government shall either (A) issue the permit, if the requirements under NEPA and other applicable law have been completed within such timeframe; or (B) defer the decision on the permit and provide to the applicant a notice - (I) that specifies any steps that the applicant could take for the permit to be issued; and (ii) a list of actions that need to be taken by the agency to complete compliance with applicable law together with timelines and deadlines for completing such actions.

5) If the government gives the notice of additional required steps, the applicant has two years to complete all of those requirements, including information needed for NEPA.

Although such an interpretation of subsection (p) is not required for the citizen defendants to prevail on this motion, it is clearly an approach that will be briefed and argued before the court, and which severely chips away at any remaining chance of success on the merits.

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

Plaintiffs protest that the Allegheny National Forest has never before required NEPA analysis for NTPs – and indeed, implies that even NTPs themselves are a new phenomenon on

the ANF. Nothing could be further from the truth. As is made clear in Exhibit A, the Allegheny National Forest Oil & Gas Handbook has for 25 years required NEPA analysis prior to issuance of Notices to Proceed for split estates.

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

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

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

- 1) "Establish a time table to complete the permit process and/or issue the notice to proceed." Ex. A at 4.
- 2) "Scope issues, draft environmental assessment [EA] alternatives and decision criteria." Id. at 5.
- 3) "Ground disturbance and topsoil protection, erosion potential of fragile soils, steep slopes and proper drainage control should be discussed and control measures agreed upon and included as management constraints and requirements in the EA." Id. at 6 (emph. added).
- 4) "Determine where surfacing material is to be used and where 'stone' pits are located or to be developed (utilize Forest Geologist!). Arrange for 'pit plans' and surface protection plan if new 'stone' pits have to be developed. (Be sure to include as a management requirement in EA.)" Id. at 6 (emph. added).
- 5) "Abandonment and reclamation procedures need to be agreed on and included in the

management requirement section of the EA." Id. at 7.

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

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

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

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

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

included with the permit." *Id.* at 9.

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

Plaintiffs cite a select portion of the Handbook, omitting critical language. Plaintiffs assert that "Minard Run was described as setting the following 'standard operating procedures on the ANF' for outstanding mineral rights. ANF O&G Handbook, Chapter 1 at 19." While that part of the oil and gas handbook does say that it then says "see Chapter II for more refined administrative procedures for Outstanding and Reserved Mineral Ownership." Exhibit E at 19. As explained *supra*, Chapter II explicitly requires NEPA analysis prior to issuing NTPs.

Plaintiffs also argue that

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.* Chapter 1 at 15. The 1911 rules generally require "[n]o permit" for "surface use, occupancy or disturbance." ANF O&G Handbook, Chapter 1 at 3, Chapter 2 at 14.

However, the 1911 rules and regulations did state that "Buildings, camps, roads, bridges and other structures of improvements necessary in carrying on mining operations shall be located as approved by the Forest officer in charge." Exhibit E at 4. Similarly, Chapter II of the Handbook states that "Forest Service approval of locations of all facilities and improvements, including roads, structures, etc." is required under the 1911 rules and regulations. Exhibit E at 16.

Chapter 2 at 21 should erase any notion that the Forest Service never intended NEPA to apply. This page contains a table titled "Usual Role of Participants" outlining the "NEPA

Process," including identifying a "purpose and need," "formulate alternatives," "evaluate alternatives," "identify the preferred alternative," and so on.

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

CONCLUSION

Based upon this brief, the federal defendants' brief filed today, and the record before the court, the citizen defendants respectfully request that the court deny plaintiffs' motion for preliminary injunction.

Respectfully submitted June 25, 2009.

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